
CANADA / JUDGMENT

A.P.O. v. A.A.A.

2014 BCSC 1567

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1567 A.P.O. v. A.A.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.P.O. v. A.A.A.,

2014 BCSC 1567

Date: 20140818

Docket: VI 12-1383

Registry: Victoria

Between:

A.P.O

Claimant

And

A.A.A.

Respondent

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for A.P.O.:

C.L. Eames

A.A.A.:

In Person

Place and Dates of Trial:

Victoria, B.C.

March 24 - 27, 2014

Place and Date of Judgment:

Victoria, B.C.

August 18, 2014

INTRODUCTION

[1] The claimant, A.P.O., and the respondent, A.A.A., were married on August 29, 2009 in a Catholic ceremony in Victoria, BC. They separated in 2011. A.A.A. asserts that the parties married on November 20, 2002 in a traditional Igbo marriage. Both parties are originally from Nigeria and members of the Igbo tribe. A.P.O. seeks an unequal division of property in her favour and occupation rent while A.A.A. seeks spousal support.

ISSUES

[2] The issues are:

1. what was the nature and duration of the parties' relationship?
2. what are the family assets and how should they be divided?
3. should A.A.A. pay occupation rent?
4. should A.P.O. pay spousal support?
5. what arrangements should be made for the children?

EVIDENCE

[3] There is little consistency in the parties' versions of events, so I will review the evidence in some detail.

The Evidence of A.P.O.

[4] A.P.O. is 44 years old. She was born in Nigeria and is a Catholic. She moved to Canada in 1991, arriving first in Edmonton, AB. She married Mr. O. in 1991 and they had two boys, A.O. and E.O. Mr. O. died in 1996. On Mr. O.'s death, A.P.O. received payment of mortgage insurance which allowed her to satisfy the mortgage registered against their home. She also received life insurance of approximately \$50,000 and the Public Guardian and Trustee in Alberta holds additional insurance proceeds for her son A.O.

- [5] She sold the house which she owned with Mr. O. and bought a property at 259 Callingwood Place in Edmonton for \$101, 500 in October 1998. Initially there was a loan from the Royal Bank to finance part of that acquisition. She lived in that residence until 2000 when she bought another house.
- [6] The Callingwood Place property had an assessed value in 2013 of \$269,000. There are still charges of approximately \$189,000 registered against that property. She estimates the net equity at \$79,272. She has tenants in the property. A.A.A. has not lived at Callingwood and has not contributed in any way to the property.
- [7] The second property she purchased was 3035 - 134th Avenue, Edmonton. She purchased that property for \$138,900 with a combination of financing and insurance proceeds. She moved into the 3035 property in September 2000. She lived in that property until 2003. That property has an assessed 2012 value of \$334,000. She estimates the equity of that property at \$165,047. She also has tenants in that property. A.A.A. has not made a contribution of any kind to that property either. A.A.A. never lived in that house with her. He had his own residence.
- [8] She met A.A.A. through the Igbo community in Edmonton in late 2001. They began dating and got along well. She had a full-time job and he had a business at West Edmonton Mall. In 2002, approximately six months after they met, they would overnight together. She would stay at his house once or twice a month. Although he was separated, he was still legally married, though they were boyfriend and girlfriend. He did not want anyone to know they were dating. They had no financial relationship; no sharing of finances. They did not live together until 2009/2010 in Victoria.
- [9] Her children called him "Uncle T."; that is a term of respect in their culture. They were girlfriend and boyfriend until early 2003 when he was still not getting a divorce and she became involved with E.N.
- [10] She denied having a traditional marriage or other arrangement with A.A.A. in Nigeria in 2002.
- [11] She met E.N. in approximately 2001. He lived in a room in her basement and eventually they fell in love and started a sexual relationship in 2002. In June 2003, she married E.N before a Justice of the Peace in Edmonton. They were married until April 2007. In 2003 A.P.O. moved to Victoria with E.N. and the boys. A.A.A. and another friend, A.B., helped them move. A.A.A. then returned to Edmonton. They had a good relationship and he was good with her boys. After their marriage, they shared a bedroom. They divorced in April 2007 because he wanted to have more children and she did not. After their separation, he became involved with her sister, Chinyere.

