

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***E.G.P. v. S.L.P.***,
2009 BCSC 685

Date: 20090525
Docket: E080212
Registry: Vancouver

Between:

E.G.P.

Plaintiff

And

S.L.P.

Defendant

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff

Angela E. Thiele

Counsel for the Defendant

Fred C.M. Lowther

Date and Place of Trial/Hearing:

March 23, 25, 26, 30, 31 and
April 1, 2, 3, 2009
Vancouver, B.C.

[1] The plaintiff was born on November 2, 1975. She is the mother of a child, L., born in 1996. The plaintiff gave evidence that L.'s father is Mr. M., but that L. took the plaintiff's maiden surname. On July 14, 2004 L.'s surname was legally changed to the defendant's surname, which I will refer to as P.

[2] The defendant was born on December 22, 1963. He had successfully established himself as a participant and as an instructor in martial arts, and had acquired certain assets before he met the plaintiff.

[3] The parties each gave evidence that they married in Mexico on August 3, 2002. Two Mexican marriage certificates were tendered in evidence, each dated August 2, 2002. I accept the evidence of the parties as to the date of the marriage, and conclude that the certificates were dated the day before the ceremony.

[4] The parties' son A. was born in 2004. The parties ceased cohabitation in October 2007, and since that time have shared custody of A. The plaintiff's daughter, L., has resided solely with the plaintiff, and with few exceptions, has declined to see the defendant.

[5] The statement of claim in these proceedings sought an order of divorce; orders for custody, access and child support for both L. and A.; spousal support for the plaintiff; division of the family assets, with orders relating to ownership, division and sale of property; and costs.

[6] The counterclaim in this action sought, among other things, custody and guardianship of both L. and A., and a reapportionment of family assets in the defendant's favour.

[7] The amended counterclaim abandoned any relief with respect to L., but sought an order of divorce, joint custody and guardianship of A., maintenance and support of A., and determination and division of family assets.

[8] At the outset of the hearing, I was advised by counsel that the issues of guardianship and custody and the parenting schedule for A. were the subject of pre-trial proceedings before the Honourable Madam Justice Dardi, who had seized herself of those matters until trial, and that those matters were not to be heard by me, so that Madam Justice Dardi would remain seized of those issues. During the course of trial Madam Justice Dardi issued a memorandum to counsel advising that, as the trial had begun before me, she would no longer be seized of any matters between the parties. In the result, with the exception of emergencies, I will now seize myself of all matters raised by the pleadings in this case, including those that Madam Justice Dardi had previously seized herself of.

Background

a) The Defendant

[9] The defendant was born and raised in Vancouver, B.C. He has had an interest in martial arts since he was 16 years of age. After completing high school, he attended Langara College and the University of British Columbia ("U.B.C."). He obtained a Bachelor of Arts degree in psychology from U.B.C. in 1987. After he obtained his

degree, he travelled, and then was given an opportunity, which he accepted, to join his martial arts instructor in a partnership in a martial arts studio.

[10] The defendant's partner phased himself out of the business and by 1990, after paying his partner the sum of \$10,000.00, the defendant became the sole owner of the studio (the "Martial Arts Business"). In 1992, the defendant moved the Martial Arts Business to new premises in Vancouver, and by that time had saved enough money to purchase a residential property in Port Coquitlam (the "Residential Property"). The property was purchased for a little less than \$200,000.00, with a down payment of approximately \$50,000.00.

[11] On the Residential Property there is a detached home (the "Matrimonial Home") with three bedrooms and two bathrooms on the main floor, and a suited basement with two more bedrooms and one bathroom which the defendant has previously rented out. He proposes to rent the suite in future, but says that it requires updating and new appliances before he can do so.

[12] The Residential Property has been subject to a mortgage (the "Residential Property Mortgage") of varying amounts since the defendant purchased it. The principal amount of the mortgage was \$256,250.00 as of August 29, 2006 when a new mortgage was taken out on this property, so that the defendant could acquire an investment property in Port Coquitlam, B.C. (the "Investment Property"). The plaintiff's signature on unspecified documents was required to facilitate this mortgage refinancing.

[13] The principal amount owing on the Residential Property Mortgage was again increased this year to \$325,000.00 when the defendant refinanced in order to obtain

some \$75,692.56 in part to pay for the cost of property appraisals. The plaintiff received \$30,000.00 from this refinancing as against her claims in these proceedings.

[14] The municipal tax assessments for the Residential Property inclusive of land and improvements for the years 2002 through 2004 and 2007 through 2009 were:

- a) 2002 - \$203,300.00
- b) 2003 - \$221,800.00
- c) 2004 - \$268,400.00
- d) 2007 - \$402,000.00
- e) 2008 - \$458,000.00
- f) 2009 - \$458,000.00

[15] The Residential Property was the subject of an appraisal by Mr. S.F. Leslie of Cunningham & Rivard Appraisals (Vancouver) Ltd. on December 23, 2008. Mr. Leslie appraised the market value of the Residential Property then at \$420,000.00. He did not offer any appraisal of the value of the Residential Property for any earlier date.

[16] By 1992, the Martial Arts Business had attracted some 150 students, and the landlord for the Martial Arts Business was not keen to continue the lease. The defendant and two others therefore purchased property (the "Commercial Property") in Vancouver for \$260,000.00. The Commercial Property had a dilapidated home on it, and the three men arranged for the home to be torn down so that a new martial arts studio could be built there (the "Commercial Property Building").

[17] Each of the three men invested \$50,000.00 in the Commercial Property and its development, and a mortgage of \$182,000.00 was obtained as further financing for the

project (the “Commercial Property mortgage”). The defendant estimated the cost of construction at approximately \$350,000.00 and said that it was completed sometime in 1996 when the defendant opened the new studio. The defendant’s two partners in the enterprise had no role in the operation of the studio which rented its space from the three men, who ultimately formed a numbered company, 477935 B.C. Ltd.

[18] The Commercial Property was refinanced in August 1998, at which time the Commercial Property mortgage grew to \$479,741.47. After some period of negotiation, the defendant bought out his two partners on December 1, 2002 by remortgaging the Residential Property and cashing in some mutual fund holdings. He paid each of his two partners \$55,000.00 for their interests in both the Commercial Property and 477935 B.C. Ltd. The Commercial Property was held thereafter 1/3 by the defendant and 2/3 by 477935 B.C. Ltd., of which he was the sole shareholder. The ownership of the Commercial Property is unchanged since then.

