
CANADA / JUDGMENT

Boylan v. Boylan

2021 BCSC 1726

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Supreme Court of British Columbia

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2021 BCSC 1726 Boylan v. Boylan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boylan v. Boylan,

2021 BCSC 1726

Date: 20210831

Docket: E172908

Registry: Vancouver

Between:

Darlene Ann Boylan

Claimant

And

Michael Cameron Boylan

Respondent

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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Vancouver, B.C.

August 31, 2021

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Introduction

- [1] In this family law claim, the only issues to be decided relate to division of family property and spousal support. The claimant seeks an equal division of the family property as of the date of separation. She also seeks spousal support. The respondent does not oppose an equal division, but disputes the appropriate date and certain valuations. He also says that the family had outstanding loans, of which the claimant was not aware. He says that the value of the family property at the time of separation was substantially less than asserted by the claimant. He also says that he has little income at present.
- [2] Both parties seek a divorce.
- [3] During the course of the 20-year-relationship the family accumulated a number of assets. This case is complicated by the fact that, since separation, most of the family assets have been sold or liquidated to finance the ongoing expenses of the parties. The claimant says that the respondent has received the bulk of the proceeds from those sales. The respondent says that most of the funds he received went to pay family loans or business expenses.
- [4] As discussed below, although the respondent retained counsel for this trial, he went unrepresented for a long stretch before trial. During his unrepresented period, the respondent's document disclosure was (overtly) incomplete. Further, he took blatantly inconsistent positions at different points during the trial. Those changing positions, among other problems, lead to my finding that the respondent is not a credible witness.
- [5] Despite the evidentiary problems, the parties agreed to proceed to trial and seek the court's ruling on the issues raised. In these reasons, I have attempted to make the best decisions possible based on the available evidence. Given my findings on credibility and other issues, the division of assets is more of an accounting exercise than a legal one. However, on the claim for spousal support, I have decided that there is insufficient evidence from the respondent to make a decision. I have adjourned that portion of the claim.
- [6] For the reasons that follow, I order that the respondent pay the claimant \$385,370 and \$200,000US. I also order that the parties shall be divorced, effective 31 days from the date of these reasons. I adjourn certain issues and grant liberty to the claimant to bring her claims in respect of those claims should proper evidence be disclosed.

Background Facts and Income Information

- [7] The parties were married on May 11, 1996. Both were in their early 20s. The claimant was pregnant with their first child on the date of the wedding. The relationship produced two children, both adult now.
- [8] During the course of the marriage, the couple accumulated significant assets which I describe below.
- [9] The parties separated in August 2015.

- [10] During the course of the relationship, the claimant did not work outside of the home. She did not work in the years immediately after separation. In 2018 she went into the real estate staging business with a partner. She has managed to achieve modest income from that business to date. Her income is not a significant issue in this trial.
- [11] As a result of problems with the respondent's credibility and disclosure, I have only a murky picture of his business and earning history. The parties agree that the respondent developed a drug addiction problem after separation. They do not agree on the extent of that problem. However, the respondent does blame his addiction for his poor recollection of certain time periods and chronologies.
- [12] Nothing turns on the early history of the respondent's business ventures. My "understanding" (which falls short of a "finding") is that he had the following business history:
- a) Prior to the marriage, he was employed at a hydroponics store owned by his relatives.
 - b) He says that he bought the hydroponics business in 1994 (i.e. pre-marriage) for \$300,000. The claimant disputes the timing of the purchase, noting that the couple lived in her parents' basement when they married.
 - c) He sold the hydroponics store in 2006 or 2007 for \$600,000.
 - d) After selling the hydroponics business, he invested the proceeds with a partner into another hydroponics business with two partners. He says he was bought-out of that business in 2008 or 2009. He had no recollection of the sale price.
 - e) In 2010 he invested with a partner in a "hand-crafted stone" business. He did not recall the purchase price, but he says that he ran the company for five years.
 - f) He ceased being involved in the stone business in 2015. He said the partners decided to wind down the company because it was "too big to sell".
 - g) Between 2010 and 2014, while he was involved with the stone business, he says that he took "stock courses" and began trading equities and assisting companies intending to make public offerings of their shares.
 - h) Commencing in 2014, the respondent conducted business under the banner of the "Affirmed Capital Group" ("Affirmed Capital").
- [13] The respondent described the mainstay of Affirmed Capital's business as follows. Affirmed Capital would obtain business plans of companies that were seeking investors. If the plan was attractive, they would either invest their own funds, or obtain outside investment. They would then push the company toward an initial public offering. He says that Affirmed Capital would earn income either from consulting fees or in return on investment. He also claimed that his two main private investors were "asset managers" from Switzerland and Hong Kong. He was not able to provide their names.