- [12] A.P.O. separated from E.N. and again became involved with A.A.A. in late 2006. She received an engagement ring from A.A.A. in 2006. He indicated that his divorce was almost through and he wanted to be with her. She was living in Victoria at the time and he was living in Edmonton. They would see each other at Christmas and he would come to Victoria to visit. She was renting a townhouse. There was no sharing of expenses.
- [13] They got married on August 29, 2009 at St. Andrew's Cathedral in Victoria. He did not want his family involved and did not invite friends from Edmonton.
- [14] Until they were married, A.A.A. had been living in Edmonton. He arrived to Victoria three to four days before the wedding. He then returned to Edmonton in September. They bought a house together in Victoria, 803 Cecil Blogg Drive, so that he would have a place to move into and a place where he could bring his business assets. Up to that point she had been living in a three bedroom townhouse and could have continued to, except that he wanted something larger for his business materials.
- [15] The Cecil Blogg property was assessed at \$429,000 in 2014. She estimates the equity in the property at \$27,961.
- [16] She did not consider moving to Edmonton because he did not suggest it. She would have been prepared to move. He said that he had had a business before in Victoria. She made him no promises or demands that he move to Victoria.
- [17] She moved into their residence on Cecil Blogg in September 2009. He moved to Victoria in early 2010. He was supposed to move earlier but kept delaying. When he did relocate, he was unemployed for the first few months. He decided to pursue further education. She did not promise to support him financially while he got an education. A.A.A. contributed \$15,000 to the purchase of the residence, as did she. She continued to pay the mortgage and line of credit on her Edmonton properties. They set up a joint account to pay the mortgage on the Cecil Blogg property, but he made few contributions to that account. He might have paid one or two payments. She paid hydro and various other expenses.
- [18] In 2008 A.A.A. bought a 2007 Dodge Nitro. A.P.O. co-signed for the car loan. She was required to repay the car loan in order to obtain financing to purchase the Cecil Blogg property.
- [19] She moved out of the family home in November 2011 but they had been separated several months before, since perhaps late April.
- [20] They had agreed to sell the house. They were both going to move out. When she found a place to rent she told him, but he did not move out of the family home. She paid the mortgage and line of credit on the Cecil Blogg residence for one or two months after she moved out of the family home. She continues to pay the line of credit, even now. As of March 2014, there was an outstanding RBC line of credit on the Cecil Blogg residence in the amount of \$39,444.51 and an outstanding mortgage on the same property in the amount of \$361,598.15. She had been paying full property insurance on the property, but now just pays

fire and flood insurance of \$85 per month. A.A.A. rents out rooms in the house. She was not aware that he had been doing so and has not received any rental proceeds.

- [21] As set out above, as of March 2014, the line of credit sat at \$39,444.51. She borrowed an additional \$10,000 in January or February of 2012 and later another \$600.
- [22] She has an RESP for E.O. The government provides an amount to top up what she contributes. She has made all of the contributions, A.A.A. has made none.
- [23] When she moved to Victoria in 2003, A.A.A. did not move with her. He helped her move and then returned to Edmonton. A.A.A. did not stay to settle her in.
- [24] She did not marry E.N. as a marriage of convenience. He had a Visa which permitted him to come and go and he could renew the Visa.
- [25] A.P.O. is employed by Integra Support Services and has been for the past ten years. She earns approximately \$38,000 per year.

The Evidence of E.N.

- [26] E.N. is 44 years old and was born in Nigeria. He arrived in Canada on August 18, 2000. He is a Canadian citizen. When he arrived in Canada, he attended theology college in Edmonton. He planned to become a Catholic priest. He did not pursue that vocation. He is now a personal trainer and security officer. He was initially married to the claimant and she is now his sister-in-law. They met in 2000 and married on June 21, 2003.
- [27] A.P.O. was involved with A.A.A. when E.N. met her. Later that relationship ended. A.A.A. attended the wedding between E.N. and A.P.O. as a friend. E.N. and A.P.O. lived in Edmonton for a year after their marriage, then they moved to Victoria to start a new life. They hired a U-Haul truck which one of their acquaintances, A.B., drove. A.P.O. drove her van and A.A.A. came along to help them move. When they arrived at the residence in Victoria, A.A.A. slept in one room. E.N. and A.P.O. slept in their master bedroom and A.B. slept on a couch. E.N. and A.P.O. separated in January 2006 and were divorced on April 27, 2007. He had been getting pressure from his family to have children. A.P.O. said that she did not want to have children. E.N. asked if there was someone in her family whom he could marry. Ultimately, he married A.P.O.'s sister, Chinyere in 2008.
- [28] He did not need to marry A.P.O. to remain in Canada. He had a full Visa.