[19] On December 8, 2002, the Commercial Property mortgage was \$426,190.94 and was fully assumed by the defendant and the numbered company. By July 2007, the principal owing on the Commercial Property mortgage had been reduced to approximately \$346,000.00, but the Commercial Property mortgage was then renegotiated. As of February 27, 2008, the principal owing on the Commercial Property mortgage was approximately \$373,000.00.

[20] The Commercial Property was assessed by the City of Vancouver at total values inclusive of land and improvements for the years 2002 through 2004 and 2007 through 2009 as follows:

- a) 2002 - \$546,000.00
- b) 2003 - \$541,000.00
- c) 2004 - \$536,000.00
- d) 2007 - \$585,000.00
- e) 2008 - \$726,000.00
- f) 2009 - \$726,000.00

[21] The Commercial Property was appraised by Mr. Leslie at a market value of \$875,000.00 as of December 30, 2008 in his letter of January 16, 2009. In a subsequent letter of February 6, 2009, Mr. Leslie reduced the appraisal as of December 30, 2008 to \$835,000.00.

[22] The defendant gave evidence, which I accept, that the roof on the Commercial Property Building requires repair within the next two years. The defendant produced an unsigned and non-detailed estimate of \$62,500.00 for these repairs, which I do not accept. The plaintiff produced more detailed estimates in the amounts of \$19,249.00 and \$23,800.00 and a less detailed one of \$19,152.00. I consider that a figure of \$20,000.00 is sufficient to provide for the repair of the roof. This is \$5,000.00 more than the figure assumed by Mr. Leslie in his initial letter of January 16, 2009, but \$55,000.00 less than the figure assumed by Mr. Leslie in his second letter, and by Mr. Tidball, the Chartered Accountant, based on information provided to him by the defendant.

[23] The Investment Property is a two-bedroom strata apartment purchased for \$208,500.00, including the funds from a mortgage on the apartment of \$78,000.00 (the "Investment Property Mortgage"). The principal owing on the Investment Property

Mortgage was approximately \$74,000.00 as of December 31, 2008. The rental income from the Investment Property is \$1,050.00 per month, which is more than the required monthly mortgage and strata service charges.

[24] Mr. Leslie appraised the market value of the Investment Property on December 23, 2008 as \$203,000.00.

[25] The Martial Arts Business was incorporated on August 4, 1994. At present, the defendant is the sole director of the Martial Arts Business.

[26] The Martial Arts Business reported net income for Income Tax purposes for the years 2004 to 2006 as follows:

- a) 2004 - \$11,645.00
- b) 2005 - \$1,322.00 (loss)
- c) 2006 - \$1,183.00

[27] The financial statements of the Martial Arts Business for the years 2003 to 2007 recorded revenues and expenses for those years as follows:

- a) 2003 - \$38,019.00 in revenues and \$53,979.00 in expenses
- b) 2004 - \$203,131.00 in revenues and \$213,997.00 in expenses
- c) 2005 - \$205,258.00 in revenues and \$209,101.00 in expenses
- d) 2006 - \$201,802.00 in revenues and \$201,456.00 in expenses
- e) 2007 - \$223,080.00 in revenues and \$224,800.00 in expenses

[28] Despite this apparently poor performance, the shareholder's equity in the defendant's company grew steadily from \$131,922.00 in 2003 to \$175,337.00 in 2006, dropping to \$153,070.00 in 2007.

[29] For the year 2007, the defendant reported personal income for Income Tax purposes of \$16,934.87.

b) The Plaintiff

[30] The plaintiff grew up in Winnipeg, Manitoba. She decided to leave home at age 13, and lived on her own, by her wits and through the kindness of friends and the assistance of various social services. She moved to Vancouver when she was 16 and entered the public school system. She completed her high school education in an adult study program in Vancouver and in 1993 enrolled at Capilano College.

[31] Before and after obtaining her high school diploma, the plaintiff held a series of positions to support herself. She also had a relationship with Mr. M., which resulted in the birth of her daughter L. in 1996. The plaintiff gave evidence, which I accept, that she tried to ensure that her daughter saw Mr. M., and that she did so, but only if the plaintiff made the arrangements, and then unreliably due to Mr. M.'s unreliability. She said that Mr. M. promised at various times to provide support for L., but that he has never made good on his promises to do so. The plaintiff agreed in cross-examination that she lived with two other boyfriends after L. was born and before she began to live with the defendant, but that neither assumed a parental role with L.

[32] From 1993 to 1996, the plaintiff attended Capilano College and later began training at the defendant's gym. Her attendance at Capilano College enabled her to

apply for a daycare subsidy for L. In order to do so, she had to assign her claim for support for L. from Mr. M. to the social service agency to which she applied for the subsidy. The plaintiff gave evidence that once the agency staff saw Mr. M.'s income tax returns no further effort was made to pursue him for support.

[33] According to the plaintiff, Mr. M. never lived with her. The plaintiff said in addition to L., he has three other children for whom he has not provided support.

[34] Mr. M.'s present financial circumstances and whereabouts are not entirely clear. The plaintiff said that this is due in part to the defendant's view that if they were to have children of their own, it would be awkward for them to have L. seeing her biological father, who was a poor role model in any event. She said that the defendant wished to "let sleeping dogs lie" and to support L. himself, so she refrained from contacting Mr. M. until approximately one year ago.

[35] At that time she decided to try to find Mr. M. in order to explore her options with him. She said that she found out about Mr. M. on the internet, and then contacted a person who was working with him. Once she had done so, she received a number of telephone calls from Mr. M., but no financial help. The plaintiff said that she is unsure of Mr. M.'s present whereabouts, but agreed that he seems to be in either Las Vegas, Nevada or Los Angeles, California.

[36] The defendant was unwilling to agree that he discouraged contact between the plaintiff and Mr. M., but I do not accept his evidence on this point. I find that it was due to his wishes that the plaintiff distanced herself further from the already distant Mr. M.

