

SUPREME COURT OF YUKON

Citation: *K.A.M. v. B.M.M.*, 2018 YKSC 14

Date: 20180323
S.C. No. 15-D4765
Registry: Whitehorse

BETWEEN

K.A.M.

PLAINTIFF

AND

B.M.M.

DEFENDANT

Before Mr. Justice R.S. Veale

Appearances:
Megan E. Whittle
B.M.M.

Counsel for the plaintiff
Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] K.A.M. (“the wife”) and B.M.M. (“the husband”) have been involved in a high conflict divorce since the wife left the Family Home on July 30, 2014, and filed her statement of claim on July 10, 2015.

[2] There have been nine interim orders dealing primarily with child support, family home issues, debt issues and the value of Legacy Construction, the husband’s construction business, and his income.

[3] On October 11, 2017, a Case Management Order (“CMO”) ordered the wife and husband to proceed to Summary Trial, based on the numerous affidavits filed.

[4] The CMO directed the husband to produce all financial records and other documents under penalty of having his statement of defence and counterclaim struck.

[5] Although the husband remains in default of the order to produce his income tax returns for 2014, 2015, 2016 and the financial statements for his construction company and an evaluation of the company, the Summary Trial proceeded without striking his pleadings.

[6] The husband has had three different lawyers but now represents himself.

[7] In a bizarre twist, reminiscent of what might be called “a scorched-earth tactic”, the husband has allowed judgments from breach of contract actions against his construction business to be registered against the Family Home. The result has been that the wife has recovered a negligible amount from the sale of the Family Home. In addition, the husband failed to make any improvements to the Family Home to enhance its prospects for sale, despite residing in it since the separation. Further, after the sale, the husband remains in the Family Home as a renter from the purchaser, who is a friend of the husband.

[8] Another major issue relates to the husband’s deficient disclosure of his business income and his failure to pay the mortgage, taxes, and associated family debts in a timely manner, from July 30, 2014, to the sale of the Family Home on May 31, 2017.

[9] I will begin these Reasons for Judgment with a restatement of portions of my November 16, 2015 oral Reasons for Judgment in this case (*KAM v. BMM*, 2015 YKSC 56). These excerpts, with some editing to reflect the time that has elapsed, are found in paras. 10 – 29 herein. The balance of this judgment recounts the events from January 2016 to the conclusion of the court proceedings on November 27, 2017.

BACKGROUND

[10] The parties met in 2001 and married in July 2003. They have two children, aged 14 and 11. The husband works as a general contractor in residential and commercial construction. He also works as a carpenter while supervising his sub-trades. He has no employees. As a result of an injury to his hand, in August 2015, he received worker's compensation based on 75% of his assessed compensable earnings of \$93,857.14 a year. It was a short-term benefit for 90 days at \$1,220.26 a week. The husband provided no medical evidence regarding his hand injury except for the worker's compensation reporting letter. His assessed compensable earnings were based on an hourly wage with a third party, not his business income.

[11] The wife has a government job that paid \$93,163 in 2015.

[12] The wife moved out of the Family Home on July 30, 2014, after an assault. She could not stay in the Family Home because she was afraid for her safety. The husband runs his construction business from the Family Home.

[13] The Family Home is a 15-acre property with an older rental home and a newly completed log residence, which has a mortgage of approximately \$414,207, with a monthly payment of \$2,001 and annual taxes of approximately \$1,800. The Family Home, including the rental property is appraised at \$632,000.

[14] The wife was not able to find rental accommodation until November 2014, when she was able to provide the children with a suitable alternative residence.

[15] The husband remains in the Family Home and, up to the time it was sold, received income from the rental home on the property in the amount of \$1,350 monthly,

subject to a chambers order that he pay half to the wife from August 2015 to November 2015.

[16] After separating in July 2014, the wife and husband initially arranged their finances jointly, but the wife's credit rating was negatively affected by non-payment of the mortgage and a personal line of credit. They have since separated their finances, but the wife has been unable to purchase a house and will continue in rental accommodation until the property issues are resolved.

The July 28, 2015 Application by the Wife

[17] The wife filed her Statement of Claim, application documents and Notice to File a Financial Statement on July 10, 2015, and served the husband on July 16, 2015. The Notice to File a Financial Statement required the husband to deliver his financial documents within 30 days, and gave notice that, if he did not comply, the wife would ask the Court to impute an income of \$150,000 for the purpose of determining child support. I note that the wife first asked the husband to disclose his income tax returns and the financial documents for Legacy Construction in January 2015.

[18] The application also included the relief that the husband bring the mortgage on the Family Home and the CIBC personal line of credit into good standing. The application was amended to ask that the husband transfer the CIBC line of credit into his name alone and remove the wife's name.