- [14] I note that, despite his purported education, and his foray into the financial markets, the respondent's testimony displayed a significant lack of understanding of the stock broking business and the operations of both private and public companies.
- [15] The respondent testified that, as of the date of separation, Affirmed Capital was working on a few deals:
- a) A "green rewards" technology company that would pay royalties for the purchase of cannabis. He says this business was eventually dissolved and had no value.
 - b) A company called "BioTrack" which I discuss below.
 - c) A company called "Lyric Lab", which was started by the respondent and his son. The concept was the pairing of DJs with rappers in an online portal. (There is no evidence that this business had any value, but there is evidence that the claimant advanced funds in respect of the business.)
- [16] The respondent claimed in his direct testimony that Affirmed Capital had no real assets or income at the time of separation. However, during cross-examination, the respondent admitted that the business received \$140,000 following the separation. He could not recall whether that amount represented income or return of capital. He says that he later spent those funds on maintaining the rent and expenses of the business. This payment establishes that the value of Affirmed Capital was at least \$140,000 as of the date of separation.
- [17] As a result of the respondent's poor document disclosure, apart from the \$140,000 deposit and other deposits to personal bank accounts, there is little information about the value of Affirmed Capital at the date of separation.
- [18] The respondent testified that he wound-down Affirmed Capital in 2017 or 2018 and that he had little income until approximately 2020. In his direct testimony, he claimed that within the last year he commenced doing "odd jobs" for friends in a small community in BC. In cross-examination, he confirmed that he was working at a marijuana "grow operation". He claimed that he was being paid a low income, akin to minimum wage. Upon further pointed questioning, he admitted that the "grow operation" is located in his residence. He provided no documentary evidence indicating the actual amount of his income.
- [19] As noted, the respondent's financial disclosure was significantly lacking. The respondent admitted to having problems with the Canada Revenue Agency (the "CRA"). He tendered into evidence unsigned copies of documents that purported to be his income tax returns for 2014 and 2015. It was my impression that the respondent tendered those documents to indicate that he had filed returns (and thus, reported his income) in those years.
- [20] However, other information provided by the CRA (T1 Comparative summary) indicates that the respondent did not file returns in 2014 or 2015. Further, the T1 Comparative summary, indicates that the CRA ascribed an income of \$315,000 to the respondent in 2016, with \$118,000 in tax owing. It also indicates that he withdrew \$100,000 in RRSPs between 2016

and 2018. I understand that the T1 Comparative Summary derives from the information in the CRA's possession (as opposed to the information provided by an individual). Hence, it appears that the respondent has not filed an Income Tax Return in any year between 2014 and 2020. The respondent testified that he is currently in a dispute with the CRA over the income ascribed to him in 2016. Again, no documents were produced. The only conclusion that I can draw is that the respondent tendered as evidence tax returns for 2014 and 2015 that had not been filed with the CRA. They were, at best, hypotheticals and do not bear any relation to his actual income.

- [21] As noted, the respondent's testimony, and the entirety of this action, appear to be significantly complicated by his addiction issues. He concedes that his memory for some events is poor. He says that he suffered injuries in a scooter accident soon after separation in 2015. He says that, arising from those injuries, he developed a dependency on pain killing medications. He says that he worked through those issues and he denies any ongoing problems. However, he blames his poor memory on those dependency issues.
- [22] The claimant says that the respondent's drug dependency was much more severe than he admits. She says that in the period after separation, the respondent gradually withdrew into a very limited life, rarely leaving his residence. During this time, she says the respondent kept asking her for money. She says that she knew that he had addiction problems, but she acceded to his requests. She did so either because he was destitute, or because he said that he needed the funds to complete a financing deal that would provide significant profit (in which she would participate). I discuss below the payment out of the funds from the sale of the family assets. To the extent that those funds were distributed in an unequal manner, the claimant's testimony on this issue explains the reasons for that inequity.
- [23] I also note the paradox that the respondent's testimony at trial attempted to minimize the extent of his addiction issues, while at the same time attributing responsibility for certain events to those issues. I discuss below certain financial steps that the respondent took that can only be described as "outrageous". I also note that at no time prior to trial did he acknowledge or apologize to the claimant for his profligate ways. Further, at trial, the respondent put forward fallacious arguments in an attempt to establish the basis for arguments in support of an uneven distribution of assets in his favour. In my mind, those are not the actions of a person who has recovered from addiction issues and taken responsibility for his actions.
- [24] I discuss the credibility of the respondent's testimony below. In short, it was lacking.
- [25] Regardless of the severity of the respondent's dependency issues, the fact is that the majority of the assets accumulated during the marriage have now been sold and the funds have been spent on supporting the lifestyles of the parties. As a result, the main issues are whether, following this long marriage, the family assets should be divided evenly and if so, their value and the date of valuation. The issue of division of assets is complicated by the following factors:

- a) the sale of significant assets;
- b) the unequal distribution of the proceeds of those sales;
- c) the respondent's failure to file income tax returns;
- d) the poor financial document disclosure by the respondent;
- e) the respondent's allegation that many of the family assets were encumbered by loans, of which the claimant was not aware and for which there is no written evidence; and
- f) the fact that there were no appraisals of the properties. (The claimant relies on assessments and actual sale prices. The respondent argues that the evidence is not sufficient.)

[26] The impact of each of these factors varies in relation to each family asset.

Credibility and Reliability

[27] Each side submits that the other is not credible or reliable.

[28] Put simply, I find that the claimant is credible but not reliable. The respondent is neither credible nor reliable.

[29] With respect to the testimony of the claimant, I accept that she testified to the best of her ability and in an honest fashion. There was no successful attack on her credibility in cross-examination. The vast majority of her testimony was consistent with common sense and the documentary evidence relating to business or real estate dealings.

[30] There were, however, many questions relating to the finances of the family and related companies that the claimant could not answer. The questions related to periods both before and after the separation. As noted, the claimant's document disclosure was good. She disclosed many bank records. On some documents she had written in the source or destination of the funds that entered or exited her accounts.