[37] Counsel for the defendant produced a printout from an internet website, which describes Mr. M. as a commercial artist and freelance show painter when he lived in British Columbia, and the writer and illustrator of seven children's books. He is said in the printout to have co-produced three television shows, produced three musical acts for both theatre and television, written three screenplays, and to have begun creating oil paintings of celebrity rock stars and actors. Mr. M. is also described as a partner in a company with the sole purpose of writing, producing and directing feature films. Whether any of this information is true is impossible to say. This was the only material introduced with respect to Mr. M.'s alleged means.

[38] By the time she completed her studies at Capilano College, the plaintiff had amassed a student loan debt of approximately \$30,000.00. She worked at a retail outlet, as a waitress and as a housekeeper. In 1998 she first came to the defendant's gym. After 1998 she worked at two gymnasiums, one belonging to a friend and the other to the defendant. She has retired all but \$3,000.00 of her student loan, mostly during the period of time she worked for, lived with and was married to the defendant. She said in cross-examination that she can do anything that she sets her mind to. I am satisfied that, within her educational constraints, her self-assessment is accurate. I do not accept the defendant's view of her as opportunistic.

[39] The plaintiff said, and I accept, that when she began working for the defendant she had some private students who paid her directly. I also accept that for her work for the defendant, he paid her between \$12 and \$15 per hour, and that over the time she worked before the couple began cohabitation her duties increased and her payment

became based upon a percentage of the profits of the Martial Arts Business. Mr. P. now pays an employee \$18 per hour for the type of work that the plaintiff did.

c) The Parties' Cohabitation and Marriage

[40] The defendant portrayed the couple's decision to begin cohabitation as his desire to offer the plaintiff and her daughter a better life. He said that he invited the plaintiff and her daughter to live with him, saying that they would not have to pay any expenses. He agreed that he discouraged her from working other than at his gym. The plaintiff said that she gave up her apartment and moved to the Matrimonial Home approximately one year before they married. They became engaged to marry in the summer of 2001, and married in August 2002. The wedding was planned for Mexico. After the plaintiff's parents had made their arrangements to attend, the defendant presented the plaintiff with a document that he had drafted and handwritten, entitled "Pre-Nuptual [*sic*] Agreement" (the "Prenuptial Agreement").

[41] The Prenuptial Agreement listed what the defendant described as his assets, and attributed a value to each. It then provided that, if the parties divorced, the parties would equally split any increase in the value of the listed assets above the value attributed to them in the Prenuptial Agreement, and that the defendant would pay reasonable spousal support.

[42] The document later reiterated that:

In summary, with growth and support, assets will increase in value, often times in proportion to the strength and support of the relationship. In the event of marital harmony, this agreement is not necessary. In the event of divorce, assets totaling [*sic*] greater than [the value attributed to the assets

by the defendant] would be split 50/50 and a reasonable monthly alimony payment would be provided by [the defendant].

[43] Finally the Prenuptial Agreement stated that “[t]he signatures below indicate that both parties agree and understand this document/agreement, and that it is signed under no duress, coercion, or mental incompetence”.

[44] Both parties agree that they each signed the Prenuptial Agreement. The plaintiff said that she was shocked by the request that she sign the document, but that the part about splitting assets made sense to her. She said that she had no idea of the value of the listed assets, and that she wanted to get advice before signing it. She also testified that she asked the defendant what would happen if they had children. She further said that her response upset the defendant, and she thus signed the document, as she did not want to delay her wedding given that her parents had already paid for their tickets to Mexico.

[45] The plaintiff said, and I accept, that once she and the defendant began to live together he unilaterally decided to deduct what he determined was one-half the family’s grocery costs from what she would otherwise have been paid. Thereafter she received roughly \$800.00 per month for what was approximately a 33½ hour work week. Her duties by that time included dealing with new students, registering them and pursuing new prospects; designing and teaching classes; keeping track of students and monitoring their fitness; ordering and selling equipment; and after her cousin joined the family, cleaning the gym and its showers and washrooms.

[46] After the couple began to cohabit, they discussed the possibility of the defendant adopting L. as his daughter. When they looked into the process, they learned that it was complicated and would require an interview of L., which they decided was unwise. They therefore decided to simply change L.'s surname to P., which they did in 2004, and encouraged L. at the same time to refer to the defendant as "Dad", which she did. L.'s CareCard refers to her with the surname P., as did her uniform at the gymnasium. I accept the plaintiff's evidence on these matters as well.

[47] After cohabitation began, the defendant drove approximately one-half hour to work. The plaintiff however, did not go to work as early as he did, and as she had no driver's licence until after A. was born, she often rode the bus to work, either bringing L. or arranging for her to stay with friends. The parties renovated the gym office so that there was a bed for L., and later for A. Ultimately the plaintiff's cousin became a nanny for the children, living with the parties and going with them to the gym. The cousin was paid \$200.00 per month by the plaintiff from the roughly \$800.00 that she was paid by the defendant, and given \$300.00 per month by the defendant in addition to her room and board.

[48] The defendant's business records disclosed that the plaintiff received \$17,117.62 for an average of \$993.00 per month from her employment at the gym during the period from May 2005 to December 2006, inclusive. I do not consider that the plaintiff was fairly remunerated for her efforts with respect to the Martial Arts Business during the marriage, but consider that those efforts did serve to improve the value of the Martial Arts Business.

[49] The plaintiff said, and the defendant did not disagree, that she had no access to or say in the family finances. The plaintiff gave evidence that she was infrequently permitted to use the defendant's credit card, but that after some period of time, the defendant allowed her to obtain a credit card with a \$500 limit. She said that she received money from her parents that allowed her and L. to visit them, but that she rarely had much money for herself from her employment or from the defendant, after paying her cousin, paying some of the family expenses and paying down her student loan.

[50] The plaintiff said that shortly after the marriage took place, the opportunity arose for the defendant to "buy out" his two partners in the Commercial Property Building and Property. She said that their involvement was a frustration, and that the defendant referred to the Commercial Property Building as their "retirement fund" as there was no retirement fund for martial artists. She said that she had no idea where the funds for the buyout came from, and saw no documents with respect to the buyout.

