

CANADA / JUDGMENT

Boyd v. Foster

2020 BCCA 177

COURT

British Columbia Court of Appeal

DECIDED

18 June 2020

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2020 BCCA 177 Boyd v. Foster

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Boyd v. Foster,

2020 BCCA 177

Date: 20200618

Docket: CA46204

Between:

Shawna Lee Boyd

Appellant/

Respondent on Cross Appeal

(Claimant)

And

Kevin Jason Foster

Respondent/

Appellant on Cross Appeal

(Respondent)

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated June 6, 2019 (Boyd v. Foster, 2019 BCSC 901, Vernon Docket E51785).

Oral Reasons for Judgment

The Appellant/Respondent on Cross Appeal, appearing in person
(via videoconference):

S.L. Boyd

The Respondent/Appellant on Cross Appeal, appearing in person
(via videoconference):

K.J. Foster

Place and Date of Hearing:

Vancouver, British Columbia

June 15, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 18, 2020

Summary:

The parties each appeal orders following a family trial. Both parties argue the judge misapprehended the evidence in dividing family property. The appellant on the appeal also argues the judge erred in not awarding spousal support. The appellant on the cross-appeal further argues the judge erred in finding the parties were in a marriage-like relationship. Held: Appeal dismissed; cross-appeal dismissed. The appellants have identified no error in principle. The judge adequately assessed and weighed the relevant evidence. There is no reason to interfere with the judge's assessment of the evidence.

[1] BUTLER J.A.: Shawna Boyd and Kevin Foster each appeal orders following a family law trial. In reasons for judgment indexed as Boyd v. Foster, 2019 BCSC 901, the judge found that the couple was in a marriage-like relationship for more than five years, dismissed Ms. Boyd's claim for spousal support and ordered Mr. Foster to pay \$71,281 to Ms. Boyd to provide for an equal division of family property and debt.

[2] On appeal, Ms. Boyd argues the judge erred in her assessment of the values attributed to five family assets: two pieces of real property; Mr. Foster's business; Mr. Foster's bank account; and a patent. She also argues the judge erred in denying her claim for spousal support.

- [3] On cross-appeal, Mr. Foster argues the judge erred by concluding the parties had been in a marriage-like relationship. In the alternative, he argues the judge erred in her assessment of the value of two pieces of family property: a portion of his personal injury settlement; and some miscellaneous assets.
- [4] For the reasons that follow, I would dismiss the appeal and the cross-appeal.

Background

- [5] Ms. Boyd and Mr. Foster met in high school and began dating in August 2011 when they reconnected having left prior relationships. Mr. Foster was 48 and Ms. Boyd was 44. Mr. Foster lived and worked in Armstrong, British Columbia, where he owned a farm he had purchased in June 2000. He operated a heavy duty mechanical business, Kevin Foster Mechanical Ltd. Ms. Boyd had two children and lived and worked in Lethbridge, Alberta.
- [6] On October 27, 2011, Mr. Foster was seriously injured in a motor vehicle collision. He asked Ms. Boyd if he could stay with her in Lethbridge and she agreed. From November 2011 to October 2012, Mr. Foster travelled back and forth between Lethbridge and Armstrong. Mr. Foster had been experiencing financial difficulties and, in October 2012, decided to rent the two houses on his farm for two years. He put many of his things in storage but brought a few items, including his bed and tools, to Lethbridge.
- [7] In July 2014, Ms. Boyd and her children moved with Mr. Foster to his home in Armstrong. Ms. Boyd sold her Lethbridge property.
- [8] In January 2015, Mr. Foster settled his personal injury claim resulting from the motor vehicle collision following a mediation. The mediation briefs of both parties were entered as exhibits at trial. In his brief dated January 27, 2015, Mr. Foster argued his claim was worth more than \$1.6 million, including \$255,120 for past income lost, but offered to settle the claim for \$1.5 million. On January 28, 2015, he settled his claim for \$650,000. He used \$187,897.39 of that money to reduce the debt owing on the Armstrong property.
- [9] In July 2015, Ms. Boyd and her children moved to a residence called Knob Hill. An exchange student was coming to stay with her daughter and Ms. Boyd did not want to expose the exchange student to the conflict between the parties. The exchange student arrived in September and stayed for three months. Ms. Boyd returned to the Armstrong property in January or February 2016.
- [10] In March 2017, Mr. Foster sold his farm and, together with Ms. Boyd, purchased a property in Falkland, British Columbia. In July 2017, Ms. Boyd moved out of the Falkland property. Both parties agree that was the end of their relationship.