[31] Despite her good record keeping, there were occasions where she could not identify the source of funds. This occurred even with respect to bank records upon which she had written notes. For example, on one deposit she wrote "Heff" on the banking record. She could not recall the nature of those deposits. When prompted, she remembered that she had sold pieces of art through Heffel Gallery.

[32] Based on her testimony, and the totality of the evidence, I find that the claimant is credible. However, her recollection of events and deals is not necessarily reliable.

[33] The respondent, on the other hand, is neither credible nor reliable. I reject all of his evidence except where it represents an admission against interest or a confirmation of a documented transaction.

- [34] The respondent had poor recall of the timeline of events both before and after separation. He was not able to identify important aspects of significant financial transactions. Many aspects of his evidence were inconsistent with documentary evidence. He referred to several loans and business deals but had no documents relating to those deals. As noted, he blamed some of those memory problems on his dependency on pain killers.
- [35] An example of internal inconsistency arose in his direct testimony. He claimed that he was essentially disabled from working following the scooter accident in September 2015. He said that Affirmed Capital did almost no business thereafter because he was disable. In his direct testimony, he could not recall when he wound-up the business. However, in cross-examination, he agreed that the busiest years for Affirmed Capital were 2015 and 2016 (after separation and the scooter accident). Those statements cannot be reconciled.
- [36] The production of financial records from Affirmed Capital is best described as "minimal". The only documents disclosed were the 2014 Financial Statement (unaudited) plus bank records commencing in late October 2015 (post-separation). There is no evidence of the financial position of the business at the date of separation.
- [37] Perhaps, not surprisingly, the starting bank balance on the post-separation (October 2015) bank records is zero. It is, of course, virtually impossible for an ongoing business to have a zero balance (reflecting no prior deposits, withdrawals or debts) at the start of any particular reporting period. I infer that the respondent opened new bank accounts in October 2015. The only reason he would do that would be to convert the pre-separation assets to his own use and to hide them from the claimant. I infer that if the business debts had existed, he would have relied on them to reduce the total value of the family's assets.
- [38] Hence, it is evident that the respondent started his practice of misleading the claimant about his assets soon after the separation. That practice continued at trial.
- [39] The respondent's evidence often contradicted itself even within the bounds of his own direct testimony. I discuss specific examples of financial transactions later in these reasons when discussing specific asset disputes. However, two examples, are illustrative.
- [40] The first example relates to the respondent's claim regarding excluded property. His position on that issue evolved over the course of the trial. Perhaps "evolved" is the wrong word. It is more accurate to say that his position lurched back and forth:
- a) In a financial disclosure form filed the week before the trial, he declared the value of his "excluded property" at \$0.
 - b) In the Opening Statement, his counsel indicated that he was making a claim for \$150,000 that he inherited and invested in the hydroponic business during the early part of the relationship.
 - c) During his testimony, he claimed that he invested either \$200,000 or \$250,000 into the business.

- d) In support of that claim, the respondent indicated that he was going to call the person who sold the business to him.
 - e) During a break in the trial, I understand that claimant's counsel contacted the potential witness.
 - f) At the resumption of trial, the respondent dropped all claims relating to excluded property.
- [41] As a result, the issue of excluded property is no longer being argued. However, I think it is fair to characterize the respondent's efforts as an attempt to mislead the court that goes beyond simple credibility problems. The steps described above indicate that he set about to manufacture a basis for an argument affecting the outcome of these proceedings. He testified to set up the foundation of that position. Then the underpinning fell apart and his testimony was exposed as false. That is a credibility problem that is different from a witness who, on cross-examination, obfuscates or tells half-truths. The respondent planned falsehoods in an attempt to mislead the court.
- [42] The second, and perhaps the best, example of the respondent's lack of credibility is, ironically, a point in his testimony when he actually told the truth. As discussed below, the couple jointly owned several condominiums, including one on Hornby Street. After separation, the respondent moved into the Hornby condo. He later signed a contract to sell that condo without advising the claimant. When asked, in cross-examination, whether he had forged his ex-wife's signature on the deposit documents, he admitted that he had taken that step. He made a point of apologizing to the claimant "on the record".
- [43] Hence, I find that the most (and perhaps the only) honest part of the respondent's testimony was his statement that he had forged his ex-wife's signature on real estate documents. That forgery meant that \$450,000 was paid to him directly without any funds being paid to the claimant. To be clear, he only made the admission at trial because the documentary evidence plainly disclosed what had occurred and the claimant's counsel had established the necessary underpinning.
- [44] These are only two of many instances where the respondent's testimony was significantly out of step with the documentary evidence or normal business practice.
- [45] As noted, I have addressed the issues in this trial on the basis that I cannot accept the evidence of the respondent as being credible or accurate unless it represents an admission against interest or confirmation of a documented transaction.

Law

Division of Assets, Date of Valuation, and Family Debts

- [46] As noted, the main issue addressed in this trial was the division of assets.