[51] The defendant gave evidence, which I accept, that the prospect of buying out his partners arose prior to the wedding. I am of the view that the timing of the opportunity is irrelevant, given the Prenuptial Agreement, and the fact that the purchase occurred after the wedding.

[52] The buyout was funded by the refinancing of the Residential Property. The defendant did not seriously suggest that the Residential Property is other than a family asset, and it was used to finance the acquisition of the interest of the defendant's original two partners. The Martial Arts Business was also enhanced and supported by

the efforts of both parties. I have concluded in all of these circumstances that the Martial Arts Business is a family asset.

[53] I am also satisfied that the Investment Property, the acquisition of which was financed by remortgaging the Residential Property, is a family asset.

[54] During the marriage, the defendant was controlling and usually made decisions, particularly financial ones, without discussion with the plaintiff. For instance, he paid money to his mother, whom he described as a successful graphic artist, despite some reservations on those payments by the plaintiff. The plaintiff felt that her mother-in-law could be supported, but that she should reduce her expenses by selling her home and moving to more modest accommodations.

[55] The plaintiff did supplement the income she received from the defendant by a home hand-made soap business until A. was born. Despite the defendant's denial, I find that she used some of the money from that enterprise to finance a trip for the defendant and herself to Las Vegas for his 40th birthday.

[56] It is clear that during the marriage, the plaintiff devoted a considerable amount of time and energy to training and ultimately competing in various martial arts. The defendant gave evidence that this became an obsession for her, taking away from her time for her family and the Martial Arts Business.

[57] The plaintiff has enjoyed considerable success as a martial artist. In fact, her success in martial arts competitions made a number of trips to other countries possible for her and her husband. These competitions provided her with free travel and free

accommodations at a number of venues outside Canada, including a number of U.S. cities, and Japan as well. The defendant took advantage of these travel opportunities and the available accommodations by accompanying his wife, and using the occasion to pursue the interests of the Martial Arts Business, writing off his travel costs against the profits of the Martial Arts Business.

[58] Indeed, the defendant has written off approximately 70% of all of his expenditures as business expenses, allowing him to accumulate a considerable asset base and to enjoy a lifestyle far beyond what the income he reports for tax purposes would permit. Indeed, the plaintiff gave evidence of what she referred to as “contra” arrangements that she participated in, where training at the Martial Arts Business would be exchanged, for example, for work on the Commercial Property Building.

[59] I do not doubt that the plaintiff’s success came at considerable cost in terms of her own efforts and the time that those efforts took from other things she might have done. I do not accept that the defendant attempted to discourage those efforts. I have concluded that he was supportive of them, for a variety of reasons, not the least of which was that they were good for their business.

d) The Separation

[60] Prior to the parties’ separation, they each had a leased vehicle, both of which were in the defendant’s name and the costs of and insurance for which were written off as business expenses. Shortly after the separation, the plaintiff returned the vehicle that she had used to the defendant. He says that he is unable to terminate the lease, but in cross-examination agreed that he has provided the vehicle to his mother for her use.

[61] Since the parties separated, the defendant has continued to reside in the Matrimonial Home and to rent out the Investment Property for \$1,050.00 per month. The plaintiff has rented an apartment for herself, L. and A. for \$1,400.00 per month.

[62] For a period of some two months after the separation, the plaintiff continued to work at the gymnasium that the parties had operated, but chose not to do so as the relations between her and the defendant cooled. She took some time to re-organize matters relating to her children, and in particular to enrol A. in a preschool that could accommodate his needs. L. is a sensitive child who requires counselling to address her anxieties, while A. has a form of autism that presents its own challenges. Both the plaintiff and the defendant recognize these challenges, and both have worked to address them in the past.

[63] For the future, the defendant appears eminently willing to work to assist A. with his challenges. However, he gave evidence that he considers that he has done all that should be expected of him respecting L., and while he remains prepared to try to re-establish a friendship with her, he does not wish to provide support for her.

[64] The plaintiff gave evidence that she continued to train and compete in martial arts events after the parties separated, enjoying some sponsorship perks. However, she realizes that her career as a martial artist has a limited future and she sought enrolment in police training with the Vancouver Police Department. She passed the first round of testing, but was rejected by the Vancouver Police Department because her visual abilities were insufficient to meet their requirements. She still has an active application for police work in Delta, B.C.

[65] The plaintiff then decided that she would pursue a career as a firefighter. She said that she has had an interest in this field since she was a child. The cost of the necessary training for this career she said was \$10,000.00, unless she is selected by the City of Richmond as a recruit, in which case that city will fund her training. She has applied to Richmond, but has yet to hear about her prospects there. If she is unsuccessful in obtaining a position as a firefighting recruit in Richmond, she intends to fund the necessary training herself. While awaiting a response to her application for work as a firefighter, the plaintiff has applied for a number of shorter-term jobs.

[66] The defendant argued that the plaintiff's interest in firefighting is convenient and recent, but I accept that she has a genuine interest in this type of work. The plaintiff understands that a working knowledge of construction will enhance her prospects as a firefighter, and so she has applied for positions in construction. She worked as a roofer in 2008 until the snows curtailed that kind of work.

[67] After the parties separated, the defendant had the plaintiff's credit card cancelled without notice to her.

[68] Since the parties separated, there have been a number of court orders, including a consent order for spousal and child support from the defendant. Despite the consent order, the defendant reduced his payments without the plaintiff's consent. The plaintiff resorted to the Food Bank to provide for the needs of her children and herself.

[69] The plaintiff initially brought an application to have the defendant held in contempt of court for his unilateral reduction in payments to her, but she abandoned the application. The order was without prejudice to either party once a final maintenance

order was determined, and the plaintiff is sensibly content to let any arrears of maintenance be decided in this trial, rather than revisit interim maintenance. The defendant's conduct in unilaterally cancelling the plaintiff's credit card and in ignoring the consent order is, in my view, further evidence of his controlling nature, insofar as the plaintiff and the children are concerned.

[70] In her financial statement sworn March 7, 2008, the plaintiff said that her only income relevant to her spousal or parental support claim was the Child Tax Benefit, B.C. Family Bonus and Universal Child Care Benefit of \$7,884.72, and that her monthly expenses were \$5,094.85. In the statement she declared assets of only \$4,144.93, and debts, including what was left of her student loan, at \$15,960.03. The statement was updated on March 10, 2009 with combined income of \$14,400.00 consisting of a government housing subsidy and the Child Tax Benefit and B.C. Family Bonus.