Trial Judgment

- [11] The judge identified five questions she had to answer at para. 14 of her reasons:

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?

Issues 1, 2, and 4 are relevant to this appeal.

Marriage-Like Relationship

- [12] The judge first considered whether the parties were in a marriage-like relationship. The judge quoted extensively from *Ashton v. Hales*, 2017 BCSC 1928, as to the proper legal framework she was to apply. If the parties had formed a marriage-like relationship, the issue was whether the relationship ever came to an end when Ms. Boyd left the household for a period of time.
- [13] The judge did not find Mr. Foster to be a credible witness on this issue. She found he minimized or distorted the nature of the relationship. The judge preferred the evidence of Ms. Boyd and a number of witnesses, including Ms. Boyd's daughter and some of the couple's friends. She found that while the parties were in Lethbridge, they presented as if they were in a loving relationship and appeared as husband and wife: at para. 21. She found that the parties' move to Armstrong "suited them both" and that they moved together because of their marriage-like relationship, rejecting Mr. Foster's argument that Ms. Boyd only moved to be closer to her family: at para. 24. The judge noted that while the parties had separate bank accounts, their finances were not entirely separate: Ms. Boyd named Mr. Foster as a beneficiary on her life insurance; each contributed to household expenses; and Mr. Foster paid for Ms. Boyd's expenses while she went to school: at para. 25. The parties had a sexual relationship and a loving one, though there were various "rough patches" throughout: at paras. 29-30.
- [14] The judge preferred Ms. Boyd's evidence regarding her temporary move to Knob Hill. Mr. Foster testified that he understood the relationship to end when Ms. Boyd moved out. However, Mr. Foster frequently stayed with Ms. Boyd at the Knob Hill residence and gave her a promise ring in December 2015: at para. 37. A witness testified to text messages exchanged with Mr. Foster after Ms. Boyd moved out in which Mr. Foster said, "Yep we are still trying - working out better again": at para. 36. The judge concluded that Ms. Boyd's move to Knob Hill did not terminate the parties' relationship.
- [15] The judge was satisfied that the parties were in a marriage-like relationship from November 2011 to July 2017. Though there were some "rocky" periods in their relationship, those periods were insufficient to sever the marriage-like relationship: at para. 41.

Value of Family Property

- [16] The judge had to determine the value of a number of pieces of family property. Ms. Boyd challenges most of the judge's valuations on appeal. Mr. Foster challenges two.
- [17] First, the judge assessed Mr. Foster's personal injury settlement arising from his motor vehicle collision. At the mediation, Mr. Foster valued his claim at more than \$1.5 million, including \$255,120 for loss of past income. He settled for \$650,000. At issue is s. 85(1)(c) of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"), which states that personal injury settlements received by one spouse to compensate for injury or loss are excluded from family property unless the settlement represents compensation for lost income of a spouse. The claimed past loss of income would have been suffered while the parties were in a marriage-like relationship. Accordingly, whatever compensation Mr. Foster received for his past income loss would be included in the judge's division of family property. Thus, the judge had to determine what portion of the \$650,000 settlement was for loss of past income.
- [18] The judge noted that the defendants' mediation brief disputed some of the claims advanced by Mr. Foster, but conceded that he was disabled from work for a period of time and suffered a loss of income. She cited *A.A.P. v. G.T.F.*, 2015 BCSC 662 for the proposition that the onus was on Mr. Foster to prove what portion of the settlement related to lost income. The judge also cited *Shih v. Shih*, 2017 BCCA 37 for the proposition that Mr. Foster need not provide documentary evidence and that the judge may draw reasonable inferences while balancing the evidence as a whole.
- [19] The judge ultimately concluded that the \$650,000 settlement included the entirety of Mr. Foster's claim for loss of past income. She wrote at para. 70:
- 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.
- [20] Having arrived at the conclusion, the judge determined that only 60% of the settlement could form the basis for an excluded property claim.
- [21] The second piece of property for the judge to assess was the value of the Armstrong farm. The judge accepted Mr. Foster's valuation of the farm. He had testified that in November 2011, the equity in the farm was \$260,658.67. The farm was sold on March 1, 2018 for \$935,000, with net sale proceeds of \$463,924.17: at para. 51. The pre-November 2011 equity (\$260,658.67) was to be deducted as excluded property. Mr. Foster used \$187,897.39 of his personal injury settlement to pay down the debt owing on the farm and argued that that entire amount should be deducted from the proceeds of sale. Since the judge found that 60% of his settlement was excluded property, only 60% of \$187,897.39 was deducted: at para. 72. The resulting value of the Armstrong farm to be divided as family property was \$463,924.17 -