- [47] The claimant seeks an equal division of assets as of the date of separation. She says that the couple came to an oral agreement on division of property shortly after they separated. She further notes that the assets have been sold over time, and proposes that the actual sale proceeds be used for the valuation of each asset.
- [48] The respondent does not oppose an equal division of assets. He argues that:
- a) there were family debts of which the claimant was not aware, which decrease the total value of the family assets;
 - b) there was no binding agreement regarding the equal division of assets immediately after separation. Hence, the valuation date should be the date of trial; and
 - c) there is insufficient evidence of valuation as of the trial date.
- [49] These issues engage Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], specifically ss. 84-87.
- [50] Those sections were recently explained in *J.F.L.M. v. S.N.M.*, 2021 BCSC 596, wherein Justice Marzari wrote:

Statutory Framework

- [40] Section 81 of the FLA provides that, on the date of separation, each spouse is entitled to an undivided half interest in all family property as a tenant in common and is equally responsible for family debt, "regardless of their use or contribution".
- [41] Family property is described in s. 84(1)(a) as all real and personal property owned or beneficially owned by either spouse on the date of separation, unless the property is excluded. There is no issue of excluded property in this case.
- [42] Family debt is defined at s. 86, and includes all financial obligations incurred by a spouse during the period of the relationship. Debt incurred after the date of separation is only defined as family debt if it is incurred for the purpose of maintaining family property.
- [43] Under s. 87(b)(ii) of the FLA, the presumptive date for valuing family property and debt is the date of the trial. Departing from the presumptive date of valuation is effectively a reapportionment or unequal division of family property and debt, which can only be achieved through application of s. 95 of the FLA and a finding of significant unfairness: see *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 59; *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76.
- [51] Pursuant to s. 81, after this long marriage, I find that each party is entitled to an equal share of the family property.

- [52] As noted, s. 87(b)(ii) provides that the presumptive date for valuation is the trial date. The obvious problem with using the trial date for valuation is that most of the assets have already been sold. The funds derived from those sales were dispersed (at least initially) between the parties. Using the trial date for valuation in these circumstances might not be unfair, but it would most certainly be impractical.
- [53] On that basis, I find that the proper date for valuation is the date of the sale of each asset.
- [54] I find that the agreement to divide assets evenly is established on the evidence. The actions of the parties after separation establishes that there was partial performance of the agreement to divide the assets evenly. I discuss below what happened after the sales. However, it is clear from the evidence that when an asset was sold (and when both parties knew of the sale) the parties divided the proceeds evenly. I further note that such an agreement is not surprising, given the length of the marriage and the roles of the parties within the relationship.
- [55] As noted, the respondent also argues that there were family debts. This submission engages s. 86 of the FLA:

Family debt

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

[56] Under the heading "Credibility and Reliability", I set out the reasons for my rejection of the respondent's evidence relating to family debts. On the basis of that reasoning, in my assessment below, I reject the respondent's evidence and arguments suggesting the existence of family debts unless there is either written evidence of a loan agreement existing before the separation, or evidence that a loan was incurred to maintain family property. In circumstances where there is documentary evidence of a loan, I have assessed whether it is reasonably related to the family's assets at the date of separation.

Assets at Separation

[57] The assets at separation fall into three categories: real estate, investments and chattels (cars and jewellery). I discuss the three groups in that order. I note, at the outset, that I have not considered the tax consequences of any of the transactions.

Real Estate

[58] The couple were registered owners in six pieces of real estate as of the date of separation. I discuss each property below.

Buchanan #1

- [59] At the date of separation, the couple owned and resided in adjoining condos on Buchanan Street ("Buchanan #1" and "Buchanan #2", respectively). Upon separation, the claimant moved into Buchanan #2 and the respondent moved into a condominium the couple owned on Hornby Street (discussed below).
- [60] After separation, a decision was made to sell one of the adjoining condos (Buchanan #1). The sale completed in May 2016.
- [61] The sale proceeds from Buchanan #1 were used to pay out: (1) an existing mortgage on the property; (2) legal fees; and (3) an existing CRA 'Requirement to Pay' and judgment held by the CRA against the respondent in the amount of \$38,864.30. I accept that this CRA amount constituted a family debt because it must have related to tax debts incurred before 2015.
- [62] The net sale proceeds from Buchanan #1 were \$391,944. Those funds were paid:
- a) \$210,000 to the claimant, with the proviso that the claimant would pay \$10,000 toward the respondent's VISA bill.
 - b) \$181,000 to the respondent.
- [63] Starting in July 2016, the respondent requested further funds from the claimant. In addition, the claimant paid expenses for the mortgage and fees on the remaining condo (Buchanan #2) where she continued to live.
- [64] The claimant documented total payments to the respondent's benefit in the amount of \$99,457.57 between July and November 2016. Those funds were paid out of her share of the net sale proceeds. She seeks an equal division of the original net sale proceeds.
- [65] The respondent makes three arguments about the payments from the claimant.
- [66] First, he argues that, included in the claimant's transfers, were payments to one of the couple's sons in the amount of \$14,950 (thus reducing the claimant's payments to \$84,507). The bank records indicate that funds in that amount were paid to the son. The dispute is whether those funds benefited the respondent.
- [67] The claimant says that these transfers were, in fact, payments to the respondent. As noted above, the respondent was involved in a business called "Lyric Lab" with his son. The claimant says that the funds were transferred to the son and flowed through to the respondent. The bank records only indicate the recipient, not the purpose, of the transfers. The named recipient of the funds (their son) did not testify.

