
CANADA / JUDGMENT

Cara-Sager v. Sager

2006 BCSC 1223

COURT

Supreme Court of British Columbia

DECIDED

10 August 2006

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2006 BCSC 1223err1 Cara-Sager v. Sager

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cara-Sager v. Sager,

2006 BCSC 1223

Date: 20060810

Docket: E0295

Registry: Powell River

Between:

Nancy Ann Cara-Sager

Plaintiff

And

Robert Scott Sager

Defendant

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the plaintiff

W.E. Whyard

The defendant

On his own behalf

Date and Place of Trial:

June 19 - 23, 2006

Powell River, B.C.

- [1] This is a matrimonial action in which the plaintiff wife and defendant husband were married on June 27, 1998, separated on January 21, 2003 and divorced February 21, 2005. A declaration pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), was made on June 3, 2003 shortly after this action was commenced on May 1, 2003. At issue are claims for spousal support and child support and for a division of the matrimonial assets. At the time of her marriage to the defendant, the plaintiff was 41 years of age, born on June 4, 1957 and the defendant was 51, born on January 18, 1947. Each of the parties had been married two previous times. The plaintiff had two children of one of her previous marriages, Daniel, born August 21, 1990 and Jamie, born September 14, 1991. It is in relation to those children the plaintiff's claim for child support is made.
- [2] Since her divorce from the defendant, the plaintiff has remarried and is living in Phoenix, Arizona with her current husband and the two children of the marriage. The claim for child support and spousal support is not prospective but is retroactive and is being sought as a lump sum to cover the period following separation in 2003 until the divorce in 2005.
- [3] The claim for a division of matrimonial assets focuses primarily on two pieces of property, the first at 2221 Swede Bell on which the matrimonial home sits, and an adjacent property at 10205 Highway 101, also in Powell River. In addition, the plaintiff claims that a business interest of the defendant called Attic Art is in whole or in part a matrimonial asset to which she is entitled to a share.
- [4] The relationship of the parties began somewhat unusually. They met while the plaintiff, who is an American citizen, was a resident of Oklahoma City and the defendant was resident in Powell River, through an online service called The Christian Connection Matchmaker. At the time they met, the plaintiff was employed as what she described as a software engineer, living with her two children in a rented home in Oklahoma City. She testified that she had a "lucrative" career and produced income tax returns for 1997 and 1998 showing her income for those years as \$68,380 and \$51,820 respectively. She testified that in 1998 her employment contract ended "early" because of her marriage to the defendant. She said she went to the matchmaker service looking for a serious relationship and explained that she presented her profile as one looking for a provider so she could raise her children not simply as "latch key kids". She testified she indicated in her profile that she wanted someone dependable who would help her take care of the family "not leaving it all on her shoulders". She testified that once she and the defendant began their communications, there was never any discussion between her and him about her seeking full-time employment, although she offered to do some contract work "to help out".

- [5] It was her evidence that the parties met online in the third week of March of 1998 and began corresponding initially through the service and then directly by email to one another. They first met face to face on May 25, 1998 when she flew to Seattle and the defendant picked her up and drove her to Powell River, to show her where he lived.
- [6] The defendant's house was an unfinished 9,000 square foot home located on the property on Swede Bell, comprising approximately three and a half acres, which adjoined the Highway 101 property consisting of another three and a half acres on which he had an Emu farm. The defendant proposed to the plaintiff during their May 25th visit and the plaintiff accepted.
- [7] According to the plaintiff, she told the defendant that at that time, she had not paid her quarterly taxes and still owed some money for student loans from the 1980s. She testified that in total, she owed \$10,000 and according to her, the defendant said he would pay those amounts once they were married after some investment property he held in Ontario was sold. The defendant told the plaintiff he expected to receive approximately \$200,000 from the sale of the property. As a result, the plaintiff agreed to go ahead with the marriage and the parties were married in Oklahoma City on June 27, 1998.
- [8] The plaintiff testified that the defendant told her that he made his money through the emu sales from his emu ranch and through investments. He had three children from one of his previous marriages, who spent some time at the defendant's home on a weekly basis.
- [9] After the parties were married, the plaintiff moved to Powell River on September 4, 1998 moving virtually all of her furniture from Oklahoma City. Subsequently, the plaintiff and the defendant signed a sponsorship agreement dated December 4, 1999. Under that agreement, the defendant agreed to provide support to the plaintiff and her dependants in accordance with the terms of the sponsorship agreement and the plaintiff agreed to make every reasonable effort to provide for his or her essential needs and those of her dependants.
- [10] The plaintiff testified that after she moved to Powell River, in accordance with her understanding with the defendant, she assumed a homemaker role, cleaning the house and cooking meals, taking care of her children and his children when they came to stay, two times a week. She testified that once every second week the defendant paid for a maid who came to clean for two hours. The plaintiff also described some other work she did around the property including cleaning up and gardening. She testified the defendant did most of the shopping and she would go along with him. She said they did not share money in any meaningful way as she effectively had no access to funds while they were married. She testified that the relationship did not change over time in that she remained in the primary role of a housekeeper and gardener and did some baking, some of which she sold for extra money.