$$\$260,658.67 - (\$187,897.39 \times 0.6) = \$90,527.$$

- [22] Third, the judge considered the value of the Falkland property. The parties purchased the property in March 2017 for \$532,500. In July 2017, it was appraised at \$625,000. Mr. Foster had made improvements to the yard and large workshop on the property at a cost of approximately \$95,000. In the absence of expert appraisal evidence on whether the increase in value could be attributed to Mr. Foster's improvements, the judge accepted Mr. Foster's argument that the increase in value of \$92,500 over the relatively short period of time was due to his improvements. As such, there was nothing to be divided as family property: at para. 73.
- [23] Fourth, the judge addressed Mr. Foster's business. Ms. Boyd had claimed half an interest in the increase in value of the business from 2011 to 2017 and provided her own EBITDA ("earnings before interest, taxes, depreciation and amortization") calculations in support of her claim as to that increase. However, the judge concluded she could not rely on Ms. Boyd's calculations and could not perform her own. Without a professional opinion, the judge was unable to conclude on the evidence that the business had increased in value during the relationship. There was nothing to be divided as family property: at para. 74.
- [24] Fifth, the judge found that the funds in Mr. Foster's bank account at the time the relationship ended were from the proceeds of the sale of the farm. As these funds were already addressed in dividing the proceeds of sale, she made no order dividing the funds in that account: at para. 75.
- [25] Sixth, the judge addressed "miscellaneous assets", including a car Mr. Foster gave to his parents and some household and camping items Mr. Foster retained. The judge found that the car was worth \$20,000 and the other assets were worth \$20,000. Combined, Mr. Foster's "miscellaneous assets" were valued at \$40,000 and were divided equally: at paras. 78, 87.
- [26] Seventh, the judge addressed another "miscellaneous asset", the "High Water patent". Mr. Foster had designed a drainpipe to drain fields during high-water periods, which was subject to a US patent. Mr. Foster had argued at trial that the High Water patent could potentially be sold for "millions -- a million dollars". Ms. Boyd sought an interest in the patent in case it was ever sold. The judge was not persuaded that the High Water patent had any value: at para. 80. The judge made no orders with respect to the High Water patent.
- [27] Finally, the judge divided the family debt: at paras. 81-86.

Spousal Support

- [28] The judge reviewed ss. 160 and 161 of the FLA on the duty to provide spousal support and the objectives of spousal support. The judge reviewed the parties' circumstances and was not satisfied that Ms. Boyd suffered any economic disadvantage or hardship:

- [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.
- [29] The judge concluded that Ms. Boyd was not entitled to spousal support: at para. 99.

Ms. Boyd's Appeal

Issues

- [30] In her factum, Ms. Boyd raises a number of issues on appeal. Most of the issues concern how the judge assessed the value of family property. In particular, Ms. Boyd disagrees with the judge's assessment of the Armstrong farm, the Falkland property, Mr. Foster's business, Mr. Foster's bank account, and the High Water patent. Ms. Boyd also argues the judge erred in denying her claim for spousal support.
- [31] Before turning to the substantive issues on appeal, there are two matters I will dispense with quickly. First, Ms. Boyd argues the judge made a mathematical error relating to Mr. Foster's personal injury settlement. The judge found that Mr. Foster's past income loss represented 40% of his settlement (\$255,120 of \$650,000). Ms. Boyd argues this is an error because Mr. Foster only received \$404,344.50: at para. 63. However, that amount represents the net sum Mr. Foster received, after expenses and fees. The judge appropriately used the gross settlement figure and did not err in her calculations.
- [32] Second, Ms. Boyd asks this Court to consider "CPP Benefits", even though neither party advanced such a claim at trial. She says that "CPP Benefits" are "standardly equally divided" upon the dissolution of the marriage. This Court cannot order division of property where no claim was advanced and no evidence was presented at trial.