- [68] I find that these funds were paid by the claimant to her son to assist in his business enterprise. The funds are not properly ascribed to the respondent. However, there is no evidence that the respondent made any corresponding contributions to the business. Likely, if the couple had been together, they would have shared in the contributions. As a result, I ascribe half of those funds to the claimant and half to the respondent. In other words, I find that the claimant contributed \$7,475 to Lyric Lab on behalf of the respondent.
- [69] Second, the respondent argues that the claimant should be charged occupational rent and be responsible for the condo fees for the apartment in which she resided (Buchanan #2). However, the claimant was also paying the condo fees for the couple's condo on Hornby Street, in which the respondent was living. Therefore, I reject the respondent's argument in this regard.
- [70] Third, the respondent argues that he used his portion of the net sale proceeds to pay business expenses in respect of Affirmed Capital. Hence, he says that those amounts should not count against him. He was using the funds in an attempt to earn income.
- [71] There are three significant and related problems with that position:
- a) First, the 2014 financial statements of Affirmed Capital (to the extent that they can be assumed to be accurate) indicate that the total business expense for 2014 was \$83,146. Of that amount \$35,660 went to "Legal Expenses". Hard expenses (salaries and rent) comprised \$31,000. Hence, the respondent's share of the net sale proceeds (i.e., the original \$181,000 that he received following the sale) would have sustained the business for well over a year.
 - b) The respondent began requesting funds from the claimant within two months after the sale proceeds were received. There is no possibility that the \$181,000 he received in July 2016 had been expended on business activities within those two months.
 - c) The respondent produced no documents that would support his claim that the sale proceeds were invested in, or put toward the expenses of, Affirmed Capital.
- [72] On that basis, I reject the respondent's arguments regarding his portion of the net sale proceeds from Buchanan #1.
- [73] Thus, the net sale proceeds were \$391,944. The claimant received \$118,017 and the respondent received \$273,927.
- [74] The claimant should have received half of the net sale proceeds, \$195,972.
- [75] On that basis, I find that the net sale proceeds from the sale of Buchanan #1 were divided unequally. I find that the respondent owes the claimant \$77,955 in respect of the proceeds from that sale. I round that figure to \$78,000

Buchanan #2

- [76] The claimant continued to live in the adjoining condo, Buchanan #2, after separation.

- [77] The parties sold Buchanan #2 in July 2018 for \$1,076,363. The claimant took the entire amount. In the chronology of the sale of the assets, this transaction occurred after most of the other family assets had been sold. The distribution of the funds from those prior sales was not equal. Hence, the claimant was protecting her position by keeping the sale proceeds of Buchanan #2 for herself.
- [78] The proceeds were used by the claimant for the following:
- a) \$600,000 was used to finance the purchase of a condo on Halifax Way (see below at paras. 124-126);
 - b) \$270,000 went into her new staging business; and
 - c) \$192,000 has been spent or remains in her account.
- [79] The claimant says that certain funds in the amount of \$14,000 were paid to the respondent's benefit. The claimant paid these funds for the respondent to attend a drug rehabilitation centre.
- [80] Hence, the claimant received \$1,062,364 on the sale of Buchanan #2. She should have received \$538,181.
- [81] As a result, the respondent is owed \$524,181 from the sale of Buchanan 2.

Hornby Condo

- [82] Prior to separation, the couple purchased a condo on Hornby Street as joint tenants (the "Hornby Condo"). Upon separation, the respondent moved into the Hornby Condo. The claimant testified that it was her understanding that they bought the Hornby Condo free and clear of any debts or encumbrances. There was no mortgage registered against the title. She was aware, however, that a mortgage in the amount of \$354,635 was later registered against the title in March 2015 (prior to separation). She understood the funds from that mortgage were to be used for the purchase of a condominium in Los Angeles (discussed below).
- [83] The respondent has a different story about the purchase and sale of the Hornby Condo.
- [84] In his testimony, the respondent claimed that the funds used for the purchase of the Hornby Condo had been borrowed from a "Swiss Money Manager". He said this was the same individual who invested client funds in the business projects of Affirmed Capital. The respondent's testimony vacillated between the funds being "invested", as opposed to "loaned", by the money manager. In answer to a question posed during cross-examination, the respondent agreed that, whoever this Swiss money manager may be, he or she would have to be terrible at his or her job to invest or lend money for the purchase of real estate, but fail to register a mortgage or interest against the title to that property.
- [85] I reject the respondent's claim that the Hornby Condo was purchased with borrowed funds. It was purchased by the parties unencumbered.

