
CANADA / JUDGMENT

Walburger v. Lindsay

2015 BCSC 341

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 341 Walburger v. Lindsay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walburger v. Lindsay,

2015 BCSC 341

Date: 20150306

Docket: E68244

Registry: Nanaimo

Between:

Lynda Darlaine Walburger

Claimant

And

John Lorne Lindsay

Respondent

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Claimant:

B. Vining

Counsel for Respondent:

C. Rivers

Place and Date of Trial:

Nanaimo, B.C.

December 1-3, 2014

Place and Date of Judgment:

Nanaimo, B.C.

March 6, 2015

Introduction

- [1] The claimant, Lynda Walburger, and the respondent, John Lindsay, were in a common-law relationship for some eight years, from 2004 to 2012.
- [2] The issues to be addressed are the division of property and spousal support.
- [3] There is a unique set of circumstances leading to the agreement of the parties as to how the property division issues are to be determined. When Ms. Walburger filed her claim in January 2013, she claimed relief under the since repealed Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA") even though the FRA did not apply in respect of the property issues. Ms. Walburger later filed a notice of family claim in February 2014 seeking relief under constructive trust principles and, later still, in July 2014, she filed an amended notice of family claim seeking property division under the Family Law Act, S.B.C. 2011, c. 25 (the "FLA").
- [4] The parties now agree that they are "spouses" in accordance with the FLA, and that this proceeding has been properly brought under that Act: ss. 3, 198(2)(b). The parties also particularly agree that the property division issues fall to be determined under the FLA, consistent with the conclusions of this Court in *Merservy v. Field*, 2013 BCSC 2378.

Background Facts

- [5] At the time of trial, Ms. Walburger was 65 years old and Mr. Lindsay was 62 years old. Both had previous relationships and both have children from those previous relationships.
- [6] Ms. Walburger was born in May 1949 and raised in Alberta. She completed her high school education in 1969. She abandoned her plans for further education when she married Mr. Berg and, later, she worked as a bank teller. Their only child, Chris Berg, was born in 1977 and is currently 37 years old. The Bergs were separated shortly after Chris' birth and Ms. Walburger then began to work in a company that operated daycares.

- [7] In December 1988, Ms. Walburger married Benny Walburger and the couple, along with Chris, moved to Parksville, British Columbia. The couple operated health food stores and Ms. Walburger worked in the business. In 1995, Mr. and Ms. Walburger separated. Although somewhat unclear, it appears that Ms. Walburger obtained some financial settlement after the divorce.
- [8] From 1997 to 2002, Ms. Walburger lived with Frank Sopp in Parksville. During that period of time, Ms. Walburger worked as a cleaning lady and she also worked part time for the Kidney Foundation. The couple seems to have lived on a very modest income of approximately \$1,000 per month. Mr. Sopp and Ms. Walburger parted ways sometime in 2002, and given her minimal income, Ms. Walburger found a female roommate to move in to share the rent expenses.
- [9] Mr. Lindsay was born in February 1952. He was trained as a welder in his late teens and he joined the Ironworkers Union, Local 97, in 1969. He had a brief stint as a stockbroker in the mid-1980s. Iron working remains his occupation to this time, although it is seasonal work. As of January 2014, he began employment at the Victoria shipyards working as a rigger with Ironworker's Union, Local 643.
- [10] Mr. Lindsay was married early in life and he has two sons from that relationship, Grant, now 39 years old, and Lorne, now 37 years old. Mr. Lindsay separated from his first wife and obtained custody of their sons who he raised with the help of his mother. He was also briefly married a second time in the early 1990s.
- [11] Mr. Lindsay and Ms. Walburger met sometime in 2002. At this point, Ms. Walburger was still working part time as a cleaning lady and living in her Parksville apartment with her roommate. Mr. Lindsay was working as a welder and living with his mother on a property owned by him at 1-1486 Price Road in Errington, British Columbia (the "Price Road Property"). At that time, Mr. Lindsay also owned a rental home at 1339 Lanyon Drive in French Creek, British Columbia (the "Lanyon Drive Property").
- [12] Mr. Lindsay was only in town about four to six months of the year as his employment required that he work extensively out of town. By the end of 2003, the parties were dating exclusively and they saw each other often when Mr. Lindsay was in town.
- [13] By the fall of 2004, the renters of the Lanyon Drive Property had moved out. In November 2004, the parties agreed that they would move in together at the Lanyon Drive Property. Ms. Walburger and Mr. Lindsay discussed how their finances would be handled, and it was agreed that Ms. Walburger would keep her own bank account at TD Bank and keep her own income, while Mr. Lindsay would pay for the household expenses, the mortgage and other related costs for the Lanyon Drive Property. Ms. Walburger's only asset at the time was a Ford Tempo that Mr. Lindsay had bought for her. She had no other assets, particularly financial assets, and no debts.

- [14] In November 2004, Mr. Lindsay owned the two properties: Lanyon Drive and Price Road. He also had various bank accounts with Coast Community Credit Union with cash balances and RRSPs of approximately \$19,355.
- [15] The Lanyon Drive Property includes a 1,900 square foot home with three bedrooms and a yard. After the parties moved in together, they took up what could be called fairly traditional roles. Ms. Walburger was in charge of the household and did the vast majority of the cooking, cleaning and laundry. She also worked in the yard and cut the lawn, weeded and tended a garden. Mr. Lindsay also did some cooking, a minor amount of housework, as well as renovations and outside yard work.
- [16] The parties talked about getting married from time to time, but Ms. Walburger remained married to Mr. Walburger until 2008. Even after her divorce, the discussion remained an open one.
- [17] Ms. Walburger also, as she had done even before moving into the Lanyon Drive Property, assisted Mr. Lindsay with his elderly mother who continued to live in the Price Road Property. Since Mr. Lindsay was working out of town for a large portion of the year, Ms. Walburger held a power of attorney for Mr. Lindsay's Credit Union accounts, and she would make deposits and pay bills from Mr. Lindsay's accounts when he was away. Despite the initial agreement regarding who would pay what bills, Ms. Walburger, from time to time, did pay for certain household expenses from her TD Bank account where she was continuing to deposit earnings from her cleaning jobs.
- [18] In October 2005, Ms. Walburger's mother passed away and Ms. Walburger received an inheritance from her estate. She received an advance payment of \$10,000 in December 2005 and would, from February 2006 to May 2007, receive the further amount of \$86,328. Ms. Walburger was not initially sure what to do with the money, although she asked Mr. Lindsay and he suggested she invest in bonds. That sound investment advice seems to have fallen on deaf ears. As best Ms. Walburger can recall, it seems that about \$40,000 was advanced to her son, Chris, although she would also say on discovery that she has lent him upwards of \$60,000 over the years. The further sum of \$16,948 went toward the purchase of a new 2005 Pontiac Grand Am in April 2006. The rest seems to have been dissipated by Ms. Walburger by general living expenses, with most of the monies having been spent by the spring of 2006. Ms. Walburger continues to drive the Grand Am, which the parties agree is an excluded asset. It has a black book value of \$4,387.
- [19] Ms. Walburger states that she gave \$5,000 to Mr. Lindsay in February 2006 from these inheritance monies. Mr. Lindsay denies that he received such a sum, but he does agree that she repaid him \$1,000 to cover an amount that Chris had borrowed from him.

- [20] In 2010, Mr. Lindsay applied for pension benefits from the Ironworkers Pension Plan, Local 97 (the "Ironworkers Pension"). In July 2010, he elected to receive a lifetime benefit of \$1,709.22 per month. That option also provided for Ms. Walburger to receive a monthly benefit of \$1,281.92 in the event of his death for the rest of her life.
- [21] The parties agree that they separated on October 16, 2012. At that time, Ms. Walburger moved into the guest home of a client, Barbara Allard. It is a 600 square foot home with two bedrooms, a bathroom and a living room located in Nanoose Bay, British Columbia. Initially, Ms. Walburger paid only utilities for the space. However, since Mr. Lindsay began paying maintenance in February 2013, she has been paying Ms. Allard rent of \$800 per month.