[19] At the hearing of the wife's application on July 28, 2015, the husband did not appear and the chambers judge ordered, among other things, that the husband's income be imputed at \$150,000 and that he be prohibited from bringing a variation application until all financial documents were provided.

[20] On July 31, 2015, counsel for the wife advised the husband of these terms by letter, including a copy of the July 28, 2015 Court order, and advising of the adjournment to August 11, 2015. The husband was self-represented at the time.

[21] The wife filed her Financial Statement on August 10, 2015, enclosing her 2013 T4 stating employment income of \$86,450. She advised that her 2014 T4 was with H&R Block to prepare her 2014 Income Tax return. However, she also provided her recent pay stub indicating a bi-weekly pay of \$3,485.17, and an annual income of \$93,163, somewhat higher than the \$86,818 figure reflected in the July 28, 2015 order.

[22] The remaining matters were adjourned to August 11, 2015, when the husband appeared. The hearing did not proceed, but an order was made to close a CIBC joint account, and the husband was also ordered to provide a copy of the appraisal of the Family Home to the wife. The balance of the July 10, 2015 application was adjourned to September 9, 2015. Counsel for the husband filed an appearance on September 8, 2015.

[23] On September 9, 2015, counsel for the husband brought a further adjournment application. Payments ordered on July 28, 2015 were incomplete, and the husband's financial documents were not available for filing. The matter was adjourned to September 30, 2015, to permit the husband to file his financial documents before the hearing, then set for November 9, 2015.

The Father's Application and Financial Documents November 2015

[24] On September 30, 2015, the husband filed his Financial Statement. He stated that his 2015 income would consist of \$26,236 from self-employment, \$388 net from rental income and \$13,200 from Worker's Compensation (for 90 days) for a total of

\$40,724. He filed his T1 General Tax Returns for 2012 and 2013 as well as a “Statement of Business or Professional Activities: Comparative Summary” for 2012 and 2013. The Comparative Summary gives gross figures for Income and Cost of Sales, which includes Purchases and Subcontracts. The husband said that his 2014 income taxes were being prepared by his bookkeeper who had not been able to do the job because of a sick husband. He said he would file them with the Court when he had them. He then proceeded to explain why 2014 was a slow year for him. He did not provide, among other things, his T1 General Income Tax Return for 2014, his 2014 Notice of Assessment, or statements for his personal and business bank accounts for 2014. Then, on November 6, 2015, the husband provided business invoices for 2014 and 2015. His total revenues for 2014 were \$317,280.38, but he did not provide the cost of Purchases and subcontracts to give an accurate indication of his profit.

[25] At the time of the November 9, 2015 hearing, the husband had brought the following payments to the wife up to date:

1. Child support of \$1,648;
2. Rental income of \$1,350; and
3. Costs of \$1,500.

[26] He had also closed the CIBC joint account and placed it in his name but had been unable to pay the overdraft of \$5,060.

[27] I found that, based on what he had filed, the Court was unable to determine the husband’s income without speculation. I adopted the reasons in *A.G. v. B.R.*, 2005 BCSC 96, in which the Court drew an adverse inference and imputed income on circumstantial evidence, rather than relying on reported income from income tax returns.

[28] I revised the July 28, 2015 Order in the following respects:

1. Using the wife's income of \$93,163 and the husband's imputed income of \$150,000, I revised the child support to be paid to the wife at \$741 (\$2,089 - \$1,348) per month, and ordered that the husband could reduce his December 1, 2015 payment by the overpayment he had made since August 1, 2015;
2. As of November 1, 2015, the husband was not required to share the rental income from the rental house on the family property.

[29] I also ordered that, going forward from November 1, 2015, the husband was required to pay the camper loan, the CIBC line of credit, the CIBC overdraft, the CIBC mortgage and the property taxes on the Family Home. The camper was to be transferred to the husband upon the wife being relieved of any obligation to pay the camper loan.

DELAY IN SELLING THE FAMILY HOME AFTER THE NOVEMBER 2015 ORDER

[30] The facts outlined in this section are substantially based upon Affidavit # 4 of the wife, which was sworn and filed on April 18, 2017, in preparation for a conduct of sale application. The husband has not filed any affidavit contradicting her affidavit.

[31] In the November 16, 2015 Order, I directed that the wife was at liberty to apply for an order for sale of the Family Home in the event that the husband did not keep making payments for the following expenses:

- a) the monthly payment of the joint RBC camper loan;
- b) the monthly payment of the joint CIBC line of credit;
- c) the overdraft on the joint CIBC account;

- d) the monthly mortgage payment on the Family Home; and
- e) the property taxes on the Family Home.

