
CANADA / JUDGMENT

Boyd v. Foster

2019 BCSC 901

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Supreme Court of British Columbia

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2019 BCSC 901 Boyd v. Foster

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boyd v. Foster,

2019 BCSC 901

Date: 20190606

Docket: E51785

Registry: Vernon

Between:

Shawna Lee Boyd

Claimant

And

Kevin Jason Foster

Respondent

Before: The Honourable Madam B.J. Brown

Reasons for Judgment

The Claimant, Appearing on her own behalf:

S. Boyd

Counsel for Respondent:

C.L. Walker

Place and Date of Trial:

Vernon, B.C.

October 2-5, 2018

November 29-30, 2018

Place and Date of Judgment:

Vernon, B.C.

June 6, 2019

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[1] Ms. Boyd seeks spousal support and division of family property and debt. She says that the parties were in a marriage-like relationship from November 1, 2011 until July 2, 2017.

[2] Mr. Foster denies that they were in a marriage-like relationship throughout this period. He says that the parties separated several times for prolonged periods. He agrees that they finally separated on July 2, 2017.

Background

- [3] Ms. Boyd and Mr. Foster knew each other when they were in high school. However, they had not seen each other for several years until they met at a wedding in August 2011. Mr. Foster is 48 years old. Ms. Boyd is 44 years old. They were each in the process of separating/divorcing their spouses. They began dating.
- [4] Mr. Foster lived in Armstrong, B.C., and operated his heavy duty mechanical business, Kevin Foster Mechanical Ltd. ("Kevin Foster Mechanical"). He owned a farm that he had purchased in June 2000. He used his shop on the farm to do his mechanical work.
- [5] Ms. Boyd lived in Lethbridge, Alberta, with her two daughters. She had an insurance business there.
- [6] On October 27, 2011 Mr. Foster was struck from behind while he was driving a large service truck used for work. Mr. Foster sustained physical injuries. He called Ms. Boyd and asked if he could come to stay with her in Lethbridge. She agreed. She says that that was the beginning of their marriage-like relationship. He disputes this.
- [7] From November 2011 until October 12, 2012 Mr. Foster travelled back and forth between Lethbridge and Armstrong. When he was in Armstrong he lived on his farm. When he was in Lethbridge he stayed with Ms. Boyd.
- [8] He travelled to British Columbia for medical treatments. He also continued to operate his business. He had customers who knew and trusted him and he was able to make arrangements to have assistants do the physical mechanical work for him.
- [9] However, Mr. Foster was having financial difficulties. He decided to rent the two houses on his farm property from the fall of 2012 for two years. He left some things in his outbuildings, his shop and his parent's basement. In October 2012 he took his bed, hot tub, skid-steer and tools with him to Lethbridge.
- [10] Ms. Boyd and her daughters moved with Mr. Foster to the Armstrong home in July 2014. They were able to move into the main house on his farm. Ms. Boyd enrolled in correspondence courses at Okanagan College to prepare her to become a certified public accountant. Ms. Boyd sold her home in Lethbridge. Mr. Foster helped her to prepare it for sale.
- [11] Ms. Boyd and Mr. Foster had a volatile relationship. Ms. Boyd would leave the residence from time to time, sometimes for a matter of days, sometimes weeks, sometimes months.
- [12] In March 2017 Mr. Foster sold the farm and they bought a property in Falkland, B.C. Ms. Boyd and Mr. Foster moved to the Falkland home together. Mr. Foster hired contractors and spent more than \$90,000 on improvements to the property, making a larger shop, etc. to accommodate his business.

[13] In July 2017 Ms. Boyd moved out of the Falkland property and the parties agree that was the end of their relationship. Mr. Foster has remarried.

Issues

[14] The issues in this case are:

1. Were the parties in a marriage-like relationship as defined by s. 3 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] such that Ms. Boyd can maintain a claim?
2. If so, what is the value of family property and family debt?
3. Should the property be unequally divided?
4. Is Ms. Boyd entitled to spousal support?
5. If so, in what amount?

Were the Parties in a Marriage-like Relationship?

[15] A spouse has a right to an undivided half interest in family property pursuant to s. 81 of the FLA.

