
CANADA / JUDGMENT

S.D. v. C.D.

2014 BCSC 952

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 952 S.D. v. C.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.D. v. C.D.,

2014 BCSC 952

Date: 20140530

Docket: E042874

Registry: New Westminster

Between:

S.P.D.

Claimant

And

C.L.D.

Respondent

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

The Claimant:

Appearing In Person

The Respondent:

Appearing In Person

Place and Date of Trial/Hearing:

New Westminster, B.C.

February 24-26, 28, March 4,

and May 8-9, 2014

Place and Date of Judgment:

New Westminster, B.C.

May 30, 2014

INTRODUCTION

- [1] The parties began living in a marriage-like relationship in June 1995 and were married on April 21, 1997. They have a son, T.D., born May 7, 1999. The parties separated on September 15, 2012. In December 2012, the claimant commenced a claim for divorce, orders regarding the parenting arrangements for T.D. and child support, an unequal share of family assets due to a greater contribution during the marriage, a determination of family debts, and exclusive occupancy of the former matrimonial home. The respondent filed a counterclaim in January 2013 adding a claim for spousal support, child support and exclusive occupancy of the former matrimonial home.

HISTORY

- [2] The claimant was born in Vancouver and is 45 years old. The respondent is 52 years old. Both parties have primarily resided in B.C.
- [3] The respondent left school early and began working, but completed her GED in 1980. She worked for a year as a nurse's aide and left the job when she married her first husband. They had a child (N.) in 1986. The respondent became a realtor and worked in this field from 1985 to 1991. Due to injuries suffered in three motor vehicle accidents that occurred between 1987 and 1991, the respondent found that she could not tolerate the physical aspect of a realtor's job and left that profession. She settled her motor vehicle claims in 1995 and received about \$90,000 in net proceeds. The respondent had her second child (D.) in 1994.
- [4] After completing high school, the claimant worked at a variety of jobs and played guitar in a band. In 1990, the claimant was introduced to a form of marketing involving a line of cosmetics produced by New Skin International. This business involved selling products directly and signing up other people to sell the product on behalf of the distributor. For each sale made by a commissioned salesperson, the distributor received a percentage of the profits. To establish a larger market for the New Skin International business venture, the claimant left Canada and lived in Taiwan until 1995. He built up the business and then returned to Vancouver and obtained employment making guitars. The New Skin International business continued to bring in a monthly income based on commission sales

with very little additional effort by the claimant.

- [5] In April 1995, when the claimant returned to Vancouver, he met the respondent, who was also selling New Skin International products as a distributor. She had become a distributor in or about 1993 after leaving the real estate business. The respondent did well in the New Skin International business but had to supplement her income with the settlement monies from the motor vehicle accidents. She also received child support from her daughters' fathers.
- [6] The claimant moved in with the respondent and her two daughters in or about 1995. The respondent's daughters were ages two and seven at that time. Because New Skin International would permit only one address per distributor, the parties decided that the respondent would give up her business in favour of retaining the claimant's distributorship. The parties required additional income, so the respondent obtained work as a server in a local restaurant and cleaned houses. She also used some of the monies received in settlement of the motor vehicle accident claims to further the claimant's New Skin International business.
- [7] In 1997, there was a lawsuit filed in Taiwan that affected the claimant's New Skin International business and forced him to go to Asia and sell a part of his distributorship to a partner. This partner paid a percentage of the profits made to the claimant in return for a part ownership in the business. The claimant remained in Taiwan to build up his business and returned home for visits with his family. He sent the business profits home and the respondent provided him with money for living expenses. The claimant ultimately moved to Thailand to expand his New Skin International business and the parties were married there in April 1997.
- [8] In 1998, the claimant returned to Vancouver but continued to receive monthly income from the New Skin International distributorship. He took a job with A&B Sound and worked as a salesperson from 1998 to 2001. Also around this time the parties purchased the respondent's mother's home. They renovated it and rented a suite. The respondent's mother carried a mortgage on the home and the parties became involved in a dispute over monies owing on this debt. As a consequence of this dispute, the house had to be sold to pay off the mortgage. Although the respondent testified that there is still \$50,000 owing to her mother, she produced no documentation concerning this debt. This home was sold in 2005 and the parties purchased another residence.
- [9] T.D. was born in 1999 and, for the most part, the respondent did not work outside of the home after his birth. The respondent spent many hours every week doing volunteer work in the community. She ran charity organizations and was in charge of large fundraising projects. This volunteer work continued unabated until the parties separated. The respondent also worked part time as a retail sales clerk for a few months in early 2012.