[32] The husband had exclusive possession of the Family Home by agreement, as the wife had stated at the outset in July 2015:

My utmost desire is to reach a fair and equitable settlement so that we can both move on. I want [the husband] to be able to stay in the house we built if possible, for the benefit of the children. I need fair compensation so that I am able to move forward financially.

[33] The November 16, 2015 Order, although not explicit, allowed the husband to have exclusive possession of the 15-acre Family Home to live in and to run his construction business from, plus allowed him to keep the rental income from the smaller house, provided that he kept making payments on the property and debts.

[34] In the November 16, 2015 application, the husband produced an appraisal of the Family Home dated April 30, 2015, and stated at paras. 41 and 45 of his affidavit # 1, dated November 3, 2015:

41. In response to paragraph 16 of [the wife's affidavit] #1, in December 2014 I agreed to pay the mortgage and I've tried my best to do so, however there have been months that I've fallen behind. I've been working with the bank to try and work out a payment plan that can get me caught up on missed payments.

...

45. I'm in the process of having the Property assessed by realtors. A realtor from Remax viewed the Property on November 3, 2015 and another realtor from Coldwell Banker is scheduled to view the property on November 6, 2015

[35] The April 30, 2015 appraisal at \$632,000 valued the 15-acres of rural property, with a consideration of the approximately 1,800 sq. ft. log and wood frame home,

described as an “unfinished executive log home” built by the husband and wife, and a second finished 2-bedroom house of approximately 1,000 sq. ft. The appraiser stated:

Maximum value would be obtained by finishing the (log and wood frame) house before considering selling it.

[36] There is no evidence that the husband, a journeyman contractor, did any work to enhance the value of the log and wood frame home after the separation on July 30, 2014.

[37] The purpose of the November 16, 2015 order was to bring some resolution to the family finances, which began to break down on separation, as mortgage and loan payments were not being made by the husband. I do not find that the husband’s failures were related to his hand injury which did not prevent him from continuing his construction business or participating in hunting trips in the fall of 2015, as deposed to in his first affidavit. Counsel for the wife requested a Family Law Case Conference on October 28, 2016, to move the sale of the Family Home forward.

[38] At the Family Law Case Conference, the husband agreed to list the Family Home for sale. The Court ordered the husband to list the Family Home for sale by November 30, 2016, at a price agreed to by the husband and wife. The Court also ordered the husband to list the camper and steel shop, the latter for \$20,000, presumably to apply to reduce the outstanding balance on the CIBC joint line of credit.

[39] The husband and wife agreed on a listing agent for the Family Home. The wife met with the agent immediately but the husband refused to sign the listing agreement by November 30, 2016.

[40] The husband and wife met on December 15, 2016, and the husband advised that he did not wish to sell the Family Home but wanted to pay the wife her equity. The

husband then offered the wife \$15,000 for her interest and said his friend would purchase the Family Home and the husband would enter a rent to own agreement with his friend. The wife was clearly upset with this turn of events, given the value of the property and the amount of money she had contributed to the mortgage.

[41] On March 1, 2017, a further Case Management Conference was held, at which time the lawyer for the wife advised that the wife would be bringing a contempt application if the listing agreement was not signed. On March 9, 2017, the wife's lawyer advised the husband's lawyer that an application would be made for conduct of sale by the wife if the listing agreement was not signed.

[42] On March 11, 2017, the listing agent advised the wife that the husband signed the listing agreement to sell the Family Home for \$599,000 "as is, where is", as the Family Home was not fully finished, nor properly permitted for occupation.

[43] The husband continued to delay the sale by not delivering keys to the listing agent, who was unable to show the property until March 27, 2017.

[44] The husband did not provide the listing agent with the status of occupancy permits, and the wife searched the building file to learn that no inspections had been completed for the foundation, electrical, plumbing and final inspection, all of which the husband should have obtained as the contractor for his own house. The wife also discovered that there was no permit for the septic system for the log home. The husband took no steps to complete the permit requirements to improve the sale prospects for the Family Home.

[45] The first interested purchaser opened with an offer of \$585,000 on April 1, 2017, followed by a second offer by the same purchaser of \$595,000, which the wife wanted

to accept. The listing agent informed the wife that the permits needed to be finalized to assist purchaser financing, but that the husband informed her that he did not care if there was no equity in the Family Home or no way to sell it. This is corroborated by the uncontradicted evidence of D.B., who deposed in an affidavit that the husband said that he would not do anything to assist in the sale of the Family Home and would leave it unfinished to prevent it from being insured or sold.