Property Division

- [22] The FLA provides for the entitlement of spouses on separation to an undivided half interest in "family property": s. 81. The parties agree that family property here includes the increase in value of Mr. Lindsay's interest in the Lanyon Drive Property and the Price Road Property, Mr. Lindsay's vehicle, the various balances owing in his bank accounts, the increase in value of his RRSP and his pension. The only family property owned by Ms. Walburger on separation was a small balance in her bank account. See FLA, s. 84(1) and (2).
- [23] The parties also agree that certain property is "excluded" property in accordance with the FLA, s. 85.
- [24] The issues to be addressed are as follows.
- (a) The Appraisal Issue
- [25] The Lanyon Drive Property and the Price Road Property owned by Mr. Lindsay are excluded property as he acquired them before the relationship began: FLA, s. 85(1)(a). However, "family property" includes the increase in value during the relationship and such value is sharable by the parties: FLA, s. 84(2)(g).
- [26] In accordance with the British Columbia Supreme Court Family Rules, Rule 13-3, the parties took steps to obtain opinion evidence from qualified appraisers with respect to the valuations of the Lanyon Drive Property and the Price Road Property, both in 2004, when the relationship began, and in late 2012, when it ended. This was done, of course, to establish the value of the family property that represented the sharable increase in value during the relationship.
- [27] The parties anticipated and hoped that retaining these experts would lead to agreement on these values, consistent with the intent under the Rule as discussed in *Aquilini v. Aquilini*, 2012 BCSC 1616 at para. 46. That turned out to be a false hope with these values being very much at issue at the trial.

- [28] In accordance with s. 87 of the FLA, the value of family property must be based on its fair market value and that value must be determined as of the date of any agreement dividing the property or as of the date of the hearing.
- [29] In February 2014, the parties agreed to jointly retain Ray Walker to prepare an appraisal of the Lanyon Drive Property in 2004 and 2012. Those values were established at \$282,300 and \$258,000, respectively. Unfortunately, the latter value was of little assistance given the requirement in the FLA, s. 87 that values be established at the time of the hearing.
- [30] In September 2014, the parties jointly retained Robert Fleming to prepare updated appraisals of the Lanyon Drive Property in both 2004 and 2014, and also to prepare appraisals of the Price Road Property on those dates. His appraisals were prepared shortly after his retention. As is noted below, Mr. Fleming's 2004 appraisal of the Lanyon Drive Property was substantially below that of Mr. Walker. In addition, there were issues about Mr. Fleming's treatment of the Price Road Property value in 2004.
- [31] Following a failed mediation, and in anticipation of the trial, the parties then agreed to retain another appraiser, Blake Leeper, to provide further appraisals of both properties on the various dates. His appraisals were prepared in November 2014.
- [32] The present contest is essentially between the appraisals prepared by Mr. Fleming and those prepared by Mr. Leeper. Mr. Lindsay supports Mr. Leeper's appraisals for both properties, while Ms. Walburger supports a blending of the valuations from Mr. Leeper and Mr. Fleming for the Lanyon Drive Property and the appraisal from Mr. Fleming alone for the Price Road Property.
- (b) Lanyon Drive Property
- [33] Mr. Lindsay acquired the Lanyon Drive Property as an investment property in May 1998 for \$137,500. The purchase was financed by a mortgage and by Mr. Lindsay borrowing \$17,000 from his RRSP through a loan (the "Home Buyer's Plan"). That initial mortgage was paid out and replaced with a mortgage from CIBC in December 2010.
- [34] By 2004, Mr. Lindsay had repaid some of the Home Buyer's Plan into his RRSP such that the balance remaining was \$10,001. By 2012, further repayments by Mr. Lindsay into his RRSP had reduced the balance remaining payable to his RRSP to \$1,942.
- [35] The issue to be addressed is what values are to be attributed to the property in terms of determining the increase in value over the relevant time. The appraisal values are:

Appraiser

Lanyon Drive (2004)

Lanyon Drive (2014)

Mr. Walker

\$282,300

N/A

Mr. Fleming

\$185,000

\$250,000

Mr. Leeper

\$270,000

\$300,000

[36] Despite the able arguments of Ms. Walburger's counsel, I am not driven to the middle ground as between the valuations of Mr. Fleming and Mr. Leeper, as was the case in *Todd v. Freeman*, 2005 BCCA 519 at paras. 63-64, 79 and *Dwinnell v. Dwinnell*, 2008 SKQB 506 at paras. 25-32.

[37] In addressing the 2004 values, the difference between Mr. Fleming, on the one hand, and Mr. Walker and Mr. Leeper on the other, is simply too big to ignore. I am persuaded that the opinion of Mr. Leeper is more compelling and is consistent with the opinion of Mr. Walker. I would note, in particular, that Mr. Leeper relies on recent sales of properties on Lanyon Drive itself in the fall of 2004 in coming to his conclusion. Similarly, I accept the opinion of Mr. Leeper in respect of the 2014 valuation. While the two valuations were within a consistent range, Mr. Leeper used a comparison on the same street in the relevant time frame, and his other comparables were shown to be within the immediate vicinity of the subject property.

[38] I accept the appraisals of Mr. Leeper and find that the value of the Lanyon Drive Property was \$270,000 as of 2004 and \$300,000 as of 2014. After deducting the respective mortgage balances on those dates, the net increase in value is \$102,188, which results in Ms. Walburger being presumptively entitled to \$51,094, subject to the reapportionment argument discussed below.

(c) Price Road Property

[39] The Price Road Property was purchased by Mr. Lindsay's parents in the mid-1970s. This property is in a rural area and it is roughly 5/8 of an acre.

[40] Mr. Lindsay moved into the Price Road Property with his sons in 1982 and he remained there until he moved into the Lanyon Drive Property with Ms. Walburger in late 2004. By that time, Mr. Lindsay had acquired the Price Road Property from his mother in April 2004 for \$85,100, essentially as an advance on his inheritance from her.

- [41] When Mr. Lindsay's mother, and then Mr. Lindsay, owned it, an older double-wide mobile or manufactured home was located on the property. There does not appear to have been much, if any, work or maintenance on the home during the relationship of the parties. The home is still there, although the appraisers note that the roof has failed and there is mould and moss in the interior. Mr. Lindsay estimates that it will cost about \$10,000 to remove the trailer.
- [42] Mr. Lindsay's mother lived there until her death in March 2006 and, after that time, Mr. Lindsay's son, Lorne, has lived on the property rent-free in his own trailer. Mr. Lindsay has no intention to sell the Price Road Property as his past and present intention is to transfer the property to Lorne. The only reason he has delayed this transfer is due to some personal problems that Lorne has faced. Mr. Lindsay has always anticipated transferring the property to Lorne once his life has stabilized, which I understand has not yet occurred. Mr. Lindsay's only contribution to the property is the payment of the property taxes. Mr. Lindsay maintains that he holds the property in trust for Lorne, in accordance with the wishes of his late mother, although it is clear that no formal trust relationship exists.
- [43] As with the Lanyon Drive Property, there is an issue as to what values are to be attributed to the Price Road Property in terms of determining the increase in value from 2004 to 2014. The appraisal values are:

Appraiser

Price Road (2004)

Price Road (2014)

Mr. Fleming

\$58,000

\$129,000

Mr. Leeper

\$90,000

\$127,000

- [44] As can be seen from this table, there is little appreciable difference between the 2014 values. Even so, I am persuaded again that Mr. Leeper's opinion is more compelling. As with his other appraisal, Mr. Leeper relied on more direct comparables including recent sales on Price Road, while Mr. Fleming relied on a "broader market area".

