
CANADA / JUDGMENT

Cabezas v. Maxim

2014 BCSC 767

COURT

Supreme Court of British Columbia

DECIDED

5 May 2014

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2014 BCSC 767 Cabezas v. Maxim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cabezas v. Maxim,

2014 BCSC 767

Date: 20140505

Docket: E130904

Registry: Vancouver

Between:

Claudia Del Carmen Cabezas

Plaintiff

(Claimant)

And

Jay Scott Maxim

Respondent

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Claimant:

Kelsey V. O'Bray

Counsel for the Respondent:

Agnes Huang

Place and Date of Trial:

Vancouver, B.C.

February 17-21, 24-26, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 5, 2014

- [1] These proceedings were initiated by a notice of family claim filed March 21, 2013. They are thus subject to the Family Law Act, S.B.C. 2011, c. 25 [the Act].
- [2] At the commencement of trial, the claimant abandoned her claim for past and future child support. She seeks:
- a) lump sum spousal support pursuant to the Act;
 - b) an unequal division of property and family debts pursuant to ss. 81, 84, 86, 88, 89, 90, 91, 95 and 96 of the Act;
 - c) a protection order pursuant to s. 183 of the Act; and
 - d) an order for costs.

Background

- [3] The claimant was born in Chile on February 7, 1966. She gave evidence that during her childhood, she was the subject of abuse by her parents. She left Chile with her family as refugees, moving first to Argentina. After her second country of residence experienced a military coup, she came to Canada on February 27, 1977. She lived with her parents and her brother for a period in Lethbridge, Alberta, and moved on her own to Calgary at age 17. She then moved to the greater Vancouver area in the 1980s. She obtained some post-secondary education in child care and sociology in Vancouver at King Edward and Langara Colleges. She also took a course to become a travel agent, and worked briefly in that field.
- [4] The claimant married in 1991 and divorced in 2003. She has one adult son from her marriage.
- [5] The respondent was born in Prince Rupert, British Columbia on November 15, 1964. He left public school when he was in grade 10, but later acquired a grade 12 equivalency certificate. He has worked as a roofer and sheet metal worker. He has also done body and mechanical work on automobiles. He was previously married. He divorced in 2002, and has three adult children from his marriage.

- [6] The claimant and the respondent agree that they lived together in a marriage-like relationship until December 5, 2012. However, they do not agree on when their relationship began, or when or where their cohabitation began.
- [7] It was common ground between the parties that on October 4, 2006, they travelled together to Chile.
- [8] On August 29, 2007, the parties purchased a mobile home and property located at 12968 Front Road, Madeira Park, on the Sunshine Coast (the "Madeira Park Property") for approximately \$265,000.
- [9] In October of 2007, the parties travelled to Mexico and Belize. The respondent testified that it was during this trip that he and the claimant began having real problems.
- [10] The couple took another trip to Chile in 2011. The claimant said the trip was to meet her half-brother and half-sister, whom she had not met before, but testified that by the time they departed, she intended as well to pursue criminal charges against her parents in Chile. She gave evidence that the respondent was not supportive of her with respect to the fallout from her childhood experiences, but agreed that the respondent paid for her plane ticket for this trip as a gift to her.
- [11] The parties decided to sell the Madeira Park Property in the fall of 2012. A buyer was found who made an offer that was accepted by the parties. The buyer made a deposit of \$22,000 for the purchase. The sale was to complete in October of that year, so the parties moved from Madeira Park to a residence on Lockyer Road in Roberts Creek, where they remained until their separation. The intended purchaser was ultimately unable to complete the purchase, and his deposit was forfeited to the parties. Until then the respondent had not shared a bank account with the claimant, but to facilitate disposition of the funds from the forfeiture of the deposit, he added the claimant as a signatory and joint holder of one of his accounts.
- [12] On December 4, 2012, the respondent concluded that the claimant was involved with another man, and the couple separated the following day, with the respondent returning to Madeira Park.
- [13] The respondent removed \$5,000 from the couples' joint bank account on December 5, 2012, which he used to pay off some of his debts, and used the remainder for living expenses.
- [14] The Madeira Park Property was eventually sold on January 5, 2013, after the parties separated, for \$240,000.00, with net sale proceeds of \$228,151.55 after payment of the realtor's fees. These net proceeds were used to pay \$29,783.23 for the Canada Revenue Agency's judgment against the respondent; \$1,157.41 for outstanding property taxes; \$306.83 for outstanding utility charges; and \$834.03 to the conveyancing lawyer, leaving \$196,070.05 in the lawyer's interest bearing trust account.

Issues to be Determined

[15] The claimant contended that the following issues required determination:

- a) When did the parties commence cohabitation?
- b) What is the "family property"?
- c) Is the \$56,000 down payment to purchase the Madeira Park Property excluded property under the Act?
- d) Is the \$196,000.00 plus interest currently held in trust from the sale of the Madeira Park Property excluded property by virtue of s. 85 of the Act?
- e) Is the claimant entitled to one-half of the sum of \$5,000.00 withdrawn from the parties' bank account by the respondent on December 5, 2012?
- f) Is the claimant entitled to a reapportionment of the family property given that part of the proceeds from the sale of the Madeira Park Property were used to pay the respondent's Income Tax arrears?
- g) If the \$196,000.00 plus interest currently held in trust from the sale of the Madeira Park Property is excluded property by virtue of s. 85(1)(g) of the Act, is the claimant entitled to a division of those proceeds pursuant to s. 96(b) of that Act?
- h) Is the claimant entitled to spousal maintenance pursuant to s. 161 of the Act?
- i) Should a protection order issue against the respondent pursuant to s. 183 of the Act?
- a) The commencement of cohabitation

[16] Both parties agree that they were introduced to each other by one of the claimant's former co-workers, but neither called the woman to corroborate their version of events.