[46] In addition to the lack of permits for the Family Home, the wife demanded a copy of the insurance policy on the Family Home. The wife was subsequently advised by the insurance company that the house insurance was cancelled in 2013, when the husband did not pay the renewal. The wife became very concerned when she discovered a lien on the Family Home arising from the default judgment of an unpaid supplier in the amount of \$23,117.63 and registered on December 4, 2015, and a default judgment of \$126,637.86 against the husband for his failure to complete a residential renovation contract. This larger lien was registered against the Family Home on April 12, 2017.

[47] In both lawsuits, and unlike his vigorous defence in *Energy North Construction v. Legacy Construction*, 2014 YKSM 1, the husband made no effort to contest the claims and permitted the default judgments to be granted and registered against the Family Home. The husband, in effect, had received a benefit of \$23,117.63 in business supplies on a residential renovations contract signed in July 2014. The husband also received cash payments of \$205,000.00 on a residential renovation contract, the total value of which was \$225,993.19 plus GST. He abandoned that contract in September 2015. The Statement of Claim for the breach was filed on December 12, 2016, the default judgment obtained on January 26, 2017, and the lien filed on April 12, 2017.

[48] I find that the husband deliberately stalled and delayed the sale of the Family Home, ordered to be listed for sale by November 30, 2016, so that his business debts would be registered against the Family Home and deprive the wife of her equity in it.

[49] The Family Home was ultimately sold to a friend of the husband for \$588,500, in a sale that closed on May 31, 2017.

[50] I find that the equity in the Family Home was reduced by the following conduct of the husband:

1. Failing to pay the property taxes owing during his occupancy in the amount of \$13,815.95;
2. Failing to pay mortgage payments, which caused the mortgagee to deduct \$2,822.30 from the wife's newly opened personal bank account, which was reimbursed by the husband in the amount of \$1,247.30, resulting in a loss of \$1,575 to the wife;
3. Depressing the sale price from the appraised value of \$632,000, by failing to secure proper inspections and permits, resulting in the sale of the property to the husband's friend in the amount of \$588,500, which is a loss of \$43,500;
4. Failing to contest or pay the supplier's lien of \$23,010.55; and
5. Failing to contest or pay the residential construction lien of \$126,637.86.

[51] I also find as a fact that the husband kept the lion's share of the household contents. The wife has valued these at \$25,750.00.

[52] Since the sale of the Family Home and the husband resuming possession as a renter to purchase from his friend, the wife states that an application to subdivide the

property into three 5-acre lots has been approved. That significantly increases the value of the property and could have been accomplished prior to the sale to the benefit of both the husband and the wife. This subdivision is corroborated by the evidence of D.B.

FAILURE TO DISCLOSE

[53] The husband has consistently stated that his residential construction business was slow in 2014 and 2015 and was negatively impacted by his hand injury. He has not filed income tax returns for 2014, 2015 and 2016.

[54] As I indicated in *KAM v. BMM*, 2015 YKSC 56, the husband did not file any financial documents until September 30, 2015, despite the Notice to File a Financial Statement on July 10, 2015, the Court Order of July 28, 2015, to produce financial documents, and the Court order on September 9, 2015, to produce financial documents.

[55] The husband's Financial Statement, while making partial disclosure, still did not provide full disclosure of the value of Legacy Construction. The husband provided a statement of his gross profit for the company for 2012 and 2013, but no supporting documents. As well, in his Affidavit #1 dated November 3, 2015, he stated at para. 14:

... my 2014 income taxes are being prepared by my accountant and I will file them with the Court when I have them.

[56] In other words, he at least has financial documents from 2014 in his control, but he is not prepared to copy them for the Court, despite two Court orders to do so. The husband's assertion that it is his bookkeeper's problem is not an excuse. He also has not produced his 2015 or 2016 tax returns.

[57] I repeat that the husband's business was given advance payments of \$205,000 in 2014 and 2015 on the residential construction project that ended in a judgment that was ultimately enforced against the Family Home in the amount of \$126,637.86.

[58] I am particularly disturbed by the allegations of the wife, which are supported by the uncontradicted evidence of D.B., that:

1. The husband does a lot of work for under the table "cash jobs" that are not done under Legacy Construction;
2. The husband continued to work on construction projects while on workers' compensation;
3. The husband worked on contracts for extra cash with an agreement that the Family Home would be sold before he received payment;
4. The husband does not enter into contracts for some of the lucrative work he performs.

[59] The husband also used the joint line of credit with the wife to buy a steel building for \$20,000 for re-sale. He made no effort to sell the steel building, and the Court ultimately granted the wife conduct of sale for the truck, camper and steel building in April 2017.