[16] The criteria to be considered in determining whether the parties were spouses was discussed by this court in *Ashton v. Hales*, 2017 BCSC 1928:

Law on Marriage-Like Relationship

[24] Section 3 of the FLA provides:

3. (1) A person is a spouse for the purposes of this Act if the person
 - (a) is married to another person, or
 - (b) has lived with another person in a marriage-like relationship, and
 - (i) has done so for a continuous period of at least 2 years
- (3) A relationship between spouses begins on the earlier of the following:
 - (a) the date on which they began to live together in a marriage-like relationship;
 - ...
- (4) For the purposes of this Act,
 - (a) spouses may be separated despite continuing to live in the same residence, and
 - (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and

(ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

[25] In *Austin v. Goerz*, 2007 BCCA 586, the Court of Appeal reviewed the legislative history of "common-law spouses" in "marriage-like relationships" as follows:

[57] Apposite is the more recent decision of the Supreme Court of Canada in *M. v. H.*, [1999] 2 S.C.R. 3, which concerned that portion of the definition of "spouse" in the Family Law Act, R.S.O. 1990, c. F.3, conferring certain rights on either a man or woman who are not married to each other but who live together in a "conjugal relationship." In discussing the requirements of conjugal (i.e., marriage-like) relationships, Cory J. indicated that while financial dependence is a factor it is but one of many to be considered:

59. *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal". [Emphasis added in *Austin v. Goerz*, 2007 BCCA 586.]

[58] It is understandable that the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like. This is because equally there is no checklist of characteristics that will invariably be found in all marriages. In this regard I respectfully agree with the following from the judgment of Ryan-Froslic J. in *Yakiwchuk v. Oaks*, 2003 SKQB 124:

[10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property - in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together - others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more

difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist. [Emphasis added in *Austin v. Goerz*, 2007 BCCA 586.]

- [59] *Yakiwchuk v. Oaks* was followed in *Ruskin v. Dewar*, 2003 SKQB 514, 48 R.F.L. (5th) 123, varied 2005 SKCA 89, 23 R.F.L. (6th) 310. In that case, the trial judge found that the parties had cohabited as "spouses" notwithstanding a lack of intermingling of finances: paras. 36 - 40. This aspect of the decision was unanimously upheld on appeal: paras. 31, 32, 113, 114.
- [60] For these reasons, I conclude that financial dependence is not a necessary aspect of a "marriage-like relationship." How the parties arrange their financial affairs is but one factor to be considered.
- [26] *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) (QL), addresses the characteristics of a marriage-like relationship as follows:
- [16] I propose to consolidate the statements just quoted by considering the facts and circumstances of this case with the guidance of a series of questions listed under the seven descriptive components involved, to varying degrees and combinations, in the complex group of human inter-relationships broadly described by the words "cohabitation" and "consortium":
- (1) SHELTER:
 - (a) Did the parties live under the same roof?
 - (b) What were the sleeping arrangements?
 - (c) Did anyone else occupy or share the available accommodation?
 - (2) SEXUAL AND PERSONAL BEHAVIOUR:
 - (a) Did the parties have sexual relations? If not, why not?
 - (b) Did they maintain an attitude of fidelity to each other?
 - (c) What were their feelings toward each other?
 - (d) Did they communicate on a personal level?
 - (e) Did they eat their meals together?
 - (f) What, if anything, did they do to assist each other with problems or during illness?

(g) Did they buy gifts for each other on special occasions?

(3) SERVICES:

What was the conduct and habit of the parties in relation to:

- (a) Preparation of meals,
- (b) Washing and mending clothes,
- (c) Shopping,
- (d) Household maintenance,
- (e) Any other domestic services?

(4) SOCIAL:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

(5) SOCIETAL:

What was the attitude and conduct of the community towards each of them and as a couple?

(6) SUPPORT (ECONOMIC):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

(7) CHILDREN:

What was the attitude and conduct of the parties concerning children?

To the foregoing must be applied the following caveat of Mr. Justice Blair in the Warwick case (supra):

"The extent to which the different elements of the marriage relationship will be taken into account must vary with the circumstances of each case."

[27] In *Weber v. Leclerc*, 2015 BCCA 492 (leave to appeal ref'd [2016] S.C.C.A. No. 19), the Court of Appeal said this about marriage-like relationships:

- [23] The parties' intentions -- particularly the expectation that the relationship will be of lengthy, indeterminate duration -- may be of importance in determining whether a relationship is "marriage-like". While the court will consider the evidence expressly describing the parties' intentions during the relationship, it will also test that evidence by considering whether the objective evidence is consonant with those intentions.
- [24] The question of whether a relationship is "marriage-like" will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was "marriage-like".
- [25] Ms. Leclerc argues that approaches like that taken in *Molodowich v. Penttinen* are nothing more than "checklists", and do not adequately analyse the nature of a relationship. While I agree that a checklist approach is not appropriate, it is my view that cases like *Molodowich* are helpful as indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship.
- [28] In *Gostlin v. Kergin* (1986), 1 R.F.L. (3d) 448 (B.C.C.A.) (CanLII), the Court of Appeal considered the definition of spouse in the Family Relations Act, R.S.B.C. 1979, c. 121, s. 1:

"Spouse" means a wife or husband and includes ... a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

- [29] The Court of Appeal addressed the purpose of the legislation and stated at 5-6:

The purpose of the legislative scheme is to impose on an unmarried couple the same obligations under s. 57 as are voluntarily undertaken by a married couple. So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of s. 57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife.

Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other, more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependant on the other, in accordance with a mutual arrangement.

All those questions, and no doubt others, may properly be considered as tending to show whether a couple who have lived together for more than two years have done so with the permanent mutual support commitment that, in the relevant sense of the Family Relations legislation, constitutes living together as husband and wife.

- [17] Mr. Foster asserts that the parties were never in a marriage-like relationship, but if they were they did not have a marriage-like relationship continuously for a period of two years that is not statute barred, i.e., any relationship they had ended prior to August 2015 and later relationships would not qualify because the parties separated July 2, 2017.
- [18] There is no doubt that the parties had a tumultuous relationship. Ms. Boyd would leave their household, sometimes for days at a time, sometimes for months at a time. The issue is whether there was a marriage-like relationship and if so, whether it came to an end on any of the occasions when Ms. Boyd left the home.
- [19] I did not find Mr. Foster to be a credible witness with respect to whether the parties were in a marriage-like relationship. He had a tendency to minimize or distort their relationship, even when they were living under the same roof, enjoying a sexual relationship and acting as a committed couple before their friends. For example, Mr. Foster acknowledges that in October 2012 he moved his bed, hot tub, skid-steer and tools with him to Lethbridge. He maintains that he did so only because it was convenient.
- [20] I do not accept that Mr. Foster would lease his farm houses in Armstrong for two years and move large items such as a hot tub to Lethbridge unless he believed that he was in a marriage-like relationship.
- [21] I prefer the evidence of Ms. Boyd, Mr. Squires and Ms. Burton as to the parties' relationship from November 2011 through to June 2014. Mr. Squires and Ms. Burton were friends of Ms. Boyd in Lethbridge. They saw Ms. Boyd and Mr. Foster frequently. They became good friends with Mr. Foster. Mr. Foster was Mr. Squires' best man when he married Ms. Burton in December 2014. They testified that Mr. Foster and Ms. Boyd were in a loving relationship, and that they appeared as husband and wife. Mr. Foster attended regular Friday nights after soccer as well as many other events with Ms. Boyd, Mr. Squires, Ms. Burton and their friends.
- [22] I also accept the evidence of Kenzie Nieuwenhuis that she was approximately 11 years old when Mr. Foster came to live with them. Initially he was there for periods of about a week and then was there more regularly. He brought his dog and left the dog with them, even though he would travel back to Armstrong from time to time.
- [23] I accept Ms. Boyd's evidence that following Mr. Foster's serious motor vehicle accident in October 2011 he moved into her residence in Lethbridge. He would travel back to Armstrong for some work, for medical appointments and to see his children but Ms. Boyd and Mr. Foster were engaged in a committed long term relationship.

- [24] I accept Ms. Boyd's evidence with respect to their move to Armstrong as further evidence that they were still engaged in a marriage-like relationship. Mr. Foster made various efforts to find work in Alberta without success. Ultimately it suited them both to move to Armstrong. Ms. Boyd was dissatisfied with her work in the insurance industry and wanted to try something else. She had family in the area of Armstrong. Mr. Foster's business was still in the area of Armstrong and he still owned the farm. He was able to end the lease of the main house on the farm and the parties were able to move into it. I reject Mr. Foster's evidence that moving to Armstrong was a mere convenience to Ms. Boyd and that she really moved to be closer to her family, not because of their marriage-like relationship.
- [25] Mr. Foster and Ms. Boyd did not have joint bank accounts. However, she did assist him to renegotiate his debts when he arrived in Lethbridge. She also named him as a beneficiary on her life insurance. When they made an offer on the Falkland property in 2017 the offer was made in joint names. Each paid their own mortgage when they had separate properties but each also contributed to joint household expenses, buying food, etc. He paid most household expenses while she went to school after she arrived in Armstrong. However, at that point in time she was not employed and he was. He paid for her cell phone through his business. The household expenses he paid in Armstrong benefited Ms. Boyd and her children as well as himself. While they lived together in Armstrong he bought a horse trailer for the horses which were kept on the Armstrong property. There were horses for him, for Ms. Boyd and for her children.
- [26] As to household duties, Mr. Foster did the cooking. As Ms. Boyd and her daughter acknowledged, she was not much of a cook. I reject the idea put forward by Mr. Foster that each was responsible for their own washing, etc. in the manner of roommates rather than as a couple. I accept Ms. Boyd's evidence that she did cleaning, laundry, bought groceries, etc. The concept that Ms. Boyd and Mr. Foster were living only as roommates or that her mother did not contribute around the house was not put to Kenzie Nieuwenhuis in cross-examination.
- [27] Mr. Foster did not typically discipline Ms. Boyd's daughters while they lived together in Lethbridge or while they lived together in Armstrong. He did not assist them with their homework. However, he did give Kenzie Nieuwenhuis driving lessons. Ms. Nieuwenhuis sought Mr. Foster's help with vehicles "all the time".
- [28] Ms. Boyd did not meet Mr. Foster's children from his first marriage but I have little evidence as to where they were living, the circumstances or how often Mr. Foster saw his children. I do not know for example if Mrs. Foster refused to have the children attend if Ms. Boyd would be present. Accordingly I can draw no conclusions regarding their relationship from this evidence.
- [29] Mr. Foster and Ms. Boyd had a sexual relationship. Others saw them as a loving couple, although acknowledging that they did not have a smooth relationship.

