

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *K.P.B. v. K.E.*,
2018 BCSC 885

Date: 20180530
Docket: E49045
Registry: New Westminster

Between:

K.P.B.

Claimant

And

K.E.

Respondent

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Claimant:

P. Evans

Counsel for the Respondent:

A. James
A. Chekh A/S

Place and Date of Trial:

Vancouver, B.C.
March 12-15, 2018

Place and Date of Judgment:

New Westminster, B.C.
May 30, 2018

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Introduction

[1] The parties married in 2003. They have two children aged 11 and 7. The parties initially separated in 2010, but continued to reside in separate areas of the matrimonial home. They had a period of reconciliation in early 2015. The parties have agreed to a separation date of July 4, 2015.

[2] The husband commenced this action on June 1, 2015, seeking a divorce, various orders regarding the children, and a division of assets. Both parties seek an order that the children primarily reside with them and child support from the other parent. The wife seeks an order for spousal support.

[3] The issues between the parties are:

- parenting arrangements;
- child support;
- spousal support; and
- the division of family assets and debts.

[4] Both parties seek an order for divorce. The parties are entitled to an order for divorce on the basis that they have been living separate and apart for over one year. Accordingly, there will be an order that the parties are divorced, the divorce to take effect 31 days from the date of this judgment.

Background

[1] Since separation the wife has continued to reside in the matrimonial home. The husband has moved to a home three doors from where the wife lives.

[2] A consent order was made on October 17, 2016, that the children would reside with the husband and the wife would have parenting time on Tuesdays from 2:30 p.m. until Wednesdays at 2:30 p.m., Thursdays from 2:30 p.m. until 7:30 p.m., Monday, Tuesday, Thursday and Friday from 6:30 a.m. until the children are dropped off at school and all professional development days from 6:30 a.m. until

3:30 p.m. The wife has been paying \$300 per month in child support since October 17, 2016. The husband has been paying \$608 per month in spousal support since February 15, 2015, and the wife has been responsible for paying \$607 to a line of credit secured against the matrimonial home.

[3] The husband is currently 48 years old and the wife is 44 years old.

[4] The parties gave very different evidence about the conflicts in the marriage. According to the wife, the husband was violent towards her. The husband says the violence is from the wife, and that he is not abusive.

[5] Both the Ministry of Children and Family Development and the police have been involved with the family. The husband has called the police on numerous occasions as a deterrent when the wife becomes upset or the parties have an argument. He has been warned by the police not to manipulate them to accumulate police files to be used in family court. There are no criminal records or outstanding charges for either party. The last involvement of the Ministry was in January 2016, and the last involvement with the police was January 2017, when the wife called the police alleging that the husband had broken into the garage of the matrimonial home and removed some items, including three laptops.

[6] The parties also gave very different evidence regarding their involvement with parenting. The wife's evidence is that she has provided the majority of the care for the children, and the husband has not been involved in their care. The husband's evidence is that he has been involved with the children's care throughout their lives.

[7] Both parties have indicated their ability to work has been limited by health issues. However, neither party has presented any medical evidence to that they were unable to work due to health issues.

[8] The husband is employed by the Fraser Health Authority, as a mental health care worker in the inpatient services in a hospital. He has been off work since an incident at work on November 21, 2017. Following the incident, he was apparently

diagnosed with an enlarged heart. Currently the husband is not receiving any disability insurance, and is intending to apply for it.

[9] The wife is employed part time as a care aid and derives income from the matrimonial home by renting part of it.

[10] A section 211 report under the *Family Law Act*, S.B.C. 2011, c. 25 [FLA], was prepared. Robert Colby, the author of the report testified at the trial.

Parenting Arrangements

[11] As noted above, there is an earlier interim order regarding parenting. The order provided that the children should live primarily with the husband, with the wife having almost daily contact with them. The children began living with the husband on September 1, 2015, as a result of mediated agreement between the parties following the involvement with the Ministry. The Ministry had become involved because of the ongoing violence between the parents. The children had disclosed to the Ministry that the wife had used physical discipline with them.

[12] Since the Ministry's involvement, both parents have engaged in support services, and parenting classes. The wife has also participated in anger management classes. She testified that she has learned new ways of dealing with disciplinary problems with the children and no longer uses physical discipline. As noted earlier, there has been no involvement of the Ministry since it closed its file in January 2016.