The Evidence of A.A.A.

- [29] A.A.A. testified that he met A.P.O. at cultural events in Edmonton. He was not able to marry at the time because he was married to J.R.
- [30] He testified that because he was not able to marry, the claimant asked that they have a traditional Igbo marriage ceremony. He said that their families met for the ceremony in Nigeria and that he and A.P.O. attended for an hour at a time by telephone. A.A.A. could not explain the discrepancy that his notice of counterclaim stated that this ceremony took place

on October 15 in contrast to his testimony that it took place on November 20, 2002. He said that as a result of this ceremony, they were committed to each other. There was no licence obtained for the Nigerian ceremony and there are no documents to reflect the arrangement.

- [31] He said that they did not invite anyone to celebrate the traditional marriage in Edmonton, although he and A.P.O. did put on traditional Nigerian clothing for the event.
- [32] Despite the ceremony, he and A.P.O. maintained two separate residences. They spent most of their time at her residence. He did not make direct financial contribution to either of her Edmonton properties.
- [33] She had a tenant by the name of E.N. who lived in the basement of her residence. His Visa was expiring and he and A.P.O. got married in 2003 to permit him to remain in Canada. The plan was that he would ultimately be divorced from A.P.O. and that he would marry A.P.O.'s sister and bring her to Canada from Nigeria.
- [34] He said that in June 2003, A.P.O., E.N., himself and a friend, A.B., as well as A.P.O.'s two sons travelled to Victoria. He said that he and A.P.O. were moving to Victoria with her sons. He ensured that they had a residence and that the boys were in school before he returned to Edmonton. He said that he stayed for three months in Victoria and while he was there, he shared the master bedroom with A.P.O. E.N. slept in a separate room.
- [35] He said that he travelled back and forth between Edmonton and Victoria to be with his family. In 2009 he married A.P.O. at a Catholic ceremony at St. Andrew's Cathedral in Victoria.
- [36] In 2008 he purchased a Dodge Nitro and A.P.O. co-signed for that loan.
- [37] In 2009 A.P.O.'s sister became very ill with cancer in India and A.P.O. went there to help her. A.P.O. had no one to take care of the two boys in Victoria and insisted that A.A.A. move to Victoria. If she hadn't insisted, they would have continued their long distance arrangement. He left his job in Edmonton on very short notice. A.P.O. promised to help him obtain training in Victoria if he moved to Victoria and said that her property would be his property.
- [38] While she was in India he took care of the boys, paid the mortgage and all of the bills. Even while he lived in Edmonton he sent mortgage payments to A.P.O. Most of his contributions were made while he was in Victoria, in cash. He would give her monthly payments, half of the groceries, etc. and she would pay the bills.
- [39] In 2011, A.P.O.'s nephew, V., was arrested on immigration charges. The claimant was upset and for some reason blamed A.A.A. In September 2011 her brother J. came to Victoria and stayed for ten days. J. threatened A.A.A. and insisted that the marriage was at an end. J. said that A.A.A. was to stay in the house and his sister would move out.