- [30] After the move to Armstrong, the parties had various "rough patches" in their relationship. The question is whether these occurrences, when Ms. Boyd concedes that she left their residence, were the end of the relationship or not.
- [31] The most significant of these occurred when Ms. Boyd and her children moved to a residence referred to as Knob Hill.
- [32] Ms. Boyd testified that they moved to Knob Hill in 2015 for a period of months because there was a French exchange student coming to stay with Kenzie, her oldest daughter, and she did not want to expose the French student to the conflict between Mr. Foster and herself and between Mr. Foster and her two daughters. She said as well that she thought being separate for a time would permit them to work on their relationship.
- [33] Mr. Foster testified that on this occasion when Ms. Boyd said she was leaving he told her that if she left, that was the end. It was his understanding that their relationship was at an end. Ms. Boyd left with furniture, personal possessions, the two girls and set up housekeeping at Knob Hill. Mr. Foster said that she had been driving one of his cars and he would not let her take it with her because it was registered in his name. She set up a new household and she helped him buy replacement furniture for his home.
- [34] Ms. Boyd says she moved into the Knob Hill residence in July 2015. The exchange student arrived in September 2015 for three months. She returned to the Armstrong farm in January or February 2016. Ms. Boyd says that she only moved some of her possessions. She did not remove keepsakes or Christmas decorations, for example. She only removed what was necessary to maintain the house in Knob Hill while she was there.
- [35] Again, I prefer the evidence of Ms. Boyd with respect to the separation. Her version is supported by the evidence of Mr. Squires.
- [36] On August 22, 2015 Mr. Squires and Mr. Foster were exchanging text messages. Among those was a discussion of Mr. Foster's relationship with Ms. Boyd. Mr. Foster said "Yep we are still trying - working out better again". Mr. Squires responded that he was glad to hear it. Mr. Squires said that from the context, he understood Mr. Foster to be saying that they were still trying in regard to their relationship and that it was working out better again. This is consistent with Ms. Boyd's evidence that they were living apart to facilitate them working on their relationship.
- [37] Mr. Foster also gave Ms. Boyd flowers on the anniversary of their first date which was August 13, 2011. He frequently stayed with her at the Knob Hill residence. He gave her a promise ring in December 2015. He helped her to install a dishwasher in the Knob Hill residence. This is evidence consistent with an ongoing relationship, not the end of the relationship as Mr. Foster testified.
- [38] I accept Ms. Boyd's evidence that she returned to the Armstrong farm shortly after the French student returned to France, in January or February 2016.

- [39] Ms. Boyd left the house again in August 2016. She says that she was out of the residence from August 29 to September 7, 2016 while she stayed at her nephew's residence. Again she says they were trying to resolve their relationship issues. Mr. Foster says that she was away for a longer period of time and that he started a relationship with another woman in this period of time, one that lasted from August 11, 2016 to September 11, 2016.
- [40] I accept that Mr. Foster was in a sexual relationship with Alma Tees from August 11, 2016 to September 11, 2016 when he told Ms. Tees that he wanted to give his relationship with Ms. Boyd another try. Ms. Tees testified with respect to her relationship with Mr. Foster and I accept her evidence. However, this is not conclusive evidence with respect to whether Mr. Foster and Ms. Boyd remained in a marriage-like relationship during this period of separation. By mid-September Ms. Boyd had returned to the Armstrong farm. They continued to live together moving to the Falkland property in March 2017.
- [41] In conclusion, I am satisfied that they lived in a marriage-like relationship from November 2011 until July 2017. Although they had periods of time in their rocky relationship when Ms. Boyd left the residence for a few days or a few weeks or a few months, I am satisfied that the relationship was not terminated during the separations and continued until July 2017.