Position of the Parties

[13] The husband agrees that both parties should remain guardians of the children, but seeks an order that he have all the parental responsibilities under s. 41 of the *FLA*. As well, he seeks an order changing the parenting arrangements to limit the wife's parenting time to every Tuesday and Thursday from 2:30 p.m. until 7:30 p.m., and all Pro-D days from 8:30 a.m. until 7:30 p.m.

[14] The wife agrees that both parties should be guardians of the children. She seeks an order that the parties equally share all of the parental responsibilities for

the children, and in the event they cannot agree, she will have the responsibility of making those decisions. As well, the wife seeks an order that parenting time be divided with the wife having parenting time from after school on Tuesday until Sunday morning and the husband having parenting time from Sunday morning until Tuesday morning when the children go to school.

[15] Both parties seek an order that they retain the children's passports, and the other parent only take the children out of the jurisdiction with the written agreement of the other party or court order.

Legal Parameters

[16] Both parties are seeking guardianship and parenting orders under both the *FLA* and the *Divorce Act*. Both the *FLA* and the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), deal with custody and access to the children, although the *FLA* uses the terminology guardianship, parenting arrangements and parental responsibilities. Despite having pleaded both Acts, the wife and husband both provided submissions based on the *FLA*, not the *Divorce Act*, and agree that the *FLA* should be used to make any orders regarding guardianship and parenting. The case law is clear that order can be made under either act. As noted in *B.D.M. v. A.E.M.*, 2014 BCSC 453, the *FLA* provides a more flexible approach to the issues regarding parenting arrangements and decision making.

[17] As set out in s. 37 of the *FLA*, the primary concern in determining parenting arrangements is the best interests of the children:

37(1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;

- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

(4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

[18] Given the allegations of violence by both spouses, s. 38 is also relevant:

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[19] Sections 40-43 and 45 are also relevant as they deal with parenting responsibilities:

40 (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.

(2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.

(3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by

(a) one or more guardians only, or

(b) each guardian acting separately or all guardians acting together.

(4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:

(a) that parental responsibilities should be allocated equally among guardians;

(b) that parenting time should be shared equally among guardians;

(c) that decisions among guardians should be made separately or together.

41 For the purposes of this Part, parental responsibilities with respect to a child are as follows:

(a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;

(b) making decisions respecting where the child will reside;

(c) making decisions respecting with whom the child will live and associate;

(d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;

(e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;

(f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;

(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;

(h) giving, refusing or withdrawing consent for the child, if consent is required;

- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
 - (i) starting, defending, compromising or settling any proceeding relating to the child, and
 - (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

42 (1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.

(2) During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.

43 (1) A child's guardian must exercise his or her parental responsibilities in the best interests of the child.

(2) If a guardian is temporarily unable to exercise any of the parental responsibilities described in section 41 (a), (c), (d), (f) to (j) or (l) [*parental responsibilities*], the child's guardian, in writing, may authorize a person to exercise, in the best interests of the child, one or more of those responsibilities on that guardian's behalf while the guardian is unable to do so.

...

45 (1) On application by a guardian, a court may make an order respecting one or more of the following:

- (a) the allocation of parental responsibilities;
- (b) parenting time;
- (c) the implementation of an order made under this Division;
- (d) the means for resolving disputes respecting an order made under this Division.

Analysis

[20] In this case, there is conflicting evidence regarding the violence in the relationship. While the wife asserts any violence is the fault of the husband, the husband asserts any violence in the past is the fault of the wife.

[21] It is difficult in the circumstances to determine the cause of the violence in the past. However, the evidence is that the current conflict between the parties is no longer physical but rather verbal in nature, with each party alleging the other harasses them and is difficult to deal with.

[22] Angie Dhesi, a social worker from the Ministry of Children and Family Development, testified about her involvement with the family. Ms. Dhesi received conduct of the file in 2015. At the time, there were concerns of physical violence and physical discipline. At the time, the youngest child reported she had been struck with a belt by both parents. The older child reported she had been hit on the head and bum, and had her cheeks pulled by the wife, and been spanked on the bum by the husband. There were some further reports of spanking and a safety plan and parenting schedule were put in place in September 2015. After the safety plan was put in place, Ms. Dhesi conducted home visits and met with each parent. She testified that she had no concerns with either parent's home. The children were happy and the parents were fine. Physical discipline was no longer being used and that ended her involvement in the file.