- [10] In February 2001, the claimant sold 50% of his New Skin International business to his partner (Mr. Park) and they divided the commission income equally. At that time, the average commission income was \$2,000 to \$5,000 per month. This income was used to support the family and pay the mortgage on the matrimonial home. When the claimant sold a share of his business to Mr. Park, he incorporated a company called Evolving Network Ltd. to receive the commission income. Because of her contribution to this business, the respondent became a director of Evolving Network Ltd. and received preference shares.
- [11] In 2009, the claimant again sold half of his share of this business to Mr. Park in return for \$180,000. This money was used to pay off a second mortgage on the matrimonial home, credit card debts, and vehicle loans. The parties were living beyond their means and had accumulated substantial secured and unsecured debts. A significant portion of the money was also used to help the respondent's daughter (D.) record and promote a country music record that was ultimately not successful. After the sale in 2009, the income from Evolving Network Ltd. was \$1,200 to \$2,200 per month.
- [12] In 2003 or 2004, the claimant established a home-based business teaching music to students. The respondent helped the claimant market the business and it grew quickly from 10 to 20 students to 140 students at its peak. Because the parties required more space for the music studio, they bought the former matrimonial home and built a sound studio in the garage and renovated a basement room to house a recording studio for teaching. The parties hired four additional instructors and the respondent's daughter taught piano. Although the studio earned a gross income of over \$86,000 in 2010, the net profits were nominal due to the high cost of building the studios and satisfying the debts accumulated for vehicles, music equipment and travel.
- [13] In 2010, the gross income from the music studio was \$86,860; and Evolving Network Ltd. produced an income of \$35,198. The net income for each of the parties was recorded on their income tax returns as \$20,600. In 2011, the music studio had a gross income of \$105,579 and Evolving Network Ltd. produced a gross income of \$16,535. In 2012, the music studio had a gross income of \$124,460 and a net income of \$38,413. The income from Evolving Network Ltd. was \$18,779. The music studio's increase in gross income was due to a marketing scheme that required new students to pay for a year of lessons in advance. During the years 2010 to 2012, the parties also had the benefit of about \$12,000 in unreported income that was derived from cash payments for music lessons.
- [14] In September 2012, the parties' marital difficulties became intolerable for both of them and they began to live separately within the former matrimonial home. The claimant became suspicious that the respondent was stockpiling money from the family's joint bank account. He searched the respondent's bedroom and found a substantial amount of cash and correspondence from a matrimonial lawyer that the respondent had retained. Because the claimant believed the respondent was planning to lock him out of the matrimonial home, on December 22, 2012, he and some friends moved out furniture that had belonged to the claimant's parents, about \$10,000 worth of music equipment from the basement studio, and

half of the cash found in the respondent's bedroom (about \$1,200). The claimant changed the locks on the main studio and left all of the equipment and business records in place. It was the claimant's plan to return to the home and continue teaching music out of the main studio. He also placed locks on his bedroom and bathroom.

- [15] In response to the claimant's actions, the respondent changed the locks on the matrimonial home and refused to permit the claimant to live there or to teach music in the studio. The claimant was forced to reside with friends and the respondent's daughters for four months until he found an apartment. T.D. continued to reside with the respondent in the matrimonial home. The claimant proposed that he take over the matrimonial home and continue to operate the music studios, but the respondent did not reply to this offer. The parties were not communicating at this time and the claimant was not paying child support, spousal support or providing money for the household expenses.
- [16] On January 9, 2013, the respondent obtained an order for interim exclusive occupancy of the former matrimonial home. This order permitted the claimant to access the music studio during business hours and the respondent was not to attend the studio when the claimant was present. The order also restrained the parties from disposing of the family assets.
- [17] Despite being granted permission to enter the music studio, the claimant decided to give the music business to the respondent and let her operate it. In an affidavit dated January 8, 2013, the respondent claimed that she wanted to continue operating the music studio and was capable of taking over the business. It was her plan to hire instructors and to contact the students who were scheduled to recommence their lessons after the Christmas holidays. To enable the respondent to contact the students, the claimant emailed her the students' schedules and contact information.
- [18] The respondent maintained that she could not access the students' schedules and contact information, even with the assistance of her brother who works in the computer industry. She testified that the students arrived in the first week of January 2013 and she was not ready to provide them with lessons. However, she sent out an email to many of the students and their families in early January indicating that she was taking over the music business and had award-winning instructors lined up. Despite this email, on January 26, 2013, the respondent sent another email to the students and their families describing her matrimonial dispute with the claimant in great detail, informing them that she was not going to continue operating the music studio, and placing blame on the claimant for putting her in this situation. She advised the families to contact the claimant to obtain reimbursement for the prepaid lessons.