[71] During the summer and fall of 2008, the plaintiff earned income as a roofer. The updated statement listed monthly expenses of \$4,430.00, and no assets, but debts of \$29,500.00.

[72] In his updated financial statement of November 21, 2008, the defendant said his income for **Federal Child Support Guidelines**, S.O.R./1997-175, as amended [CSG] purposes was \$26,500.00 and he listed assets of \$550,000.00 comprised of the value of the Residential and Investment Properties. He did not include any value for the Commercial Property nor the Martial Arts Business. He listed debts of \$336,878.00 against the Residential and Investment Properties, and the potential for his guarantee of

the Commercial Property and the line of credit for the Martial Arts Business. He did not complete the portion of the statement for his expenses.

[73] In his report, Mr. Tidball pointed out that the defendant reported approximately \$18,000.00 of personal expenses in the financial statements of the Martial Arts Business; including some portion of amounts paid to his mother, and that in addition three-quarters of the automobile expenses were personal in nature.

[74] In cross-examination, the defendant agreed that from January 2007, until November 2007, the month after the parties separated, he paid the plaintiff a total of \$9,667.19, which averages out to \$878.83 per month.

[75] The plaintiff gave evidence that between February 2008 and March 2009 she has been paid a total of \$57,634.00 inclusive of the \$30,000.00 she received from the refinancing of the Residential Property.

e) The Position of the Parties

[76] The plaintiff gave evidence that she is prepared to live with the Prenuptial Agreement, provided that she receives one-half of the increase in the value of the assets; support for her daughter L. and herself; and whatever support that she is entitled to, if any, for A.

[77] The defendant gave evidence that the plaintiff did not provide appropriate support in the home or in his business.

[78] After the parties separated, and after he had had some preliminary legal advice, the defendant drafted a document entitled "Separation Agreement" (the "Draft

Separation Agreement”) proposing that the plaintiff have primary custody of L., the parties share custody of A. 50/50, he pay some child and spousal support, and the parties divide equally the increase in the value of what he described as the assets. Although he refers to the same assets in the Draft Separation Agreement as in the Prenuptial Agreement, the figures assigned to each differ.

[79] Neither party signed the Draft Separation Agreement.

Analysis

[80] I accept the plaintiff’s submission that the assets listed in the Prenuptial Agreement and the Investment Property are family assets. I also accept her submission that she contributed to the home, family and business by her efforts as a wife and mother as well as working long hours in the family business at a minimal salary, which limited her own lifestyle. In my view, she helped to build the Martial Arts Business by her work and her own accomplishments, while she and the defendant cohabited and were married and living together: see *Elsom v. Elsom* (1983), 49 B.C.L.R. 297 at 299-300, 37 R.F.L. (2d) 150 at 153-154 (C.A.); and *Berman v. Berman*, [1999] B.C.J. No. 750 at para. 46 (S.C.).

a) Divorce

[81] The parties’ marriage is over and there will be an order that the parties are divorced 30 days from the date of these reasons for judgment.

b) Division of Assets

i) Plaintiff's Entitlement

[82] Both parties, at the insistence of the defendant, began their married life on the basis that if their marriage did not work out, they would share not the assets used as family property during their marriage, but just the increase in the value of the assets that the defendant brought to their union.

[83] The Prenuptial Agreement was not witnessed, and so does not fit the criteria set out in s. 62(3) of the *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*] for a marriage agreement. Nonetheless, given the criteria in s. 65(1) of the *FRA* to determine the fairness of a marriage agreement or the division of assets and the discussion in s. 68 of agreements other than marriage agreements, I consider that I can take the Prenuptial Agreement into account in my analysis.

[84] Although the marriage was a relatively brief one, I am satisfied that the plaintiff made considerable contributions to the increased value of what the defendant brought to their union, by her work at reduced income at their business, by her success in martial arts and by her role in the marriage as the defendant's wife.

[85] I consider that the arrangement with respect to any increase in the value of the assets was a reasonable one to which both parties agreed, and to which the defendant apparently still adhered even after they separated. I have considered the increase in value and the plaintiff's entitlement to spousal and child support.

[86] I am also satisfied that the equal split of the increase in the value of the assets and the equity in the Investment Property is fair and reasonable in the circumstances,

and consistent with case authority, such as **Harrison v. Kalinocha** (1994), 90 B.C.L.R. (2d) 273, 1 R.F.L. (4th) 313 (C.A.); **S. v. S.**, 2006 BCSC 1229; and **James v. James**, 2007 BCSC 476.

[87] Since the parties neither executed a separation agreement nor sought a s. 57 declaration, the triggering event for the division of assets is the divorce order included in this judgment.

[88] I find that the plaintiff is entitled to one-half of the increase in the value of the assets as described by the defendant in the Prenuptial Agreement and to one-half of the equity in the Investment Property as well.

[89] I also find that the plaintiff's share of the increase in the value of these assets must be reduced by \$20,000.00 which I attribute to the reduction in her student loan during the marriage.

ii) Valuation of the Family Assets

[90] I am not prepared to accept the defendant's valuation of the assets in May 2002 when the parties agreed to share their increase in the event of a divorce. As there is little other evidence as to the value of the assets in May 2002, I will do the best that I can to assess the increase in value from the evidence that I do have.

[91] I will approach the valuation and division of each family asset individually, rather than globally as suggested by the plaintiff. Nonetheless I have considered the impact of each valuation and division on the total order.

[92] Further, as there is no evidence before me to suggest that another date is more appropriate for any of the family assets other than the Residential Property, the valuation date for the increased value of the family assets other than the Residential Property is the date of trial: *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99, 22 R.F.L. (3d) 337 (C.A.).

(1) The Residential Property

[93] Unfortunately, there is little evidence as to the value of the Residential Property when the parties married in 2002. Consequently I will determine the increase in value as best I can.