[23] The Ministry's file was closed in March 2016. General practice is that a file is closed because there are no continuing concerns. Since the file was closed in March 2016, the only involvement of the Ministry was in May 2017 when the Ministry received a report that the husband was using a belt as discipline. Both children denied being hit with a belt.

[24] Mr. Colby, an expert in psychology, prepared a s. 211 psychological assessment report and testified at the trial. Mr. Colby states in his report that the children interact with each of the parents and engaged actively with them. His observations indicated a positive parent child relationship with each parent. Neither child expressed negative statements regarding their engagement with either parent. The children reported to Mr. Colby that they seek to be involved with both parents.

[25] The husband alleges the wife suffers from mental health problems. However, Mr. Colby administered psychological tests to both parties and did not find any

evidence of clinical psychopathology. Mr. Colby found the wife can be over-reactive. However, he noted both parents' propensity for action and reaction to each other, such as cutting the cords on electrical devices.

[26] Mr. Colby noted that at various points, each of the parents has had primary parenting care. The wife stayed at home with the children from 2006 to 2008. Since 2015, the father has been the primary care giver, while the mother has had almost daily involvement with the children pre and post school.

[27] Mr. Colby also noted that the parents have very poor communication and a high level of distrust of one another. There are allegations of family violence that go back to the beginning of the relationship. However, he notes that since 2015, the parents have both been actively providing care for the children. The husband provides the overnight care, and the wife provides before and after school care. Mr. Colby states the children appear to be functioning well in that framework. Mr. Colby concludes that the parents each have basic parenting skills and can assume responsibility for the children. Mr. Colby found that both parents love their children, wanted to engage with them, and were fully able to parent them.

[28] Mr. Colby recommends that the parents operate on a parallel parenting plan to co-parent their children. The co-parenting recommended consists of the following:

- Each parent will assume responsibility for the children when they are in their care.
- The parents will not communicate directly but by email, or in an emergency, by text.
- Exchanges should occur at a distance.
- If the parents are at the same event, they should keep a distance, and not communicate.

[29] Mr. Colby recommended that the current parenting arrangements remain in place for 6 months during which both the wife and husband seek therapeutic

engagement and support. Mr. Colby recommended a re-evaluation take place after 6 months.

[30] It is clear from the parent's evidence, as well as the s, 211 report, that each parent distrusts the other's capability to care for the children. However, both parents have been actively involved in parenting and the children want to spend time with both parents.

[31] The parents live in close proximity and the children are able to move easily between the two residences. Although the portion of the wife's residence she is currently living in is smaller, both parents have made accommodation for the children. The wife has indicated she will likely move into the large suite in the townhome if the children are spending more overnights with her.

[32] The husband makes allegations about the wife's mental health which are unsubstantiated. For example, he suggested that she went to the hospital as a result of mental health concerns when it is apparent from the medical records that she was having abdominal problems. On another occasion he called for the specialized intervention of the police mental health team (Car 67) for a wellbeing check. The police attending in Car 67 determined that the husband was creating a wellbeing check file for leverage in future court proceedings related to the parties' custody dispute.

[33] There is evidence of the wife being over reactive to situations, however, as noted by Mr. Colby there are no mental health issues that endanger the children or impact the wife's ability to parent. Both parties have been quite reactive to one another from time to time, particularly while they were still living together after separation. It is apparent there are significant cultural differences between the two.

[34] As indicated earlier, the wife and husband both allege the other has been violent with them, and the children have witnessed fights. Both parties say the other party is the cause of any conflict. It is apparent from their evidence, and Mr. Colby's report, that both the husband and wife have acted inappropriately from time to time, such as cutting electrical cords.

[35] As noted earlier, the husband called the police frequently while the parties were living together. On a number of occasions, the police made note that there was no disturbance when they arrived. There are indications in the police files that the husband was making calls to create files for custody purposes. In June 2013, the husband was told by the police not to manipulate them to use the files in a family court file.

[36] Since they have moved into separate residences the conflict between the parties has abated. However, I note the recommendation by Mr. Colby that it would be in the children's best interests if both parties sought third party assistance to improve their parenting and communication skills.