- [19] It was not until the end of February 2013, that the claimant learned the respondent was not going to continue operating the music studio. He contacted the students who had prepaid for lessons and indicated that he would repay the money over time. He sent back to the students, \$6,000 to \$7,000 in uncashed cheques and offered to give lessons to any of the other prepaid students in lieu of returning their money. There was a total of \$14,000 to \$15,000 owing and as of February 2014, the claimant had repaid \$5,000.
- [20] The respondent remained in the former matrimonial home with T.D. She did not pay the mortgage or any of the household expenses. The claimant did not pay child support at this time and he used the monthly income from Evolving Network Ltd. to pay his living expenses. He also earned about \$500 per month in cash teaching music. The respondent sold music equipment and furniture to pay her living expenses. She did not attempt to find employment and applied for income assistance benefits.
- [21] At the end of April 2013, the claimant obtained part-time employment with Appleton Window Screens. His annual income from this work is estimated at \$21,450, but the work is seasonal and varies during the year. His music lesson business expanded in the summer of 2013 and he rented a small room two days per week. The claimant's cash income from music lessons is currently about \$700 per month. Evolving Network Ltd. also earned more profits than in prior years (gross income \$31,196). The claimant earned about \$1,080 in 2013 playing music at a restaurant in Fort Langley. He estimates that it will take 15 years to rebuild his music lesson business to what it was before the parties separated.
- [22] In or about August 2013, the respondent obtained work for the local school board as a lunch hour monitor. She works one hour a day at this job and earns \$19.14 per hour. The respondent has also started two businesses. She has created an instructional video for parents on how to educate their children about sexual predators. To date, she has sold three CDs. The Cloverdale Rotary Club has offered to advertise the CD on their website, but the respondent has not been able to afford the cost of this marketing media. The respondent has also started a business with a friend called, "Just Ask". They provide services for busy people; they do errands, clean houses, and "moving in" services. The respondent's long-term plan has always been to become a registered counsellor. She has taken courses in the distant past but has always put off completing the one-year certificate program because of childcare responsibilities. Currently, the respondent has a good friend who is willing to hire her as an intern counsellor once she completes the one-year certificate program. After a one-year apprenticeship as an intern, the respondent can start taking on clients without supervision.
- [23] The respondent is committed to accomplishing this career objective, but feels that her existing injuries will preclude her from attending college on a full-time basis. In support of her continuing injuries and pain experience, the respondent filed a note from her doctor, which indicates that she is in constant pain and suffers from arthritis, lumbar pain, depression and fibromyalgia. The respondent could not provide any information as to how long or how often she has seen this doctor. The respondent has applied for Canadian Pension Plan disability benefits but has not yet received a response.

- [24] On May 30, 2013, Master Caldwell ordered that the former matrimonial home be sold and the parties were granted joint conduct of the sale. The proceeds of sale were to be placed in trust pending further order of the court. The claimant was ordered to pay child support of \$654 per month commencing June 1, 2013, and spousal support of \$1,700 per month commencing June 1, 2013. The claimant could not afford these payments and has only paid the respondent a total of \$922 per month since April 2013. He paid \$188 in March 2013.
- [25] The former matrimonial home was sold at the end of January 2014 and about \$33,000 in net proceeds of sale was placed in Mr. Lessing's trust account. It is apparent that the respondent damaged some of the music equipment that was left in the former matrimonial home and sold some of the furniture and music equipment to supplement the support payments made by the claimant. In total, she received about \$4,300. It is also apparent that the claimant damaged the inside of the residence when he placed new locks on the doors and moved out furniture and equipment. The respondent repaired the damage herself.
- [26] The parties also had a dispute about the timing of the sale of the home and the condition in which it was left. The claimant was to carry out some yard work and he failed to do these chores. The respondent cleaned the inside of the home and staged it so as to enhance its value. However, the respondent delayed the completion of the sale for two months because she had not found a place to live. She also left the home in a state of disarray and the respondent cleaned the home for two days before the purchasers could move in.
- [27] After the claimant moved out of the former matrimonial home, he had visits with T.D. during the day about two or three days per week. The claimant could not have overnight visits until he found an apartment in April 2013. By the summer of 2013, the claimant and respondent agreed that T.D. would spend equal time with each parent on a one week on and one week off schedule. At the end of January 2014, when the former matrimonial home was sold, T.D. moved into the claimant's apartment and he has lived full time with his father since this date.
- [28] T.D. is currently in grade 9 at a high school in Cloverdale and is doing well at school. I interviewed T.D. to determine his wishes. T.D. wants to continue residing with his father on a full-time basis. Although he loves his mother, T.D. feels that she is not as stable as his father and is a very negative person. He denied that either parent had attempted to turn him against the other.
- [29] The family debts, apart from the mortgages on the former matrimonial home, included two vehicle loans. At the date of separation, a loan of \$16,418 was outstanding on a Cadillac that the claimant retained. He paid the monthly payments with money from Evolving Network Ltd. The respondent retained a Jaguar and she made the payments on this vehicle. The debt owing on the Jaguar loan was \$17,299 as of February 2014. In addition, the parties had credit card debt of about \$32,000 and bank overdrafts in the amount of \$11,200. There are also Telus and cable bills owing. The claimant paid off \$3,000 of the overdraft debts. The remaining debts have not been paid and are still outstanding.