Property and Debt

- [42] Ms. Boyd argues that the farm sold for \$935,000. Mr. Foster received \$901,744.24. She says the excluded value is \$688,500, leaving \$213,244.24 to be divided. She seeks one half of this amount, \$106,622.12.
- [43] She also asserts that there has been a growth in equity in the Falkland property. She says that the increase is equity. She seeks one half of the increase, \$42,750.24.
- [44] She argues that the business, Kevin Foster Mechanical, which is operated as a proprietorship, had a value in 2012 based on an EBITDA formula of \$138,636. She says its value in 2017 was \$430,284. She seeks one half of the difference, \$145,824.
- [45] Ms. Boyd also seeks a half interest in miscellaneous assets. She says that Mr. Foster retained miscellaneous assets which she values at \$48,520. She received miscellaneous assets of \$11,500. She seeks one half of the difference, \$18,510.
- [46] She says that he retained \$30,000 of household contents while she took \$3,500. She seeks one half of the difference, \$13,250.
- [47] She seeks one half of the yard/camping goods retained by Mr. Foster. She says that he retained \$8,000 worth of goods. She received \$500. She seeks one half of the difference or \$3,750.
- [48] Finally, she says that there was \$31,660 cash in the bank as of July 5, 2017. She seeks one half of it, \$15,830.

- [49] As to debt, she says that most of her debt is student loans that were taken so that she could come to British Columbia and be employable at a decent wage. She also has credit card debt mostly accumulated while she was a student. She said she was debt-free when she moved to Armstrong. She says that Mr. Foster has credit card debt and line of credit debt. Hers totals \$51,842.40, and his \$21,000. She says that the line of credit is a business liability and should be excluded. She has the lion's share of the debt and seeks \$28,921.
- [50] Finally, she says that there is an asset which she refers to as the High Water patent. Because it needs to be pursued further she suggests that she should have 15% of the preferred shares.
- [51] Mr. Foster argues that in November 2011 the equity in the farm was \$260,658.67. He argues that the farm was sold March 1, 2018 for \$935,000. After the costs of sale, net sale proceeds were \$463,924.17. He says from this must be deducted the equity from November 2011 \$260,658.67 plus \$187,897.39 from his personal injury settlement (which he says is excluded) that Mr. Foster used to pay down debt. He says that the increase in equity in the property is \$16,068.11.
- [52] He says that the Falkland property was purchased March 2017 for \$532,500. He made improvements to the property which cost \$95,000. The property was appraised in July 2017 at \$625,000, an increase of \$92,500 over five months. He says that this increase in value is due to his improvements of \$95,000 from proceeds of sale of the Armstrong farm.
- [53] Mr. Foster says that the business has not been professionally valued. He says that it has not increased in value and Ms. Boyd has not demonstrated that it has.
- [54] Mr. Foster says that when the relationship ended in July 2017 the funds in the accounts were \$227,504.77, entirely attributable to the remaining funds from the sale of the farm.
- [55] He says that the value of his RRSPs in November 2011 were \$109,100.05 and a second account \$19,257.31. He says that their value decreased between the start of the relationship and the end of the relationship, except for the \$50,000 addition he made from his personal injury settlement which is excluded.
- [56] He says that the only asset that has increased in value was the family farm which increased by \$16,068.11. Ms. Boyd has retained a Jeep Grand Cherokee valued at \$1,000; a horse trailer valued at \$6,500; the refund from the Cotton Wood property of \$5,000; and horses for which there is no evidence of value. The total retained by her is \$12,500. He says that he should pay one half of the difference to Ms. Boyd, \$1,784.
- [57] As to debts, Mr. Foster argues that when the relationship ended he had the following debts:
1. RBC Visa #3823, \$12,685.59;
 2. RBC Visa #6342 balance, \$4,811.71;
 3. Vantage One line of credit, \$24,987.36;

4. Tax debt of \$10,000 (reassessment on capital gains from the farm sale in 2017);

Total: \$52,484.66.