- [86] The disposition of the Hornby Condo is significantly troubling.
- [87] Unbeknownst to the claimant, the respondent entered into an agreement to sell the Hornby Condo in August 2016 for the sale price of \$1,375,000. The terms of the sale were unusual in that the contract provided for a deposit of \$450,000 paid by the purchaser. There was a long closing period, during which the respondent continued to live in the condo.
- [88] In order to sell the Hornby Condo, which was held jointly, the respondent forged the claimant's signature on the buyer's document acknowledging receipt of the \$450,000.
- [89] In his testimony, the respondent provided two stories. First, he claimed that he had not received the \$450,000 and that it was an error on the lawyer's closing documents. At other points in his testimony, he claimed that he used the \$450,000 to repay the Swiss money manager. He provided no evidence of the deposit or ultimate destination of those funds. I reject both of his stories.
- [90] In the autumn of 2016 (after receiving, and presumably spending, the deposit funds), the respondent advised the claimant that he would be putting the Hornby Condo on the market to sell. This was a lie. He already had a contract to sell the property to the individuals who paid the deposit. The claimant agreed to the respondent marketing the condo.
- [91] In October 2016, the respondent advised the claimant that he had arranged a "bridge loan" on the Hornby Condo in the amount of \$150,000. He asked that she attend at a lawyer's office with him to sign the necessary papers. (The claimant did not yet know about the \$450,000 deposit or the existing contract of purchase and sale.)
- [92] When the claimant arrived at the office, the lawyer advised her that the "bridge loan" funds were being borrowed at an interest rate of 55% per annum. The claimant refused to sign the documents and left the office. The respondent followed her and told her that he needed the funds because people were threatening harm against him and his family. On the basis of that information, the claimant returned to the lawyer's office and signed the mortgage documents. The claimant says that she only agreed to the extremely high interest rate because of the respondent's coercion. I accept her submission on that issue.
- [93] On November 3, 2016, the sale of the Hornby Condo completed. Not surprisingly, at the closing meeting, there was a dispute over the purchase price of the property as between the claimant and the respondent.
- [94] The seller's statement of adjustments indicated that the purchase price was \$1,375,000 and that \$450,000 had been paid to the vendor as a deposit. The claimant signed the documents, but demanded to know what had happened to the \$450,000 deposit. The respondent told her that it was a mistake on the documents. The vendor's statement of adjustments indicated that the purchase price was \$926,023. The difference between those figures is approximately \$450,000.
- [95] Further, there were two mortgages registered against the Hornby Condo:

- a) \$354,636 to a private lender (used in the purchase of the L.A. Apartment, discussed below); and
 - b) \$177,500, being the amount owed under the 55% mortgage granted in October 2016.
- [96] I deal with the proceeds of the \$354,636 mortgage below under the heading "L.A. Condo". However, for the purpose of the sale of the Hornby Condo, that mortgage was paid off (to the benefit of both parties). After accounting for legal fees, strata fees and property taxes, the net sale proceeds available for distribution were in the amount of approximately \$1,020,365.
- [97] By the date of completion of the sale, the respondent had already received a total of \$627,000 comprised of:
- a) The \$450,000 advance payment/deposit.
 - b) The proceeds from the \$150,000 loan in October 2016;
 - c) (although he did not receive it) interest of \$27,000 on the \$150,000 loan;
- [98] I noted above the coerced mortgage loan of \$150,000 at high interest that was paid-out at \$177,000. I find the claimant is not responsible for the interest paid on that loan. The respondent received the benefit of the amount borrowed. He is responsible for the interest paid of \$27,000.
- [99] Hence, the Hornby Condo sold for \$1,375,000. The respondent received \$627,000. The mortgage for the L.A. Condo was paid off \$354,636 and some legal fees and property taxes were paid (approximately \$6,200). That left approximately \$387,000 as the funds available for distribution after closing.
- [100] Those funds (\$387,000) were deposited into a joint account. At the request of the respondent, the claimant allowed funds to be dispersed to the respondent's benefit. She testified, and I accept, that he manipulated her by suggesting that he needed the funds for business deals. Further, he reassured her that her financial position was secured by the equity in other properties that had not been sold.
- [101] The claimant says that, in the months after completion, she paid out approximately \$313,000 to the benefit of the respondent. That amount is supported by bank records showing transfers. This left approximately \$74,000 paid to the benefit of the claimant.
- [102] I have reviewed the evidence regarding the claimant's payments. I note that \$16,000 was paid to the couple's son. As with my treatment of the payments from the proceeds from the sale of Buchanan #2, the evidence establishes that the funds went to the benefit of Lyric Lab. Hence, I attribute half of that amount (\$8,000) to the claimant and half to the respondent. Hence, the claimant received approximately \$82,000 (\$74,000 + \$8,000) from the sale of Hornby.

- [103] However, the rest of the funds from the sale of the Hornby Condo were disbursed to the benefit of the respondent.
- [104] Hence, the sale of the Hornby Condo garnered \$1,375,000. Of that amount, approximately \$354,635 went to pay the L.A. Condo mortgage and other expenses, leaving \$1,020,365.
- [105] The claimant should have received \$510,182.50.
- [106] Of the net sale proceeds, the respondent received approximately \$940,000 and the claimant received approximately \$82,000.
- [107] Hence, the claimant is owed \$428,000 on the sale of the Hornby Condo.