PARENTING ARRANGEMENTS FOR T.D.

- [30] Section 37 of the Family Law Act, S.B.C. 2011, c. 25, provides that the best interests of the child are the only considerations in deciding upon guardianship, parenting arrangements, and contact with a child. An order regarding a child is not in his best interests unless it takes into account the child's physical, psychological, and emotional safety, security and well-being. Many of the relevant factors regarding the determination of parenting arrangements are articulated in s. 37(2) of the Act.
- [31] Addressing the relevant factors in this case, T.D. is now 15 years old and, as a consequence of his age, his wishes must be given considerable weight. T.D. wishes to reside with his father on a full-time basis. T.D. describes the respondent as an overly negative person who tends to blame him for things that go wrong in her life. It is apparent, based on their testimony, that the respondent's two daughters are alienated from their mother. They describe their childhood as very difficult because the respondent was emotionally demanding and was never satisfied with what they accomplished. The respondent was described as negative, angry, and overly critical. D. and N. feel that their mother damaged them emotionally and now do not wish to have contact with her. On the other hand, T.D. and the respondent's daughters describe the claimant as a good father with a calm and steady personality.
- [32] The claimant has had a stable residence since April 2013 and has housed T.D. since January 31, 2014. The respondent has not secured a new residence since the house was sold. While an improved financial picture would remedy this situation, the respondent has made no plans regarding the re-establishment of a home for T.D. and continues to reside with friends. I note that the claimant has continued to pay her child support and spousal support notwithstanding T.D.'s change of residence.
- [33] In terms of the historical care of T.D., it appears that both parents were equally involved in their son's upbringing. For the most part, the claimant worked in the home teaching music. While the respondent did not work outside the home, she spent many hours on volunteer projects that took her away from the home.
- [34] The respondent testified that there have been times since the separation that T.D. has been left alone while in his father's care and this has caused her to doubt the claimant's parenting skills. She also testified that the claimant is not a disciplinarian and does not set boundaries for T.D. that are essential for his safety. I find, however, that there is little evidence in support of these assertions. T.D. appears to be a well-adjusted child who is mature beyond his years and doing well at school academically and socially. He plays sports and has a good outlook on his life.

[35] On balance, and considering the factors outlined above, I find that it is in T.D.'s best interests to permit him to reside with his father on a full-time basis. Both parties shall remain T.D.'s guardians but, as the primary resident parent, the claimant shall have the following parental responsibilities:

1. The day-to-day care, control and supervision of T.D. and the authority to make day-to-day decisions affecting him.
2. Making decisions about where and with whom T.D. resides, except that the claimant cannot move with the child outside of the Lower Mainland without the consent of the respondent.
3. Making decisions about T.D.'s education and extracurricular activities, except that where a monetary contribution is required from the respondent, the claimant must obtain the respondent's consent to enrol the child in the educational program or extracurricular activity.
4. Making decisions about T.D.'s religious upbringing, except that if the claimant wishes to alter T.D.'s current religious affiliation, he must obtain the consent of the respondent.
5. Applying for T.D.'s passport, licence or other permissions.
6. Giving consent for any matter regarding T.D., including medical procedures, dental work, or other health-related treatments and receiving and responding to notices from third parties regarding T.D.
7. Making decisions regarding any legal action involving T.D. and protecting his legal and financial interests.

[36] The parties shall have joint decision-making authority regarding the following parental responsibilities:

1. Requesting and receiving from third parties, health, education and other information regarding T.D.
2. Making any other decision, except as outlined above, that is reasonably necessary to nurture the child's development.

[37] Where the parties have joint parenting responsibilities, or where the respondent must consent to a change or to the payment of monies, the parties must consult with each other before making a decision. Further, either party may apply to the court for relief in the event of a dispute that cannot be resolved by consultation with each other pursuant to s. 49 of the Act.