[17] The claimant maintained that she was introduced to the respondent when she and her son were living at a cooperative for people of Chilean heritage in Vancouver. She contends that the relationship began in the summer of 2005, and their cohabitation commenced later that year, or early the next, when the respondent moved into her cooperative.

[18] It was her evidence that the respondent had a business location for his roofing business and his body shop, but worked in and out of the greater Vancouver area. She also testified that by December of 2005, the respondent was living with her at the cooperative when he wasn't working out of town, keeping his truck at the cooperative, and his clothes and toiletries in two drawers in her dresser. She said that because the respondent had no medical coverage, she registered him on her Blue Cross medical plan. She produced no documentation to that effect from Blue Cross for 2005. The respondent gave evidence that he never moved into the cooperative full time, but admitted that he was there a lot. He denied leaving his clothes or furniture there.

- [19] The claimant called a friend, who I will refer to as Cecilia, who had lived at her cooperative beginning in 1986, and with whom she has maintained a friendship since then. This friend testified that the parties began living together at the cooperative in late December of 2005 or early January 2006, leaving for the respondent's parents' home in Surrey later in 2006. She offered no basis upon which to fix her dates, and I regard her evidence with some suspicion. I am not prepared to find that she was deliberately untruthful, but have concluded that she believes the claimant, and has adopted what the claimant asserts without question.
- [20] The respondent, on the other hand, contends that the couple's relationship did not begin until August of 2006, and their cohabitation did not begin until April of 2007 when the claimant moved into the basement suite in the respondent's home. He gave evidence that he was involved in a relationship with a registered nurse that did not end until June of 2006, and that he could not have been seeing the claimant until that relationship ended. He testified that he did not meet the claimant until the August of 2006, as he maintained it was in that month that the two attended a B.C. Lions football game after the introduction by the claimant's former co-worker.
- [21] At one point in his evidence, the respondent said that the claimant's son Eduardo was 14 years of age when they first met. Eduardo's birthdate is April 6, 1991. He would have been 14 years of age in the summer of 2005.
- [22] The 2006 trip to Chile was the subject of competing versions by the parties. The claimant conceded that she may have planned the trip before she met the respondent, but also gave evidence that she cashed in her RRSPs and pooled her money with that of the respondent to finance the trip. She did not take her pension, which she still has. It is valued at \$6,915.35.
- [23] The respondent agreed that he and the claimant travelled together to Chile commencing on October 4, 2006, but in his evidence in chief maintained that he did not see the claimant for two weeks after the football game, and then only a couple of times in September of 2006.
- [24] The respondent's version of the number of times he saw the claimant changed during his evidence. In his evidence in chief, he said that he didn't call the claimant after the football game until encouraged to do so by the woman who had arranged for them to meet. He said that he saw her once in August when they went to the football game and then not again until September, and not often after that. In cross examination, he expanded the number of his meetings with the claimant to 6-8 before they left for Chile on October 4. I do not accept his expansion as anything more than an attempt to make his version of events sound more plausible, and I reject this evidence.
- [25] The claimant testified that she flew separately from the respondent because he had a criminal record, relating to a grow-op, that necessitated him travelling first to Mexico, and then to Chile. She said that it was not until the couple moved to Madeira Park that she learned that the respondent's criminal record included not only a conviction for a grow-op, but for breaking and entering, as well as assault and weapons offences. At trial, the respondent admitted only to the grow-op conviction and a conviction for possession of

stolen property of a value of less than \$1,000.

- [26] While the parties disagree as to the date that they began living in the respondent's parents' basement suite, it is clear that the couple did reside there for a period of time immediately before the purchase of the Madeira Park Property. The claimant gave evidence that she, the respondent, and her son shared the suite beginning in late 2006, shortly before or after the trip to Chile. It was her evidence that she had Christmas dinner with the respondent, his parents, his sister Cindy, and Cindy's family in 2005.
- [27] The respondent's sister Cindy gave evidence placing the start of the respondent's relationship with the claimant in 2006. She was uncertain whether the claimant moved into her parents' basement suite in 2006 or 2007.
- [28] The respondent's sister Julie also gave evidence that she and the respondent shared their parents' basement suite in Surrey for about one year, until she moved out on September 9, 2004. She also gave evidence that the respondent was dating a nurse for a couple of years, and did not begin seeing the claimant until the summer of 2006. She also said that it was not until 2007 that the claimant moved into her parents' basement suite in Surrey. It was her evidence that the Madeira Park Property was purchased in 2007.
- [29] The claimant's evidence was that she and the respondent chose to move into his parents' basement suite in order to save money, and that she paid the respondent \$700 per month towards the rent, whereas the respondent denied having to pay rent, or that the claimant paid him anything towards rent. He agreed that the claimant put him on her medical and dental coverage. The respondent gave evidence that he never lived at the cooperative with the claimant, and that she moved into the basement suite in the spring of 2007, but denied that the claimant's son lived in the suite. It was his evidence that the claimant's son only visited the suite on weekends.
- [30] The claimant also called her son Eduardo as a witness. He testified that he lived in the basement suite at the respondent's parents' home in Surrey with his mother and the respondent, and confirmed that the respondent often yelled at the claimant. I was unimpressed with this young man's evidence. He was unable to say when or where he attended school at relevant times, or how he got to Vancouver schools while living in Surrey, other than perhaps by bus. He was clearly left on his own in October of 2006 when the parties travelled to Chile for a number of weeks. At that time he was fifteen years of age and he surmised that he stayed then with his grandmother in Burnaby, British Columbia.
- [31] I accept that while his mother was living in the Surrey basement suite, he did stay, for some time, at the suite, but not for any extended period of time. Instead, I accept the respondent's submission that he was likely staying at his grandmother's for much of the time his mother was living in the basement suite. Indeed, when his mother initially moved to Madeira Park, Eduardo stayed with his grandmother in order to retain friendships in Vancouver.