[60] The wife's income is as follows:

2014 – \$86,818

2015 – \$102,463

2016 – \$97,915

2017 – \$85,601

[61] She also has a government pension that was valued at \$93,303.53 at the date of separation.

[62] I conclude that the wife has been a credible witness and the husband has not been credible. The wife has been meticulous in accounting for the numerous assets retained and sold during this almost four-year saga to reach a fair division of family assets.

ISSUES

[63] There are 4 issues to be determined:

1. Should the husband and wife have joint custody of the children with a 50-50 sharing arrangement?
2. Should the income of the husband be imputed for child support purposes?
3. Should there be an unequal division of family assets and a compensatory payment from the husband to the wife?
4. Should the wife recover special costs against the husband?

ANALYSIS

Issue 1. Should the husband and wife have joint custody of the children with a 50-50 sharing arrangement?

[64] The husband and wife married in July 2003 and have two children, aged 14 and 11. The wife moved out of the Family Home on July 30, 2014, after an assault by the husband. She attended at the Whitehorse General Hospital, stayed at a hotel and then with a friend for one month. She stated the following about the assault in her affidavit filed on July 10, 2015:

4. I did not file a police report about the assault. I did consult several RCMP members about developing a

safety plan for myself, and I obtained information about what happens in the event that a charge is laid. I did not lay a charge because I was concerned that it would create a worse situation between [B.] and me. I was also concerned and that there would be a negative and lasting impact on our two Children. I was satisfied that the Children were not at risk. [B.]'s anger was directed to me.

5. This was the second time that I left the Family Home due to extreme marital dysfunction. The first time was in 2012. [B.] and I attended counseling in 2012 and [B.] quit drinking alcohol for approximately 2 years following our attendance at counselling.
6. I left the Family Home because, on the morning of July 30, 2014, I was afraid for my safety. On July 30, 2014 I did not feel that I had any options left but to leave.

[65] The husband has alleged that the wife has made many false allegations in both her affidavits in July 2015 but he has not specifically denied the assault.

[66] The wife was not able to rent suitable accommodation for the children until November 2014. She moved again on June 15, 2015, to another home that was centrally located for the benefit of the children. She had to accumulate second-hand furniture from family and friends and use what was included in the rental arrangement.

[67] The husband and wife have had joint custody of the children and have implemented a one-week/one-week rotation since September 1, 2014. This 50/50 sharing arrangement was confirmed in the July 28, 2015 court order.

[68] This custody arrangement indicates the parents have attempted to place the children first despite the dysfunctional marriage and financial turmoil. I do not suggest that the parenting of the children has been amicable.

[69] The wife has had difficulty obtaining her personal effects and required a court order to get access to retrieve her personal belongings on July 28, 2015. She has never been given access to the family computer for photographs and music.

[70] There was a major flare-up regarding the custody sharing arrangement which the wife set out in her affidavit filed November 15, 2017, in preparation for this hearing. The husband has not responded.

[71] In March 2017, the wife alleges an alarming incident, involving drug use and negligent gun use, when the children were in the husband's care. She decided to report two assault allegations against the husband to the RCMP and, on April 6, 2017, the RCMP filed an Information with two counts.

[72] The first count relates to a June 1, 2011 uttering threats incident and the second to the July 30, 2014 assault mentioned above. The husband entered into a Promise to Appear that included a clause that he not directly or indirectly contact or communicate with the wife or the children. He applied to have the clause deleted, and on May 19, 2017, the clause was changed to only apply to the wife. On September 22, 2017, Crown counsel directed a stay of proceedings, which the wife says reflects her request to drop the charges because of the stress of testifying and being further victimized.

[73] The husband's access to the children was prohibited from March 2017 to May 19, 2017. However, the husband and wife have since resumed their week on, week off sharing arrangement, but the wife remains concerned about the husband's personal life. In the circumstances, I am ordering that the husband and wife have joint custody of the children with the 50/50 sharing arrangement continuing with the husband's care and

control on the condition that he not consume alcohol or drugs during his week of access.

Issue 2. Should the income of the husband be imputed for child support purposes?

[74] I include in this issue the wife's claim for full child support during the March to October 2017 period, while she had more than 60% of custodial time. As this claim relates to the time following the filing of the Information referred to above, I do not think it is appropriate in the circumstances to change the existing child support order based upon the previous 50-50 sharing arrangement.