- [38] T.D.'s passport, which is being held in trust by Mr. Lessing, shall be returned to the claimant forthwith. The claimant shall be responsible for obtaining renewals of T.D.'s passport and its safekeeping. The claimant shall provide T.D.'s passport to the respondent to facilitate any travel plans and the respondent shall immediately return the passport to the claimant upon return to Canada.
- [39] Regarding time with T.D., s. 59 of the Act provides the court with the discretion to make such an order as long as it is in the best interests of the child. T.D. and the claimant both maintain that unspecified parenting time with the respondent is the optimum situation due to T.D.'s schedule. He is busy with school and extracurricular activities and cannot consistently be available for visits with the respondent. On the other hand, the respondent says that she has seen little of her son since he began living with his father based on an informal access arrangement. She argues that only a fixed schedule will guarantee that T.D. spends time with her.
- [40] Although T.D. is now 15 years old, and has a busy school and activity schedule, it remains important for him to have contact with the respondent. It is apparent that without a set schedule, T.D. has spent minimal time with his mother.
- [41] Accordingly, I order that the respondent shall have the following parenting time with T.D.:
1. T.D. shall spend every Wednesday evening with his mother from 5:00 p.m. to 10:00 p.m. and, whenever possible, the respondent shall respect any pre-scheduled sport or other extracurricular activity T.D. has on these evenings. The claimant shall not schedule any family or other types of activities that conflict with this parenting time.
 2. T.D. shall spend alternating Christmas Eve and Christmas Day with his parents; these days in December 2014 shall be spent with his mother and these days in December 2015 shall be spent with his father and continue in this manner alternating years with each parent.
 3. T.D. shall spend one week of Spring Break with the respondent each year.
 4. T.D. shall spend two weeks of the summer break with the respondent each year and the respondent shall have the right to select her weeks in priority to the claimant, provided her choice is communicated by email to the claimant on or before June 30 each year.
 5. T.D. shall spend Mother's Day each year with the respondent and he shall spend his birthday with the respondent every other year; his May 2015 birthday will be spent with his mother and his May 2016 birthday will be spent with his father and continue in this manner alternating years with each parent.
 6. Any additional parenting time that the parties agree upon.

- [42] The Wednesday night parenting time shall be postponed if the claimant takes T.D. on a vacation, but only a maximum of twice during the summer months. This parenting time shall be rescheduled in the two weeks after the vacation is completed by adding an additional evening visit in two consecutive weeks of the respondent's choosing.
- [43] If the respondent wishes to take T.D. out of Canada for a vacation during her parenting time, she must provide the claimant with a travel itinerary indicating the dates of travel, the location and a contact telephone number. The respondent shall give the claimant two weeks' notice of any planned travel outside of Canada.
- [44] On May 30, 2013, the claimant was ordered to pay child support to the respondent for T.D. in the amount of \$654 per month based on a Guidelines income of \$71,000. If one-half of the gross income from Evolving Network Ltd. is included in the claimant's employment income, his Guidelines income was in reality no more than \$45,000. Child support for one child based on this Guidelines income is \$411. Accordingly, I find that the claimant's child support obligation from May 30, 2013 to January 31, 2014, should have been \$411 and not \$654. The claimant's obligation to pay child support for T.D. is cancelled entirely effective January 31, 2014.
- [45] Any monies overpaid as child support between May 30, 2013 and the date of trial shall be credited against the arrears calculated by the Family Maintenance and Enforcement Program ("FMEP"). The respondent's obligation to pay child support is suspended for a period of two years from the date of this order to provide her with an opportunity to become economically independent and self-sufficient.

SPOUSAL SUPPORT

- [46] Sections 161 and 162 of the Act address the objectives and determination of spousal support as follows:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[47] The respondent's capacity to earn income has been adversely affected by the roles played by the parties during their relationship. The claimant has been the primary earner since the inception of the parties' marriage and the respondent did not work outside of the home, except for a brief period in 2012, after T.D. was born in 1999. The parties were together for 18 years and they chose to arrange their lives in this manner. Although the respondent has developed skills related to her volunteer work, she has been absent from a competitive labour market for at least 15 years and she has no formal education beyond high school. The respondent is now 52 years old and she suffers from chronic pain. Without additional training, it will be difficult for her to earn sufficient income to be self-sufficient. However, the respondent has a realistic option available to her in the future. She is capable of completing the counsellor certificate program and a subsequent one-year training period under the supervision of a registered counsellor. The respondent already has a friend who is willing to hire her as an intern and pay her \$20 per hour. It is during the two-year period prior to the completion of these prerequisites to a new career as a counsellor that the respondent is particularly in need of economic support to overcome the financial impact of the parties' separation.

[48] There is no doubt that the respondent's decisions regarding the music studio led to the loss of a good business opportunity that could have provided her with a steady income. However, I find the respondent's offer to take over the business was unrealistic and not well considered. The draw for the music studio was clearly the claimant's talent as a musician and as an instructor. He was the primary and essential asset of the business and without the claimant's involvement the business was likely to fail. Although the respondent helped market the music studio, she knew little about the everyday workings of the business and its administration. The claimant should have known that the respondent's offer to take over the music studio was more bravado than a realistic proposal. It was also unrealistic for the claimant to envisage working in the music studio after the parties separated in light of their acrimonious relationship. Thus the blame for the loss of the music studio lies equally with both of the parties.