- [45] The considerable difference in the 2004 values arises from the mobile or manufactured home on the property. Mr. Fleming did not attribute any value to the mobile home that was on the property in 2004 in which Mr. Lindsay's mother lived at the time. While Mr. Fleming's appraisal refers to the "owner" advising that it "added no value", that likely came recently from either Mr. Lindsay or Lorne and referred to the current state of the mobile home. Mr. Fleming, therefore, made no effort to assess the historical value of the home in 2004.
- [46] In contrast, Mr. Leeper evaluated the Price Road Property on the assumption that the mobile home had, as of 2004, been normally maintained and that it had a remaining life expectancy of 14 years. He notionally attributed \$35,000 to this "improvement" on the property. When viewed in this light, the difference in the two appraisals is largely explained by the mobile home value.
- [47] The issue essentially boils down to Ms. Walburger's contention that the mobile home is personal property, which has depreciated to a nil value, versus Mr. Lindsay's contention that the home was part of the property and its value should not be separated from it. A determination of whether property is a fixture and, therefore, part of the land, is a very fact-specific exercise. The law on the matter was recently reviewed by Madam Justice Fisher in *Zellstoff Celgar Ltd. v. British Columbia*, 2013 BCSC 1108 at paras. 17-21, 26, 59-60, *aff'd* 2014 BCCA 279.
- [48] *Zellstoff Celgar* was a tax appeal that concerned the imposition of tax under the Property Transfer Tax Act, R.S.B.C. 1996, c. 378 to the lands, improvements, production machinery and equipment of a pulp mill. The issue was whether the production machinery and equipment were fixtures at common law.
- [49] The test at common law for defining fixtures and chattels was established in *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335 at 338 (Ont. Div. Court):
1. That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
 2. That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue [as] chattels.
 3. That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
 4. That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

5. That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

[50] The Supreme Court of Canada discussed the object of annexation in *Haggert v. Brampton (Town)* (1897), 28 S.C.R. 174 at 182:

In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and showing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee.

[51] The principles in *Stack v. T. Eaton Co.* and *Haggert v. Brampton* were reaffirmed in *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549 (B.C.C.A.) and the Court of Appeal in *La Salle Recreations* at 554 also discussed the distinction between "permanent" and "occasional" affixing:

When used with reference to affixing or annexing chattels to realty I cannot believe that "permanent", a relative term, means remaining in the same state and place forever or even for an indefinitely long period of time. Especially this must be so where the chattels being considered are subject to wear and tear through use.

These principles continued to be applied to the present day: *Zellstoff Celgar* at para. 26.

[52] The Court of Appeal in *Zellstoff Celgar* affirmed the decision of the trial judge: see paras. 31, 40-43. It concluded:

[45] [T]he evidence established an intention of permanent affixation despite the fact that most of the equipment could be dismantled and sold in a secondary market. The objective intention was that, barring unforeseen circumstances, the equipment was to remain for its useful lifetime. Together with her consideration of the use of the land as a pulp mill, this finding informed the judge's conclusion that the object of annexation was for the better use of the land and that the items of machinery and equipment had therefore become fixtures.

[53] In this case, I have scant evidence on the point beyond Mr. Lindsay's assertion that the mobile home was placed on the land some decades ago. Mr. Leeper describes it as an "improvement" and the photos attached to both appraisals indicate that the home looks no different than one which a person would normally think of as being part of the land upon which it sits. The property has also been taxed on the basis of including an "improvement". In other words, there is some, albeit limited, evidence upon which to conclude that the mobile home is affixed to the land to some degree.

- [54] Despite the fact that this mobile home could have been moved off the Price Road Property at some point, and likely will in the future, the latter circumstance only arises from the lack of maintenance such that the home has become uninhabitable. Nevertheless, considering all the circumstances, at the time the home was placed on the Price Road Property, the object of the annexation was for the better use of the land, particularly given that this was intended to be a permanent structure on the lands for Mr. Lindsay's family over its useful lifetime: Zellstoff Celgar (BCCA) at paras. 40-45.
- [55] In these circumstances, I conclude that the home is a fixture and part of the Price Road Property, both in 2004 and at this time. Accordingly, the Price Road Property should have been valued in 2004 on the basis that the mobile home on it had some value. To do otherwise would relieve Ms. Walburger of the effect of a depreciating asset with the added prejudice to Mr. Lindsay of bearing the cost of removing the home at a later time.
- [56] In the result, I accept Mr. Leeper's appraisals and find that the value of the Price Road Property was \$90,000 as of 2004 and \$127,000 as of 2014. The net increase in value is \$37,000, which results in Ms. Walburger being presumptively entitled to \$18,500, subject to the reapportionment argument discussed below.
- (d) Personal Property
- [57] The parties agree on the relevant values of the personal property held by them at the date of separation. Those include: Mr. Lindsay's 2003 vehicle (\$6,000), Mr. Lindsay's various savings accounts (\$12,152.27), and Ms. Walburger's chequing account balance (\$258.15).
- [58] The total value of these assets is \$18,410.42 which results in Ms. Walburger being entitled to a compensation payment of \$8,947.06 in accordance with s. 97(2)(c) of the FLA.
- [59] The parties also agree that, since Ms. Walburger's Grand Am vehicle was purchased with her inheritance, it is an excluded asset, as it is derived from excluded property, pursuant to ss. 85(1)(b) and (g) of the FLA. In addition, as all amounts received by Ms. Walburger from her mother's estate were spent by her, no other assets come into play. Even if such assets were purchased with these funds, they would likely have similarly been excluded assets.
- [60] Mr. Lindsay held RRSPs both before the relationship began and at the end of the relationship. The parties agree that the value of the RRSPs in 2004 was \$19,355.75 and that the amount held by him in late 2014 was \$29,370.12.
- [61] Ms. Walburger seeks a transfer of half of the increase in value in his RRSPs (\$5,007.19) by way of a spousal rollover. Mr. Lindsay argues that in 1998 he borrowed \$17,000 from his RRSP for a down payment on the Lanyon Drive Property. In November 2004, the balance owing back to his RRSP was \$10,001. He therefore takes the position that the value of the RRSPs in 2004 was actually \$29,356.75, such that there has been no gain in his RRSPs over the course of the relationship.

- [62] In my view, the answer to this issue lies in what would have happened but for Mr. Lindsay borrowing from his RRSP to purchase the Lanyon Drive Property. If he had not done so, he would have had to finance the purchase through other means, and assuming the same rate of repayment as what occurred here, it would have increased the mortgage or loan owing in respect of the Lanyon Drive Property (i.e., by \$10,001 in 2004). In that event, the increase in value that would be shareable by the parties would be the same amount.
- [63] But Mr. Lindsay did not replace this capital asset (the RRSP) through another capital asset. Rather, he used family income to repay these amounts every year under the Home Buyer's Plan, as he was required to do under the income tax legislation. In these circumstances, I see no basis upon which Mr. Lindsay's RRSP can be said to have been actually \$10,001 higher in 2004 than was the case. In short, in 2004, he owed a receivable back to his RRSP which he has been repaying back since that time. I can only assume that the repayments back into his RRSP have contributed, at least in part, to the current balance in the RRSPs.
- [64] Accordingly, Ms. Walburger is entitled to a direction that Mr. Lindsay complete a spousal rollover of his RRSP in her favour in the amount of \$5,007.19.
- [65] The parties have agreed to divide the Ironworkers Pension in accordance with Part 6 of the FLA such that Ms. Walburger will receive 50% of the value for the period November 1, 2004 to October 16, 2012. Similarly, the parties agree to an equal division of their respective Canada Pension Plan ("CPP") benefits for that same period of time.
- [66] There was much discussion at the trial concerning the monies owed to both Ms. Walburger and Mr. Lindsay by Chris Berg, presumptively both assets or personal property held by them at this time.
- [67] Despite lending her son, Chris, a large amount from her inheritance, in addition to what I find were other advances, Ms. Walburger does not see much prospect in Chris repaying her the amounts owed to her, which may range anywhere from \$40,000 to \$60,000. I accept that the possibility of this happening is virtually nil, even if his mother's financial situation is more tenuous now after the separation from Mr. Lindsay. To the extent that Ms. Walburger could prove that such loans to Chris arose from an advance from her inheritance, it would be the case that any repayment would be an excluded asset: FLA, s. 85(1)(g). In my view, she has not proven that to be the case.
- [68] The generosity extended to Chris Berg did not stop at his mother. Mr. Lindsay also loaned substantial amounts to him. Firstly, Mr. Lindsay assisted Chris in purchasing a 2004 Chevrolet Colorado in May 2010. The vehicle and financing is in Mr. Lindsay's name although Chris makes payments to him from time to time. There is a small balance owing by Mr. Lindsay on the loan from the finance company. The amount owed by Chris to Mr. Lindsay for this loan was \$9,680 as of January 2014. The truck is worth approximately \$10,052.