[58] He says that she had the following debts incurred during the time the parties were together:

1. Canadian Tire MasterCard, \$14,653.21;
2. PC Financial MasterCard, \$1,880.95;
3. Hudson Bay MasterCard, \$6,026.86;
4. Student loan, \$23,000;

Total: \$45,561.02.

[59] He says that to adjust the balance of the debt Ms. Boyd should pay one half of the difference to him, \$3,461.82. He says that the net offset would be \$1,677.82 payable by Ms. Boyd to him.

Determination of Family Property

[60] As I have noted above, on separation, spouses are entitled to an undivided half interest in family property pursuant to s. 81 of the FLA. This is subject to a deduction for excluded property. Excluded property includes property acquired by a spouse before the relationship between the spouses began and a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for lost income of a spouse: FLA, s. 85(1). A spouse claiming the property as excluded property is responsible for demonstrating that the property is excluded: FLA, s. 85(2).

[61] Accordingly, I must determine the value of the property and deduct the appropriate exclusion.

1. Personal Injury Settlement

[62] Mr. Foster argues that all or the vast majority of his personal injury settlement is excluded pursuant to s. 85(1)(c).

[63] He settled his personal injury claim on January 28, 2015. He received a net sum of \$404,344.50. He used \$187,897.39 of that money to reduce debt on the Armstrong farm and made a RRSP contribution of \$50,000. He says that these two amounts should be treated as excluded property.

[64] It appears not to be contentious that the balance of the personal injury settlement was spent and is not in issue.

- [65] As evidence of the division of the personal injury settlement, Mr. Foster provided me with the mediation brief which his counsel prepared dated January 16, 2015, the mediation summary of the defendant dated January 21, 2015, and an invoice from his personal injury lawyer. That invoice indicates that he recovered \$650,000 in total as a settlement. After deducting expenses, lawyer's fees, etc., he received the balance noted above.
- [66] In his mediation brief, he claims damages for pain and suffering of \$125,000; special damages of \$1,849.92; cost of future care of \$25,000; past income loss of \$255,120; loss of future earning capacity of \$1,179 474.75; residual property loss of \$25,000; downtime of \$100,000; and costs and disbursements of \$27,716.10. He proposed a compromise settlement of \$1,500,000.
- [67] In the defendant's mediation brief, the defendant concedes that Mr. Foster was disabled from his work for a period of time and sustained a loss of income. The defendant also accepts that Mr. Foster sustained soft tissue injuries as a result of the accident. They dispute his claims to a loss of earning capacity. They accept that he suffered some past wage loss. They accept special damages of \$1,072.62. They dispute his claims to cost of future care. They reject his claims to a downtime loss and to repairs to the service truck.
- [68] In *A.A.P. v. G.T.F.*, 2015 BCSC 662 Mr. Justice Ehrcke said:
- [68] Second, and more fundamentally, the claimant has not demonstrated what portion, if any, of the settlement money she received from ICBC is excluded property. Although s. 85(1)(c) provides that excluded property includes a settlement or award of damages as compensation for injury or loss, it also provides that such a settlement is not excluded property if it represents compensation for lost income. On the evidence before me, it would appear highly probable that a very significant portion of the settlement from ICBC resulted from the fact that the claimant was let go from her job at City Xpress and did not work again outside the home up to the date of the settlement.
- [69] It is not for the respondent to prove what portion of the settlement was in relation to lost income. The claimant is the spouse who is claiming that the settlement money is excluded property. Pursuant to s. 85(1)(c) of the Act, she bears the onus of proving that the portion of the settlement she says is excluded, was not paid as compensation for lost income. She has adduced no evidence on that point, and therefore, I must conclude that she has not proven that any portion of the equity in the current Family Home is excluded property.
- [69] Mr. Foster argues that while he cannot establish the component parts of the settlement, that the law has substantially changed in the recent British Columbia Court of Appeal case of *Shih v. Shih*, 2017 BCCA 37. There the Court of Appeal said:
- [42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.

- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [70] In his testimony, Mr. Foster was not able to assist as to the components of the settlement. I am persuaded that a portion of his settlement represents his claim for general damages and a portion of his settlement represents a past loss of income and possibly a future loss of income. From my review of the mediation briefs it is reasonable to infer that Mr. Foster's past wage loss was accepted at \$255,120, 40% of his recovery, because the defendants do not strenuously object to that claim.
- [71] Although it would have little impact in the circumstances of this case, I agree with the submissions of Mr. Foster with respect to future loss of income or loss of capacity. In my view the "lost income" referred to in s. 85(1)(d)(ii) is a past loss, i.e., income that has been lost. The words are not forward-looking. It would be unfair to divide as family property a sum meant to compensate an injured party for a loss of earnings or earning capacity over a working life. It may be that as the future loss accrues, it would become family property. The future income loss may be used for support purposes. Neither of these applies in this case and I make no decision in this regard.