- [11] She testified that eventually the defendant did get \$200,000 in the fall of 1998 from the sale of the property which he owned in Ontario, but that he did not pay out her loan or her quarterly taxes as he had agreed to do. She said he did give a friend \$10,000 and paid a woman named Elkie Cummings, his former common-law partner, some \$18,000 that he owed to her.
- [12] The plaintiff testified that the defendant had not told her about his relationship with Ms. Cummings at any time before they were married and the fact of the relationship came as a shock to her when she eventually arrived in Powell River, having already married the defendant.
- [13] The plaintiff testified that in December of 1998 she got some programming contract work which she sub-contracted that allowed her some extra income with which she made her loan payments, although she still had money owing as of the date of the trial.
- [14] The plaintiff testified that she was aware that the defendant received a significant quantity of money from his father in the fall of 1999. According to the plaintiff the defendant told her that the money, approximately \$300,000, was an "early inheritance", and she had no knowledge that the defendant had ever borrowed money from his father either before or during the marriage and she was never told by him that he was indebted to his father in any amount.
- [15] The plaintiff described the marriage deteriorating, attributing it to the defendant's withdrawal from involvement with her and the children. The plaintiff testified that the defendant told her that he had lost money in the stock market although, she said she found receipts showing that he withdrew money from his accounts.
- [16] The art business which the plaintiff claims is a matrimonial asset entitling her to some proportion of it is called Attic Art and consisted of a number of framed limited edition prints hung on the walls of the house as well as a number of unframed prints which were stored in cardboard boxes in the upstairs area of the house.
- [17] The plaintiff described separating temporarily from the defendant in 1999 when she and the defendant had an argument while they were in the United States on a trip, resulting in him returning to Powell River by bus, and the plaintiff driving to Idaho where she had left her children with her former parents-in-law and staying there for six weeks.
- [18] The final break-up occurred in January of 2003, according to the plaintiff, when the defendant, who had gone to Halifax to care for a dying brother and subsequently his elderly father, emailed her to tell her that he would not be returning to Powell River.
- [19] She testified that at that time, the defendant told her that the money he had previously received from his father, amounting to some \$297,000 was a loan, and she believed that he was setting things in motion for a divorce. She said that communication took place on January 21, 2003.

- [20] The plaintiff stayed in the matrimonial home, testifying she could not get work in her field as she had been out of it for too long and as a result, she went on social assistance. She carried on looking for work and finally got some employment at the Evangelical Church that she and the defendant had gone to, earning \$12 per hour, setting up an accounting system for the church.
- [21] In April of 2003, the defendant returned to Powell River. Before his return, the plaintiff had removed all of the unframed art from the house. She explained that she was concerned that the cardboard that it was kept in was getting chewed by rats and the art might be damaged, so she took it to a storage locker and kept it there. When the defendant discovered the missing prints, he became "violent and angry" according to the plaintiff. In the result, the police were called and the plaintiff and her children left the matrimonial home to stay at a woman's shelter for a month.
- [22] The plaintiff testified that before their separation, the defendant had asked her to help him sell the art work over a web site and she arranged to get a domain name in order to market the art work. She said that there were over one hundred prints and the defendant gave her a list to put on the web site to sell in November of 2002. She testified that she thought some of the art was sold in October and November of 2002. The plaintiff testified that she did sell one piece of art herself while she was waiting for social assistance in order to help support herself and the family. She said her brother was the host of the web site through which the art was to be sold and he bought the piece for \$700. The money was paid to a bank account she still had in Oregon.
- [23] Subsequently, the plaintiff got further employment working for Re/Max in Powell River "to computerize the office". For that work she was paid \$18 per hour for 18 hours per week. Although she had moved back into the house after the defendant, who had returned in April of 2003, left again to go back to Halifax, she moved out of the house finally in April of 2004 because she found it too far from town and inconvenient, so she rented a home for \$850 per month. After that, she stored the art which she had in storage in the house, until in December of 2004 pursuant to discussions between her counsel and counsel for the defendant it was delivered to the offices of the defendant's then lawyer, Stacey McCausland. The plaintiff said all the prints that she had taken from the house were delivered except for three, the one she originally sold for \$700 and two additional Wayne Gretzky prints which she had sold for \$200 each.
- [24] The plaintiff testified she took everything that she had brought to the house from the house, except her king size bed which had been damaged. She took another one in its place and also took a dryer which had been purchased to replace a dryer that she had brought from Oklahoma City. She denied knowing that the king sized bed she took belonged to the defendant's former common-law spouse, Elkie Cummings. She also kept a 1991 Ford Taurus which the defendant and she had bought in the fall of 1998. She testified that when she went to the shelter in 2003, a number of things were taken from the house including tools and various other items.