- [69] Secondly, Mr. Lindsay is owed \$7,500 which was advanced in 2007 to Chris, at 6% annual interest. That loan was outstanding in 2013 in the amount of \$9,663.53. Accordingly, the total amount owing to Mr. Lindsay by Chris is approximately \$19,344 and is likely more.
- [70] Somewhat astonishingly, Ms. Walburger has suggested that if her son pays Mr. Lindsay any amount, she should receive half of it. She does not seek an interest in the truck, which her son continues to use. Nor does she suggest that Mr. Lindsay's debt for the truck should be shared as a family debt. Nor, further, does she suggest that she take over the remaining loan owing to the finance company for the truck. Not surprisingly, Mr. Lindsay has offered to transfer such loans owing by Chris to her, along with the truck and related debt, so that she may elect to pursue or not pursue her son as she sees fit. The catch is that Mr. Lindsay wants half the value of the truck (approximately \$5,026) on his side of the ledger.
- [71] This argument by Ms. Walburger is disingenuous. If she truly wants the value of the asset, it is the truck that has value, and if she forced the issue, Mr. Lindsay will have no choice but to sell the truck, repay the vehicle loan and send her son to buy bus tickets. She clearly does not want to do that. In my view, the fair market value of the debt owing by Chris Berg to Mr. Lindsay is to be valued at zero: FLA, s. 87(a). I come to this conclusion after notionally factoring in the remaining debt on the truck, the truck's value if sold now, and the probability of Chris Berg repaying any remaining net amounts owing.
- [72] There is no net asset of value here - whether owing to Mr. Lindsay or Ms. Walburger - beyond the goodwill that both parties have extended to Chris Berg, and his mother can share in the repayment of that goodwill as she pleases. It will not increase the value of the assets she may share arising from the relationship.

(e) The Debt Issues

- [73] As with family assets, spouses are presumptively equally responsible for "family debts" under s. 81 of the FLA. In accordance with s. 86 of the FLA, "family debt" includes all financial obligations incurred by a spouse during the relationship and ending at the time of separation. The value of family debt is to be determined at the date of the hearing to determine the division of family debt: FLA, s. 87(b)(ii).
- [74] As of separation, Ms. Walburger's indebtedness was \$15,850 and she claims half of these debts from Mr. Lindsay.
- [75] This amount was represented, in part, by a TD line of credit that she obtained in September 2007 which was used for general expenses. Mr. Lindsay was surprised to learn of this line of credit. In September 2010, Mr. Lindsay offered to use his line of credit, secured against the Lanyon Drive Property, to pay \$12,798 to Ms. Walburger for the express purpose of her paying the line of credit off. The reason he offered to do this was because his rate of interest was much lower than that of Ms. Walburger. He advanced that amount to her in December 2010. However, she used only \$10,000 to reduce her credit balance to \$2,774 and she spent the rest. By the date of separation, she had continued to use this line of credit and the

balance had grown again to \$11,451.

- [76] Ms. Walburger also has a TD VISA balance under a credit card that she obtained in 2006. She used this card for general living expenses and also for some of her cleaning supplies. By the date of separation, the balance was outstanding in the amount of \$4,399.
- [77] Mr. Lindsay is presumptively responsible for half of these debts, subject to his reapportionment argument, which I will address below.
- [78] The final debt issue arises from Mr. Lindsay's advance of \$12,798 to Ms. Walburger in December 2010 which was used by Ms. Walburger, in part, to repay her line of credit. Ms. Walburger agreed that she would repay Mr. Lindsay this amount with interest. Mr. Lindsay prepared and maintained a ledger to record the amount owing from time to time. Payments were made in either \$100 or \$200 installments throughout 2010 to January 2012. Ms. Walburger stopped making payments thereafter, stating that she could not afford to continue the payments.
- [79] As of February 2013, the amount outstanding was recorded by Mr. Lindsay as \$12,514, including accrued interest. He seeks to deduct that amount from any amount he may be ordered to pay Ms. Walburger under the FLA provisions.
- [80] Pursuant to the FLA, s. 92, spouses may make agreements respecting the division of property and debt, including the division of family debt, and may do so unequally or to exclude as family debt items of debt that would otherwise be included: see ss. 92(a) and (c), respectively.
- [81] Ms. Walburger submits that this agreement to repay the debt should not be upheld or enforced. She cites s. 93 of the FLA in support, although that section only applies if there is a "written agreement", which by s. 1 of the FLA means an "agreement that is in writing and signed by all the parties". Ms. Walburger relies on the decision of this Court in *Asselin v. Roy*, 2013 BCSC 1681. In that case, Mr. Justice Harvey was addressing the court's jurisdiction under s. 93 in respect of a written agreement which, as both s. 92 and 93 require, must be "respecting the division of property and debt" upon separation.
- [82] It is well-taken here that the agreement between Mr. Lindsay and Ms. Walburger to repay this debt was oral, not written. As such, s. 93 does not apply, although I acknowledge that such circumstances may well result in the unusual situation where an oral agreement under s. 92 may well be enforceable, if proven, without the court's oversight under the provisions of s. 93. It would, however, remain open to a spouse to assert that any oral agreement is unenforceable under common-law principles.
- [83] In terms of s. 92, it is not entirely clear from the provisions of this fairly straightforward loan agreement that the parties intended that this was an "agreement respecting the division of debt" in the sense of the parties turning their minds to the result upon a separation. In fact, I consider that the parties did not specifically intend that result, and only sought to delineate their responsibilities within their relationship which was ongoing at the time. However, I see

nothing in this agreement to indicate that it would cease to apply upon separation, and the formality of this agreement between the couple would suggest that their intention was that it would survive any separation.

- [84] I do not consider that there is any basis upon which Ms. Walburger can contend that the agreement is unenforceable under common-law principles. She argues that she did not have independent legal advice, but that is not an absolute requirement, and it is very apparent that she understood what Mr. Lindsay required in return for advancing the funds. She is a woman of average intelligence and there is no suggestion that she did not know what she agreed to. In December 2010, there was no concept in place in respect of "family debts" as it now exists under the FLA, and Ms. Walburger's argument that she should not have agreed to repay such "family debts" at the time disregards that the parties made this agreement while under a common-law regime.
- [85] In that event, the loan owing to Mr. Lindsay can be said to be "family property" shareable by the parties pursuant to the FLA, ss. 84(1)(a) and 84(2)(c). Conversely, the amount owing by Ms. Walburger to Mr. Lindsay can be said to be a "family debt" likewise shareable by the parties pursuant to the FLA, ss. 81 and 86. Viewed in this light, there is a circular analysis in determining where the final responsibility for this loan should lie.
- [86] In my view, the fairest result in respect of this loan is to require each party be responsible for half of the balance outstanding. The same result arises from an application of the reapportionment provisions under s. 95 which results in each party being equally entitled to/responsible for this asset/debt. Accordingly, Mr. Lindsay is entitled to a credit from Ms. Walburger of \$6,257.