Standard of Review

- [33] Ms. Boyd appeals from the judge's orders respecting division of family property and spousal support. This Court succinctly stated the applicable standard of review for such orders in *Hallgren v. Fry*, 2013 BCCA 15 at para. 8:

The objectives of finality and certainty in matrimonial litigation lead to a deferential standard of appellate review of trial decisions dealing with division of family assets and spousal support. This Court may not interfere with such orders unless the trial judge has made an error in principle, significantly misapprehended the evidence, or made an award that is clearly wrong: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12, 172 D.L.R. (4th) 577; *Van De Perre v. Edwards*, 2001 SCC 60 at para. 15, [2001] 2 S.C.R. 1014.

Analysis

Value of Family Property

- [34] Though Ms. Boyd does not say so explicitly in her factum, I take her arguments regarding the division of family property to be that the judge significantly misapprehended the evidence because she has not identified an error in principle nor can she show that an award is clearly wrong. I will deal with her arguments as they relate to each of the contested issues of family property. However, as a brief summary, I note that while Ms. Boyd may disagree with the judge's conclusions, there is nothing to suggest the judge misapprehended the evidence. Indeed, the judge carefully considered the contested evidence that each party presented with respect to the value of the items of family property. The evidence was, at times, imperfect or lacking. The judge, as required, did her best to assess the evidence in spite of those frailties.
- [35] Regarding the Armstrong farm, Ms. Boyd says the judge erred in her valuation of the equity in the property when the parties entered their marriage-like relationship. She argues that Mr. Foster owned the farm with his ex-wife when the parties started their relationship. As a result, Ms. Boyd suggests that Mr. Foster only owned 82% of the November 2011 equity in the farm. Using that lower figure as the starting point would increase the change in value of the farm during the parties' relationship, resulting in a larger portion for each party.
- [36] There is no merit to Ms. Boyd's argument. At trial, each of the parties presented their evidence with respect to the original value of the farm. The judge preferred Mr. Foster's evidence: at para. 72. There is nothing to suggest the judge misapprehended the evidence, let alone that such a misapprehension was significant. Further, it is evident that at some point Mr. Foster bought out or acquired his former spouse's interest in that property. There is no basis on which Ms. Boyd could assert a claim to some share of Mr. Foster's former spouse's interest.
- [37] Regarding the Falkland property, Ms. Boyd disputes the fact that Mr. Foster made improvements to the property worth \$95,000. She argues Mr. Foster's cost estimate was not proven. Further, she argues the judge did not give appropriate weight to the appraisal and that the judge erred by not ordering an additional appraisal to assess whether the increase in value of the property was due to Mr. Foster's improvements.

- [38] At trial, the judge explained why it was incumbent on the parties to obtain an appraisal to consider that issue. The trial was adjourned for the parties to arrange the appraisal. Counsel for Mr. Foster prepared a joint retainer letter and invited Ms. Boyd to agree to proceed with the joint retainer of an appraiser. She declined to do so. In the absence of expert appraisal evidence on that issue, the judge concluded that the increase in value was due to Mr. Foster's improvements. The judge did not commit any error in her analysis and it was open to her to come to that conclusion. In the absence of any misapprehension of evidence, we are unable to interfere with the judge's conclusion by reweighing the evidence as Ms. Boyd invites us to do.
- [39] Regarding Mr. Foster's business, Ms. Boyd argues that the judge should have accepted the evidence of the change in value of the business from 2011 to 2017 that she presented. Alternatively, Ms. Boyd argues the judge erred by not ordering an appraisal for the court. I would not accede to these arguments. As Ms. Boyd was claiming an interest in the business, she bore the onus of presenting evidence to support that claim. As the judge explained at trial, the judge was not prepared to rely on Ms. Boyd's calculations of the value of the business and could not perform her own valuation. The judge found that without expert evidence, she could not determine whether the value of the business had increased from 2011 to 2017: at para. 74. Contrary to Ms. Boyd's submission, determining the change in value of a business over time is not a simple exercise. In the absence of agreement between parties, courts almost invariably require expert evidence to assist in that determination. I see no error in the judge's approach or in her conclusion.
- [40] Regarding Mr. Foster's bank account, Ms. Boyd argued at trial that \$31,660 had been deposited to the account, though it was not clear when those funds had been deposited. She sought 50% of those funds. She says the judge erred when, at para. 75 of her reasons, the judge wrote that Ms. Boyd did not contest the fact that the only funds in Mr. Foster's account were from the proceeds of sale of the Armstrong farm.
- [41] While the judge may have misstated Ms. Boyd's position, there is nothing to suggest she misapprehended the evidence about the funds in Mr. Foster's bank account. Ms. Boyd is unable to demonstrate that the judge made a palpable error in accepting Mr. Foster's assertion that the funds in the account came from the proceeds of the sale of the farm. Contrary to the argument in Ms. Boyd's factum, there was no evidence as to when the \$31,660 was deposited into Mr. Foster's account and no contrary evidence as to the provenance of those funds. Indeed, the Order to Pay dealing with the proceeds from the farm sale in February 2017 shows that Mr. Foster received \$347,091.33 in net proceeds after \$163,582.84 was applied to the down payment for the purchase of the Falkland property. Accordingly, it was open to the judge to find that the funds in the account were remaining proceeds from the sale of the farm that belonged to Mr. Foster and were not subject to being divided as family property. The judge did not misapprehend any evidence in accepting the evidence of Mr. Foster.