[49] While the claimant also has no formal education apart from high school, he has worked in a variety of industries over the past 20 years and continues to be able to teach music, albeit to a lesser degree, as he did before the separation. The claimant is also capable of earning income from other sources such as the part-time job he secured last spring. In addition, the claimant is able to secure work playing music and continues to do this in his spare time. While caring for T.D. requires some of his time, the child is old enough to be left alone and much of the claimant's work can be performed at home. Thus the claimant's parental responsibilities for T.D. cannot be regarded as an impediment to securing full-time

employment. The respondent's position that the claimant could easily earn as much now from teaching music as he did before the separation is not credible. The claimant spent many years building up a solid client base and referral contacts and it will take a number of years for him to re-establish his business. Moreover, the claimant no longer has a studio and the equipment required to operate a music studio is beyond his current means. The claimant simply lacks the capital necessary to rebuild the music studio and, in light of the large outstanding family debt, it is unlikely that he could borrow the funds to rebuild.

- [50] Thus I find that the respondent is entitled to spousal support and the claimant is able to pay; however, I must also conclude that the claimant is not underemployed and is earning what could be expected in all of the circumstances. The claimant earns approximately \$30,000 annually from his part-time job and music lessons (\$700 per month). The respondent's annual income is \$4,578 from her lunch monitor job. The Spousal Support Advisory Guidelines ("SSAG") (without child formula) recommend a range of spousal support of \$504 at the low end; \$588 at the mid-range; and \$672 at the high end.
- [51] In my view, the respondent is entitled to spousal support at the low end of the range in light of the variation in the claimant's part-time income throughout the year. I order that the claimant pay spousal support to the respondent in the amount of \$504 per month commencing June 1, 2014, and thereafter on the first day of each month until May 30, 2017. During this three-year period, the respondent will be expected to pursue retraining diligently and complete her training as a counsellor. Thereafter, the issue of spousal support shall be subject to review by the court on the application of either party without the necessity of establishing a material change in circumstances.
- [52] On May 30, 2013, the claimant was ordered to pay spousal support to the respondent in the amount of \$1,700 per month based on a Guidelines income of \$71,000. Excluding the net income from Evolving Network Ltd., which will be addressed under the heading of division of assets, the claimant's income for spousal support was only \$30,000. Accordingly, spousal support (based on the with child formula) should have been calculated by the SSAG as \$306 at the low end, \$395 at the mid-range, and \$486 at the high end. Accordingly, I order that spousal support be varied downward for the period June 1, 2013 to May 30, 2014, to the low range of the SSAG at \$306 per month. FMEP shall recalculate any amounts owing for spousal support in accordance with this retroactive order.

DIVISION OF FAMILY ASSETS AND DEBTS

- [53] Although there was considerable disputed evidence regarding the parties' contributions to the family assets, it is apparent that there is very little to be divided between them and their collective family debt far exceeds the value of their assets. There is no dispute as to what constitutes family assets in this case. The parties agree that Evolving Network Ltd., and its income from the sale of cosmetics, is a family asset. The parties also agree that the net proceeds from the sale of the former matrimonial home is a family asset. Lastly, the parties do not dispute that the chattels from the former matrimonial home and their respective

automobiles are family assets. The family debts are not disputed and they have been outlined above.

- [54] Subject to an order of the court, each spouse is entitled to an equal share in the family assets and is equally responsible for family debt upon separation: s. 81 of the Act. However, s. 95 of the Act permits the court to order an unequal division of family property or family debt if it would be significantly unfair to divide it equally. Section 95(2) articulates the factors relevant to this determination and grants the court a discretion to consider other factors that would render an equal division of property or debts unfair.
- [55] The division of family property and debt is also influenced by orders for spousal support and the impact of the relationship on a spouse's ability to earn income or become self-sufficient: s. 95(3) of the Act.
- [56] The most valuable family asset is the ongoing income from Evolving Network Ltd. Both parties claim a substantial contribution to the development of this business and to its capital investment. It is apparent that before the parties were married, the claimant spent several years developing this cosmetic distributorship. However, the respondent also contributed her labour and some capital in the early years of the parties' marriage. Moreover, the respondent gave up her own distributorship because of the parties' relationship. In addition, the relationship has been a lengthy one. Lastly, for many years the labour and financial contribution required to keep the business operating and producing income has been minimal. These factors all favour an equal division of the asset.
- [57] The respondent claims an unequal share of the business due to her need to become economically self-sufficient and because she does not trust the claimant to comply with a court order to pay her a share of the income from Evolving Network Ltd. In my view, the claimant has not demonstrated a cavalier attitude toward court orders and there is nothing to support the respondent's position. The order for spousal support will also assist the respondent to become economically self-sufficient based on an equal share of this family asset.
- [58] The respondent is entitled to an equal share of the net income produced by Evolving Network Ltd. from January 1, 2013 to May 30, 2014. Thereafter, the respondent is entitled to share equally in the net income produced by Evolving Network Ltd. on a quarterly basis commencing September 1, 2014. Each payment shall be accompanied by an accounting of the amounts deducted from the gross income to determine the net income. Accounting expenses for the business, along with all other reasonable expenses, shall be shared equally by the parties. All extraordinary expenses shall be subject to the prior written consent of both parties. Consent shall not be unreasonably withheld.
- [59] The accounting records indicate that the company earned gross profits of \$31,196 in 2013. Evolving Network Ltd. has not yet filed its income tax return for 2013 to determine net income. There is also no evidence of the gross income earned in 2014 up to the date of trial.