(f) Reapportionment Issues

[87] The FLA provides for an unequal division of family property and family debt:

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide benefits as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;

- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor that may lead to significant unfairness.

[88] Mr. Lindsay seeks an order that the increased value from the Lanyon Drive Property be reapportioned 80% in his favour, and that the increased value from the Price Road Property be reapportioned 100% in his favour. The onus clearly lies on Mr. Lindsay to prove that an equal sharing of the increase in value of the Lanyon Drive Property and the Price Road Property would be "significantly unfair".

[89] Mr. Lindsay's argument in respect of the Lanyon Drive Property and the Price Road Property is focused on ss. 95(2)(a) and (i).

[90] With regard to s. 95(2)(a), he refers to *Williams v. Killey*, 2014 BCSC 1846 where the court was addressing a three and-a-half year relationship where the parties had separated prior to the coming into force of the FLA. Mr. Justice Truscott reapportioned the family property and awarded the claimant only 15% of the increased value in the townhome. The court found that the claimant had contributed "significantly" to the household expenses and to the preservation and maintenance of the townhome: para. 69.

[91] Mr. Lindsay takes the position that the result in *Williams* should be doubled in respect of this eight-year relationship to apportion 20-30% of the increase in value to Ms. Walburger. I understand the mathematics of this analysis, but that hardly does justice to the various factors set out in s. 95 of the FLA. Further, Mr. Lindsay cites *G.H.H. v. R.N.H. (sub nom Hofer v. Hofer)*, 2005 BCSC 423, *Murphy v. Murphy*, 2007 BCSC 870 and *Ferreira v. Peloquin*, 2012 BCSC 1952. I note that all of these cases are of limited assistance here since they were decided under the test found in the FRA, s. 65(1), which allowed the court to reapportion assets where it would be "unfair", as opposed to "significantly unfair".

- [92] Mr. Lindsay also relies on the FLA, s. 95(2)(i) in arguing that a factor to be considered is that the parties here lived their entire relationship under the auspices of the FRA, where property division issues between common-law spouses were to be determined under unjust enrichment and constructive trust principles. In *Williams*, just as here, the parties separated prior to the FLA coming into force, yet the court in *Williams* applied the "significantly unfair" test under s. 95 of the FLA.
- [93] In *Bressette v. Henderson*, 2013 BCSC 1661, Madam Justice Griffin was addressing the same unique circumstances that arise here. The claim was initially advanced under common-law principles, but the claimant later also advanced a claim under the FLA. Ultimately, the court did not find it necessary to decide the issue as to whether the FLA applied; rather, the court concluded that the division of property result was the same whether decided under the common law or under the FLA. The court cited the leading case of *Kerr v. Baranow*, 2011 SCC 10 and applied the factors arising from that case, being the duration of the relationship, the parties' intentions and expectations during the relationship, and the parties' respective direct and indirect contributions to the acquisition of property during the relationship, as applicable: para. 138.
- [94] The court in *Bressette* considered such factors equally applicable in any application of the reapportionment provisions under the FLA, s. 95:
- [134] The unjust enrichment legal cause of action is based on fairness, or equity, and as such is intended to be flexible and to take into account the many varieties of relationships that may exist. An important factor running throughout the authorities in determining whether or not there has been unjust enrichment is the legitimate expectations of the parties. Here, if the FLA was applicable to these parties, it would be "significantly unfair" to reach a different result than that based on the unjust enrichment remedy, given that the common-law remedy is based on fairness and the legitimate expectations of the parties. Here the parties never considered or expected that there would be a new statutory regime applicable to the relationship during the course of the relationship.
- [95] Similarly, in this case, the parties lived their entire relationship before the FLA came into force and would have anticipated that any determination of the property issues arising upon their separation would have to be determined in light of those same factors. Indeed, Ms. Walburger's initial pleadings sought relief on the basis of unjust enrichment and constructive trust principles. It is well-taken that the application of those principles is a complex matter and requires a rigorous consideration of the facts.
- [96] The parties here did not combine their assets and debts and both organized their lives under separate property and financial regimes. There were no jointly-held assets or debt.
- [97] The legislature, in enacting the FLA, clearly intended that common-law spouses would now qualify to see these issues resolved under the new legislation. By doing so, many of the difficult factual issues and the application of the law to common-law relationships have been eliminated. The new regime applies equally to both married and common-law couples.

More certainty is now in place for both with the additional benefit for common-law couples in eliminating the added cost and delay in deciding issues under unjust enrichment and constructive trust principles.

- [98] The fact of the matter is that the parties have now qualified to resolve their property claims under the FLA and both agree that this regime applies. However, in these unique circumstances, it remains a relevant consideration within the "significant unfairness" analysis that this relationship began and ended with this "pre-FLA" mindset, which again would have been indicative of the legitimate expectations of the parties.
- [99] Turning back to the FLA analysis, at the outset, I would note that the governing concept of entitlement under the FLA, s. 81(a) is to apply "regardless of [the spouses] respective use or contribution" to family property.
- [100] In one of the first decisions of this Court to consider the meaning of "significant unfairness", Mr. Justice N. Brown stated in *L.G. v. R.G.*, 2013 BCSC 983 at paras. 69-70. Brown J. further stated:
- [71] In my view, the term 'significantly unfair' in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.
- [101] To similar effect, Mr. Justice Butler discussed the meaning of this new term in *Remmem v. Remmem*, 2014 BCSC 1552:
- [44] The FLA provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), courts had a discretion to divide family property in unequal shares if the court found that the division of property (pursuant to agreement or the provisions of the FRA) would be unfair having regard to the factors set out in that section. The first and obvious difference between the discretion given under the FRA and the discretion given in Part 5 of the FLA is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely "unfair". There must be a finding that the division of property pursuant to the statutory scheme is "significantly" unfair. The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact - something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).

- [102] I conclude that this relationship of eight years was of medium duration. As Ms. Walburger argues, I agree that the significance of the length of the relationship will depend to some extent on the age of the spouses at its beginning: see *Wilson v. Fotsch*, 2010 BCCA 226 at para. 64. In this case, Ms. Walburger was 55 years of age when she began her relationship with Mr. Lindsay. She is now 65 years of age and has few options in terms of her ability to support herself.
- [103] I would reiterate, however, that even without this relationship, it was extremely unlikely that Ms. Walburger would have seen herself in any materially different circumstances. She has shown no appreciable inclination or ability over the years since her first divorce to seek out more remunerative employment. Nor did there ever seem to be any ability or desire to accumulate savings or assets. Her low income no doubt foreclosed much ability to do so, however, the dissipation of her inheritance evidences a general disregard for planning for her financial future.
- [104] The evidence does establish that Mr. Lindsay paid for the vast majority of the expenses relating to the Lanyon Drive Property, including the mortgage payments, taxes and most utilities. He also did extensive work around the property in terms of the renovations that were completed when he and Ms. Walburger moved into the property. He also worked in the yard and garden.
- [105] That being said, it is also apparent that Ms. Walburger made contributions to the Lanyon Drive Property. She maintained the home when Mr. Lindsay was working out of town, she assisted in the renovations (in respect of the less physical tasks and clean up), she paid for various household expenses and she did considerable work in the garden, including paying for plants from time to time. I find that all of this work and expense did contribute to the upkeep of the home by which its value was maintained and perhaps enhanced over time.
- [106] Turning to the Price Road Property, Ms. Walburger acknowledged that she had not made any financial contribution to that property during her relationship with Mr. Lindsay. In addition, she made absolutely no other contribution to that property, such as maintaining it. Her sole involvement with the Price Road Property was in visiting Mr. Lindsay's mother from time to time until her death in 2006.
- [107] Similarly, Mr. Lindsay's only contribution to the Price Road Property has been to pay the taxes on that property, with Lorne paying all other expenses and generally maintaining the property. I accept Mr. Lindsay's evidence that it was always his intention to transfer the property to his son, Lorne, when his personal issues had progressed to the point when that was appropriate. It is also my conclusion that the transfer of the Price Road Property to Mr. Lindsay by his mother in April 2004 was essentially an advance against his inheritance.