- [25] The plaintiff's evidence as to the value of the matrimonial home was supported by several appraisals, the first done on February 7, 2001 when the defendant wanted to raise money "to get in on an investment". That appraisal assigned a value of \$354,000 to the house and the two properties in total. A second appraisal was done in June of 2005 by an accredited appraiser, Robert Miller, on behalf of the plaintiff and revealed a value of the house and two properties of \$390,000.
- [26] In her first financial statement, sworn in June of 2003, among her assets the plaintiff included an interest in Atomato Inc. which she described as a small investment with her friend, Jim Sutton in England, which nothing came out of. She said Atomato was a company belonging to the defendant, but that she was invited by her friend Sutton to invest with "a dignified group of people". She testified the defendant obtained some money from the joint account and gave it to her to invest, but that they heard nothing further about that investment.
- [27] She said that before she moved from Powell River, her mother gave her some money for a down payment for a home which she bought in Powell River. The home's assessed value is \$153,000 and it has a \$113,000 mortgage on it.
- [28] In cross-examination, the plaintiff was shown a number of emails and several submissions she made to the matchmaker service at or around the time that the parties met online. The emails she was shown were apparently written by her to the defendant. On their face, those emails appeared to demonstrate that in the communications between the parties at the outset of the relationship, the plaintiff was not presenting herself as in search of a provider or looking to assume a traditional homemaker role in any relationship that ensued. Some of the emails appear to show the plaintiff actually seeking work in her field even after June 27, 1998 following her marriage to the defendant. One email in particular, showed that her programming contract which she had prior to her marriage with the defendant ended, not because she married the defendant and moved away from Oklahoma City, but for other reasons altogether. Other emails showed her actively seeking work to replace that lost contract in July and August of 1998.
- [29] The plaintiff acknowledged some of the emails as having been partly written by her, but said some portions were edited or "monkeyed with". In the case of some of the emails, she denied any knowledge of them at all, suggesting, in effect, that they were concocted by someone else. In one case, an email to the plaintiff dated July 23, 1998 from the Sr. Projects Director at Microkey Software asked her "when her availability was" and commented on her resume. In another email, the plaintiff appeared to be writing to Jim Sutton, asking for a job as she anticipated the end of her contract in June of 1998 for reasons unconnected with her marriage to the defendant. In yet another case, the plaintiff appeared to email the defendant, telling him that she was keeping "the door open" on an organization she referred to as Infocan, speculating that they would "accommodate her" in Powell River. In another email apparently sent to the plaintiff from Allegro Software on June 29, 1998, the plaintiff was told that she could start working at \$37 per hour. The plaintiff denied knowledge of any

of those emails, suggesting they were concocted or that the dates were changed on them from the time when she was seeking work, perhaps in December of 1998 or at other times.

- [30] There were other emails which the plaintiff acknowledged sending which made it appear as though she contemplated continuing to pursue her career. In addition, in one email which she acknowledged sending, she commented that "there is not much for me in Oklahoma", suggesting that it was not her marriage to the defendant and her move from Oklahoma which ended what she had described as a lucrative career to that point.
- [31] In cross-examination, in relation to her claim that the defendant had not told her about his prior relationship with Elkie Cummings, the plaintiff was shown an email dated April 27, 1998 which appeared to reflect her knowledge of the defendant's prior relationship with Elkie Cummings and its nature. She testified that she never was told anything about the extent of the relationship, although in that email, it appears otherwise.
- [32] The plaintiff acknowledged that she had been asked in discovery to turn over all emails between herself and the defendant. She testified that she did turn over many such emails, but not all because "it would take time and effort to produce." She testified she was sure some of the emails shown to her by the defendant had been altered. She testified that she was aware it was possible to alter emails after receipt.
- [33] She was shown submissions that she had made to the matchmaker website which seemed inconsistent with what she claimed she was looking for in a relationship when she and the defendant met. The plaintiff testified she had several accounts, one under her own name, one under the name "Bobbie" and one using the name "Peaches". She said the latter was a hoax, just put on to "lighten the air".
- [34] There was evidence concerning the art owned through Attic Art in relation to which the plaintiff makes a claim. The defendant in his case testified he took an inventory of the art initially in November of 2002 and that inventory included both the unframed prints stored in the house, and the framed prints hung on the walls of the house. He testified that when he returned to the house on April 25, 2003, he videotaped all the art remaining on the walls in the house and confirmed the inventory of the framed prints at that time. He was unable to confirm the inventory of the unframed prints from November of 2002 because at that time it all had been taken by the plaintiff and put into storage.
- [35] Subsequently, on April 28, 2004, the defendant returned to the matrimonial home again, after the plaintiff had moved out and again videotaped the framed prints on the walls, discovering that a number of the framed prints were missing. The defendant also produced a number of photographs taken of the framed pictures on the walls of the house by the plaintiff when she left the house in early April of 2004. Those photographs were turned over to her counsel, who sent them on to counsel for the defendant. They were represented in communication from the plaintiff's counsel to the defendant's counsel as a catalogue of the art remaining on the walls when the plaintiff left the home. The plaintiff testified that she gave two packages of photographs to her lawyer, and later received two packages back, but

did not know what was taken from the packages before she received them back from her lawyer.