- [60] Turning to the sale proceeds from the former matrimonial home, the monies currently held in trust are in total \$33,970.31 (including interest to March 31, 2014). The parties each argue that the other is responsible for reducing the value of the former matrimonial home due to their actions. I find there is no cogent evidence of what decrease or increase (if any) was caused by each party's actions or omissions in regard to readying the home for sale. There was no formal evaluation of the former matrimonial home and no estimates of the value added by the respondent's efforts or the reduced value due to the claimant's failure to carry out yard repairs. There is also no evidence of any decline or increase in the market value of the home due to the delay in its sale. Accordingly, this family asset should also be shared equally by the parties.
- [61] At the conclusion of the trial, I ordered that each party was entitled to receive \$5,000 from the trust funds remaining after the sale of the former matrimonial home. The remaining trust balance is approximately \$23,970. Notwithstanding the order for equal division of this family asset, I find the respondent is entitled to receive the balance of the trust monies forthwith to offset the income she would have been entitled to receive from Evolving Network Ltd. from January 1, 2013 to May 30, 2014.
- [62] The claimant shall direct the accountants employed by Evolving Network Ltd. to prepare an accounting of the net income earned by the company from January 1, 2013 to May 30, 2014. This accounting shall be provided to the respondent within seven days of its completion and no later than July 30, 2014. In the event that the accounting shows that the respondent has received more than an equal share of the net income during this period as a result of the payment of monies from trust pursuant to this order, the claimant may deduct the amount of overpayment from the first quarterly payment going forward (September 1, 2014). If the September 1, 2014 payment is not sufficient to cover the overpayment, the claimant may deduct any remaining overpayment from the subsequent quarterly payment. In the event that the respondent is underpaid for her share of the net business income for the period January 1, 2013 to May 30, 2014, the claimant shall increase the September 1, 2014 quarterly payment to make up the shortfall.
- [63] The respondent shall do all things necessary and complete and sign all documents required for the continued operation of the business of Evolving Network Ltd. An unreasonable refusal to take necessary steps or complete required documents or an unreasonable delay in taking necessary steps or the completion and signing of required documents shall result in a suspension of payments to her from the net income of the company until such time as the respondent has completed the required steps or signed and completed the required documents.
- [64] Turning to the remaining family assets, it is apparent that the parties both either took possession of various household items and music equipment or sold them to pay for living expenses. It appears that the claimant received a greater share of the household furniture than the respondent; however, there is no cogent evidence of the value of these items. Neither party provided an independent estimate of the market value of the household items

and music equipment. It is also apparent that the respondent sold much of the music equipment and furniture left in the home after the parties separated and, further, that the monies received for these items was somewhat less than their true value. In these circumstances, I am unable to conclude that anything other than an equal share of these assets is appropriate or that to date either party has not received an equal share of these assets or their monetary value. Thus no order will be made concerning the household items and music equipment. Each party shall retain what they now possess without any setoff.

- [65] It is appropriate, however, to order that the parties immediately provide each other with family photographs that are in their possession for the purpose of having copies made. Each party is entitled to have possession of the other's photographs for a period of 30 days to facilitate copying and thereafter each party must return the photographs to the other party.
- [66] The parties also each have a motor vehicle. The claimant has possession of a 2006 Cadillac Escalade that was purchased in 2008 and the respondent has possession of a 2005 Jaguar XK8 that was purchased in 2012. In April 2013, the claimant filed a financial statement that deposed the value of the Cadillac was \$16,000 and the outstanding loan for the vehicle was also \$16,411. The respondent produced no evidence of the value of the Jaguar but testified that the amount owing (as of February 2014 - \$17,299.81) was the result of a consolidation of the loan for the Jaguar and the prior family vehicle.
- [67] Without independent evidence of the value of the parties' vehicles, the Court cannot determine whether each party has retained an equal share of the vehicles as family assets. Accordingly, I order that each party retain the vehicle currently in their possession without any setoff or contribution to the other party.
- [68] Finally, the respondent testified that she and the claimant, along with D., still retain ownership of two songs written and produced by D. that have an unspecified value. Each party and D. has a one-third interest in the songs. In the event that the songs ever produce income, I order that the parties are entitled to a one-third share in the net proceeds.
- [69] Turning to the family debt, the evidence establishes that both parties overspent during their marriage. While the respondent maintained that it was the claimant who could not curtail his spending and was responsible for the family's heavy debt load, the evidence does not support this assertion. The respondent's father testified that he loaned the family money because both spouses could not live within their means. He testified that the respondent was equally responsible for the overspending. The respondent had a personal trainer, took tennis lessons, had weekly massage and chiropractic treatments, and did not supplement the family earnings with part-time work during the marriage. Further, there is no evidence that during the marriage the respondent disagreed with any financial decision made by the claimant. The fact that the parties were equally responsible for the family's accumulation of debts is a factor in favour of an equal division. The marriage is also a lengthy one, which favours an equal division of the debts.