- [108] Ms. Walburger takes the position that Mr. Lindsay will be left with the lion's share of the excluded assets (including what he owned before the relationship began) and half of the increased value over the relationship. He will also be left with the majority of the Ironworkers Pension, after the division of that asset. Ms. Walburger says that she will be left "virtually destitute". In these circumstances, she says that it is hardly "significantly unfair" that she receive half of the increased value of the family assets.
- [109] I conclude that Mr. Lindsay has not proven that it would be significantly unfair that Ms. Walburger share in half of the increased value with respect to the Lanyon Drive Property. However, with respect to the Price Road Property, I have come to a different conclusion. In my view, it would be significantly unfair to allocate any amount of that property to Ms. Walburger, particularly given her lack of any contribution to the property, its origins arising from the transfer from Mr. Lindsay's mother, Lorne's maintenance of the property over the entire time and, finally, Mr. Lindsay's intentions with respect to transferring it to Lorne. I would reapportion the entirety of the increase in value of the Price Road Property to Mr. Lindsay.
- [110] Turning to Ms. Walburger's debts, as discussed above, Mr. Lindsay submits that Ms. Walburger should be solely responsible for her debts, again citing "significant unfairness": FLA, s. 95(1).
- [111] In my view, the most relevant consideration under s. 95(2) arises in respect of paragraphs (a) and (d). I have already discussed the duration of this relationship which indicates that this was a medium-length relationship. Whether debt was incurred in the normal course of the relationship is of some significance as it is apparent that Ms. Walburger's debts arose in the normal course of their relationship. While Mr. Lindsay may not have known about the accrual of these debts, I am satisfied that the expenditures were for normal items in respect of either or both of the parties or the household at the Lanyon Drive Property. There is nothing to indicate that such expenditures were frivolous or untoward in any respect.
- [112] There is, in my view, no basis for Mr. Lindsay's argument that his sharing of such expenditures would be "significantly unfair". He is responsible to pay half those debts (\$7,925.23) to Ms. Walburger: FLA, s. 97(2)(h). Given my conclusion that Mr. Lindsay is entitled to half of the loan owing by Ms. Walburger in the amount of \$6,257, the net amount owing by Mr. Lindsay is \$1,668.23.
- [113] As a final point, I wish to make clear that my conclusions on the reapportionment issues discussed above have been considered by me on both an individual and on a global basis. In Remmem at para. 47, the court notes, I think correctly, that the court may only consider reapportionment after dividing up the family property and family debt.

- [114] Just as the parties did not compartmentalize their lives together and their relationship, the court, in my view, must take a global approach to reapportioning all, some, or none of the family assets in terms of whether "significant unfairness" results, while taking into the account the factors in s. 95(2).
- [115] In summary, Ms. Walburger will benefit from half of the increase in the value of the family home (the Lanyon Drive Property) and the RRSPs during the relationship, along with an equal sharing of personal property held by the parties at the time of separation. She will also share in the pension and CPP benefits accrued by both parties during that time. Finally, Mr. Lindsay will take equal responsibility for Ms. Walburger's debts accrued during the relationship, but respecting at least a partial payment under a specific agreement whereby she agreed to repay Mr. Lindsay certain monies which he advanced to her for a specific purpose.

Spousal Support

- [116] Ms. Walburger claims spousal support from Mr. Lindsay under the FLA. She seeks an order for mid-range spousal support under the Federal Spousal Support Advisory Guidelines of \$883, based on Mr. Lindsay having guideline income of \$85,961 and her guideline income of \$18,704.
- [117] She also seeks an order that this support obligation be binding on Mr. Lindsay's estate. Finally, she seeks an order that Mr. Lindsay reinstate her on his employee benefit plans (medical, extended medical and dental), subject to him being able to do so as a result of their relationship having ended.
- [118] Mr. Lindsay contends that Ms. Walburger has not established entitlement to spousal support. In the alternative, he says that the court should impute income to Ms. Walburger of \$20,000 and that his income should be established at \$50,129, which disregards the pension income that Ms. Walburger will already have shared in.
- (a) Previous Proceedings
- [119] After the separation in late 2012, Mr. Lindsay made some minor payments to Ms. Walburger. Ms. Walburger commenced this action in January 2013.
- [120] In August 2013, Ms. Walburger sought interim spousal support. On August 30, 2013, Mr. Justice B. Mackenzie ordered Mr. Lindsay to make support payments commencing February 2013 in the amount of \$427 per month. This was based on an imputed income to Mr. Lindsay of \$47,000 which appears to have arisen from his evidence at the time. This evidence did not disclose his pension income of \$20,868 (per his 2012 tax return filed just before the hearing).

[121] That support order was later replaced by the order of Mr. Justice Butler on July 14, 2014 at which time Mr. Lindsay's income was found to be \$85,961. The court ordered that the monthly payment be increased to \$900 per month, commencing July 2014.

[122] These spousal support amounts are, of course, interim and subject to a determination at this trial. Nevertheless, neither party sought retroactive relief relating to the amounts paid. I am advised that Mr. Lindsay has made all required payments to Ms. Walburger.

(b) Entitlement

[123] The first issue is whether Ms. Walburger is entitled to support. The FLA provides:

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;
- (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.

[124] At the outset, I agree with Mr. Lindsay that Ms. Walburger has not shown any basis upon which to claim compensatory support. She acknowledges that at no time did her contributions to the household or within her relationship prevent her from earning an income. Nor did she sacrifice any of her needs as a result of the minor amounts she paid in respect of the household. Accordingly, there is no basis under s. 161(a) upon which to say that Ms. Walburger suffered any "economic disadvantage" arising from the relationship or that she conferred an economic advantage on Mr. Lindsay such that she would be entitled to compensatory spousal support. See *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50-53.

[125] There is, however, in my view, some basis upon which Ms. Walburger may claim non-compensatory support. "Need" alone may be sufficient to ground a claim for spousal support: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at 444. Further, "need" is something more than basic necessities, as discussed by the court in *Chutter*:

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

- [56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:
- [21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.
- [126] Ms. Walburger's line 150 income for 2004 was \$4,872, which included net business income from her cleaning business of \$1,022. In later years, while with Mr. Lindsay, she received cash payments for her cleaning services and did not declare that income from 2005-2008. She began receiving CPP benefits when she turned 60 years of age in 2009. Her net income for 2009 and 2010 was \$1,157 and \$2,722, respectively.
- [127] When Mr. Lindsay started receiving money from the Ironworkers Pension in 2010, half of that amount \$10,434, was allocated to Ms. Walburger's income. This resulted in her net income for 2011 rising to \$12,434, but she did not actually receive the transferred amount. Accordingly, her true 2011 income was \$2,025.
- [128] After the separation, in late 2012, Ms. Walburger began claiming business income and expenses, in addition to collecting her CPP benefits. She reported cleaning income for 2012 (\$5,000) and 2013 (\$4,000). Her total income for 2012 was \$7,082 and her income for 2013, besides support payments, was \$6,147. Currently, she has various part-time cleaning jobs from which she anticipates making \$6,955 gross. After expenses of approximately \$1,860 per year, she nets about \$5,100 per year.
- [129] Ms. Walburger's present income for spousal support purposes is \$18,704, which includes her cleaning income and CPP/OAS of \$13,704. Her budgeted expenses are \$2,792 per month for a yearly total of \$33,505.
- [130] Ms. Walburger has, since separation, faced some medical issues. In late 2013, she was diagnosed with retinal occlusion in one eye, which has caused blurred vision and pain in that eye. She regularly attends an ophthalmologist for treatment which provides some relief. She has been advised, however, that recovery is not likely. Otherwise, she describes herself as healthy.