- [36] The plaintiff's evidence was that all the framed prints were on the walls when she left the house in early April of 2003 to move into town. She testified that the unframed prints which she had taken into storage and later moved into her own house in town, were all returned to the defendant via his counsel in December of 2004. The defendant testified that in the inventory he took of the prints following their return to his counsel, he noted that a number of the prints were missing. The plaintiff denied knowledge of what had happened to those prints that were missing except for three that she acknowledged selling to help support herself and her children while she was waiting for social assistance. She denied having anything to do with any of the missing framed prints.
- [37] The plaintiff was cross-examined as to her knowledge of the debt owing that was incurred during the currency of the marriage. She testified she was aware of a CIBC line of credit debt of about \$45,000. She was asked whether she was aware of the building of debt through some nine credit cards used by the parties during the currency of the marriage. She said she was aware of only three credit cards in use, a U.S. Mastercard, a Carp Mastercard and a Canadian Tire card. She acknowledged being aware that there was a Sears card, but testified it was only used by the defendant.
- [38] The defendant in the course of his evidence explained that his marriage to the plaintiff was his third marriage, not including his common-law relationship with Elkie Cummings. The defendant testified that his first marriage ended in the late 1970s and at that time he learned that loans his father made to him could be claimed as matrimonial assets if they were not clearly identified as loans. He said thereafter, he and his father resolved to ensure that the loans were properly identified through the execution of promissory notes.
- [39] The defendant said that he was trained as an engineer and was working in a lucrative job in Toronto when he was laid off in the mid 1980s. He testified that he had some difficulty at that time in finding new employment and as a result, he decided to, in effect, retire by using the proceeds of the sale of his home in Toronto to purchase less expensive land in Powell River and to earn a living through investment and various businesses associated with the home. He said that after moving to Powell River, he and his then wife Shelley, now Shelley Halliday, built the home on the Swede Bell property and began the art sales business through Attic Art, acquiring a number of limited edition prints for resale. He testified that his second marriage broke up in 1991 and he and his second wife, Ms. Halliday, signed a separation agreement in the course of which he paid her the sum of \$33,500 for her interest in the Attic Art assets.
- [40] In the course of the separation agreement (which the defendant acknowledged drawing up), Ms. Halliday acknowledged "that all monies advanced by the father of [the defendant] to [the defendant] and employed in the purchase of the matrimonial home at 2221 Swede Bell Road, is an encumbrance against the aforesaid property and that the husband is obliged to repay

the loan and discharge the increments out of the proceeds of any sale or mortgage of the said property." Ms. Halliday testified on behalf of the defendant that she was aware that the defendant's father had advanced them \$150,000 in order to build the property and she believed it to be a loan and not a gift.

- [41] The defendant testified that he provided a copy of the separation agreement made between himself and Ms. Halliday to the plaintiff in the present case in order to make "complete disclosure".
- [42] The defendant testified and provided a summary of the debt that he said was incurred during the currency of the marriage through the line of credit and the credit cards. In the result, he testified that the debt incurred during the marriage amounted to approximately \$103,000 and that since the separation, he has made all the principal and interest payments on those cards.
- [43] He also testified as to the ongoing transactions between his father, Cecil H. Sager, and himself in which his father advanced him money in exchange for which he signed promissory notes. He testified that on April 10, 1988 his father advanced him \$110,000 and between 1988 and 1990 he was advanced a further \$40,000 in order to enable him to build the house on the Swede Bell property. On August 29, 1991 his father advanced him \$34,500, \$33,500 of which was used to purchase his former wife's share in Attic Art and the balance which was used for legal fees incurred in the divorce proceedings. On December 31, 1998, a further \$39,462 was advanced; on November 30, 1999, \$297,000 was advanced; on December 31, 1999, \$65,750 was advanced; and on November 29, 2002, \$25,000 was advanced.
- [44] The defendant testified that in relation to each transaction at the time it took place, he and his father signed a promissory note under which he promised to repay his father for the sums advanced. He testified that on May 23, 2003 he signed what he described as a consolidated promissory note reflecting all the amounts referred to, except the \$25,000 advanced on November 29, 2002 which amounted to, in total, \$564,500 which he testified was owing to his father as of the time of the marriage breakdown and throughout the course of the marriage.
- [45] In relation to the advances on December 31, 1998, November 30, 1999 and December 31, 1999, those were advances of the father's capital to the defendant to allow him to invest the funds under an agreement whereby he would pay to his father interest on the capital equal to what the father could earn on GICs or on dividends from BCE shares and that he, the defendant, would keep any amount he earned above that threshold income.
- [46] The defendant testified that he entered into the consolidation agreement with his father in February of 2003 because at that time he was concerned about the plaintiff initiating divorce proceedings in light of their separation and he wanted to ensure that his debt to his father was properly documented. That document reads as follows:

PROMISSORY NOTE

Date of Issue: February 19, 2003

TO OR TO THE ORDER OF: CECIL H. SAGER and Assigns

FOR VALUE RECEIVED ROBERT SCOTT SAGER (the "Borrower") promises to pay or to the order of CECIL H. SAGER and Assigns (the "Lender") the principal amount specified before (the "Principal") together with interest at the rate specified before (the "Interest"). All payments received under this Promissory Note (the "Note") shall be applied first to the payment of Interest and second to the payment of Principal.

This Note is a Negotiable instrument and may be assigned by the Lender without prior notice to the Borrower.

The following are the terms and conditions of the Note:

1. PRINCIPAL

Five Hundred Sixty-Four Thousand Five Hundred (\$564,500.00) Dollars representing money already received by the Borrower from the Lender.

2. PAYMENT

The principal under this Note shall be paid in part or in full without notice or penalty. The full amount of this debt is to be repaid on or before August 30, 2011.