[32] While the evidence is far from clear, I find, on the balance of probabilities, that the parties met in the summer of 2005. I am not persuaded, however, that the respondent was ever living at the claimant's cooperative. I find that the parties did not commence cohabitation until they moved into the respondent's parents' basement suite. I find that that move occurred in the spring of 2006. I find that thereafter, based on the criteria discussed in *Campbell v. Campbell*, 2011 BCSC 1491, rev'd on other grounds 2013 BCCA 109, the parties lived in a marriage-like relationship until their separation on December 5, 2012.

b) Family Property

[33] The claimant gave evidence that when she met the respondent, she had her own furniture, a Tracker motor vehicle, a pension, and funds in an RRSP.

[34] When he met the claimant, the respondent was living in his parents' basement suite in Surrey, British Columbia, and operating his roofing and automobile operations out of a rented shop in that city. He owned a number of vehicles in various states of repair, as well as tools and tool boxes, a boat, a camper, and a life insurance policy.

[35] The claimant gave evidence that she was persuaded to purchase the Madeira Park Property by the respondent based on his representations that as there were no roofers on the Sunshine Coast, there would be lots of work for him. The Madeira Park Property had a work shop with a hoist that would enable him to work on automobiles, and that all in all they would be more financially secure there. The claimant gave evidence that while she was reluctant to give up her job and friends and co-workers, she foresaw that she could provide respite care in the home at Madeira Park. She said that after moving to Madeira Park, she learned that the respondent's criminal record would disentitle her to do respite work from their home.

[36] The respondent gave evidence that at the time of the purchase, he was interested in property on the Sunshine Coast for recreational use. He said he knew there were at least twelve other roofers on the Sunshine Coast, so there was no likelihood of such work for him there. He gave evidence that he and the claimant did not immediately move to Madeira Park, but once they did he was able to discontinue the \$1,000 per month that he had been paying to rent his business location in Surrey. He said that when the claimant's son and his son moved into the home, there was no room for the claimant to offer respite care from the home.

[37] The respondent gave evidence that he bought the property as recreational property and as a place to keep his "stuff". I reject this evidence entirely. The respondent did not have the means to purchase recreational property, nor did he use the property as such at any time. Further, his mother had threatened to sell her home unless he and the claimant moved. Mrs. Maxim's relationship with the claimant never improved thereafter, and she said that she broke off contact with the claimant because of the way the claimant acted. She did, however, continue to welcome the claimant into her home.

- [38] The respondent's sister Cindy trained as a Certified General Accountant and prepared documentation tracing the various payments made by her parents and their company to the respondent and his company. Her documentation was for the most part, if not entirely, retrospective, and I am not prepared to rely on her description of various payments to the respondent or his company as loans. I mean no disrespect to this witness by this reticence, but as she was not privy to the decisions regarding these payments, her description lacks a reliable evidentiary foundation.
- [39] I find that the family property in this case consists of the joint bank account at TD-Canada Trust in Sechelt, British Columbia, and the Madeira Park Property. Both fall within the definition of family property found in s. 84 of the Act. I find that the remaining vehicles, boat, camper, tools and tool cases in the possession of the respondent were acquired by the respondent before the relationship began, or were derived from such property, and thus are excluded by s. 85 of the Act. The respondent's father's motor vehicle, which was gifted to him after his father's death, is excluded by virtue of s. 85(1)(b) and remains the property of the respondent alone.
- [40] I am similarly not persuaded that the claimant has an entitlement to any share of the respondent's business, the shares of which were acquired before the relationship began. Given the significant debts of the company, I am not persuaded there has been any increase in value of those shares during the course of the relationship which would constitute family property. I find that the company debt is the debt of the respondent alone.
- [41] As for the claimant's pension, I find that it is excluded property under s. 85(1)(a) of the Act, and that it remains hers and hers alone. If I am wrong in my characterization of the pension as excluded property, I find that it would be significantly unfair to divide the pension between the parties as required by the Act, and would thus order it remain the property of the claimant alone pursuant to s. 95.
- [42] I shall address the proceeds of the sale of the Madeira Park Property below.
- c) The \$56,000 down payment to purchase the Madeira Park Property
- [43] A down payment of \$56,000 was made to purchase the Madeira Park Property from a \$13,000 deposit from the respondent's business, Above All Roofing, \$22,000 from the respondent's bank account, and a further \$21,400 from Above All Roofing. The balance of \$210,080.00 was borrowed from the TD Bank and secured by a mortgage pursuant to which the claimant and the respondent were jointly and severally liable.
- [44] The respondent gave evidence that the claimant agreed to give him one half of what he put down as a deposit for the property and one half of the down payment funds. The claimant contends that it was her rent payments of \$700 per month to the respondent for his parent's basement suite that allowed him to accumulate part of the down payment. The respondent agreed that the claimant gave him \$700 payments for some months, but said that this was not until they moved to the Madeira Park Property.