[37] As well, there is evidence that both the wife and husband physically disciplined the children in the past. The Ministry had concerns about the wife's discipline of the children. However, the wife has taken some anger management and family development response programs through the Ministry which have taught her alternative disciplinary measures, such as time outs. The wife testified that she also attended six months of counselling with a private counsellor following the recommendation by Mr. Colby.

[38] The Ministry's involvement with the family ended in early 2016. It is unfortunate that there has been no follow up assessment as suggested by Mr. Colby, but the evidence of both parents is that there has not been any recent violence between them. The evidence is that neither parent uses physical discipline any more.

[39] Although the wife would like to travel with the children to Japan, the husband has expressed concerns that she would not return. According to the husband, the wife has threatened in the past to leave with the children. There is some basis for the husband's concerns. The wife's parents and siblings live in Japan, and she is not a Canadian citizen. The wife has suggested in her evidence that she wants to take the children to Japan for eight weeks every year. In my view, that suggestion is unrealistic in that it would leave the husband with very little, if any, summer holiday

time with the children. As well, it is unlikely the wife will be able to find a job where she will have eight weeks off a year to travel with the children to Japan.

[40] Having considered all of the circumstances, I have concluded that shared parenting is appropriate. The parties live very close to one another and both are fully capable of assuming parenting responsibilities as noted by Mr. Colby.

[41] In my opinion each parent should have an equal amount of parenting time on a three day basis given the age of the children.

[42] Accordingly, I am making the following orders:

- Both parties shall remain guardians of the children.
- Each guardian will have the obligation to discuss with the other guardian any significant decisions that have to be made concerning the children, including significant decisions about health (except emergency situations), education, religious instruction and general welfare.
- In the event that the guardians cannot reach agreement, the husband will be entitled to make the decision and the wife will have the right to apply to Court for directions on any decision affecting the children pursuant to s. 49 of the *FLA*.
- Each guardian will have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.
- The parties will only administer medication to the children that has been prescribed by a physician.
- The parties will share parenting time equally on a three day rotation.
- Each parent will have parenting time for three days starting after school and ending with the drop off to school. If the third day ends on non-school day, the other party will drop the children off at 10:00 a.m. with the other party. The

- party who has the children is responsible for the drop off at the other party's residence. The schedule can be altered by agreement between the parties.
- The parties will each be permitted a two week period of vacation during the summer with the children. The parties will exchange dates for the two week period by June 30 each year.
 - The children will be with the husband on Father's Day and the wife on Mother's Day.
 - Christmas will be alternated with the parent who the children are with on December 24th delivering the children to the other parent at noon on Christmas Day.
 - Spring break will be shared with each parent having the children for a week.
 - Each party will be entitled to enroll the children in one activity at a time. The other party will take the children to their activities when they are in their care. In the event they are unable to do so they should advise the other party by text or email. The other party may take the children to the activity regardless of whose parenting time it is.
 - Neither party will remove the children from the Province of British Columbia without the written permission of the other party, such permission not to be unreasonably withheld.
 - The husband will retain the children's passports and provide them to the wife should she need them for travel.
 - Either party is at liberty to apply to the Court should the other party refuse a request for travel.
 - Both parties will permit the children to speak with the other parent two times a day by telephone during their respective parenting times. Other times can be agreed to between the parties.

Child Support

[43] Each party seeks child support from the other. Neither party was working full time at the time of the trial. The husband had been working until November 2017, when he had a work place injury, and was subsequently diagnosed with an enlarged heart. The wife apparently had some health issues that prevented her from working full time until January 2018. Neither party presented any expert evidence that they were unable to work due to health issues.

[44] The husband submits his guideline income should be determined to be \$40,000 per year, even though prior to 2017 he was making between \$50,000 and \$60,000 per year. The husband says the wife is capable of working full time and earning at least minimum wage. The husband suggests the wife's income for guideline purposes should imputed as \$27,600 per year. The husband seeks to add the wife's rental income of \$1,100 per month to her income. The husband also rents a portion of his residence and there is no evidence regarding how much rental income he receives. The husband submits that special expenses of the children should be shared equally.

[45] The wife says her guideline income for the purpose of determining child support should be \$27,600 and the husband's income should be set at \$52,857. The wife submits that the special expenses not covered by benefits should be shared equally.