- [40] A.A.A. said that he started to panic that he would be left alone in the house so he advertised for tenants. A.P.O. moved out by November 30, 2011. Sometime in January 2012, she arrived at the property and threatened him again, telling him that she would kill him.
- [41] A few weeks later he received notice that she was seeking a divorce.
- [42] He currently has three tenants, each paying \$450 per month. From time to time, he has had four tenants, each paying \$450 per month.
- [43] In cross-examination, he acknowledged that he was married to J.R. from 1997 to 2009. He said that he began dating the claimant in 2001 when he was still married but separated from J.R. His residence was at 18123 - 87A Avenue in Edmonton. After they started dating they would sometimes stay at each other's residence. He said that this happened more frequently than the claimant said; he said that they would spend five to six nights per week together. They had belongings at each other's residences. He confirmed that he did not contribute financially to her properties. He did contribute to groceries, birthday presents, etc.
- [44] He said that from 2003 onwards, he regarded Victoria as his home. He denied that his relationship with A.P.O. ended in 2003. He insisted that he too moved to Victoria in the summer/fall of 2003 and that he maintained two residences; one in Victoria and one in Edmonton. He could not remember if he provided money to her for her rental home in Victoria between 2003 and 2009. He considered Victoria his home although he did not have MSP, etc. in British Columbia. He said that their relationship was a long distance one until he could settle down in Victoria. He said that they did not have much contact in 2005 while he reorganized his business.
- [45] With respect to A.P.O.'s two properties in Edmonton, he said that he did not contribute financially but would occasionally go by to check on the properties. He confirmed that a management company looked after rent and maintenance of the properties. He said that he did buy some things like paint and light bulbs.
- [46] He denied that they separated in April 2011, while they remained in the same residence. He denied that A.P.O. asked him to move out of the family home in 2011.
- [47] From 2005 until January 2010, A.A.A. worked full-time as a security officer in Edmonton, earning approximately \$35,000 per year.
- [48] After he moved to Victoria, he started studying at Camosun College. He has attended Camosun over several years, initially taking a practical nursing course for 20 months starting in May 2012. He was not able to complete that course. He then enrolled in a health care attendant course. He received a letter from Camosun that he had not been able to meet the requirements of the health care attendant's course. He is currently enrolled at Camosun taking courses in mental health. The mental health program in which he has been enrolled since September 2013 runs to June 2015 and has classes nine hours per week. He is only able to work one day per week for 8 hours at Paladin Security while taking these courses. In the summer, he would be able to work 30 hours per week. He earns \$12.25 per hour at Paladin.

In 2013, he had employment income of \$10,443.98 and rental income from the tenants of \$7,717.81.

- [49] He acknowledged that he and A.P.O. maintained separate bank accounts. They had a joint account that was set up to pay the mortgage over the Cecil Blogg property. He said that A.P.O. did not pay the mortgage and the line of credit; rather, he says that he sent 50% from Alberta. He did not pay it into the joint account that had been set up because he didn't know the details of that account.
- [50] He acknowledged that he did not make deposits to the RESP.
- [51] He acknowledged that he has removed funds from the line of credit to pay the mortgage. He said that he used funds from the tenants to pay hydro, television, internet, telephone, etc.

DISCUSSION

What was the nature and duration of the relationship?

- [52] I am not persuaded that there was a traditional Nigerian form of marriage which was performed in 2002. There is no documentation to support such an event and I find A.P.O. to be more credible than A.A.A. on this point.
- [53] Even if a traditional marriage were performed, it would not be a legal marriage in Canada. In 2002, the parties were domiciled in Alberta so legislation from that province applies. The Marriage Act, R.S.A. 2000, c. M-5 as in force in 2002, defined marriage in s. 1 as "a marriage between a man and a woman". The wording is singular and therefore does not allow for more than one spouse at a time. At the time of the traditional marriage, A.A.A. was still legally married to J.R. Accordingly, he could not legally marry another wife.
- [54] Indeed, I do not understand A.A.A. to argue that the traditional form of marriage was a legal marriage for Canadian purposes. Rather, I understand him to argue that the parties were in a committed relationship from that point forward and that this commitment should be recognized for the purposes of spousal support and division of property.
- [55] I do not accept that A.A.A. and A.P.O. were in a committed relationship from 2002 onward. I prefer A.P.O.'s evidence that A.A.A. was not proceeding with his divorce of J.R. and that she became disenchanted as a result. Although they dated and spent some nights at each other's homes, this ended in 2002.
- [56] There is no doubt that she was married to E.N. from 2003 until 2007. A.A.A. is adamant that this was a sham marriage set up for immigration purposes only. The evidence of E.N. and A.P.O. of the details of their relationship is not consistent. Indeed, their stories are at odds to such an extent that I place no reliance on A.P.O.'s marriage to E.N.
- [57] However, I am satisfied that A.P.O. was not in a committed relationship with A.A.A. from 2003 to 2006. A.A.A.'s explanation for the family move to Victoria makes no sense. By his evidence, he had no intention of moving to Victoria at any particular time. Even when he

moved in January 2010, he did so only at A.P.O.'s insistence. It makes no sense that he and A.P.O. would decide to start a new life in 2003 and discuss various places to move, ultimately deciding on Victoria, but that he would not join her and have no intention of joining her at any particular time. Her evidence of the marriage and their intent that he should move to Victoria after he arranged his affairs in Edmonton makes sense and I accept it.