- [45] Given the arrangements for the division of the down payment between the parties, it is not surprising that the Madeira Park Property was registered in the name of both the claimant and the respondent as joint tenants.
- [46] While the funds used to make this down payment were initially provided entirely by the respondent, they were not provided unconditionally. The respondent secured the claimant's agreement to repay one half of the amount used for the down payment, and I find that the claimant did repay one half of this amount, after a fashion. I therefore find that both parties ultimately contributed equally to the down payment on the Madeira Park Property, and the respondent's initial contribution of the down payment does not entitle him to anything other than the one-half interest in the property granted to him by s. 81 of the Act. If I am incorrect in this finding, I find that it would be substantially unfair to the claimant to award her less than one half of the Madeira Park Property, as discussed below, and would therefore order an unequal division of that property pursuant to s. 95 of the Act to rectify that unfairness.

d) The monies held in trust from the sale of the Madeira Park Property

[47] Section 85(1) of the Act provides:

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) gifts or inheritances to a spouse;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) property held in a discretionary trust
 - (i) to which the spouse did not contribute,
 - (ii) of which the spouse is a beneficiary, and
 - (iii) that is settled by a person other than the spouse;

- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- [48] At issue here is the effect of the funds paid by the respondent's parents towards the mortgage on the Madeira Park Property. If those funds were a gift or inheritance solely to the respondent, any property derived from them may be excluded property under the Act.
- [49] In *Wiens v. Wiens* (1991), 31 R.F.L (3d) 265, [1991] B.C.J. No. 274 (S.C.), Mr. Justice Harvey discussed the jurisprudence regarding funds provided by the parents of a married child for the purchase of the matrimonial home at para. 24:
- [24] It is clear from the case law that where the parents of a married child advance money to facilitate the purchase or the improvement of the matrimonial home, and the spouses later do not agree as to the nature of that advancement, the court must presume that the money advanced is a gift to the child which on a presumption of advancement becomes a gift to the wife. In the absence of clear evidence, like a promissory note specifying the amount or any other secured document showing to the court that the advancement is a loan, the court must assume that the money advanced is a gift. See: *Sleightholme v. Sleightholme* (unreported)(26 March 1982), Doc. Vancouver A803106, MacDonald L.J.S.C. (B.C. S.C.); *Leach v. Leach* (unreported)(19 May 1982), Doc. Victoria 202/81, Stewart J (B.C. S.C.); *Hadley v. Hadley* (unreported)(18 January 1988), Vancouver A862747, Catliff L.J.S.C. (B.C. S.C.); *Yip v. Yip* (unreported)(20 April 1988), Vancouver A871481, Errico L.J.S.C. (B.C. S.C.).
- [50] In *Locke v. Locke*, 2000 BCSC 1300 at para. 20, Mr. Justice Wilson set out a list of factors to be considered when determining how to properly categorize payments made by parents to their children's families:
- [20] A number of other cases were provided by each counsel which turn on their own facts, but give indications of the factors considered by the courts in making the characterization: *Sleightholme v. Sleightholme* and *Polvi*, unreported, B.C.S.C., Vancouver Registry No. A803106, March 26th, 1982, MacDonald C.C.J.; *Yip v. Yip*, unreported, B.C.S.C., Vancouver Registry No. A871418, April 20th, 1988, Errico J.; *Storie v. Storie*, unreported, B.C.S.C., Vancouver Registry Nos. D082456 and A913874, September 29th, 1992, Preston J.; *Ridley v. Ridley*, unreported, B.C.S.C., Victoria Registry Nos. 5939/28177, July 16th, 1996, Drake J.; *Singh v. Singh*, unreported, B.C.S.C., Kamloops Registry No. 011364, June 1st, 1998, Lamperson J.; *Poole v. Poole*, B.C.S.C., Prince George Registry No. 30213, August 7th, 1998, Parrett J.; *Henderson v. Henderson*, unreported, B.C.S.C., Penticton Registry Nos. 14275 and 15074, December 7th, 1999, Preston J.; and *Baddeley v. Baddeley*, unreported, B.C.S.C., Vancouver Registry No. D108663, December 10th, 1999, Cole J. Factors considered by the courts in these cases include:
1. whether there were any contemporaneous documents evidencing a loan;
 2. whether the manner for repayment is specified;

3. whether there is security held for the loan;
4. whether there are advances to one child and not others, or advances of unequal amounts to various children;
5. whether there has been any demand for payment before the separation of the parties;
6. whether there has been any partial repayment; and
7. whether there was any expectation, or likelihood, of repayment.

[51] The respondent gave evidence that his father began to assist with mortgage payments in 2010-2011. He said that there was no arrangement for repayment with his father.

[52] The claimant testified that the respondent's father told her that he wanted "us" to be mortgage free, especially following her car accident. She said he told her that he wanted her to have her home paid for. She gave evidence that she was very close to the respondent's father, who knew that the Madeira Park Property was jointly owned by her and the respondent, and that on June 21, 2011, he asked her to accompany him to the bank so that she would know what he was doing for her and the respondent when he paid \$31,512 on their mortgage. The respondent denied knowing about his father making this payment, and gave evidence that he did not think that he accompanied his father to the bank when the payment was made.

[53] The respondent agreed that when his father was last hospitalized, he and the claimant visited the hospital every day, and that on one occasion his father asked him to leave. The claimant gave evidence that the father often asked the respondent to leave.

[54] The respondent's mother was called by him as a witness. I have no hesitation in concluding that she did her best to tell me what she believed to be the truth. By her own admission, her memory is not what it once was, and I am satisfied that her allegiance to her son has coloured her recollections. I therefore treat her evidence with some caution.

[55] The respondent's mother gave evidence denying any close relationship with the claimant, stating to the contrary that she did not like the claimant and that she insisted that her son move from her basement suite due to the claimant's conduct.

[56] Mrs. Maxim said that she was unaware that the claimant was a joint owner of the Madeira Park Property or named on the mortgage, but she also gave evidence that she helped the respondent with his finances because he was going to lose the house because "that's how far they were behind in payments". In cross-examination Mrs. Maxim testified that she "knew they were having trouble making their mortgage payments" and that "they lived off the Visa".

[57] On January 9, 2012 the respondent's mother made a payment of \$31,512 against the Madeira Park Property mortgage. The respondent agreed in cross-examination that his mother never told him that her \$31,512 payment was a loan from her to him or that he had to repay that money.