L.A. Condo

- [108] In March 2015 (prior to separation), the respondent advised the claimant that he intended to purchase a condominium in Los Angeles, California, as an investment (the "L.A. Condo"). The purchase price was \$400,000US. The property would be registered solely in his name. He told her that the apartment would produce good rental income. On that basis, he convinced her to consent to borrowing (jointly) \$339,000CND secured by a mortgage against the Hornby Condo. With fees and expenses, the total amount borrowed was \$350,000CND.
- [109] The respondent purchased the L.A. Condo in May 2015 for \$400,000US.
- [110] The respondent later sold the L.A. Condo (post-separation) although the date is unclear and we have no documentation. He did not use the sale proceeds to pay off the mortgage on the Hornby Condo. He has never accounted for the proceeds of the sale of the L.A. Condo.
- [111] In 2019, the claimant emailed the respondent and asked about the status of the L.A. Condo. He responded with an email advising that it had been sold. He further advised that the purchase price had been financed "100%" through friends and investors. He stated: "When it sold for a \$10,000.00 loss the proceeds went directly back to the Investor. As you can see it never went into my Accounts".
- [112] At trial, the respondent admitted that the L.A. Condo did not sell at a \$10,000 loss. However, he reiterated that he used the proceeds from the sale of the L.A. Condo to pay off either "investors" or "lenders".
- [113] However, the evidence is clear that the May 2015 mortgage on the Hornby Condo (advanced on May 13, 2015) was used for the purchase. Hence, the majority of the purchase funds had clearly come from the loan secured on the Hornby Condo.
- [114] On the evidence presented, the only conclusion I can draw is that the L.A. Condo sold for \$400,000US and the respondent received 100% of those funds. I accounted for the mortgage on the Hornby Condo (\$354,635) above under the sale of that property.

[115] The respondent is owed \$200,000US on the sale of the L.A. Condo.

Pre-Sale Contract for Halifax #1

[116] Prior to separation, the couple invested in a pre-sale condominium contract for a property located on Halifax Way ("Halifax Pre-Sale #1"). They invested \$122,000. They paid cash.

[117] In March 2017, in order to finance their ongoing expenses, the claimant and the respondent agreed to sell Halifax Pre-Sale #1. It had appreciated in value.

[118] The claimant testified that the sale price of the Halifax Pre-Sale #1 was \$234,000, which should have resulted in a profit of \$112,000. Hence, there was \$234,000 to divide between the parties.

[119] On the closing day, the parties arrived at a lawyer's office. The claimant was advised that the sale price was going to be \$122,000. She says that the respondent received the remainder of the sale price in cash from the purchaser. The respondent denies that allegation.

[120] The claimant called the purchaser of Halifax Pre-Sale #1 to testify. The purchaser's evidence on the transaction was, at best, vague. However, the purchaser confirmed that, prior to his purchase of Halifax Pre-Sale #1, he had loaned funds to the respondent for either gambling or investments in 2016 (post-separation). He recalled that the "sale" of Halifax Pre-Sale #1 was "likely" the manner in which those loans were repaid. He did not recall providing cash to the respondent.

[121] The claimant submits, and I accept, that the respondent received his share of the proceeds of the sale of Halifax Pre-Sale #1 by some means described in the paragraphs above. He received either cash, or forgiveness of debt. The claimant acknowledges that she received \$112,380 from the sale in late June 2017.

[122] However, the claimant says that the respondent pleaded with her to provide money for his living expenses. She says that she was aware that the respondent was in dire straits because her sons would visit him and advise her. By the summer of 2017 the respondent's utilities had been shut off in the house he was renting. As a result, the claimant paid \$44,775 toward the expenses of the respondent. She used \$67,604 for her own purposes.

[123] Accordingly, the claimant is owed \$44,775 from Halifax Pre-Sale #1.

Pre-Sale Contract for Halifax #2

[124] In addition to the Halifax Pre-Sale #1 purchase, the couple purchased a second pre-sale contract for another condo located on Halifax Street ("Halifax Pre-Sale #2"). They paid a cash deposit of \$142,780.

[125] In December 2019, the building on Halifax Street was completed. The claimant used the funds from the sale of Buchanan #2 (\$600,000) (discussed above at paras. 76-81) to finance the completion of the purchase of the second Halifax Street condo.

[126] As noted, the couple paid a deposit of \$142,780, which was a family asset. Hence, the respondent is owed half of that amount, \$71,390.

The Respondent's Business and Personal Accounts

[127] There is no dispute that the respondent's business, Affirmed Capital, was a family asset. The only issue relates to its valuation. As noted above, there is a paucity of credible evidence on that subject.

[128] The respondent's testimony about the nature and conduct of the business was internally inconsistent. There is no financial disclosure indicating the financial transactions that were being undertaken or pursued at the date of separation (despite an order for production). Bank records disclosed from the period following separation were for new accounts that started with a zero balance. The only bank records that the respondent disclosed were two personal accounts, showing transactions from 2015 to 2019. It is evident that these were not the respondent's only accounts.

[129] I note that this paucity of evidence both hurts and helps the respondent's position. Obviously, if the business held equity positions, those would add to the value of the business. Conversely, the respondent's claim that family assets were encumbered by business loans is dependant upon documentary evidence. In addition to the other problems with his evidence, it is simply not credible that a business in the financial sector (especially one with the ironic name of "Affirmed Capital") would not have financial records indicating (at least) its assets, debts, and loan transactions.

[130] I noted above the existence of the company "Lyric Lab". I heard no evidence that this enterprise had any value. I have accounted for the claimant's advances regarding that business. I do not ascribe any value to it.

[131] The claimant reviewed the respondent's personal bank statements from June 2015 to 2019. Those records show total deposits of \$564,332 that are not explained by the sale of other family assets.

[132] The claimant submits that the respondent has provided no credible explanation regarding the basis of the deposits. I agree. Funds do not magically appear in corporate or personal bank accounts. They are paid by clients or customers on accounts receivable, or for other debts owed. Whatever the reason, they constitute assets of the business of the respondent. I find that they must have derived from the sale or transfer of family property or assets.