[42] Regarding the High Water patent, Ms. Boyd argues the judge erred by finding the patent had no value and by failing to grant her an interest in it. While the judge's comments about the patent are brief, so was the evidence at trial. The patent was held in Mr. Foster's name and he described its use in cross-examination. Ms. Boyd expressed the view that the patent could be sold for "a million dollars", and Mr. Foster agreed that he would not "sell it cheap". However, there was no evidence on which the judge could rely to ascribe any value to the patent. The judge did not misapprehend any of the evidence in concluding there was no value in the patent to divide. Further, while the court could have awarded Ms. Boyd an interest in the property under s. 97(2)(a) of the FLA, the judge did not do so given the insufficiency of evidence about the value or potential value of the patent. The judge did not err by failing to divide property that she found had no value.

Spousal Support

[43] Ms. Boyd argues the judge erred in denying her claim to spousal support. At trial, Ms. Boyd argued she was entitled to support on the basis of compensatory support and non-compensatory support. Her arguments on appeal amount to an invitation for this Court to reweigh the evidence and make an award for spousal support.

[44] I see no reason to interfere with the judge's decision not to award spousal support. The judge was clearly aware of the appropriate legal framework, having cited the spousal support provisions from the FLA. The judge found that Ms. Boyd suffered no economic hardship or disadvantage arising from the marriage-like relationship and its breakdown. Indeed, Ms. Boyd was able to take advantage of retraining during the relationship and now earns significantly more than she did when the relationship began: at para. 98. Ms. Boyd challenges these conclusions on appeal making the same arguments she made at trial about the hardship she suffered by selling her home in Lethbridge and moving to Armstrong where she says her standard of living is lower than it was prior to their relationship. However, the judge drew conclusions based on the available evidence and application of the principles set out in ss. 160 and 161 of the FLA. Ms. Boyd can point to no error in the judge's analysis that would justify appellate intervention.

Summary of Ms. Boyd's Appeal

[45] In conclusion, Ms. Boyd has not been able to demonstrate that the judge misapprehended the evidence at all, let alone that such a misapprehension was significant. The judge reviewed the evidence and divided the family property based on the evidence that was available to her. There is no reason for this Court to interfere.

Mr. Foster's Cross-Appeal

Issues

- [46] Mr. Foster raises three issues in his cross-appeal. First, he argues the judge erred in determining that he and Ms. Boyd had been in a marriage-like relationship. Second, he argues the judge erred in determining what portion of the personal injury settlement was excluded property. Third, he says the judge erred in her assessment of the value of his miscellaneous assets.

Standard of Review

- [47] The standard of review for division of family property has already been stated: see Hallgren at para. 8.
- [48] The judge's determination that the parties were in a marriage-like relationship involved applying a legal framework to the facts. This Court will not interfere absent a material error, a serious misapprehension of the evidence, or an error of law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12; *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 14-15; *Usova v. Harrison*, 2011 BCCA 209 at para. 26, leave to appeal ref'd [2011] S.C.C.A. No. 264.