2. Armstrong Farm

- [72] I accept Mr. Foster's calculation of the value of the Armstrong farm, after deduction of the pre-2011 value. The net sale proceeds were \$463,924.17. From this must be deducted the November 2011 equity which is \$260,658.67, leaving an increase in value of \$203,265.50. Mr. Foster argues that this should be reduced by \$187,897.39 from his settlement. However, it is my view that 40% of his recovery was for income loss, so only 60% of \$187,897.39 should be deducted leaving \$90,527 to be divided.

3. Falkland Property

- [73] This property was purchased in March 2017 for \$532,500. By July 2017 it was appraised at \$625,000, an increase of \$92,500 over five months. In the meantime, Mr. Foster had made improvements of \$95,000. At trial, I raised with the parties the issue of whether the increase in value could be attributed to the improvements made to the property. The trial was adjourned for a period of time. The parties had the opportunity to address the issue. Ms. Boyd refused to agree to retain an appraiser to provide an opinion. I am left without the benefit of an appraisal addressing the issue. Without this appraisal, I accede to Mr. Foster's submission that the increase in value over such a short period of time is likely due to the improvements he made to the property. Accordingly, there is no increase in value to divide.

4. Kevin Foster Mechanical

[74] Mr. Foster's business was not professionally valued. Ms. Boyd did her own EBITDA calculations. As I explained trial, I am not able to accept Ms. Boyd's calculations or to perform my own calculations. To determine the value of the business and whether there had been any increase in value from 2011 to 2017 would require a professional opinion. I do not have one. The evidence before me does not permit me to conclude that there was any increase in value.

5. Bank Accounts

[75] Mr. Foster says that the only funds in the bank account were from the proceeds of sale of the farm. Ms. Boyd does not dispute this. Those proceeds are addressed in dividing the proceeds from the Armstrong farm.

6. RRSPs

[76] Ms. Boyd does not seek a portion of Mr. Foster's RRSPs.

7. Miscellaneous Assets

[77] Ms. Boyd retained a Jeep Grand Cherokee (\$1,000), a horse trailer (\$6,500) the Cotton Wood refund (\$5,000), a total of \$12,500.

[78] Mr. Foster unilaterally disposed of some family assets. He gave a car to his parents, apparently in settlement of a \$20,000 debt which preceded his relationship with Ms. Boyd. He gave an electric fence to his neighbours. He failed to maintain or sell a holiday trailer. He also kept most of the household goods and camping equipment. Ms. Boyd is entitled to be compensated. In my view these assets can be valued at \$40,000: \$20,000 for the car and \$20,000 for the other assets collectively.

[79] Although Ms. Boyd argues that the values are higher, used goods such as household goods have notoriously low values and I do not accede to her argument on this point. Nor am I satisfied that all of the assets she identifies were acquired while they were together.

[80] I am not persuaded that the High Water patent has any value at this time.

8. Debt

[81] Ms. Boyd says that she has \$51,842.44 of debt. Mr. Foster says that he has \$52,484.66 of debt.

[82] Ms. Boyd argues that the \$24,987.36 Vantage One line of credit claimed by Mr. Foster was a business debt and should be excluded. I have reviewed the bank records carefully. The Vantage One bank records show that there were two lines of credit. The Vantage One regular line of credit first appears in June 2015 with nothing owing. On July 31, 2015 there is \$28,074.99 owing, of which \$28,000 was transferred to the business account. On December 31, 2015 the amount owing was reduced by \$20,000 which was transferred from the business account to the household account and then to the line of credit.

- [83] On January 31, 2016 the amount owing on the regular line of credit was increased to \$15,537.61. \$4,000 was transferred to the farm account and \$3,500 to the business account. On August 31, 2016 the amount of \$24,000 was transferred to the regular chequing account, leaving a balance of \$39,636.99 on the regular line of credit. Also in August 2016 a new line of credit, Account No. 1, was opened and \$25,000 was transferred to the regular chequing account. From the regular chequing account, \$28,000 was paid by a cheque to Dave Bulach. Another cheque for \$21,000 has not been produced. On March 31, 2017 the regular line of credit was paid in full. On July 9 the Account No. 1 line of credit was also paid in full in the amount of \$24,987.36. Funds were transferred between these accounts, sometimes for business purposes. The evidence does not permit me to determine whether the \$24,987.36 is a family debt.
- [84] Mr. Foster claims a tax debt of \$10,000, a reassessment on capital gains from the farm sale in 2017. I do not have any details with respect to this reassessment. Mr. Foster acquired the farm in 2000. I do not know what capital gain there was between 2000 and 2011. It would be inappropriate to allocate all of the tax debt to the period 2011 to 2017. Allocating it evenly over 2000-2017, \$3,530 would be attributable to 2011-2017.
- [85] I conclude that Mr. Foster's family debt at separation totalled \$21,027.
- [86] As to Ms. Boyd's family debt at separation, she asserts that it was \$51,842.44. Mr. Foster says that it was \$45,560. The evidence does not satisfy me that Ms. Boyd's family debt at separation was the amount she seeks. I will use the figure conceded by Mr. Foster, \$45,560.
- [87] In summary, I find.