3. INTEREST

Interest shall be paid monthly on the outstanding Principal balance advanced commencing __, 19__ and said interest is payable monthly.

4. INTEREST RATE

The interest rate on the principal debt is zero.

5. DEFAULT

In the event of default of the payment in accordance with the terms of the Note of any Principal or Interest, the Borrower, the Guarantor and every endorser shall pay all costs incurred by the Lender in enforcing and collecting upon the Note including legal costs on a solicitor and client basis.

6. PRESENTMENT, ETC.

The Borrower and Guarantor hereby waive presentment, demand, notice of dishonour, notice of protest, notice of non-payment and any other notice required to be law to be given on this Note in connection with the delivery, acceptance, performance, default or enforcement of this note and consents to:

(a) any delays, extensions, renewals or other modifications of this Note;

(b) any waivers of any terms or conditions of this note;

by the Lender or any other person, and the Borrower and the Guarantors agree that no such action or failure to act by the Lender or any other person shall affect or impair the obligations of the Borrower or the Guarantors, or be construed as being a waiver by the Lender or that other person of its rights under the Note.

7. PROPER LAW

This note is governed by the laws of Nova Scotia.

8. GUARANTORS

The Guarantors hereby acknowledge and agree that they are individually, or if more than one then jointly and severally, liable for the obligations of the Borrower pursuant to this Note and that it shall be bound by the terms of this Note.

9. GENDER AND NUMBER

All changes to number and gender are to be applied to this Note to give full effect of its intent.

10. ASSIGNMENT

In the event any or all of the principal amount of this promissory note remains unpaid by the Borrower to the Lender at the time of death of the Lender, namely CECIL H. SAGER, then the Borrower, namely ROBERT SCOTT SAGER, in consideration of Three (\$3.00) Dollar, receipt of which is acknowledged, assigns his debt obligations due to the said CECIL H. SAGER to SHANE ANDREW SCOTT SAGER, SHANNON ALICIA MARYANNE SAGER, and ADAM CHRISTOPHER EVAN SAGER who shall have all the joint rights and privileges of the said Lender as contained in the body of his Promissory Note. This assignment shall be automatic, without the needs for any further action, upon the death of CECIL H. SAGER.

DATED AT Dartmouth this 19 day of February, 2003.

[signature of witness] [signature of Robert Scott Sager]

ACKNOWLEDGEMENT

I, CECIL H. SAGER, hereby acknowledge receipt of this Promissory Note. As well, I confirm that any outstanding debt due to me pursuant to this Promissory Note is hereby assigned to SHANE ANDREW SCOTT SAGER, SHANNON ALICIA MARYANNE SAGER, and ADAM CHRISTOPHER EVAN SAGER at the time of my death.

DATED AT Dartmouth this 19 day of February, 2003.

[signature of witness] [signature of Cecil H. Sager]

- [47] He testified that he and his father had an understanding between the two of them that his Powell River properties were collateral for the loans advanced, but he did not want to put a mortgage on the properties because of the associated cost, because it was unnecessary, and because he wanted to keep the properties clear of encumbrances to "remain flexible" and have "them handy to raise money for further investments".
- [48] The defendant specifically testified that the "early inheritance" of \$297,000 which the plaintiff referred to in her evidence as coming from the defendant's father during their trip to Ottawa in the fall of 1999 was a situation in which his father turned over \$297,000 to him to invest on the terms described, but the capital continued to belong to his father although it was in the defendant's name. The defendant testified that after receiving the capital from his father, during the course of his marriage to the plaintiff, he continually dipped into his father's capital in order to support himself and the plaintiff and the family, which included the plaintiff's two children and his own three children from his second marriage to Ms. Halliday.
- [49] The promissory note dated November 30, 1999 signed by the defendant and his father in relation to the \$297,000 reads as follows:
- I, Robert Scott Sager acknowledge receipt of 3,000 shares of BCE Inc. common shares at the market price of [\$99] per share and hereby promise to pay \$297,000 to my father, C.H. Sager (of Ottawa Ontario) his assigns on demand for the value received.
- I may sell and/or reinvest the monies from any sale of such shares but it is understood and expected that the value of the original \$297,000 will remain my obligation to repay to my father, C.H. Sager.
- [50] At the bottom of the agreement, the following additional paragraph was typed:
- Scott, take care of this as I can't afford to lose it. I need to at least get the dividend amount as a regular income.
- It was signed "Love Dad".
- [51] The defendant produced a summary of money transferred from investment accounts utilizing his father's capital between December 4, 1998 and September 13, 2000, showing a total of \$210,000 which the defendant testified were used for family purposes.
- [52] The defendant tendered the original of the first promissory note signed by his father and himself on April 10, 1988 relating to the \$110,000 used to build the home on the Swede Bell property. He also tendered the original of the consolidated promissory note dated February 19, 2003. He was unable to find original or copies of the promissory note for the second loan for building the home amounting to \$40,000 and produced a copy of the third promissory note dated August 26, 1991 in the amount of \$34,500 which the defendant testified he used to pay to his second wife for her share in the Attic Art inventory and for the divorce costs.