[94] I have determined that the Residential Property had a value of \$203,000.00 in 2002, as set out in the assessment for that year. I also accept that the outstanding balance on the mortgage in 2002 was \$45,000.00, as listed by the defendant in the Prenuptial Agreement and as conceded by the plaintiff in her closing argument. To determine the defendant's equity in the Residential Property in 2002, I have deducted the outstanding balance on the mortgage in 2002 from the 2002 assessed value. This results in 2002 equity of \$158,000.00.

[95] I consider that the appropriate valuation date for the Residential Property is immediately before the refinancing which took place earlier this year, as that refinancing was at least in part for this litigation. I therefore find that the value of the property is \$420,000.00, as set out in the appraisal, and that the mortgage value is \$253,250.00. This results in current equity of \$166,750.00.

[96] The difference between the 2002 and 2009 equity is \$8,750.00, half of which is \$4,375.00. The plaintiff's entitlement is thus \$4,375.00.

(2) The Investment Property

[97] I find that the equity in this property was entirely generated during the parties' marriage. I find that that equity is \$133,000.00 based upon the appraisal by Mr. Leslie less the mortgage of approximately \$70,000.00. The plaintiff is entitled to one-half of this equity, or \$66,500.00.

(3) The Commercial Property

[98] I find that the value of this property is \$870,000.00 based upon Mr. Leslie's first appraisal report, adjusted to take into account what I have found to be the cost of the necessary roof repairs at \$20,000.00 as opposed to the \$15,000.00 that the report assumed.

[99] The property is encumbered by a mortgage in the amount, as of March 1, 2009, of approximately \$346,000.00.

[100] I conclude that the increase in the net equity in this property between August 2002 and November 2007 is in part due to the buyout of the defendant's two former partners, but that the plaintiff is entitled to share in that part of the increase in the equity. I further find that the increase in the equity is in part due to the reduction in the principal owing on the mortgage that was achieved during the marriage.

[101] I conclude that the increased equity in this property, to which the plaintiff is entitled to a one-half share, is \$349,000.00. I have reached this figure by taking the net

equity in December 2002 of \$550,000.00 using the City of Vancouver appraisal for 2002, and deducting the mortgage of approximately \$425,000.00, to reach a net equity figure of \$125,000.00 for the property when the parties married.

[102] I then contrast that figure to the present net equity figure based upon my conclusion as to the present value of the property at \$870,000.00, less the existing mortgage of approximately \$346,000.00 for a present net equity of approximately \$524,000.00. The difference between the two is \$399,000.00. One-half of this amount is \$199,500.00.

(4) The Martial Arts Business

[103] The only evidence as to the value of this business is found in the report of the Chartered Accountant, Mr. Tidball. He provided his opinion that the fair market value of the Martial Arts Business, excluding the Commercial Property, is approximately \$50,000.00. There is no reason offered by either party to question that opinion, and I accept that that is the fair market value of the business.

[104] Because I consider that the increase in the value in the Commercial Property reflects what would otherwise have been an increase in the value of this business, I dismiss the plaintiff's claim for a share in this asset, as otherwise she would be doubly compensated.

(5) Vancity Bank Account

[105] The defendant used the account which the plaintiff claims an interest in as a business account, despite it being in his name rather than the company's name. I consider that it was a business account. Given my conclusions on the division of the

other assets and on the calculation of his income, set out below, I am satisfied that the plaintiff's further claim for a share of the defendant's Vancity bank account would duplicate her recovery, to some extent, and I therefore dismiss that claim.

iii) Conclusion on Division of Family Assets

[106] The plaintiff has already received \$30,000.00 from the refinancing of the Residential Property earlier this year. I therefore have deducted that amount from the value of her entitlement to the family assets.

[107] The plaintiff's share of the family assets therefore amounts to:

Residential Property	\$4,375.00
Investment Property	66,500.00
Commercial Property	199,500.00
Total Entitlement	\$270,375.00
Reduction in the plaintiff's student loan	\$20,000.00
Plaintiff received from refinancing	30,000.00
TOTAL OWED TO PLAINTIFF	\$220,375.00

[108] The plaintiff has proposed that the defendant transfer the title of the Investment Property to her, so as to avoid sale and associated costs of transferring or refinancing any more than necessary. The defendant objected to such a transfer as he was of the view that the equity in the property exceeded the plaintiff's entitlement, and he did not wish to transfer title, and remain responsible for the mortgage.

[109] I will not order that he transfer the property, but he may choose to do so, given my conclusions with respect to the plaintiff's entitlement.

c) Defendant's Income for the Purposes of Child and Spousal Support

[110] The defendant's treatment of his expenses is questionable. His choice, which he says was based on advice from his accountant, to claim 70% of all his expenses, no matter why they were incurred, places him in a position where he enjoys a lifestyle that he could not possibly afford on the income that he reports for Income Tax purposes.

[111] Mr. Tidball offered the opinion that a reasonable salary for someone in the defendant's position would be \$40,000.00 per year, as a manager. Mr. P. is not just a manager; however, as he owns the building and property where the Martial Arts Business is located, a home that has a basement suite that he has rented out in the past and an investment apartment that is currently rented out.

[112] In his business, Mr. P. engages in the exchange of his services or those of his staff for services that he would otherwise pay for from his income or that of the Martial Arts Business. He has clearly been able to finance the purchase of the business, the land and building where it operates, his home, and an investment property, all from the Martial Arts Business that he created, and that I have found that the plaintiff helped to succeed.

[113] I am unable to accept that the defendant's income for the purpose of child and spousal support is the equivalent of either \$106,100.00 or more, as contended for by the plaintiff. These figures were arrived at by "grossing up" the figures of \$78,520.00 or \$71,395.00 per year that the plaintiff arrived at from the figures derived from Mr. Tidball's report for the expenses claimed by the defendant as business expenses

that were questioned by Mr. Tidball. While I find that a number of these expenses are questionable business deductions, I am not prepared to conclude that they all are.

[114] I conclude that a reasonable annual income figure for the defendant from the Martial Arts Business is the \$40,000.00 salary that he could reasonably be expected to draw as a manager, together with a further \$20,000.00 per year in non-taxable benefits that he is able to realize from his business. The latter must be “grossed up” for the purposes of determining the defendant’s income for **CSG** and spousal support purposes: see, for example, ***Schaefer v. Schaefer***, 2009 BCSC 169.