- [131] In addition, for the past two to three years, she has suffered from arthritis in her hands and knees which causes pain. Both this condition and her eye issue are, obviously, of some concern in terms of her ability to continue working over the long term. The evidence indicates, however, that both these conditions have not yet affected her ability to work at the cleaning jobs.
- [132] At bottom, given Ms. Walburger's age (now 65), her past history of employment, and the possible effect of her medical issues on her future work, it is extremely unlikely that she would be able, even if she was inclined to, recover to the point of being able to support herself as she was supported during the relationship. Frankly, the dire circumstances of Ms. Walburger can most certainly be laid at her own feet in terms of her casual past approach to employment, and her disregard for saving the substantial inheritance funds for her own financial future. Ms. Walburger has shown that she can survive on a very low income in the past. However, she must now fall back on her own abilities, in terms of making a living, with the added impediments of doing so while ten years older and possibly facing health issues in the future.
- [133] Mr. Lindsay, not surprisingly, also recounts some health problems over the years arising from his very physical job. He quit Local 97 in 2010, given the types of jobs there which required working on the steel, that were hard for him given his age. His newer job with Local 643 is easier on his body since he is working on the cranes and not having to walk up stairs all the time. He has knee problems and some eye problems, but he describes himself as more or less healthy. Even so, Mr. Lindsay is much better equipped to address the financial needs of both him and Ms. Walburger into the future, given his superior income.
- [134] I find support for my conclusion, regarding entitlement on non-compensatory grounds, in *Newton v. Newton*, 2003 BCSC 333, which addressed the issue in similar circumstances. In *Newton*, the court similarly rejected any claim for compensatory support: see paras. 24-25. The court addressed the non-compensatory ground as follows:
- [26] In my view, her situation is similar to the wife's situation in *Plourde* [v. *Plourde*, 2000 BCSC 292] in that her opportunities, both before and after marriage, are severely limited. Mr. Newton was aware of her limited ability to earn income when he married her. While *Bracklow* may have modified, to some extent, the principle articulated in *Moge* [v. *Moge*, [1992] 3 S.C.R. 813], that primary responsibility for a former spouse ought to fall on family members rather than the state, the [C]ourt in *Bracklow* makes it clear that principles of basic social obligation continue to be pertinent to determining issues of spousal support.
- [27] I find that Ms. Newton has demonstrated need. While Mr. Newton called evidence which he contended supported his position that Ms. Newton could earn much more if she worked harder or found a more lucrative location for the hot dog cart, the evidence is not compelling. Mr. Newton knows full well that during the marriage the two of them tried a number of options in an effort to increase earnings and profitability from the hot dog cart business, without noticeable success.

- [28] Ms. Newton's standard of living is arguably similar now to that she had prior to the marriage. On the one hand, she has income from employment and, on the other, she no longer qualifies for subsidies available to her while on social assistance, as was referred to earlier.
- [29] Mr. Newton's standard of living has improved. While his income is a modest one, he has the ability to pay. In the absence of any foregone opportunities or economic loss that might give rise to support based on compensatory principles, these are relevant considerations.
- [30] In summary, on the issue of entitlement, this is not a case in which the wife has sacrificed career and financial security for domestic duties. Nor is it a case in which the need for support arises at least in part from illness or disability unconnected with the marriage. On the other hand, the relationship was of some duration, and although Ms. Newton cannot be said to have suffered any disadvantage arising from the marriage breakdown, she must now fend for herself despite the fact that she is ill-equipped to do so. In my view, the principles articulated in Bracklow are broad enough to encompass this type of situation.
- [135] I find that Ms. Walburger is entitled to spousal support on a non-compensatory or needs basis.

(c) Determination of Incomes

- [136] There is little doubt here that Ms. Walburger's income has been modest over the years. When Ms. Walburger was living with Mr. Sopp, their combined income was very modest. Even so, Ms. Walburger does not appear to have made any serious effort to work full time, with her hours either being limited for the day or her work week shortened. I took her evidence to indicate that, despite that modest income, she really never had any plan or inkling to increase her income. During cross-examination, it was apparent that she seemed to have little regard toward increasing her income to better her lifestyle or save for the future. During her time with Mr. Sopp, she was 48-53 years of age.
- [137] This attitude toward working continued once Ms. Walburger met Mr. Lindsay, when she was 55 years old. Her retirement "plan", at that point, evolved into thinking that she would have security by reason of Mr. Lindsay's income and assets. She remained working part time throughout the entire time of their relationship. Despite her stated reason for the part-time work as being that she was "exhausted" by the cleaning, Ms. Walburger spent a substantial amount of time in the garden of the Lanyon Drive Property when she got home. Nor did she ever, during this time, seek other types of employment that might be less physically tiring.
- [138] Mr. Lindsay submits that Ms. Walburger's income should be imputed at \$20,000 on two bases: (i) that it is anticipated that at least \$100 per month will arise from the sharing of Mr. Lindsay's pension for a total of \$1,200, and (ii) that she is intentionally underemployed by working only part time.

- [139] In my view, there is some merit in the latter submission. During cross-examination, Ms. Walburger frankly admitted that she could have worked, and could be working harder at her cleaning jobs, but she chose not to, and she continues to choose this path. She seems to have chosen this line of work because she likes to only work part days. This part-time work schedule had also, in the past and while in the relationship with Mr. Lindsay, allowed her to do her gardening in the yard. In my view, the part-time work is clearly as a result of choice.
- [140] In the circumstances of this case, there is no reason why Mr. Lindsay should suffer the consequences of Ms. Walburger's approach to her employment. I would add again that, despite having some medical issues, there was no evidence that Ms. Walburger was physically able to only work these limited hours. Rather, this seems to have been an approach that she has adopted for many years since, at least, her relationship with Mr. Sopp in the late 1990s. I would also add that this small imputation of income to Ms. Walburger disregards any income that she might be able to derive from the payments to be made to her by Mr. Lindsay in the future arising from the property division I have ordered above, although, I acknowledge that such income may be modest.
- [141] I would impute income of \$20,000 to Ms. Walburger, but only after the pension division is complete and Mr. Lindsay has paid the amounts owed to her in accordance with these reasons. This delay should also allow her to seek and obtain other employment income, if she wishes.
- [142] Turning to the matter of Mr. Lindsay's income, he submits that it should be fixed at \$50,129. His line 150 income over the years is as follows:
- 2009 - \$70,066;
- 2010 - \$84,571 (when he started collecting the pension);
- 2011 - \$81,008;
- 2012 - \$97,282;
- 2013 - \$92,819.
- [143] In his form F8, Mr. Lindsay set out income of \$82,339, which is his 2013 income net of employment expenses. This is comprised of his employment income of \$57,986, employment insurance benefits of \$12,274, pension income of \$20,868, "other" income of \$1,691 and deductions of \$10,481. He claims monthly expenses of \$6,250 with annual expenses of \$75,007. Nevertheless, as of mid-November 2014, his employment income was only \$46,436, and he did not anticipate any further income for the remainder of the year.
- [144] The first issue is whether his yearly pension benefits of approximately \$20,869 should be included in Mr. Lindsay's income. This amount should be reduced slightly in the future once Ms. Walburger's share of his pension is calculated. Mr. Lindsay cites *Chalmers v. Chalmers*, 2009 BCSC 517 at paras. 26-27, which relies on *Boston v. Boston*, 2001 SCC 43 at paras. 41-45, as standing for the proposition that income from assets that have been

previously divided, such as his pension, should not be considered. However, this is not a hard and fast rule, and the court in Chalmers noted that some "double recovery" may be justified if there is a need for support:

[30] Finally, despite these general principles, the Supreme Court [of Canada] in Boston recognized that in some circumstances, particularly when the payee spouse has a demonstrated need for support and the payor has an ability to pay, double recovery is permissible. As Major J. says at para. 65:

Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders or agreements based mainly on need as opposed to compensation,

[145] I am not entirely convinced that it is appropriate to completely disregard Mr. Lindsay's pension income. As I have stated above, the amount that Ms. Walburger will "share" in that income is relatively small. Even after the sharing of that amount, she will still be in a state of need in terms of meeting her expenses.