[53] In the course of their pre-marital communications, in fact, before the parties had actually met one another in person, the defendant sent the plaintiff an email providing disclosure of his financial circumstances along with some other reflections on his overall circumstances. In the course of that email, the defendant wrote as follows:

I will convert to approximate US dollars to make things easier for you although Canadian dollars make me look much better. Yes I have a house and yes it is big. Each floor is over 3,000 square feet when finished. It is designed for seven bathrooms and 6 bedrooms although there are only 2 bathrooms functional and 4 bedrooms in use. Each floor has been designed, to be finished to the same standards but only the main floor is anywhere near complete. It really does look unfinished inside and even Nancy's touch, would take a very long time to get it into shape. That refers to the finishing part. As for clean it's not bad. I cheat and have a house cleaner come in once a week. The house is a white elephant as I designed it for my family and never really expected to sell it so soon. It is big because I always wanted to have projects to look forward to and didn't want to get bored with what I had. I have moved too many times in the past. There is a great deal of me in the design and it is something like ATOMOTA. Ask a simple question and there is a long story behind it. There really isn't much of a market for it and the appraised value is 228,000 as is. The other side of the coin is that there is a mortgage on it for about 45,000. It would take several months to be ready to sell and probably a year to actually sell. When the house was being built, it was somewhat of a local tourist attraction. They just don't often build them that big around here.

I bought property over ten years ago and I still haven't got my money out of it yet. If I did, I could have leveraged it very nicely and been in a good position or lost it and been worse off. I own mortgages on the property that are worth somewhere between \$290,000 and \$450,000. This one is real complicated and sometimes I wonder whether I will ever see any money out of it. At this very moment payments to me are 3 months in arrears. What a pain.

Next we move to the stock market where I have about \$275,000 of blue chip stocks sitting in my name. In addition to all this there is my father's estate which gets split between my brother and I. How much, we never ask because it is his to spend as he pleases or to give away if that is his desire. For a measure, let's call my piece potentially \$400,000. That's pretty much it. My Van is 13 years old and I have no plans on changing it at this time. The house is furnished but sorry dear there are no antiques. No really modern stuff either. My computer if you wonder is a PII300, 64 meg, 56kb modem, 7 gig (room for more pictures). I have the potential of pulling up stakes and establishing a nest but then it's work to generate income. So now I have covered the easy part and you know the bare truth that nobody else is aware of. They probably don't care either.

[54] The defendant testified that although saying that he was converting to U.S. dollars in the course of his email, he did not always do so in his ensuing explanation which rendered his email somewhat inconsistent. He testified that his reference to having "\$275,000 of blue chip stocks in his name" was a reference to his father's capital, which was in his name for investment purposes, but signed over to his father and that referred to the \$297,000 he later received from his father in December of 1999.

- [55] The defendant did not disclose any indebtedness to his father in the May 4, 1998 email, which at the time would have amounted to approximately \$184,500. He testified that at that time, he hoped he would be forgiven on that loan and acknowledged he did not disclose it to the plaintiff.
- [56] It was the defendant's evidence based on the inventories of the framed and unframed art that the value of the framed art that went missing while in the plaintiff's possession was \$14,895 out of a total of \$25,305 and the amount of unframed art that went missing was valued at \$42,065 out of a total value of \$100,824.
- [57] The defendant calculated that of all the various credit card debts incurred by the parties during the currency of marriage, he had to trial paid a total of \$67,289.63 in principal and interest, which represented \$33,644.82 for each party's share of the matrimonial debt.
- [58] The defendant further testified that his income for the three years commencing in 2003 was \$6,508, \$5,589, and \$10,583 respectively.
- [59] It was the plaintiff's contention that the marriage was a traditional marriage of 6½ years in total with about 4½ years of cohabitation. Her counsel submitted that pursuant to s. 56 of the FRA, the plaintiff was entitled to a deemed one-half interest in the matrimonial assets, and he contended that the main asset consisted of the matrimonial home and its adjacent lot, which were appraised at \$285,000 for the home and Swede Bell lot and \$105,000 for the adjacent lot, for a total of \$390,000. He pointed out that there was evidence that property values were increasing in the Powell River area on a monthly basis.
- [60] Counsel for the plaintiff submitted with respect to the Attic Art that although the defendant has the balance of the collection and claimed it to be an excluded business asset pursuant to s. 59 of the FRA, the assets were used for a family purpose, as when the plaintiff moved into the matrimonial home in 1998, the framed prints were hung on the walls and displayed for sale in the matrimonial home. He also submitted that late in the relationship, in November and December of 2002, both parties worked in relation to the art business, preparing inventories and getting the art ready for sale.
- [61] Counsel for the plaintiff further submitted that as far as the chattels were concerned, about which there was not much evidence of value, I could simply order that each party retain what was in his or her possession without adjustment.
- [62] The plaintiff contended that the adjacent lot was a matrimonial asset as there was evidence that it was logged during the currency of the marriage producing income of approximately \$5,000 and there was also some evidence that the children used the property to play on.
- [63] Insofar as Atomota was concerned, the plaintiff submitted it had no current value left and was nearly an empty vessel.