[75] The husband operated a residential and commercial construction business throughout the period of separation. The husband filed income tax returns for 2011, 2012 and 2013 which reflect Statements of Business Income in 2012 for \$87,814 and in 2013 for \$270,278.50. He has not provided any income tax returns for 2014, 2015 or 2016, despite court orders to do so. He states that he earned a profit of \$26,236 from Legacy Construction from January through to August 2015. He says that 2015 was a slow year for Legacy Construction, so he took a construction job with a friend in the summer of 2015, starting on August 14, 2015. He states that he broke his right hand while doing timber framing work on August 18, 2015. I note that this happened subsequent to the July 28, 2015 court order that imputed his annual income at \$150,000. The husband appeared in this court personally on August 11, 2015. He has provided no medical documentation of his injury or employment on that date, except for a letter dated September 3, 2015, from the Yukon Workers' Compensation Health and Safety Board stating that he started to work for his employer on August 14, 2015, and

was injured on August 20, 2015. He reported gross earnings of \$93,857.14 per annum based upon a 40-hour week at \$45 per hour. He indicates that his benefit was for a period of 90 days. There is evidence that he was able to go on several hunting trips, despite his injured hand.

[76] Section 19(1) of the Federal *Child Support Guidelines* provides that where a spouse is intentionally under-employed or unemployed or has failed to provide income information when under a legal obligation to do so, the Court may impute such amount of income to a spouse as it considers appropriate in the circumstances.

[77] I find that the husband has failed to disclose personal income tax returns and complete business income, thereby depriving the Court of the ability to verify his true income. He has also intentionally been under-employed in his own business. I conclude that his income should be imputed at \$150,000 for the calculation of his child support obligation in each of the years 2015, 2016, 2017 and going forward.

[78] Commencing January 1, 2018, based on the wife's 2017 income of \$85,601 and the husband's imputed income of \$150,000, the wife will pay monthly child support of \$1,206 to the husband and the husband will pay monthly child support to the wife in the amount of \$2,182. For the convenience of the husband and wife, the husband shall pay the set-off amount of \$976 per month to the wife commencing January 1, 2018, and continuing each month thereafter. The husband and wife shall share s. 7 expenses in proportion to their respective incomes with the husband paying 64% and the wife paying 36%.

Issue 3. Should there be an unequal division of family assets and a compensatory payment from the husband to the wife?

[79] The *Family Property and Support Act*, R.S.Y. 2002, c. 83 (the “FPS Act”), states the following with respect to unequal division of family assets:

Unequal division

13 The Supreme Court may make a division of family assets resulting in shares that are not equal if the Supreme Court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to

- (a) any agreement other than a marriage contract or a separation agreement;
- (b) the duration of the period of cohabitation under the marriage;
- (c) the duration of the period during which the spouses have lived separate and apart;
- (d) the date when property was acquired;
- (e) the extent to which property was acquired by one spouse by inheritance or gift;
- (f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, or use of property rendering it inequitable for the division of family assets to be in equal shares;
- (g) the date of valuation of family assets. (my emphasis)

[80] The proper procedure to determine whether an unequal division of family assets is appropriate is for the judge to decide whether an equal division would be unfair before considering a re-apportionment. See *Holmes v. Matkovich*, 2008 YKCA 10 at paras. 13-15. Under the *FPS Act*, the triggering date is the date of separation (s. 6).

[81] I also note the decision in *Narayan v. Narayan*, 2006 BCCA 561, in which the British Columbia Court of Appeal concluded that the dissipation of assets and material

non-disclosure are relevant circumstances to take into account in determining the trustworthiness of the evidence of the non-disclosing party and in making compensation orders.

[82] Below, I set out the value of the assets and debts of the husband and wife as I determine them to have been at the date of separation. I decline to consider the assets and debts associated with Legacy Construction. In particular, I will not consider the value of the tools and job trailer used by the husband in his business or the lines of credit utilized by Legacy Construction. I am including the value of the steel shop, as I understand that, while it was purchased for the use of Legacy Construction, it was financed through the family's CIBC joint line of credit. I am therefore ordering that the husband is solely responsible for the CIBC joint line of credit and that he shall indemnify the wife, should she be required to pay any amount of that debt in court action S.C. No. 17-A0050.

[83] Although the wife left the Family Home on July 30, 2014, the parties did not separate their finances until December 2014, and various assets have been sold by the wife since that time. Where I do not have information about the value of a particular asset or debt at July 30, 2014, I am determining its value based on the documentation I do have. Also, with the exception of \$35,000 that I am applying for household contents and vehicles and trailers owned by the Family, I am only considering those assets for which I have been provided documentation in the form of assessments, agreements, bills of sale or bank statements. I am also rounding numbers off for ease of calculation.

[84] The table also indicates in whose hands the assets and debts were held after the date of separation.