[46] Both parties agree that the wife's income for guideline purposes should be \$27,600. I agree that is appropriate given her earning history.

[47] The only dispute is the husband's income for guideline purposes. Although the husband suggests the income be set at \$40,000, as noted earlier, he has provided no medical evidence that he is unable to work. Nor had he applied for disability at the time of the trial.

[48] Having considered the evidence, and the husband's past income tax returns, I am of the view that the amount of \$50,000 per year should be set for the husband's income.

[49] In this case I have ordered split custody. As a result, s. 8 of the *Federal Child Support Guidelines*, S.O.R./97-175 applies. Section 8 provides:

Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

[50] The amount of child support payable by the husband for two children based on an imputed income of \$50,000 is \$781 per month. The amount of child support payable by the wife based on an imputed income of \$27,600 is \$439.21. The difference is \$341.79. The husband will pay to the wife \$341.79 in child support per month commencing June 1, 2018, and continuing on the first day of the month thereafter.

[51] The husband seeks an order for retroactive child support payable by the wife from 2015 to present. However, as noted earlier, the evidence is that although the children resided with the husband, the wife looked after the children on an almost daily basis, both before and after school, as well as having overnight access. In the circumstances, it is my view it is inappropriate to make a retroactive child support order.

[52] Both parents agree they should share special expenses equally. Special expenses include medical and dental expenses that are not covered by the parties' benefits. All other special expenses are to be agreed upon between the parties.

[53] The parties will exchange summaries of their tax returns by June 1 every year and adjust the amount of child support based on their current income.

Division of Assets

[54] The issues to be determined are what is family property, what is family debt, and what is excluded property.

[55] There is an issue between the parties about whether monies provided by the wife's parents for the purchase of the matrimonial home and an inheritance the husband received from his mother are excluded property.

[56] As well, the husband purchased a new residence after separation. The evidence is that the husband took a credit line against the matrimonial home in order to purchase the new residence. The wife seeks to have the husband's new residence declared a family asset. As well, the wife says that the husband took \$72,778.22 from the line of credit post separation that did not go into the new residence. The wife submits that she should receive compensation for the removal of the monies from the line of credit secured against the matrimonial home.

[57] The husband submits that the new residence is not family property. The husband says the wife had no involvement in the purchase of the new residence, and that it was purchased after the date of separation. The majority of the funds used to purchase the new residence came from a mortgage that the husband has been solely responsible for servicing. The husband has been responsible for all maintenance and expenses for the new residence.

Legal Parameters

[58] The relevant portions of ss. 84 and 85-87 of the *FLA* provide:

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

(a) on the date the spouses separate,

(i) property that is owned by at least one spouse, or

...

(b) after separation,

(i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, ...

...

85 (1) The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began;

(b) inheritances to a spouse;

...

(g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

(2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

86 Family debt includes all financial obligations incurred by a spouse

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and

(b) after the date of separation, if incurred for the purpose of maintaining family property.

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

(a) the value of family property must be based on its fair market value, and

(b) the value of family property and family debt must be determined as of the date

(i) an agreement dividing the family property and family debt is made, or

(ii) of the hearing before the court respecting the division of property and family debt.

[59] Under s. 85 of the *FLA*, monies received by one party as an inheritance or a gift from a third party is excluded property.

[60] When spouses divorce, parents will frequently say that any money they gave during the marriage was either a loan or a gift to their child and there was no intention to benefit the other spouse. When a parent chooses to provide funds for the purchase of a family residence, there is a presumption that the monies are a gift to both a child and his or her spouse to assist with the purchase of the family home. In order to determine whether the monies are excluded, the court must look to the circumstances and intentions at the time the money was advanced: *Madruga v. Madruga*, 2015 BCSC 1605 at paras. 15 - 17.

[61] If monies from an inheritance are used to invest in a family residence, those monies remain excluded property: Section 85(1)(g) of the *FLA*; *L.A.F. v. E.H.D.*, 2015 BCSC 1450 at paras. 110 - 116.

[62] The person alleging a family debt has the burden of proving its existence, and that it arose during the relationship or to preserve family property: *Chatha v. Uppal*, 2018 BCSC 6 at para. 309; *B.A. v. L.S.*, 2017 BCSC 1796.