ASSETS

Armstrong farm non-excluded equity

\$90,527

Falkland property

\$0

Kevin Foster Mechanical

\$0

Bank accounts

\$0

RRSPs

\$0

Miscellaneous Assets

\$52,500

\$143,027

÷ 2

= \$71,514

- \$12,500

TOTAL

= \$59,014

DEBTS

Ms. Boyd

\$45,560

Mr. Foster

\$21,027

=\$66,587

÷2

\$33,294

-\$21,027

TOTAL

=\$12,267

Ms. Boyd would receive \$71,281 from Mr. Foster to equally divide family property and family debt

Should the Property be Divided Unequally?

[88] Section 95 of the FLA provides:

Unequal division by order

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

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;

- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [89] After considering these factors, I am not persuaded that it would be significantly unfair for Ms. Boyd to receive one half of the family property and family debt.
- [90] Mr. Foster retains significantly more assets. Although Ms. Boyd may have received, indirectly, some portion of his past wage loss award, this is contemplated by the FLA. She provided him with emotional support and companionship while he recovered. He lived under her roof while he recovered from his injuries. The income loss was incurred while they were together.
- [91] The FLA also provides that Ms. Boyd should receive half of the increase in value of the Armstrong farm. There is nothing in the circumstances which makes this division significantly unfair.

Spousal Support

- [92] Ms. Boyd seeks retroactive spousal support for 16 months plus an additional 24 months of spousal support. She says that spousal support should be in the mid range and she seeks \$857 per month. She argues that she will incur hardship without spousal support. She says that she and Mr. Foster made the decision for her to return to school and she now has her student loan which costs \$490 a month. She is also supporting the horse that they made a joint commitment to. She says that while she has been paying rent and acquiring no equity Mr. Foster has been increasing his equity through mortgage payments. She says that without spousal support she would not have the same purchasing power for a property for herself.
- [93] Mr. Foster argues that Ms. Boyd is not entitled to spousal support. He says that both parties were working and capable of supporting themselves and there is no needs-based claim to spousal support. Although she argues that she gave up her employment to move to Armstrong and be with Mr. Foster, Mr. Foster denies this. In any event, she retrained with the benefit of student loans that have been assessed as a family debt and is now earning an income that is very close to what Mr. Foster earns and significantly higher than what she was earning when she lived in Lethbridge.
- [94] He argues that the parties did not have children and Ms. Boyd did not stay home to run the farm and manage the household. There is no compensatory claim to spousal support.
- [95] He argues that even if Ms. Boyd establishes a claim to spousal support the relationship lasted for at most five years and eight months. He says that they earn similar incomes. He says that her entitlement if there is one would be between zero and \$150 per month for one half to the full length of their relationship.
- [96] Sections 160 and 161 of the FLA provide:

Duty to provide support for entitled spouse

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

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[97] I am not satisfied that Ms. Boyd has suffered any economic disadvantage from the relationship or its breakdown (FLA, s. 161(a)) or has suffered economic hardship arising from the breakdown of the relationship (FLA, s. 161(c)). The hardship that Ms. Boyd identifies is primarily due to Mr. Foster's greater financial resources that he had before the relationship started. She is receiving her share of the family property. She is also receiving compensation for one half the family debt, which includes her student loans.

[98] During the relationship she was able to take advantage of retraining and living with Mr. Foster to improve her financial circumstances. She now earns significantly more than she did before their relationship started. Although Mr. Foster may well earn more than he declares and undoubtedly writes off some personal expenses through his business, I am not satisfied that there is a significant difference between her income and his income.

[99] As such, I am not persuaded that Ms. Boyd is entitled to spousal support.

Conclusion

[100] Mr. Foster will pay Ms. Boyd \$71,281. The parties may speak to costs if necessary.

"B.J. Brown J."

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