[133] In addition, the respondent conceded that Affirmed Capital received \$140,000 on account of its work for, or investment in, "BioTrack".

[134] The claimant seeks half of these sums.

[135] I find that the claimant is owed \$352,166 (half of \$564,332 + \$140,000) from the respondent's business activities. As noted, I am not factoring in the impact of any income tax payable.

[136] In coming to this conclusion, I am opting not to accept the claimant's alternative argument (based on *C.P. v. K.W.A.*, 2018 BCSC 332 at paras. 255-257), that I should presume that the respondent had an equal (additional) amount of financial assets that were not disclosed in the litigation.

RRSPs

[137] As noted above (at para. 20), the CRA T1 Comparative Summary indicates that the respondent withdrew \$100,000 from his RRSPs between 2016 and 2018. At trial, the respondent conceded that he withdrew those funds.

[138] The claimant acknowledges that she received (a different) \$16,000 in RRSPs.

[139] All RRSPs (\$116,000 total) were a family asset. Of that amount the claimant received \$16,000. She should have received \$58,000.

[140] The claimant is owed \$42,000 from the withdrawal of those RRSP funds (before calculation of income tax).

Investment Account

[141] The claimant alleges that the respondent has been trading stocks on an account held in the name of another person. While I accept that allegation as being true, I received no evidence to indicate the amount in the trading account. That lack of evidence was due to the respondent's failure to disclose documents.

[142] I make no order regarding the investment account. I grant leave to the claimant to pursue the value in that account, should further evidence come to light.

Vehicles and Jewellery

[143] The parties each held significant jewellery at separation. They have agreed that the value is balanced and no compensation is required.

[144] The couple also owned five vehicles, three newer and two vintage.

[145] Two of the newer vehicles were BMWs. Those vehicles were sold and the proceeds divided evenly.

[146] The respondent owned a Porsche. He sold it for \$72,000 and kept the proceeds. The claimant is owed \$36,000 from that sale.

[147] The respondent also had possession of a vintage Impala. It was registered in the name of one of the couple's sons. The respondent sold that vehicle for \$40,000. The only way he could have accomplished that feat was to forge his son's signature. He did not account to the claimant for those funds.

- [148] The claimant was in possession of a vintage Camaro. She testified that she sold that vehicle for \$40,000. She did not account to the respondent for those funds.
- [149] The respondent suggests that the Camaro was valued in the range of \$120,000. He tendered no credible evidence to support that allegation. I dismiss it.
- [150] The sale proceeds from the Impala and the Camaro cancel each other out.
- [151] The net result of the sale of the vehicles is that the claimant is owed \$36,000 for the sale of the Porsche.

Spousal Support

- [152] The claimant seeks an order for spousal support under s. 15.2(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), or the equivalent of s. 165 in the FLA.
- [153] The claimant has started a business and testified that her income is in the range of \$24,000 per year.
- [154] The claimant's counsel submits that I should impute an income of \$100,000 per year to the respondent.
- [155] As noted, the respondent's financial disclosure is lacking and his testimony is not credible. He claims that he is earning a very low income working at a "grow operation". I have no reason to accept his evidence in that regard.
- [156] However, having considered the submissions of counsel for the claimant, I find that the best course is to adjourn the claim for spousal support. I have no credible information about the respondent's income. There is a significant chance that if I were to make an award, one party or the other would be prejudiced. I am forced to this decision because of the actions of the respondent in this litigation.
- [157] I grant the claimant liberty to bring on a claim for spousal support, should she obtain financial disclosure from the respondent that supports her claim.

Summary and Conclusion

- [158] On the basis of my findings above, and without taking into account any tax implications of the transactions discussed above, I find that the claimant is owed:
- a) \$78,000 on the sale of Buchanan #1
 - b) \$428,000 on the sale of the Hornby Condo
 - c) \$200,000US on the sale of the L.A. Condo
 - d) \$44,775 from the Halifax Pre-Sale #1
 - e) \$352,166 from respondent's business activities

f) \$42,000 from the withdrawal of RRSP funds

g) \$36,000 for the sale of the Porsche

[159] These amounts total \$980,941CDN plus \$200,000US.

[160] The respondent is owed:

a) \$524,181 on the sale of Buchanan #2

b) \$71,390 for Halifax Pre-Sale #2

[161] These amounts total \$595,571.

[162] The net result is that the respondent owes the claimant \$385,370CDN plus \$200,000US. As noted, all of these figures are calculated without considering the tax consequences of any of the transactions.

[163] I adjourn the issues relating to the respondent's investment account and spousal support. The claimant is at liberty to bring those matters back on should she obtain evidence or document production sufficient to determine the issues.

[164] I order that the parties shall be divorced from one another (divorce to take effect 31 days after the date of these reasons).

[165] At the close of trial, a request was made to anonymize these reasons with the use of initials. I decline to exercise my discretion in that respect. In my opinion, there is no reason to depart from the usual practice. There are no minor children or third parties who may be harmed. The public interest in open and accountable courts outweighs the individual interests of the parties in this case.

[166] I would be remiss if I did not thank counsel for their assistance in this trial. The claimant's counsel, on her client's behalf, successfully wrestled a difficult opponent to trial in an efficient manner. The respondent's counsel took a difficult case, late in the day, and assisted the court with her submissions.

[167] The claimant has been fully successful in this action. She is entitled to her costs.

"A. Ross J."

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