[58] On January 10, 2012 the respondent's mother retired the mortgage by a final payment of \$124,325.85. The respondent gave evidence that he did not learn until August of 2013 that the monies paid by his parents against the mortgage on the Madeira Park Property were directed in his mother's will to come out of his inheritance from his mother's estate to ensure that he and each of his siblings benefitted equally. A similar provision was included in the mother's will for the respondent's brother, who had received their father's interest in a Langley property, discussed below.

[59] In cross-examination, the respondent confirmed the following questions and answers from his examination for discovery:

1063 Q Okay. So your mother never classified whether it was a gift or a loan?

A Not to me, no. Not that I know of.

1064 Q Wasn't it your mother doing what your late father wanted and helping you and Ms. Cabezas with your mortgage?

A As far as I know, yeah. That's what she - - her intentions.

[60] The claimant called Mr. Don Nilson, an accountant, as a witness. Mr. Nilson's clients include Mica Holdings Ltd., which was the corporate vehicle of the respondent's parents. Mr. Nilson gave evidence that he provided advice to hundreds and thousands of clients and invariably recommended that if parents chose to give money to their children, they should take some form of security from the child, preferably registerable, but if not at least in the form of a promissory note. While he had no specific recollection of so advising the respondent's father, he did recall providing that advice to the respondent's mother. Clearly neither of the respondent's parents followed that advice.

[61] Mr. Nilson testified that neither of the respondent's parents spoke of any of their children's spouses to him. Although he assisted in the record keeping of monies advanced by Mica Holdings to the respondent or his company, including payments against the mortgage on the Madeira Park Property, Mr. Nilson did not know who the owner of that property was.

[62] Mr. Nilson gave evidence that the respondent's parents provided financial assistance to all of their children at different times and in different amounts. The respondent's brother Daniel and his wife were the owners of a home in Langley, British Columbia. The respondent's father was a tenant in common in that home, holding a 38% interest. Sometime after his death, given taxation considerations, that interest was transferred as a gift by the respondent's mother. The details of the registration of the property before and after the gift were not introduced into evidence.

[63] Mr. Nilson said it was transferred to both Daniel and his wife, but then testified that it was transferred to Daniel only. Mr. Nilson did not indicate the basis for his alleged knowledge. I prefer the evidence of Mrs. Maxim on this point. She said that she gifted the 38% interest that her husband held in the property to both her son Daniel and his wife.

- [64] The respondent's parents loaned money to his sister Cindy and her husband for the acquisition of investment property at Whistler, British Columbia. This property was held jointly by Cindy and her husband. I infer that the respondent's parents advanced funds to the respondent in the same fashion as they advanced funds to Daniel and his wife, and to Cindy and her husband; that is, regardless of the fact that the spouses of these children would also benefit from their financial assistance.
- [65] I conclude that when the respondent's parents provided financial assistance to their children, they did so regardless of whether the child's spouse was registered as one of the owners of property acquired with that assistance, and that neither of the respondent's parents turned their minds to how such properties were registered. I find that this was what occurred when they made the mortgage payments on the Madeira Park Property.
- [66] In this case, despite the advice of Mr. Nilson, there are no contemporaneous documents evidencing a loan, nor any security asked or obtained for any of the lump sum mortgage payments made by the respondent's parents. There has been no demand for repayment from the respondent or the claimant, and certainly no repayment of any kind. It was not until after the last payment that Mrs. Maxim chose to treat her payments to the respondent as an advance on his inheritance.
- [67] I have already concluded that the Madeira Park Property was a family asset. Considering the factors outlined in *Locke*, I am not persuaded that the funds used to pay off the mortgage were provided to the respondent either as a loan or as an advancement on his inheritance. Such a conclusion would be at odds with how the respondent's parents treated all of their children. While I accept that the respondent's mother has subsequently and sensibly chosen to treat the gifts to both of her sons and their partners as advancements against what the sons will inherit from her estate, I find that such an intention was formed well after the gifts were given. I therefore find that the funds in question were given as a gift intended to benefit both the respondent and the claimant.
- [68] Had Mrs. Maxim's intentions been unclear, I would nonetheless have found that, in keeping with the statement of Harvey J. in *Wiens*, the funds used to pay off the mortgage on the Madeira Park Property were provided by the respondent's parents as a gift to avoid the foreclosure of the property, resulting in a presumption of advancement to the claimant. This presumption of advancement is limited in scope, and does not apply to all gifts or inheritances received by a spouse from his or her parents. Generally, such gifts are excluded property under s. 85(1)(b) of the Act, as was the Camaro received by the respondent from his father in this case. However, where a parent chooses to provide funds to a child for the purchase or maintenance of the family residence (to use the language of the Act), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the Act. None of the evidence presented is capable, in my view, of rebutting that presumption.

[69] Subject to the amounts for which I would credit the claimant from the respondent's withdrawal from the joint TD-Canada Trust account discussed in para. 72 below, and the payment of the Canada Revenue Agency's judgement against the respondent, discussed at para 73 below, the parties are each entitled to a one-half interest in the net sale proceeds, and I order them divided equally between the claimant and the respondent.

e) The sum of \$5,000.00 withdrawn from the parties' bank account by the Respondent

[70] While it is clear that this withdrawal was made by the respondent, and some credit should be given to the claimant for a part of this amount, I accept the submissions of the respondent that the claimant herself used some funds from the joint bank account following their separation. I accept that it was she, and not the respondent, who went to Sechelt on December 5, 2012.

[71] I find that the claimant spent money from the joint account on December 5th and 6th, 2012 as follows:

a) \$501.50 at a non-TD-Canada Trust ATM;

b) \$20.00 at a gas bar;

c) \$20.00 at a Petro Canada outlet;

d) \$7.60 at a Tim Horton's outlet; and

e) \$300.00 at another ATM.