	Value	Wife	Husband	Notes
Asset				
Family home equity	\$211,760.00	\$105,880.00	\$105,880.00	Assessed value of \$632,000, less \$420,240.00 of mortgage owing at December 31, 2014, and see discussion below
Truck and camper	\$12,000.00	\$12,000.00		Sale price July 2017
Jeep	\$14,500.00	\$14,500.00		Sale price June 2015
Loose gem stones	\$520.00	\$520.00		Purchase price
Wife's pension	\$94,000.00	\$94,000.00		At July 30, 2014
Household items, including truck and trailer	\$35,000.00	\$1,000.00	\$34,000.00	Imputed based on affidavit evidence.
Steel shop	\$20,000.00		\$20,000.00	Purchase price
Asset Subtotal	\$387,780.00	\$227,900.00	\$159,880.00	
Debts				
CIBC Line of Credit	\$48,610.00	\$24,305.00	\$24,305.00	Balance owing December 1, 2014
CIBC Visa Infinite	\$6,310.00	\$3,155.00	\$3,155.00	Balance owing November 27, 2014
RBC Line of Credit (truck & camper)	\$3,220.00	\$3,220.00		Balance owing at date of sale
RBC Line of Credit (Jeep)	\$12,800.00	\$12,800.00		Balance outstanding December 1, 2014
Debt Subtotal	(\$70,940.00)	(\$43,480.00)	(\$27,460.00)	
Total	\$316,840.00	\$184,420.00	\$132,420.00	

[85] Using the numbers in the table, on an equal division, the parties would each be entitled to \$158,420.00. From the table above, the wife would nominally be required to make a transfer payment to the husband of \$26,000.00. However, that calculation completely disregards the fact that her equity in the family home was destroyed by the

husband. I find that he bears sole responsibility for any difference between the appraised value in April 2015, less the mortgage, and the actual amount recovered after sale, because of his conduct in failing to pay property taxes, falling behind on the mortgage payments and in allowing two liens to be registered against the property. Ultimately, the wife's recovery following the sale of the family home was just \$10,000.00, and, in my view, an equitable division of family property must reflect the fact that the husband deprived her of approximately \$95,000.00 through his conduct.

[86] As noted above, I am not considering Legacy Construction, either in terms of its assets or liabilities. Because of the husband's non-disclosure, I am unable to determine what the company's value is. It is entirely clear to me, however, that the husband has minimized his income from the company while at the same time allowing its liabilities destroy the wife's equity in the Family Home.

[87] In my view, this is a case where there should be an unequal division of the assets as they are calculated at the triggering date.

[88] In *Mular v. Lawrence*, 2014 BCCA 507, the Court was considering a similar situation, in which the conduct of the wife significantly diminished the value of the family home after the triggering event, which, in British Columbia, was the date of trial. There, the wife's conduct in refusing to complete the agreed sale of a matrimonial home was found to be "any other circumstances relating to the ... preservation [and] maintenance of property", given the subsequent depreciation in value of the property. I find the husband's conduct in this matter entirely analogous, such that it opens the door to an unequal division on the grounds of inequity.

[89] In *Mular*, the Court remedied the unfairness in the asset division by essentially allowing the husband to recover what he would have received had the house sale gone through when it was supposed to. Similarly, here, I find that an equitable asset division requires that the wife recover the \$95,000.00 that, but for the husband's failure to deal with the house in a fair and reasonable manner, she would have received.

[90] An equal division of the family asset and debts as calculated at the date of separation would be unfair and inequitable. I find that the wife is entitled to an additional \$95,000.00, as a result of the husband's failure to preserve and maintain the equity in the Family Home. An equitable division of property is as follows:

Total value of family assets	\$316,840.00
Equal division	\$158,420.00
Entitlement – wife (\$158,420.00 + \$95,000.00)	\$253,420.00
Net assets at separation – wife	\$184,420.00
Difference:	\$69,000.00
Entitlement – husband (\$158,420.00 - \$95,000.00)	\$63,420.000
Net assets at separation – husband	\$132,420.00
Difference:	(\$69,000.00)

[91] The husband shall make an equalization payment to the wife of \$69,000.00. He shall also indemnify the wife for any bank or business debt of the husband arising from Legacy Construction or in his personal name.

Issue 4. Should the wife recover special costs against the husband?

[92] Counsel for the wife applies for special costs throughout this proceeding. The application is based upon the following actions of the husband:

1. He has persistently refused to make full disclosure of his personal and corporate income despite repeated court orders;
2. He has failed to pay the mortgage on the Family Home and other debts on a timely basis, thereby severely damaging the wife's credit rating, which ultimately prevented her from purchasing a new residence while the father continued to reside in the Family Home; and
3. He deliberately permitted default judgments on his business debts to be registered as liens against the Family Home while he delayed the sale of it, thereby destroying the wife's equity in that asset.