[146] I accept Mr. Lindsay's counsel's submissions that the evidence establishes that, for the current year, Mr. Lindsay's income, other than the pension, has been established at \$50,129. That figure is derived from employment income of \$46,436, \$9,800 of employment insurance, and \$1,714 in "other" employment income with employment deductions of \$7,831. It is this figure that is the more appropriate starting point in setting the income amount for support purposes, particularly where Mr. Lindsay's employment has fluctuated from year to year: *Bell v. Bell*, 1999 BCCA 497 at para. 12.

[147] In these circumstances, I set \$69,000 as Mr. Lindsay's income for support purposes which, as with Ms. Walburger's income, is to be effective after the pension is divided and the property division is complete by payment by Mr. Lindsay.

(d) Duration and Amount of Spousal Support

[148] The FLA provides:

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

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.

[149] Both parties rely on the Spousal Support Advisory Guidelines in respect of the duration and amount of support in the future. Relying on the income amounts that I have established above, the calculation results in a range of monthly payments from a low of the high \$400s to a high of the mid \$600s, with the mid-range at mid \$500s. I consider the fairest amount to be in the mid-range or \$550. At that amount, Ms. Walburger will have added income of \$6,600 per year, which will result in total income of \$26,600.

[150] On the issue of duration, Ms. Walburger relies on the "rule of 65" which provides that in relationships of less than 20 years, indefinite support is available if the years of the relationship plus the age of the support recipient, at the time of separation, equals or exceeds 65. In this case, Ms. Walburger meets the "rule of 65" by her age at separation (63) and the length of the relationship (8). Both of the calculations provided by the parties call for a range for spousal support "for an indefinite (unspecified) duration, subject to variation and possibly review". The review aspect was further clarified in the Spousal Support Advisory Guidelines, section 7.5.3, where the authors state:

In reality, given the ages of the parties in the cases covered by the rule of 65, there will likely be significant changes in the amount of support ordered upon the retirement of one or both of the spouses.

[151] Both parties made submissions on what review mechanism or review date might be appropriate in terms of duration of support: FLA, s. 168(1).

[152] Ms. Walburger seeks indefinite support with the added, but unattractive, process of the parties exchanging income tax returns and re-adjusting the amount yearly into the future based on those figures, and failing agreement, mediation. In my view, such a process adds uncertainty, and likely cost, that these parties can ill afford.

[153] The issue of Mr. Lindsay's retirement was also raised, but when Mr. Lindsay might retire is anything but clear. In that respect, I am not persuaded by his counsel to order that support to Ms. Walburger will terminate when Mr. Lindsay turns 65. It may be the case that he will continue to remain employed after that time.

[154] In the alternative, Mr. Lindsay submits that I should order that support payments cease when he does retire. This leaves the matter entirely within his control, but the matter of his retirement is not something that I would expect to be done to avoid support payments. Ms. Walburger's own evidence was that Mr. Lindsay had plans to retire in his early 60s, and that he has not done so by reason of these proceedings and his financial support obligations which have arisen. Mr. Lindsay confirmed the view that he would keep working in these circumstances. In addition, Mr. Lindsay's employment is such that I consider it unlikely that he would obtain some other form of work to replace it, particularly given his age and medical issues.

- [155] While it is not ideal, I order that the support payments to Ms. Walburger will cease when Mr. Lindsay retires, but this will be subject to any application by Ms. Walburger for review on the basis that he is intentionally underemployed. In that fashion, the scope and nature of the review will be clear to the parties: FLA, s. 168(1)(c). See *Domirti v. Domirti*, 2010 BCCA 472 at paras. 33-35.
- [156] Ms. Walburger also seeks an order that Mr. Lindsay reinstate her on his employee medical plan. She was removed from the plan shortly following separation. She was enrolled by Mr. Lindsay under his plan in May 2008 after she was taken off Mr. Walburger's plan at the time of their divorce. In light of their separation, I see no basis upon which Mr. Lindsay should be forced to do so. In any event, it is well-acknowledged that it is likely impossible to do so since she is no longer his "spouse", as the plan indicates she must be. I would note also that Ms. Walburger has since signed up for her own medical coverage under the provincial plan, which is free to her given her low income.
- [157] The final issue relating to spousal support arises from Ms. Walburger's claim that the support obligations be binding on Mr. Lindsay's estate. The FLA provides in s. 170(g) that the court may order that a support obligation survives the death of the payor spouse and that it is a debt of his estate "for the period fixed by the court." Factors to be considered are set out in s. 171(1).
- [158] Despite having raised the issue at the outset of the trial, Ms. Walburger did not make submissions on the issue. Nor was I referred to any authorities on the point, if they exist at all. In my view, the appropriate order is that if Mr. Lindsay dies before he turns 65, his estate will be subject to the support payments that would have accrued to that age.

Disposition

- [159] To summarize, the following relief is granted:
- a) Mr. Lindsay is entitled to, as excluded property, the Lanyon Drive Property and the Price Road Property;
 - b) Ms. Walburger is entitled to a compensation payment of \$60,041.06, as follows:
 - i.) \$51,094 (the Lanyon Drive Property increase); and
 - ii.) \$8,947.06 (division of personal property);
 - c) Mr. Lindsay is directed to complete a spousal rollover of his RRSP to Ms. Walburger in the amount of \$5,007.19;
 - d) Mr. Lindsay's pension plan with the Ironworkers Union, Local 97, will be divided in accordance with Part 6 of the FLA such that Ms. Walburger will receive 50% of the value for the period November 1, 2004 to October 16, 2012;

- e) the parties will equally divide their respective Canada Pension Plan benefits for the period November 1, 2004 to October 16, 2012;
- f) Mr. Lindsay is responsible to pay Ms. Walburger half of Ms. Walburger's debts (\$7,925.23), less the sum of \$6,257 in respect of Ms. Walburger's outstanding debt to him, for the net amount of \$1,668.23;
- g) Mr. Lindsay will continue to pay spousal support of \$900 to Ms. Walburger on the first day of each month until both the Ironworkers Pension is divided and he satisfies all financial obligations payable to Ms. Walburger as above. Thereafter, he will pay to Ms. Walburger, again on the first day of each month, the sum of \$550 until the date of his retirement from his current employment;
- h) the spousal support obligations of Mr. Lindsay, as above, are subject to review by Ms. Walburger after Mr. Lindsay's retirement in the event that Mr. Lindsay is intentionally underemployed; and
- i) if Mr. Lindsay dies before he turns 65, his estate will be subject to a debt equal to the support payments that he would otherwise have made to Ms. Walburger until that age.

[160] The last matter to be addressed relates to costs. In particular, I understand that the parties agreed that the costs of the various appraisals were to be addressed by the court, although no submissions were made at trial.

[161] Given the divided success at this trial, I would order no costs payable to either party. However, during submissions, Mr. Lindsay's counsel indicated that he may wish to address the matter of costs once these reasons for judgment were delivered. Accordingly, any party seeking to vary this costs order will provide written submissions to the other party and the court, with the first submission due no later than 30 days after release of this decision and the response, and any reply due within 10 days after receipt of the submission or response, as the case may be. The parties are, of course, at liberty to agree on the matter of costs.

"Fitzpatrick J."

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