- [58] I also accept A.P.O.'s evidence that the marriage was not successful from the start. I accept that by April 2011 they were living separate and apart, although in the same residence. I also accept that she asked A.A.A. to leave the family residence because it would be easier for him to move out than for her and the boys to move out and that she only moved out when he persuaded her that he too would move out and they could sell or rent the family home. A.P.O.'s evidence makes sense, while A.A.A.'s evidence is at odds with human experience.
- [59] A.A.A. argues that they did not separate until September 2011 and only at the insistence of A.P.O.'s brother, J. He said that he was blamed for her nephew V's deportation and that as a result he received threats from A.P.O.'s family and that A.P.O.'s brother J. insisted that the marriage was at an end and that she would move out of the family residence.
- [60] I am not persuaded that the marriage ended as A.A.A. suggests. If A.P.O.'s brother wanted the relationship terminated because the family blamed A.A.A. for V's deportation, it would be likely that A.P.O.'s family would insist that A.A.A. move out. Instead, he has had the benefit of the residence since November 2011 and has received income from the tenants from that date forward. By contrast, A.P.O. has paid rent throughout this period.
- [61] A.A.A. called M.P. to support his evidence of threats, etc. which ended the marriage. I did not find M.P.'s evidence helpful. He had no direct evidence of threats against A.A.A. and could only say that the marriage appeared happy to him during his visit in 2010.
- [62] I am satisfied that the parties were in a committed relationship from 2006 to April 2011, although they maintained separate residences and did not share expenses until their marriage in August 2009. They did not live together in a marriage like relationship until they were married in 2009.

What are the family assets and how should they be divided?

- [63] Pursuant to s. 252(2)(b) of the Family Law Act, S.B.C. 2011, c. 25, [FLA] which came into force on March 18, 2013, proceedings respecting property division started under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] must be continued under the FRA (see also *Cochrane v. Cochrane*, 2013 BCSC 2114 at para. 16).
- [64] I am satisfied that all of the major assets are family assets, including the Alberta properties, the RESP accounts, A.P.O.'s Saturn vehicle and A.A.A.'s Dodge Nitro.
- [65] The presumption is that family assets are divided equally and the presumption may only be displaced if equal division would be unfair: s. 56(1) of the FRA; *Pasch v. Blackmore*, 2011 BCCA 420 at para. 15.

- [66] A.P.O. argues that equal division would be unfair in this case having regards to the factors set out in s. 65(1) of the FRA.
- [67] A.P.O. acknowledges, correctly, that the net proceeds that she receives from the rent from the Alberta properties are used for family purposes. Accordingly the properties are family properties. She says, and I agree, that 100% of those properties should be reapportioned to her. She acquired them with insurance proceeds which she received on the death of her first husband. She has paid all of the mortgage payments, expenses, etc. for those properties. She acquired them to provide one for each to her children. I do not accept A.A.A.'s evidence that she told him that he would be entitled to half of those properties. Applying the provisions in s. 65(1) of the FRA, specifically, the relatively short duration of the marriage, the period during which the parties have lived separate and apart, the fact that A.P.O. acquired the properties a number of years prior to the marriage in part using insurance proceeds and the fact that A.P.O. hired and paid a management company to look after the properties, I reapportion those properties entirely to A.P.O.
- [68] Similarly, her Saturn Vue was acquired in September 2011, after the vehicle that she had been driving was destroyed in a motor vehicle accident. The vehicle which was destroyed was acquired with monies provided to her as a gift from her brother in Spain. The Saturn Vue will be apportioned 100% to A.P.O., pursuant to the factors set out in s. 65(1) of the FRA.
- [69] I am also satisfied that A.P.O. paid the majority of the expenses relating to the acquisition and maintenance of the matrimonial home from 2009 until November 2011. They each contributed \$15,000 to acquire the house. She has continued to pay the line of credit which is secured against the house. A.A.A. has made mortgage payments by drawing down the line of credit. I agree with her submission that pursuant to the factors set out in s. 65(1) of the FRA, the residence should be apportioned in her favour, 70% and 30% to A.A.A. She has contributed more to the acquisition and maintenance of the residence.
- [70] Although A.A.A. asserts that he made contributions to the mortgage and household expenses, he has no records to support this assertion. He says that he gave cash to A.P.O. He says that he sent cash while he was living in Edmonton. Surely he would simply have made deposits to the joint account that they set up for the mortgage payments. He says that he did not know the details of that account. If that were true, he could easily have obtained that information from A.P.O. Again, his evidence does not accord with common experience. I prefer the evidence of A.P.O.
- [71] With respect to the RESP held in the name of A.P.O., she has contributed to this account, A.A.A. has not. A.P.O. has accumulated the RESP for the benefit of her son E.O. Again, considering the factors set out in s. 65(1) of the FRA, the RESP will be allocated 100% to A.P.O.