Analysis

[63] I will deal first with the monies provided by the wife's father for the purchase of the family residence and the inheritance received by the husband.

[64] In the Agreed Statement of Facts, the parties agree they signed a promissory note for \$70,000 for the purchase of the family residence. The promissory note indicates that the parties will pay off the loan as soon as possible, and will pay any amount remaining when the property was sold. The husband does not contest that the debt was a loan by the wife's father. Accordingly, I find the amount of \$70,000 is excluded property.

[65] The evidence is that the husband inherited \$76,966.67 from the estate of his mother. The husband acknowledges he spent approximately \$5,000 on trips with the family, approximately \$10,000 for a vehicle, and a further \$1,000. The husband testified that he invested the balance of the funds in the RRSPs and mutual funds that existed at the time of separation.

[66] The wife submits that the fact the inheritance funds went into the RRSPs and mutual funds has not been established on the evidence. The wife asserts that given the husband has taken \$120,000 in family assets through the line of credit, he has failed to meet the onus of establishing the current RRSP consists of his inheritance.

[67] However, the wife does not take issue that the husband received an inheritance. The notice to admit indicates that the husband received the following distribution from the estate of his mother:

- a) \$5,000 on January 28, 2008;
- b) \$30,000 on January 30, 2008;
- c) \$16,300 on March 17, 2008;

- d) \$15,000 on October 16, 2008;
- e) \$10,666.67 on July 2, 2009;
- f) Total \$76,966.67.

[68] Although the wife submits that the husband has not established that the monies went into the RRSPs, the evidence is that the parties' income was limited to the income earned by the husband for the most part since the birth of their first child. The wife was employed for only fourteen months between the birth of their first child in 2006 and the birth of their second child in 2010. After the birth of her second child, the wife did not return to work until after the parties separated. In her Financial Statement sworn in 2015, the wife indicates that she has no employment income.

[69] The husband's evidence was that he was paying down the TD Bank line of credit on the family residence at the time he received his inheritance, and invested the monies into RRSPs and mutual funds. The evidence is that at the time of separation the mortgage on the family residence had been paid off. Having considered the documents, I accept the husband's evidence that approximately \$60,000 of his inheritance was invested in RRSPs and mutual funds. Accordingly, I find that the amount of \$60,000 in the husband's RRSP and mutual funds is excluded property.

[70] I turn next to the issue of the new residence the husband purchased post separation. The wife asserts that the new residence is a family asset because it was derived from family assets. That argument assumes that the debt incurred by the husband post separation is a family debt.

[71] The evidence is that the wife had no involvement in the purchase of the new residence, and that it was purchased after the date of separation. The Agreed Statement of Facts sets out that the TD Bank credit line had a balance of \$0 as of January 30, 2015. The parties have agreed to a separation date of July 4, 2015.

[72] After separation, the husband removed \$25,000 from the line of credit which he used for a deposit on the new residence. On August 12, 2015, the husband

purchased the new residence with a TD Bank mortgage of \$211,151, the \$25,000 deposit and \$95,430.25 he took from the TD Bank line of credit on August 10, 2015. On September 17, 2015, the husband took another \$72,788.22 from the line of credit. In January 2016, the husband refinanced with a CIBC mortgage of \$260,000.

[73] I agree with the husband, that the debt incurred after separation is the husband's debt and not a family debt. The wife appears to agree with that position in her submissions as she states that compensation payment should be made to her for the amount removed from the line of credit which was not used to purchase the new residence.

[74] In my opinion, the monies taken from the line of credit after separation are the husband's debt, as the debt was not incurred to preserve or maintain a family asset, i.e. the family residence.

[75] It follows that the new residence is not derived from family property as the debt is not a family debt but is one for which the husband is solely liable.

[76] The evidence establishes the following as family property:

- The family residence valued at \$480,000.
- CIBC chequing account held in husband's name valued at \$4890.41.
- CIBC RRSP valued at \$14,882.21 (after the excluded amount of \$60,000 is removed) held in the husband's name.
- TD Bank chequing accounts in the amount of \$40,981.30 held in the wife's name.

[77] There are no family debts, as the TD Bank line of credit was \$0 at the time of separation. The debt against the family residence of \$190,430.25 is the husband's debt.

[78] The husband disposed of a mutual fund in the amount of \$58,221.48 post separation. The wife seeks to be compensated for half of the amount or \$29,110.74.