- [64] Counsel for the plaintiff submitted therefore that the matrimonial assets of contention consisted of the matrimonial home, the adjacent property, and the assets of Attic Art. He conceded that in relation to each of those assets, there should be a judicial reapportionment in favour of the defendant, but submitted that the debts relied on by the defendant as an encumbrance against the value of the real property should be carefully analyzed. He submitted that the timing of the disclosure of the debt was suspicious, particularly in light of the defendant's email letter to the plaintiff on May 4, 1998, when he purported to make full disclosure of his personal circumstances and revealed nothing of any debts to his father. Further, the plaintiff pointed to the defendant's assertion in a letter dated February 22, 2001 written on Atomata letterhead seeking to participate in an investment opportunity by asserting that his personal property had "a value in United States dollars of \$1 million and was free and clear of liens and/or encumbrances". The property he referred to consisted of the two parcels of real estate comprising Swede Bell and the adjacent property and some t-bills and stocks.
- [65] Mr. Whyard submitted that on all the evidence the court should question the credibility of the defendant's claims of indebtedness to his father in connection with this property, and that an appropriate value to place on the real property was \$390,000 and that the Attic Art and collectibles should be valued in the range of \$75,000.
- [66] Mr. Whyard submitted a reapportionment of 75% to the defendant and 25% to the plaintiff would be appropriate having regard to all the circumstances including the length of the marriage, the plaintiff's loss of employment consequent upon the marriage, and the difficulties she encountered finding re-employment in the two years following the breakdown of the marriage.
- [67] With respect to spousal and child support, the plaintiff submitted that the defendant had signed an agreement with the Government of Canada when he married the plaintiff that he would support the plaintiff and her children, but that after the separation he paid no support to her, which compelled her to seek social assistance until she was able to obtain some employment. Mr. Whyard submitted that the defendant's evidence of his circumstances between 2003 and 2005 was very scant and consisted mostly of his assertion that he was living in Nova Scotia looking after his father until his father's death, and that he was involved in building a home on some property belonging to his nephew. He submitted there was some evidence before the court that Mr. Sager continued to have some mortgages in properties in Bolton, Ontario, but there was no clear evidence whether the mortgages had any value at the material times. The plaintiff submitted that I should input some income to the defendant sufficient to award \$700 per month support for the two year period between 2003 and 2005 when the plaintiff remarried, and award a lump-sum payment of \$16,800 in retroactive child support on that footing.
- [68] It was the defendant's contention that the plaintiff's action should be dismissed in its entirety. He submitted that the matrimonial debts exceeded the assets, that Attic Art was an excluded business asset, and one from which in any event the plaintiff got substantial value

from the pieces of art which went missing when in her possession. The defendant further submitted that quite apart from any debt owing to his father or his father's estate, the defendant has been paying off substantial debt incurred during the currency of the marriage that should offset any reasonable division of matrimonial assets.

- [69] I do not accept the contention of the defendant that the money advanced to him by his father over the years was a debt in relation to the matrimonial property or otherwise. I find the promissory notes, such as they were, were designed to guard against claims against the property arising out of matrimonial-like relationships but not to evidence an actual debt. It is quite clear that despite his evidence on the point and the contents of the promissory note on November 3, 1999, the defendant did not treat the money advanced to him as his father's but freely used the capital from those funds to live on. It is equally clear that in his letter to the plaintiff on May 4, 1998 and the February 21, 2001 letter on Atomata letterhead that the defendant represented no such debts or encumbrances. Further, it is clear on reading the consolidated promissory note of February 19, 2003 that the "debt" in evidence was not ultimately vested in the father's estate as it would have been if it was genuinely a debt to his father, but was assigned to the defendant's sons, which, in my view, is a clear indication that the intent of the promissory note was to keep the defendant's property in the defendant's family and not to expose it to claims arising out of matrimonial-like relationships.
- [70] In addition, there was no evidence before me of any schedule of payments which the defendant was compelled to make to his father on the debts and despite his evidence of paying his father a threshold amount based on his utilization of the capital, there was no evidence that such payments were ever made.
- [71] Thus, I am not satisfied that the amounts advanced by the defendant's father represent any sort of encumbrance on the matrimonial property or a genuine debt owed by the defendant. I am however satisfied that there was substantial debt incurred during the marriage which the defendant has been entirely responsible for paying. I am also satisfied that the Attic Art assets identified by the defendant as having gone missing while in the plaintiff's possession were used by her to generate income. I am not satisfied as to her explanation that she had nothing to do with the disappearance of the art in question. She testified that she did sell several pieces of the art and that she put the proceeds of the sale into an account she had in a bank in Oregon. It is significant in my view that the plaintiff did not disclose the existence or the contents of her Oregon bank account in her financial statements of either June 2003 or March 2005.
- [72] I also do not accept the plaintiff's evidence as to the basis of her relationship with the defendant, and I specifically reject her evidence that she did not write the emails attributed to her. I find her evidence that someone edited or "monkeyed with" the emails to be not believable, particularly in light of her refusal to disclose to the defendant any of her copies of the emails she claims were falsified or concocted. I do not find that she gave up a specific job or career to marry the defendant. It is clear on the evidence of the emails that her contract in Oklahoma ended before the plaintiff married the defendant and moreover that

she remained in Oklahoma after the marriage looking for additional work, which she either did not find or did not take. In the result, while the plaintiff did move to Powell River I find that it was not as the result of an understanding that she would assume the role of homemaker and that the defendant would provide for her and her children.