[72] With respect to A.A.A.'s Dodge Nitro, as he acknowledges, the car was used for family purposes. A.P.O. retired the debt in 2009, as part of the financing to acquire the residential home. A.A.A. made the payments on the car from 2008 until September 2009. I do not accept his evidence that he made any payments on account of the car loan after September 2009. I will not reapportion the Dodge Nitro vehicle. Pursuant to s. 56 of the FRA, the presumption of equal division stands and it will be apportioned between the parties, 50% to each.

Should A.A.A. pay occupational rent?

[73] A.P.O. seeks occupation rent, saying that she was effectively ousted from the residence. Madam Justice D. Smith recently set out the law on occupation rent in concurring reasons in *Shen v. Tong*, 2013 BCCA 519. The objective of an award for occupation rent is to do what is just and equitable between the parties: *Shen* at para. 94. The Court of Appeal has made it clear that occupation rent is not a stand-alone claim under the FRA, rather it is generally assessed in the context of a reapportionment under s. 65(1) of the FRA: *Shen* at para. 91. Further, factors that may be considered in a claim for occupation rent include whether child and/or spousal support was being paid by the non-occupying spouse: *Shen* at para. 94. I have considered occupation rent in conjunction with the division of property and A.A.A.'s claim that A.P.O. pay spousal support.

[74] A.P.O.'s submissions on occupation rent are predominantly related to arguments that she was ousted from the matrimonial home. However, there are a number of factors that may be considered in granting an award for occupational rent. As stated by D. Smith J.A. in *Shen*:

[94] A non-exhaustive list of potentially relevant factors in assessing a claim for occupation rent includes: (i) whether there has been ouster (although several authorities have indicated that this is not a requirement); (ii) whether children are residing with the occupying spouse; (iii) whether the occupying spouse has made a claim for contribution from the non-occupying spouse for the expenses related to the premises; (iv) whether child and/or spousal support was being paid by the non-occupying spouse; (v) whether the occupying spouse increased the selling value of the property; (vi) the duration of the occupancy; and (vii) any other competing claims: *Oyama*; *Casey v. Casey*, 2013 SKCA 58, 417 Sask. R. 34; *Griffiths v. Zambosco* (2001), 54 O.R. (3d) 397 (C.A.); *J.A.H. v. R.H.*, 2005 BCSC 1713, [2005] B.C.J. No. 2667; *Donovan*; and *Carmichael v. Carmichael*, 2005 NSSC 318, 238 N.S.R. (2d) 195. The objective of an award for occupation rent is to do what is "just and equitable" between the parties, albeit within the parameters of s. 65(1) of the FRA: *Stasiewski v. Stasiewski*, 2007 BCCA 205, 67 B.C.L.R. (4th) 81 at para. 33.

[75] I have considered the above factors in addition to A.P.O.'s claims that she was ousted from the matrimonial home. Although I accept A.P.O.'s evidence that it was unpleasant for her and her sons to live in the residence and that she moved out of the residence as a result, I do not agree that this constitutes ouster. A.P.O. does not suggest that there were threats of violence or that A.A.A. forced her out of the residence. She certainly could have sought an order for exclusive occupancy, should she have wished. She did not do so and I am not

satisfied that she was ousted from the property. I will not make an order for occupation rent.