Analysis

Marriage-Like Relationship

- [49] Mr. Foster argues the judge did not appreciate that his relationship with Ms. Boyd evolved over time. He argues the judge did not properly consider all the evidence in coming to her conclusion that the parties had been in a marriage-like relationship. In his factum, Mr. Foster essentially reargues the points he raised at trial where he suggested the parties were not in a marriage-like relationship. He argues it was "inexplicable" for the judge to accept certain witness testimony. However, Mr. Foster's disagreement with the judge's assessment of the evidence does not mean the judge has erred in her analysis.
- [50] The judge was clearly aware of the applicable law on marriage-like relationships, having cited the extensive passage from *Ashton*. Following that passage, the judge reviewed the evidence presented by the parties and various witnesses and explained why she preferred the evidence of some over, in particular, Mr. Foster's evidence. The judge found that Mr. Foster had "a tendency to minimize or distort [the parties'] relationship, even when they were living under the same roof, enjoying a sexual relationship and acting as a committed couple before their friends": at para. 19.
- [51] On appeal, Mr. Foster asks this Court to reweigh the evidence before the trial judge in order to come to a different conclusion. It is clear the judge stated the law correctly and considered all the relevant evidence in concluding the parties were in a marriage-like relationship. I see no reason to interfere with her decision.

Value of Family Property

- [52] Regarding his personal injury settlement, Mr. Foster argues the judge erred in concluding that the \$650,000 settlement included all of the \$255,120 he claimed for loss of past income. He notes that since liability and quantum were at issue in the settlement negotiations, it was not reasonable for the judge to conclude that he recovered the full amount of his claim for loss of past income when the total amount he received in settlement was heavily discounted from what he put forward in his mediation brief. He says this must be wrong because it would mean that he recovered nothing or nominal amounts for other heads of damage that he claimed. He also notes that the defendants in the personal injury action took issue with his claim for past income loss on the basis that part of that loss was due to his move to Lethbridge.
- [53] Mr. Foster writes in his factum that \$255,120 represented 18.1% of his original claim for \$1.5 million. At the hearing he argued that the percentage for past income loss was actually 15.1% of the total value of his claim based on the fact that his total claim was originally put forward at \$1,689,160 in his mediation brief. Using that starting point, he asks this Court to find that 15.1% of the \$650,000 settlement (or \$98,150) was family property, meaning that 84.9% of the settlement (or \$551,850) was excluded property. If this argument is accepted, the value of Mr. Foster's excluded property in the Armstrong farm would be increased.
- [54] I do not agree with Mr. Foster's arguments. First, the judge committed no legal error in her analysis. The judge correctly noted that the onus was on Mr. Foster to prove excluded property: s. 85(2), FLA. She also reviewed case law on what that onus represented: at paras. 68-69. Moreover, the judge reviewed and assessed the relevant evidence. She examined the defendants' mediation brief and found that the defendants did not "strenuously object" to Mr. Foster's claim for past income loss: at para. 70. This was in comparison to the defendants' objections to Mr. Foster's loss of earning capacity, cost of future care, downtime loss, and service truck repairs: at para. 67.
- [55] In my view, the judge did not misapprehend the evidence and it was open for her to conclude that the \$650,000 settlement included Mr. Foster's entire claim of \$255,120 for past income loss.
- [56] Mr. Foster argues the judge over-estimated some of his miscellaneous assets. In particular, he notes that the judge valued a car at \$20,000 when neither party provided any evidence as to the actual value of the car. He asks this Court to cut the judge's \$40,000 valuation of those assets in half.

[57] Contrary to Mr. Foster's argument, there was evidence about the value of the car. At trial, Mr. Foster testified that he gave the car to his parents to satisfy a \$20,000 debt owed to them: at para. 78. As to the other household items, apart from saying the judge did not properly assess their value, Mr. Foster cannot point to any evidence the judge failed to consider or misapprehended in coming to her conclusion. There is no reason for this Court to interfere in the judge's assessment of the evidence.

Summary of Mr. Foster's Appeal

[58] In summary, I am not persuaded that the judge misapprehended any evidence or committed any other error in her assessment of the parties' relationship and the value of the family property.

Disposition

[59] I would dismiss the appeal and the cross-appeal. The general rule regarding costs is that the successful party to an appeal or cross-appeal is entitled to their costs, unless the Court otherwise orders: s. 23, Court of Appeal Act, R.S.B.C. 1996, c. 77. In the circumstances, I would order that each party bear their own costs of both the appeal and the cross-appeal.

[60] FITCH J.A.: I agree.

[61] ABRIOUX J.A.: I agree.

[62] FITCH J.A.: The appeal and cross-appeal are dismissed. The parties will bear their own costs in relation to both appeals.

"The Honourable Mr. Justice Butler"

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