- [73] I also find that during the currency of the marriage the defendant expended considerable amounts of capital on the family, thereby reducing his net worth.
- [74] Insofar as the matrimonial assets are concerned, I am satisfied that they consist of the matrimonial home on the Swede Bell property, but not the adjacent property and the Attic Art and collectibles. Insofar as the adjacent property is concerned, the evidence of its use for a family purpose consists of its occasional use by the children for playing on and the use of \$5,000 acquired from logging it. Section 58(2) of the FRA provides that "Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset." It is clear that the primary use of the adjacent property was for the emu farm which the defendant operated and to which the plaintiff made no direct or indirect contribution. I conclude that the minor use of the adjacent property as revealed in the evidence did not establish that it was "normally, regularly or customarily" used as a family asset so as to attract that characterization. see *Todd v. Freeman*, 2003 BCSC 1155.
- [75] Insofar as the Attic Art business is concerned, I accept there was some level of use of the art for a family purpose, both by using it to adorn the walls of the matrimonial home and by using the matrimonial home to display some of the art for sale, and I accept that the plaintiff made some direct contribution to that business by helping catalogue the art in November of 2002 and readying it for sale by obtaining a domain name for internet sales.
- [76] In considering the issue of division of matrimonial assets, s. 65 of the FRA reads as follows:
- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
 - (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient,
or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[77] This was a short marriage of 6½ years in which the parties lived separate and apart for the latter two years. The defendant, who is nearly ten years older than the plaintiff, has in effect retired and attempted to live off income he can generate through use of his capital and various businesses, including Attic Art and formerly the emu farm. He acquired the Swede Bell property in 1988, ten years before his marriage to the plaintiff, and much of its acquisition was financed by gifts or early inheritances from his father. I accept that, in the course of his marriage to the plaintiff, the defendant reduced his capital by a significant amount which to some extent has an impact on his ability to be economically self-sufficient. I also accept that the defendant has ongoing obligations towards the children of his previous marriage and that he has paid for and maintained the property throughout the marriage and following the separation while the plaintiff had the sole possession of it between 2003 and 2004.

[78] Insofar as the plaintiff is concerned, I accept that following her marriage to the defendant in 1998 she did not work extensively in her field and may have, to some extent, disadvantaged herself by moving away from her sources of employment. However as I indicated, I am not satisfied that she gave up a specific job or career to marry the defendant or assume a particular role in the family. While I accept she did not work to any significant extent outside the home following her marriage to the defendant, I am not satisfied that this was the product of an agreement between the plaintiff and the defendant. It appears that the plaintiff has remarried and is now working in the real estate field with her current spouse. It is my view that given the debts arising out of the marriage which the defendant has assumed responsibility for, what I find to be the plaintiff's acquisition of the missing pieces of art from Attic Art, the defendant's age and need to rely on his capital for economic self-sufficiency, and his assumption of responsibility for the matrimonial debts, it is appropriate to reapportion the matrimonial assets substantially in his favour. I therefore reapportion the balance of the assets of Attic Art 100% in favour of the defendant, and the matrimonial home, after deducting the mortgage, 90% to the defendant and 10% to the plaintiff. I set the value of the matrimonial home on the Swede Bell property at \$285,000 as of the trial date which I conclude is the appropriate date for valuation. I deduct the sum of \$50,000 from the value to reflect the approximate mortgage outstanding at the time of separation. Therefore,

the plaintiff is entitled to receive the sum of \$23,500 from the defendant.

[79] Insofar as the issue of child support is concerned, I am not satisfied that it would be appropriate to input income to the defendant or to award retroactive child support in the manner suggested by counsel for the plaintiff. In my view, in the present case, to make the order sought by the plaintiff would engage those factors that have weighed against making retroactive support orders, including:

1. the order would cause an unreasonable or unfair burden to the defendant and would interfere with his ongoing support obligations towards the children of his earlier marriage;
2. the purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and
3. there was a significant and unexplained delay in bringing this application.

See *L.S. v. E.P.*, 1999 BCCA 393.

[80] I order that each party will retain the chattels in his or her possession. I order that the plaintiff return all of the documents relating to Atomata Inc., including registration papers, minute books, statements, correspondence, and all bank records to the defendant forthwith, and I reapportion Atomata Inc. 100% to the defendant, regardless of its value. I further order that in the event the investment of USD \$30,000 made through Atomata Inc. with James Sutton is returned, that it will be apportioned 100% to the defendant, but that if there is any profit realized from the initial investment of \$30,000 it will be divided on a 50/50 basis between the plaintiff and the defendant.

[81] I make no order as to costs. I grant leave to the parties to address the matter in writing.

"A.F. Cullen, J."

The Honourable Mr. Justice A.F. Cullen

September 14, 2006 - Revised Judgment

On page 10, paragraph 28, fourth line should read:

"The emails she was shown were apparently written by her to the defendant "

On page 12, paragraph 32, first sentence should read:

"The plaintiff acknowledged that she had been asked in discovery to turn over all emails between herself and the defendant. "

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Prepared on 30 October 2026 · Esheria