- [76] As to rental income, A.A.A. has used the property to generate income, earning approximately \$7,700 per year. He has apparently paid certain expenses for the residence and has used the proceeds as his income. A.P.O. has had the benefit that she has not had to pay spousal support which she may otherwise have been required to pay. Accordingly, I will not order that A.A.A. compensate A.P.O. for this income.
- [77] A.P.O. seeks an order for exclusive occupancy of the family home and an order for exclusive conduct of sale. She also asks that A.A.A. give notice to the tenants to vacate the property.
- [78] I will order that A.P.O. have exclusive conduct of sale of the matrimonial home. She will be in a position to give notice to the tenants. If A.A.A. does not cooperate with respect to listing and showing the home, A.P.O. may apply to have A.A.A. vacate the property. In the meantime, he will be permitted to continue to reside in the property.

Should A.P.O. pay spousal support?

- [79] A.A.A. seeks spousal support for five years pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.) and the FRA. Before I assess the merits of the claim, it is important to note that unlike the division of property, where the transition provisions set out in the FLA state that the FRA applies to property division, there are no similar provisions for spousal support. Accordingly, though this action was started prior to the coming into force of the FLA, since March 18, 2013, the FLA applies rather than the FRA to spousal support: *L.J.R. v. S.W.R.*, 2013 BCSC 1344 at para. 37; *Ross v. Ross*, 2013 BCSC 1716 at para. 74. However, the Divorce Act, as federal legislation, is paramount: *D.R.K. S.G.G.*, 2013 BCSC 2107 at para. 13. Accordingly, I assess A.A.A.'s claims under the Divorce Act.
- [80] Before he moved from Edmonton, A.A.A. was working as a security guard, earning \$35,000 per year. He still works as a security guard while taking courses. He says that he is not able to earn as much in Victoria as he could in Edmonton. He says that A.P.O. promised to support him while he retrained if he moved to Victoria. He says that he has been prejudiced by the move. He says that A.P.O. earns approximately \$90,000 per year, though he has not provided any documentation to substantiate that claim, while he earns approximately \$20,000.
- [81] A.P.O. says that she earns \$38,000 from her employment with Integra Support Services. Although she rents the properties in Edmonton, she has very little net income and no consistent income from these properties.

- [82] She argues that A.A.A. is not entitled to spousal support. She says that he has not lost any economic opportunities or disadvantages as a result of the marriage. She says that while he is earning less than he did before, this is his choice. He continues to attend Camosun College, now in his third program, having failed at two earlier programs. She says he could be working full time, but chooses not to. Finally, she says that she did not agree to support A.A.A. if he moved to Victoria.
- [83] The Divorce Act sets out factors which must be considered in making a spousal support order (s. 15.2(4)) as well as objectives of a spousal support order (s. 15.2(6)). I agree with A.P.O.'s submissions. This was a very brief marriage, two years (s. 15.2(4)(a)). A.A.A. has not been disadvantaged by it (s. 15.2(6)(a)). He is able now, as he was before he moved to Victoria, to work full time as a security guard. I do not accept his evidence that A.P.O. agreed to support him if he moved to Victoria. A.P.O.'s circumstances are not significantly better than his (s. 15.2(6)(a)). A.P.O. also supports her two sons.
- [84] A.A.A. is not entitled to spousal support pursuant to the Divorce Act or, in the alternative, under the Family Law Act.

What arrangements should be made for the children?

- [85] A.P.O. asks for sole custody and guardianship of the children. This is not opposed and I will make that order. A.P.O. also sought child support in her pleadings, but this was not pursued at trial.

CONCLUSION

- [86] The parties will be granted an order for divorce to take effect 31 days from the date of these reasons pursuant to s. 12(1) of the Divorce Act.
- [87] The family home will be sold as set out above, and the charges against the property will be paid from the proceeds of sale. Should any issues arise with respect to conduct of sale, or distribution of proceeds following sale, the parties may seek direction from the court. The parties may appear before another judge if I am not available.
- [88] A.P.O. has provided a schedule of property and debt. The assets and debts will be divided as contemplated in that schedule, with the exception of the Dodge Nitro, which is apportioned equally between the parties.
- [89] A.P.O. has been successful in the action and will have her costs at scale B.

"The Honourable Madam Justice B.J. Brown"

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