[72] I therefore deduct the claimant's total withdrawals of \$849.10 from the joint account from the respondent's \$5,000.00 withdrawal, meaning that he received \$4,150.90 more than she did. I would therefore award her one-half of that amount, or \$2,075.45, from the net sale proceeds of the Madeira Park Property.

f) Reapportionment of the Family Property

[73] The claimant seeks a reapportionment of the proceeds of the sale of the Madeira Park Property to take into account the fact that, by way of an irrevocable authority to pay dated January 31, 2013, the respondent used some \$29,783.64 of those proceeds to pay off an indebtedness to the Canada Revenue Agency from his tax liability for 2007. While it is clear that \$29,783.64 of those proceeds was paid to extinguish that debt, the debt arose when the parties were cohabiting, and would have been avoided had the respondent paid the taxes that he owed that year. This, in my view, constitutes family debt and so must be shared equally between the parties pursuant to ss. 81 & 86 of the Act. Further, as the respondent did not pay this debt as it came due, the parties shared in whatever he ought to have paid. In these circumstances I conclude that the debt should be shared by the parties, and that its deduction from the sale proceeds before they are paid to the parties does not entitle the claimant to a reapportionment of the sale proceeds.

g) Sections 85(1)(g) and 96(b) of the Family Law Act

[74] Section 96 of the Act provides:

96 The Supreme Court must not order a division of excluded property unless

- (a) family property or family debt located outside British Columbia cannot practically be divided, or
- (b) it would be significantly unfair not to divide excluded property on consideration of
 - (i) the duration of the relationship between the spouses, and
 - (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

[75] I have already found that the proceeds of the sale of the Madeira Park Property represent funds from the sale of a family asset. If I am wrong in that finding, in my opinion, it would be significantly unfair to deprive the claimant of a share in the proceeds of the sale of the Madeira Park Property. I am therefore satisfied that if I erred in that finding, the claimant would have been entitled to a division of the proceeds of the sale of the Madeira Park Property pursuant to s. 96(b) of the Act.

[76] For most of the period of their cohabitation, the claimant paid more of the parties' expenses than did the respondent. It was her, and not the respondent, who maintained the home on the Madeira Park Property. She was registered as a joint tenant on the title to the property, and undertook liability for the mortgage on the property. But for her contributions the property would have been lost to foreclosure, unless the respondent's parents paid even more than they did against the mortgage.

[77] I find that if the property was excluded property pursuant to s. 85 of the Act, the duration of the parties' relationship along with the claimant's direct contribution to the preservation and maintenance of the property entitles her to an equal share of the net proceeds of its sale.

h) Spousal support

[78] The objectives of spousal support are set out in s. 161 of the Act:

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.
- [79] From 1988 until late November of 2010, the claimant worked as a care worker, much of that time for the Vancouver Resource Society for the Physically Disabled. Her income, when fully employed, peaked in 2006 when she reported income from employment of \$75,895. The work was physically demanding and included the transfer of patients from beds to wheelchairs, and other lifting of patients.
- [80] Following her move to the Madeira Park Property, the claimant testified that she continued to work for the Vancouver Resource Society for a period of time, commuting back and forth from the Sunshine Coast. She also gave evidence that she was second on the Society's seniority list, and that the Society was so keen to keep her that, rather than laying her off, it insisted that she take a leave of absence. Her evidence in this regard is at odds with the Society's documentation that the claimant, represented by a union representative, reached a "without prejudice and precedent" agreement with the Society to refrain from pursuing a grievance against the Society in exchange for a severance package of 20 weeks benefits and a Record of Employment indicating that she was laid off as a result of reorganization.
- [81] The claimant gave evidence that she has not worked since November of 2010, but insisted that until then, all of her income was given to the respondent for family expenses, including the mortgage. Her income tax returns for the years 2007-2010 reported the following employment related income (including WCB benefits):
- 2007 - \$44,146;
 - 2008 - \$33,591;
 - 2009 - \$27,781;
 - 2010 - \$48,806.
- [82] While it seems clear that the claimant must have contributed more to their financial obligations than did the respondent while they lived in Madeira Park, her income waned over that period as well. She conceded that she was away from work on stress leave in 2009. She attributed this to being "burned out" and in part to the respondent's attempts to control her by constantly phoning her and texting her to find out where she was.
- [83] In November 2010, the claimant was in a single car accident. She fractured her clavicle and injured her right shoulder. Her clavicle injury required three surgeries, due to an infective process, and she has since had physiotherapy for over a year, occupational therapy, and has engaged in an exercise regime three days per week. She testified that since her motor vehicle accident she has been unable to work. The medical records that were filed as exhibits during the trial confirm that the claimant is presently disabled from the sort of work that she had been involved in for most of her adult life. She received Employment Insurance benefits following this accident, and then began to receive wage loss benefits

from ICBC. The claimant gave evidence that after a period of time she was unable to pay her bills, and so made an assignment into bankruptcy on March 3, 2011. She declared her unsecured debts to be \$34,390.02. She was discharged from bankruptcy on April 11, 2012.