[115] I am unable to determine, from the evidence that I have, the effect of grossing up the figure of \$20,000.00 per year for income tax purposes, and adding it to the figure of \$40,000.00 per year of taxable income in order to determine the defendant’s income for child and spousal support purposes, and I will require submissions from the parties in order to do so.

[116] I will make time at 9:00 a.m. or 4:00 p.m. in the next two weeks for the parties to make submissions to me on the defendant’s income based on \$40,000.00 of salary and \$20,000.00 in expenses grossed up. I order the parties to set down such a hearing with Trial Scheduling in the next two weeks. If they can agree as to his income, they can make submissions as to their agreement. Otherwise they can each make submissions as to their positions on his income.

[117] In addition to this income, I expect that the defendant will or should derive income from the rental of his basement suite in the future. The parties may apply in one

year for a variation of the defendant's income for child and spousal support purposes, if he does derive such income.

[118] Similarly, if the defendant elects to retain the Investment Property, any income from there can be considered at the same hearing in one year.

d) The Plaintiff's Income for the Purposes of Spousal and Child Support

[119] I attribute the plaintiff's total income for 2008 from declared and undeclared sources at \$15,000.00.

[120] For the sake of consistency, and as I do not have sufficient evidence to conclude otherwise, I will impute the same annual income to the plaintiff, pro-rated, for the period of 2007 after the parties separated and the period of 2009 before trial.

[121] The parties may apply for a variation of the plaintiff's income for child support purposes if there is a material change in her income.

e) L.

i) Custody, Guardianship and Access

[122] As the defendant did not contest the plaintiff's claim for sole custody and guardianship of L., I allow that claim. I will make no order for access by the defendant to L. as none was sought.

ii) Child Support

[123] Sections 2(1) and (2) of the **Divorce Act**, R.S.C. 1985, c. 3 (2nd Supp.) define a "child of the marriage" as follows:

2. (1) In this Act,

...

“child of the marriage” means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

2. (2) For the purposes of the definition “child of the marriage” in subsection (1), a child of two spouses or former spouses includes

...

(b) any child of whom one is the parent and for whom the other stands in the place of a parent.

[124] Section 5 of the **CSG** provides:

Spouse in place of a parent

5. Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent’s legal duty to support the child.

[125] The defendant argued that whatever support obligations he has for L. are subservient to the obligations of her biological father, Mr. M., whom the plaintiff should pursue before him. Further, he argued that his own obligations have been satisfied in any event, relying on the reasoning in **Sharratt v. Green** (1995), 11 R.F.L. (4th) 386 (B.C.S.C.), aff’d (1997), 27 R.F.L. (4th) 38 (B.C.C.A.) [**Sharratt**]; **Russenberger v. Rebagliati**, 2000 BCSC 82, 5 R.F.L. (5th) 130 [**Russenberger**]; **Dutrisac v. Ulm**, 2000 BCCA 334, 6 R.F.L. (5th) 132 [**Dutrisac**]; and **L.J.C. v. G.S.C.**, 2008 BCSC 1672.

[126] The first three of these decisions are discussed in the decision of the British Columbia Court of Appeal in *H. (U.V.) v. H. (M.W.)*, 2008 BCCA 177, 59 R.F.L. (6th) 25 [*H. (U.V.)*], and the fourth relies upon the reasoning in *H. (U.V.)*.

[127] *H. (U.V.)* was a case where the mother of two children began a common law relationship with a man, the stepfather, but continued to share access to the two children with their biological father. The trial judge made a finding of fact that the stepfather was “anxious to assume full responsibility as the children’s step-parent’ and insisted that the father pay no child support”.

[128] The mother then discovered that the stepfather had sexually assaulted one of the children and made videotapes of her bathing and sleeping. The mother separated from the stepfather immediately, and sought interim child support from him. The stepfather then asserted that the biological father should support the children with whom the stepfather had no contact.

[129] Both the mother and the biological father relied upon the decision of the Supreme Court of Canada in *Chartier v. Chartier*, [1999] 1 S.C.R. 242 [*Chartier*], for the principle that the stepfather’s support obligation was ongoing and not qualified as to duration. The stepfather relied upon the reasoning in *Dutrisac* that the time had come to relieve him of the obligation to pay child support.

[130] The defendant’s role in L.’s life meets the criteria established by the Supreme Court of Canada in *Chartier* for showing that a step-parent is in the place of a parent. In particular, the defendant not only permitted, but encouraged L. to treat him and refer to

him as her father, and she participated in the new family as did A., the biological child of the parties.

[131] At paras. 27-40 of *H. (U.V.)*, Newbury J.A. for the Court canvassed the authorities, including *Chartier*, *Dutrisac*, *Sharratt* and *Russenberger*, and explained the principles of law regarding the child support obligations of step-parents that have come from those cases. She found, first, that biological parents bear an “inflexible” and possibly “primary” obligation for child support. In contrast, step-parents’ obligation is flexible and, in appropriate circumstances, can be reduced to zero. She also distinguished between situations where the child’s natural parent is involved in the child’s life or the court proceedings, and those where the natural parent is absent from both.

[132] Newbury J.A. concluded at para. 41 that “[g]iven the ‘children-first’ perspective of the Guidelines..., primacy should be given to the children’s standard of living”. She then listed some examples in which a child support order against a step-parent would be appropriate or inappropriate under s. 5 of the **CSG**, concluding as follows:

Or, where one of the natural or adoptive parents is not present or is unable to pay any support, the stepparent may well have to pay his or her full table amount. The Legislature has left it to the judgment of trial and chambers judges in the first instance to fashion orders that are “appropriate” under s. 5. At the same time, the Guidelines system is not thereby jettisoned in favour of a “wide open” discretion. The inquiry must, like the Guidelines themselves, focus on the children and their needs.

[133] Newbury J.A. declined to make a retroactive order for support against the biological father, reasoning that the mother had not applied for support against him, nor

was there any allegation that the children were not enjoying a reasonable standard of living.