- [70] Because the family debt exceeds the family's assets, the parties' ability to pay the debt load is a factor to consider in determining whether to order an unequal division. At present and for the next two to three years, the claimant has a greater ability to pay off the debts than the respondent. However, the claimant has already taken responsibility for paying the debts owed by the music studio to students. He has so far paid off \$5,000 of a \$15,000 debt and he has also paid off \$3,000 on a bank overdraft.
- [71] For these reasons, I find that the responsibility for paying the current outstanding family debts shall be shared equally by the parties. The family debts are defined as the credit card debt as of December 22, 2012, the date of separation; Telus, Hydro and Shaw Cable overdue accounts as of December 22, 2012; the overdrafts on bank accounts and credit union accounts held by one or both spouses as of December 22, 2012; and any other debts in the joint names of the parties as of December 22, 2012. The parties are solely responsible for the loans encumbering their respective motor vehicles. The parties are solely responsible for any other debts in their sole names.
- [72] In the event of a dispute concerning a family debt, as defined above, the parties may refer the matter to the Registrar for determination.

DIVORCE

- [73] The parties have been separated for over a period of one year. They have not co-habited since December 22, 2012. There is no possibility of reconciliation and there has been no collusion as defined in s. 11(4) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.). I thus grant the parties a divorce pursuant to s. 8 of the Divorce Act and the order for divorce will take effect 31 days from the date of this order.

COSTS

- [74] The parties have been equally successful at trial. Thus each party shall bear their own costs. In the event that the Court has ordered costs in favour of a party on an interim application, those costs are due and payable forthwith. Any dispute concerning costs shall be resolved by the Registrar upon application.

SUMMARY OF THE ORDERS

- [75] T.D. shall reside with the claimant on a full-time basis with specified parenting time with the respondent. The parties remain joint guardians of T.D.; but the claimant retains primary authority for parenting decisions and responsibilities.
- [76] The claimant's child support obligation ceases as of January 31, 2014, and is reduced to \$411 per month retroactively from June 1, 2013 to January 31, 2014. Any overpayment of child support shall be deducted from arrears calculated by FMEP. The respondent's obligation to pay child support is suspended for a period of two years from the date of this order.

- [77] The claimant shall pay spousal support to the respondent commencing June 1, 2014, in the amount of \$504 per month until May 30, 2017. Thereafter the issue of spousal support is subject to review by the court without proof of a material change in circumstances. Spousal support payable by the claimant is reduced to \$306 per month retroactively effective June 1, 2013 to May 30, 2014, and any overpayment shall be credited to the arrears calculated by FMEP.
- [78] The respondent is entitled to an equal share of the net income earned by Evolving Network Ltd. from January 1, 2013 to May 30, 2014. Thereafter each party is entitled to an equal share of the net income earned by Evolving Network Ltd. on a quarterly basis commencing September 1, 2014.
- [79] The parties are entitled to an equal share of the trust funds remaining from the sale of the former matrimonial home. Notwithstanding this order, the respondent shall be paid all of the remaining monies held in trust forthwith, subject to an accounting of the net income earned by Evolving Network Ltd. from January 1, 2013 to May 30, 2014. In the event the respondent has been overpaid for her share of the net income earned by Evolving Network Ltd., the claimant shall deduct the overpayment from the September 1, 2014 quarterly payment and from subsequent quarterly payments if necessary. In the event that the respondent has been underpaid for her share of the net income earned by Evolving Network Ltd., the claimant shall pay the shortfall along with the quarterly payment on September 1, 2014.
- [80] Each party shall retain the vehicle and the household items and music equipment currently in their possession without setoff. The music CD owned jointly by the parties and D. shall remain their joint property in three equal shares.
- [81] The parties are hereby divorced and the divorce shall take effect 31 days after the date of this order.
- [82] Each party shall bear their own costs.

"Bruce J."

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