- [84] The claimant described the respondent as contributing very little to their expenses, and little by way of help with the household duties. The respondent explained his limited contribution to household duties on the basis that the claimant loved to cook and clean, and that he was content to let her pursue these activities that she enjoyed so much.
- [85] The complainant testified that the respondent rarely worked after the move to Madeira Park, spending his time "hanging out" and smoking marijuana on a daily basis. The respondent gave evidence that both he and the claimant smoked marijuana daily. The claimant gave evidence that she acquired a medical marijuana licence some three years prior to trial.
- [86] The respondent gave evidence that he stopped all roofing work in 2010-2011. By that time, he had already been relying on his parents to provide him with money to make house insurance, income tax, property tax, and credit card payments. While he gave evidence that he was to repay these monies to his mother, I find that he had no intention or wherewithal to do so, and that based on his track record and lack of industry, his mother had no expectation that she would be repaid. Indeed, ultimately his mother recognized that he would not repay her when she changed her will to recognize that the respondent had received some \$300,000 over the years, which she decided to treat as an advance on what he might inherit from her estate.
- [87] It is evident that the respondent had little to contribute to the finances and he agreed that he "pretty much shut down [working] after 2007". He professed to have back problems that limited his ability to work and said that he did not find work on the Sunshine Coast. The respondent gave evidence that there have been several times since 1997-1998 that his back condition has resulted in paraplegia affecting the function of his legs. The respondent called no viva voce evidence to corroborate what he professed to be the condition of his back. He did file as exhibits some medical records, but they do not suggest difficulties of the seriousness he described. The only evidence of any disability in these records is a brief note from a Dr. P. Wodynski dated October 8, 2012 that states:

Mr. Maxim has a medical condition that precludes any employment. I will review him in six months.

[88] An MRI report from an examination of September 16, 2013 concluded that:

1. No instability is demonstrated on the flexion and extension series. A slight mid lumbar dextroscoliosis is present with vertebral alignment otherwise normal.
2. At L4-5 level there is a small central disc protrusion with associated annular tear with mild anterior effacement of the dural sac without nerve root compression.
3. Mild disc bulges are present at L3-4 L5-S1 levels without nerve root compression.

4. Mild bilateral facet OA is present at L5-S-1 level.

[89] The claimant described him as capable of climbing up a mountain, chopping wood and manually moving large rocks on their property. She denied that he was ever paralyzed or unable to walk, but did concede that he had required the use of crutches at one time. She denied that he evidenced difficulty sitting for long periods of time, and certainly I saw no evidence of any such difficulty during the trial, either when he was in the witness box or in the body of the courtroom.

[90] The respondent's income tax returns for the years 2007-2012 reported total income as follows:

- 2007 - \$32,300;
- 2008 - \$9,000;
- 2009 - \$11,500;
- 2010 - \$11,294;
- 2011 - \$6,287.86;
- 2012 - \$5,099.88, later amended to \$0.

[91] The respondent filed an amended income tax return for 2007 which remains the subject of a dispute between him and the Canada Revenue Agency.

[92] It is unclear whether he has ever made any real income from automobile work. His income appears to have peaked in either 2006 or 2007. In 2006, he reported income from employment of \$43,500, and in 2007 of \$32,300, although his income for that year was assessed by the Canada Revenue Agency at \$104,500. His income for that year remains a matter in dispute with the Canada Revenue Agency, but the Agency appears to have accepted that his income that year was not as high as its assessment.

[93] The mortgage payments for the Madeira Park Property were approximately \$1,400.00 per month. The respondent testified that he made the mortgage payments from his chequing account, but conceded that half of some of the payments in 2008 came from the claimant. I reject this evidence. The total mortgage payments for 2008, including credit protection insurance, were \$17,642.88. The respondent only earned \$9,000.00 in 2008, and had expenses other than the mortgage payments to address. While I am prepared to accept that the respondent contributed in some way to the mortgage payments during the period of time that the couple owned the Madeira Park Property, I find that it was the claimant who provided the funds from which the majority of the mortgage payments were made.

[94] The claimant calculated her present monthly expenses at \$2,233. Her present income is derived from accident disability payments of \$1300.00 per month from ICBC. The respondent claims monthly expenses of \$2,460, but reports no income.

- [95] I accept the claimant's submission that the respondent appears to be getting by on what his mother provides to him. I see no reason why the claimant should be supported by the respondent's mother. The claimant's position, which I accept, is that since at least 2007, if not sooner, the respondent worked very little, and contributed far less than she did to their joint expenses. While I question the extent of the respondent's back condition, for some reason he has refrained from remunerative employment for most of the parties' relationship, and in the result created no expectation on the part of the claimant that she would be supported by him.
- [96] Given my findings above, during the parties' relationship the claimant acquired a half interest in property, and I am unable to conclude that she would have acquired such an interest on her own. I find that rather than experiencing economic disadvantages from the relationship, she has experienced a net economic advantage.
- [97] The claimant has abandoned any claim arising from any alleged duty on the part of the respondent to provide support for her son, and indeed it would appear from the evidence that the son is not in need of such support from either the respondent or the claimant.
- [98] I consider that both parties will experience economic hardship from the breakdown of their relationship, but cannot conclude that the claimant will suffer more than the respondent from the breakdown of their relationship.
- [99] The division of the only significant asset, the proceeds of the sale of the Madeira Park Property, will serve as the only means to promote self-sufficiency on the part of either of the parties, and it would be unfair to the respondent to divide those proceeds other than I have done.

i) Protection Order

- [100] The claimant seeks a protection order pursuant to s. 183 and subsections 184(1)(a), (b), (c), (d), (e), (f), (g), and 184(2) of the Act. Those subsections provide:

184 (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

- (a) any history of family violence by the family member against whom the order is to be made;
- (b) whether any family violence is repetitive or escalating;
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;

- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
 - (f) the at-risk family member's perception of risks to his or her own safety and security;
 - (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.
- (2) If family members are seeking orders under this Part against each other, the court must consider whether the order should be made against one person only, taking into account
- (a) the history of, and potential for, family violence,
 - (b) the extent of any injuries or harm suffered, and
 - (c) the respective vulnerability of the applicants.
- [101] The claimant gave evidence that her relationship with the respondent was unhealthy. She explained that he yelled at her, would push her and pull her hair, verbally abuse her about her size, and taunt her with information that she had shared with him about the difficulties she had experienced with her parents when she was a child. She said that she was afraid of the respondent, that he took away her car keys and cell phone and threatened her, warning that she would never know when he might show up unexpectedly.
- [102] The claimant described one incident where the respondent parked his vehicle in the driveway of one of her friend's homes with whom she was staying while in Vancouver. The incident was to some extent confirmed by her friend Cecilia. She also gave evidence of an incident at the Madeira Park Property when the respondent pushed her against a tool box, causing a nosebleed. This incident was discussed by the same friend, though I am not satisfied that she saw what was described by the claimant. Finally, in this regard, the claimant said that the respondent kept weapons in the trunk of one of his automobiles, and guns in their home, and, as described above, had a number of criminal convictions.
- [103] Cecilia's evidence was inconsistent on a number of points. In her evidence in chief, she stated that she permitted the respondent to stay at her home when he had to work early in the morning in Vancouver, but in cross examination said he was never permitted to stay at her home unless the claimant was with him. She gave evidence that she never left her daughter alone with the respondent, but for some reason, her daughter referred to the respondent as "Uncle Scott", a description that seems unlikely given the friend's professed antipathy for the respondent.
- [104] Cecilia gave a somewhat tortured version of observing the respondent manhandling the claimant at the Madeira Park Property, but given the description of the buildings there by the claimant's son, I find she could not have observed what she described of that incident.

- [105] There is no question that the parties had a tempestuous relationship. I do not, however, accept that the respondent was solely responsible for the tempestuous nature of the relationship. I find that the complainant's evidence about the physical and emotional suffering that she said she had to endure from the respondent was grossly exaggerated. I am not persuaded that the respondent kept weapons in the parties' home or in his automobile, or that he had convictions for offences other than those that he conceded.
- [106] At the time of the parties' separation, the claimant exchanged text messages with a friend in which she eschewed any fear of the respondent. I did not find her evidence that she made these comments to assuage her friend at all persuasive. It is clear that, but for activities related to their litigation, with the exception of one attempt to view the claimant's Facebook entries, the respondent has had no contact with the complainant. On December 5, 2012, the respondent left the Lockyer Road home. The claimant asserted in her evidence that she had an arrangement with Cecilia that if the friend had no contact with her for two days, she would phone the police. The friend confirmed such an arrangement, but said that the time was more a matter of as little as an hour, or a particular fixed time. I do not believe either of these witnesses on this issue. I find that the claimant fabricated her evidence as to such an arrangement, and that her friend, in a misguided effort to support her, went along with the evidence without an understanding of the details given by the claimant.
- [107] The respondent produced copies of text messages between the claimant and another man. This other man was not called to give evidence. I find that the respondent's suspicions about the claimant and the other man were justified.
- [108] The claimant gave evidence that the respondent locked the gate behind him, preventing her from leaving, but that Cecilia and the friend with whom she had exchanged text messages the prior evening arrived to rescue her after they had called the police. I reject the claimant's assertion that the respondent deliberately locked her in the property as she could have left at least by foot, had she chosen to, and was able to leave when her friends arrived.
- [109] The claimant gave evidence that the respondent wrote a number of comments in her diary, and that he delivered the pages where the entries were made to her former mother-in-law's home, along with some, but not all, of her other possessions or records after a judicial case conference in August 2013.
- [110] It would appear that the judicial case conference was at least scheduled for August 21, 2013, but I do not see that that is of any real significance. The claimant said the items were delivered in plastic garbage bags, and left exposed to inclement weather. I am not persuaded that the claimant's possessions were left exposed to the elements, as she testified.

- [111] I find that the comments on the claimant's diary pages are the respondent's juvenile attempts at romantic prose, with the exception of those dated August 22nd and 23rd, 2013 which are more recriminating in tone, accusing the claimant of infidelity. As I have indicated, I find the accusations justified, and while the respondent's conduct in writing the entries he concedes were made on August 22nd and 23rd are even more juvenile, I am not persuaded that they are threatening, or that the claimant viewed them as such.
- [112] I am not persuaded that the complainant is in fear of, or has any present reason to fear the respondent. He has had extremely limited contact with her since their separation. Against the backdrop of what I find to be very limited physical contact or emotional interference by the respondent, I am not persuaded that family violence is likely to occur. In the result, there is no basis for a protection order pursuant to s. 183 of the Act.

Conclusion

[113] I conclude that:

- a) the parties commenced cohabitation in the spring of 2006;
- b) the family property is limited to the Madeira Park Property and the proceeds of its sale;
- c) the \$56,000 down payment for the purchase the Madeira Park Property should have no impact on the division of property;
- d) the \$196,000.00 plus interest currently held in trust from the sale of the Madeira Park Property is not excluded property by virtue of s. 85(1)(g) of the Act;
- e) the claimant is entitled to repayment of \$2,075.45 from the proceeds of the sale of the Madeira Park Property for the \$5,000.00 withdrawn from the parties' bank account by the respondent on December 5, 2012;
- f) the claimant is not entitled to a reapportionment of the family property given that part of the proceeds from the sale of the Madeira Park Property were used to pay the respondent's Income Tax arrears;
- g) if the \$196,000.00 plus interest currently held in trust from the sale of the Madeira Park Property was excluded property by virtue of s. 85(1)(g) of the Act, I would have reapportioned those pursuant to s. 96(b);
- h) the claimant is not entitled to spousal maintenance pursuant to s. 161 of the Family Law Act; and
- i) a protection order should not issue against the respondent .

Costs

[114] The claimant has enjoyed more success than the respondent in these proceedings. If either party wishes to make submissions as to costs, they should so advise the Registry, and if so, I will decide whether the submissions should be oral or written, and will set a timetable for those submissions.

"The Honourable Chief Justice Hinkson"

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