[134] The plaintiff here argued that there is no evidence that she will reasonably be able to obtain an order for child support from Mr. M., but she is prepared to file an application to pursue such relief pursuant to the *Interjurisdictional Support Orders Act*, S.B.C. 2002, c. 9. I accept her explanation that there was little prospect of success in pursuing Mr. M. before her relationship with the defendant began, and her evidence that she was discouraged from doing so while she was involved in a relationship with the defendant. Nonetheless she ought, in my view, to have pursued the relief that she says that she now intends to seek once her relationship with the defendant dissolved in late 2007.

[135] Having said this, I am not persuaded that the prospect of support from Mr. M. will be simple, speedy or reliable.

[136] Applying the principles discussed in *H. (U.V.)*, I have concluded that the standard of living that L. enjoyed when the defendant assumed the role of her parent, at his own insistence, can only be maintained at present by his continued support.

(1) Retroactive Maintenance

[137] I find that the defendant must pay retroactive child support for L. The amount will be based upon the amount determined by the application of the **CSG** to his income, once that income is determined, from November 2007 to date, after receiving credit for the payments that he has made.

(2) **Future Maintenance**

[138] I find that the defendant must pay future child support for L. The amount will be determined by the application of the **CSG**, once his income is determined, subject to a review in one year to determine if there is any real prospect of her biological father providing any support for her.

[139] If support is received from Mr. M. within that year, the plaintiff is to so advise the defendant. He may then apply for a variation of his support for L.

f) **A.**

i) **Custody, Guardianship and Access**

[140] The parties asked that I refrain from making any orders as to custody and guardianship of and access to A. I therefore do not make any order on this issue.

ii) **Child Support**

[141] The parties have shared custody of A. approximately equally since their separation. That does not preclude an award of child support for A. when there is a great disparity between the incomes of the parties: see **C.J.R. v. S.P.J.**, 2009 BCSC 264.

[142] Nonetheless, in **Contino v. Leonelli-Contino**, 2005 SCC 63, [2005] 3 S.C.R. 217, all members of the Supreme Court of Canada agreed that one of the factors to take into account in determining the appropriate child support order in a shared custody situation is the **CSG** table amount for each parent. Consequently, until I receive submissions on the defendant's income for support purposes, I cannot determine the amount of child support due for A., if any. The parties can make submissions on this

matter at the hearing within the next two weeks which they will schedule to make submissions on the defendant's income.

[143] If necessary, the parties may also re-apply in one year to vary any support which I order after the hearing.

g) Spousal Support

[144] As I have found above, the plaintiff contributed to the home, family and business by her efforts as a wife and mother, as well as by working long hours in the family business at a minimal salary, which limited her own lifestyle. I have also found that the Martial Arts Business benefited from her efforts.

[145] On the other hand, she was able to reduce her student loan debt, and pursue her interest in martial arts as a result of the support that she received from the defendant.

i) Retroactive Spousal Support

[146] I have concluded that her parenting responsibilities, the reality of her separation from the defendant eliminating any real prospect of continuing in the Martial Arts Business that she helped to improve, and the limited time period in which she can compete in martial arts requires that she obtain some retraining, which she was unable to do prior to the redistribution of the family assets.

[147] The defendant's support of her during the period following their separation has not been adequate. I have concluded that was simply an extension of his desire to exert control over the plaintiff, and the family assets.

[148] I have concluded that the plaintiff is entitled to retroactive support from November 2007 to March 2009, after allowing for the amounts that she has received from the defendant, with the exception of the \$30,000.00 she received from the refinancing of the Residential Property, which I have addressed in dealing with the family assets.

[149] The amount of the retroactive spousal support will depend on the defendant's income and the application of that income and the plaintiff's \$15,000.00 income to the *Spousal Support Advisory Guidelines (SSAG)*. The parties can make submissions on this matter at the hearing within the next two weeks which they will schedule to make submissions on the defendant's income.

ii) Future Spousal Support

[150] During her cohabitation with and marriage to the defendant, until the parties separated in October 2007, the plaintiff worked in the business that the defendant will now continue without her. I agree with her conclusion that she does not have long left in her martial arts career, and that it would be unwise for her to continue in the sort of work that she did with the defendant.

[151] I consider that her desire to pursue a career as a firefighter is genuine, and reasonably attainable, but will require her to wait to see if she is hired and to undergo training if she is hired. If and when she is established as a firefighter, she should be able to provide for herself without assistance from the defendant. She will be able to work during the time she waits to hear from those employers to whom she has applied for work as a firefighter, but not during the period of time that she spends in training. I consider that her training costs of \$10,000.00 and some support from the defendant for

the next nine months is reasonable. I order that the defendant pay her a lump sum of \$16,000.00 for these purposes for spousal support, exclusive of her retraining cost, which I find she must pay herself, if she is unable to secure employment as a firefighting recruit with the City of Richmond.

[152] The plaintiff's claim for any further spousal support may be reviewed in 12 months, on the application of either party.

h) Costs

[153] The parties may make submissions with respect to costs, in the event that they are unable to resolve them between themselves, at the hearing before me in the next two weeks.

Summary of Orders Granted

[154] I will remain seized of all matters raised by the pleadings in this case, excluding emergencies.

[155] The parties will be divorced 30 days from the date of these reasons for judgment.

[156] The plaintiff is entitled to one-half of the increase in value of the Residential, Investment and Commercial Properties, less the monies already paid to her and the reduction in her student loan. The total sum due to the plaintiff is \$220,375.00.

[157] The parties will set down a hearing within two weeks of the date of these reasons for judgment to make submissions on the defendant's income, and the amounts of child and spousal support. I find that the plaintiff's annual income is \$15,000.00 for 2008 and, pro-rated, for the relevant periods of 2007 and 2009.

[158] The plaintiff will have sole custody of L. The plaintiff is also entitled to child support, both retroactive and prospective, for L. The amount will be set once the defendant's income is determined.

[159] As per the parties' request, I make no orders regarding the custody and guardianship of and access to A. I will determine whether to award child support for A., and in what amount, once the defendant's income is determined.

[160] The plaintiff is entitled to retroactive and prospective spousal support and future spousal support. I award prospective spousal support via a lump sum award of \$16,000.00 for the 12 months following the date of these reasons for judgment. I will make an award for retroactive spousal support once the defendant's income is determined.

[161] The parties may make further submissions as to costs as set out above.

"Hinkson J."