[79] I am making the following orders regarding the division of the family assets:

- The family residence will be divided equally. The wife is at liberty to purchase the husband's interest in the family residence.
- The monies held in the wife's name total \$40,981.30.
- The monies held in the husband's name total \$19,772.62, of a total of \$60,753.92.
- The husband is solely responsible for the debt against the family residence which was acquired post-separation.

[80] The required payment from the wife to the husband to equalize the liquid assets is \$10,604.34. The wife is entitled to offset the amount against the monies owing to her to equalize the CIBC mutual fund the husband disposed of. In order to equalize the monies held by the parties at the time of separation, the husband will pay to the wife \$18,506.40 (\$29,110.74-\$10,604.34).

Spousal support

[81] The wife seeks spousal support in the amount of \$251 per month based on an imputed income of \$52,857.18. The Spousal Support Advisory Guidelines I have been provided shows that in a joint parenting situation, the low range is \$0, the mid range is \$3 and the high range is \$251.

[82] Although there is some basis for a claim for spousal support, the husband is not currently working. With an imputed income of \$50,000 per year, the mid range would be less than \$3.

[83] Having considered the parties financial situation, I find this is not an appropriate case in which to make an award for spousal support at the high end. Accordingly, I am not making an award for spousal support as the low to mid range for the income levels in issue is nil to \$3 at most. The wife's claim for spousal support is dismissed.

Conclusion

[84] In conclusion, I make the following orders:

- The parties are entitled to a divorce, to take effect 31 days after the date of this judgment.
- Both parties shall remain guardians of the children.
- Each guardian will have the obligation to discuss with the other guardian any significant decisions that have to be made concerning the children, including significant decisions about health (except emergency situations), education, religious instruction and general welfare.
- In the event that the guardians cannot reach agreement the husband will be entitled to make the decision and the wife will have the right to apply to Court for directions on any decision affecting the children pursuant to s. 49 of the *FLA*.
- Each guardian will have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.
- The parties will only administer medication to the children that has been prescribed by a physician.
- The parties will share parenting time equally on a three day rotation.
- Each parent will have parenting time for three days starting after school and ending with the drop off to school. If the third day ends on non-school day, the other party will drop the children off at 10:00 a.m. with the other party. If the third day ends on a non-school day they will drop off the children with the other party at 3:00 p.m. The party who has the children is responsible for the drop off at the other party's residence. The schedule can be altered by agreement between the parties.

- The parties will each be permitted a two week period of vacation during the summer with the children. The parties will exchange dates for the two week period by June 30 each year.
- The children will be with the husband on Father's Day, and with the wife on Mother's Day.
- The spring break will be split with each party having the children for one week.
- Each party will be entitled to enroll the children in one activity at a time. The other party will take the children to their activities during their parenting time. In the event they are unable to do so they should advise the other party by text or email. The other party may take the child to the activity regardless of whose parenting time it is.
- Neither party will remove the children from the Province of British Columbia without the written permission of the other party, such permission not to be unreasonably withheld.
- The husband will retain the children's passports and provide them to the wife should she need them for travel.
- Either party is at liberty to apply to the Court should the other party refuse a request for travel.
- Both parties will permit the children to speak with the other parent two times a day by telephone during their respective parenting times. Other times can be agreed to between the parties.
- The husband's guideline income is imputed to be \$50,000 and the wife's guideline income is imputed to be \$27,600. The husband will pay to the wife \$341.79 in child support per month commencing June 1, 2018 and continuing on the first day of the month thereafter.

- Both parents agree they should share special expenses equally. Special expenses include medical and dental expenses, not covered by the parties' benefits. All other special expenses are to be agreed upon between the parties.
- The parties will exchange summaries of their tax returns by June 1 every year and adjust the amount of child support based on their current income.
- The family residence will be divided equally between the parties. The wife is entitled to purchase the husband's interest for \$240,000. The husband is solely responsible for the debt registered against the family residence.
- The husband's inheritance of \$60,000 is excluded property. The loan from the wife's father in the amount of \$70,000 is excluded property.
- The husband will pay to the wife \$18,506.40 to equalize the family assets.
- The wife's claim for spousal support is dismissed.

[85] Given the divided success, each party will bear their own costs.

"Gerow J."