[93] The applicable principles for an award of special costs are set out in *Brosseau v. Aurora Mines Inc.*, 2008 YKSC 18, at paras. 24 – 27:

[24] Special costs may be awarded, as a general rule, for reprehensible conduct during the course of litigation. In the recent decision in *Dockside Brewing Co. v. Strata Plan LMS 3837*, 2007 BCCA 183, the British Columbia Court of Appeal determined at para. 90 that:

“The authorities do not establish any rigid rule that would prohibit an award of special costs where pre-litigation conduct is “reprehensible” and warrants rebuke. As Lambert J.A. noted in ***Sun Life Assurance***, however, “special costs are usually awarded only in relation to misconduct during the course of the litigation itself.””

[25] The test for “reprehensible conduct” for an award of special costs is found in *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 at 311 (C.A.):

“The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and where the parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in

the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words “scandalous” and “outrageous” have also been used.” (my emphasis)

[26] The timing of the conduct was discussed in the *Sun Life Assurance Company of Canada v. Ritchie* (2000), 76 B.C.L.R. (3d) 93, 2000 BCCA 231 at para. 54 where Lambert J.A. stated:

“Special costs are usually awarded only in relation to misconduct in the course of the litigation itself. However, there may arise circumstances where special costs may be awarded because of the reprehensible conduct giving rise to the litigation, particularly where the fruits of the litigation do not provide any appropriate compensation in relation to the reprehensible conduct.”

[27] The circumstances which give rise to an award of special costs are varied but the following were considered in *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (B.C.C.A.):

1. improper allegations of fraud;
2. improper motive for bringing the proceedings such as imposing a burden on a weaker party;
3. improper conduct of the proceedings themselves;
4. material non-disclosure or misrepresentation;
5. obtaining an order without notice when the situation required notice.

[94] In *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.), at para. 23,

Cumming J.A. stated:

Special costs, or solicitor-and-client costs are therefore awarded when a court seeks to dissociate itself from some misconduct. Because the court is expressing its disapproval, the award must go beyond mere indemnity and enters the realm of punishment.

[95] In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.), the Court of Appeal indicated that the conduct in question must be

considered in its totality. In other words, when individual actions are considered, the conduct may not be reprehensible but a combination of factors may support the view that the conduct overall was reprehensible.

[96] Further in *Pierce v. Jivraj*, 2015 BCCA 188, the Court of Appeal confirmed that an award of special costs is to be used sparingly. In other words, not all forms of misconduct are reprehensible and there must be exceptional circumstances to make such a finding.

[97] In my view, the conduct of the husband deserves the rebuke of a special costs order, particularly as it is in a family law proceedings in which the legal costs incurred by the wife are attributable to the husband's reprehensible conduct. Similar to *Holmes v. Matkovich*, 2007 YKSC 5 (aff'd 2008 YKCA 10), the husband has failed to fully disclose his income and failed to produce his business income or provide an evaluation of the value of his construction business. Failure to disclose, particularly in family law proceedings, strikes at the heart of the civil justice system.

[98] Further, while having the benefit of occupying the Family Home, the father failed to pay the mortgage promptly, thereby negatively affecting the wife's credit rating. And finally, his failure to protect the Family Home from his business creditors has destroyed his wife's equity in the Family Home.

[99] Collectively, this misconduct is reprehensible and I therefore order that special costs consisting of the full fees and disbursements of the wife, less previous cost orders paid, be paid by the husband as both punishment for such misconduct and to indemnify the wife for the numerous court actions she had to bring.

CONCLUSION

[100] In summary, I make the following orders:

1. The wife and husband shall have joint custody of their two children with a week on/ week off sharing arrangement on the condition that the husband not consume alcohol or drugs during his care and control of the children;
2. The husband shall pay the wife all child support arrears;
3. Commencing January 1, 2018, the husband shall pay child support to the wife in the amount of \$2,182 per month based on the husband's imputed income of \$150,000 and the wife shall pay child support to the husband in the amount of \$1,206. This child support may be set-off so that the husband pays the wife a set-off of \$976 on the first of each month;
4. The husband and wife shall share s. 7 expenses in proportion to their income with the husband paying 64% and the wife 36%;
5. The husband shall make an equalization payment to the wife in the amount of \$69,000.00;
6. The husband shall indemnify the wife for any costs or expenses arising out of litigation involving the banking or business debts from the husband's business or Legacy Construction and the CIBC court action S.C. No. 17-A0050;
7. The husband shall pay special costs to the wife based upon her own legal fees and disbursements, less previous cost orders paid.

[101] The special costs may be determined in case management upon the wife producing the statements of account from her lawyer with all details of the services redacted.

VEALE J.