
CANADA / JUDGMENT

Chester v. Lin

2008 BCSC 836

COURT

Supreme Court of British Columbia

DECIDED

26 June 2008

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2008 BCSC 836 Chester v. Lin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chester v. Lin,

2008 BCSC 836

Date: 20080626

Docket: E071017

Registry: Vancouver

Between:

Robert George Chester

Plaintiff

And:

Christina Yifeng Lin

Defendant

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Plaintiff

Diane MacKinnon

Counsel for the Defendant

Paul J. Reimer

Date and Place of Trial:

April 28, 29, 30 and May 1, 2008

Vancouver, B.C.

Authorities Cited:

Locke v. Locke, 2000 BCSC 1300

Livingstone v. Livingstone, 1999 BCCA 295, 68 B.C.L.R. (3d) 109

Cunha v. da Cunha (1994), 99 B.C.L.R. (2d) 93 (S.C.)

MacNeil v. MacNeil, No. D032446, New Westminster Registry, Reasons for Judgment of Josephson J. April 19, 1995

Duncan v. Duncan, [1997] B.C.J. No 2804 (QL) (S.C.)

Lodge v. Lodge (1993), 79 B.C.L.R. (2d) 360 (C.A.)

Toth v. Toth (1995), 13 B.C.L.R. (3d) 1 (C.A.)

Wilson v. Wilson (1997), 31 B.C.L.R. (3d) 332 (C.A.)

Samson v. Samson (1996), 27 B.C.L.R. (3d) 363 (C.A.)

B.J.A. v. P.R.A.A., 2004 BCSC 1434

Ostrom v. Ostrom, 2002 BCSC 863

S.R. v. N.R., 2006 BCSC 412

Statutes Cited:

Family Relations Act, R.S.B.C. 1996, c. 128, s. 65.

- [1] This is a matrimonial action where the parties have achieved an admirable consensus with regard to almost all the issues regarding the two young children of the marriage. Some parenting schedules are still being decided. A dispute remains on the distribution of the two properties owned by the parties and whether or not a substantial sum of money from the defendant wife's father constituted a gift or a loan.
- [2] The plaintiff husband, Robert George Chester, is 47, born March 12, 1961. The defendant wife, Christina Yifeng Lin, is 44, born April 9, 1964. The parties were married July 12, 1997 and separated November 24, 2006. A divorce was granted on the first day of this trial, April 28, 2008.
- [3] There are two infant children of the marriage, Emma Tzu-Min Chester, now 8 ½, born September 3, 1999; and Heather Chia-Wen Chester, born December 31, 2002, now 5 ½.

- [4] The parties have agreed on joint custody and guardianship for the children, with their principal residence to be with their mother who now lives in the matrimonial home at 343 West 16th Avenue in Vancouver.
- [5] A consent order made by Madam Justice Russell on June 5, 2007 provided that the defendant husband pay \$759 a month to the wife on behalf of the children, based on an income of \$50,000. That order also specified that Mr. Chester was to disclose any additional income he might have, and he was to contribute to counselling expenses for the children. Pursuant to s. 57 of the Family Relations Act, the order confirmed there was no hope of reconciliation.
- [6] A parenting schedule for the children was set out in that consent order. The children would be with their father each Monday from 6:00 to 9:00 p.m., and Wednesday from 6:30 to 9:30 p.m.; beginning July 4, 2007 each Wednesday from 6:30 p.m. to Thursday at 8:00 a.m., and each Friday from 6:30 p.m. to Saturday 6:30 p.m. Further, the children would vacation with their father in 2007 from July 7 to July 13, with frequent cell phone contact with their mother during that time.
- [7] The plaintiff father now suggests parenting time with him as follows:
- (a) Mondays from 6:00 p.m. to 9:00 p.m.
 - (b) Wednesdays from 6:00 p.m. to Thursday morning, with the children to be returned to either their mother's home or directly to school;
 - (c) Fridays from 6:00 p.m. to Saturday 6:00 p.m.
 - (d) Two-week summer vacation periods, provided that the plaintiff is able to take two-week periods off work. If he is unable to do so in two-week periods, then he will have access during the summer either for one two-week period or for two one-week periods.
 - (e) The parties to divide the winter holiday period between them equally. In even numbered years, the children will be with the plaintiff on Christmas Eve and Christmas morning, and with the defendant in odd numbered years.
 - (f) Statutory long weekends to be spent alternately with each parent, with the mother having had the children for Good Friday in 2008, then with their father in 2009, and so on alternately. Victoria Day in 2008 the children will be with their father, with their mother in 2009, and so on. On Canada Day the children will be with their mother for that long weekend in 2008, and then alternately as set out above. B.C. day at the beginning of August in 2008 the children will be with their father, with the alternate schedule to apply; for each Labour Day September long weekend, the children will be with their father for Friday and Saturday to 6:00 p.m., and then with their mother for the rest of that weekend; for Thanksgiving Day in 2008, the children will be with their father, then with their mother for Thanksgiving in 2009, and so on alternately. Remembrance Day will be with their mother in 2008, with their father in 2009, and so on.

- (g) For the summer 2008, the children to be with their father from July 5 to July 13, 2008 at Hornby Island, returning to Vancouver on July 13. They will be with their father from August 1 to August 9, 2008 at the plaintiff's sister's home in Ladysmith. There will be reasonable telephone contact with their mother during this holiday time. The father will not take his laptop on the vacation time with his children.
- [8] As I understand it, the defendant mother is in agreement with that parenting schedule, with the exception of the overnights on Wednesday night. She feels this is too disruptive for the children. However, given the time of year, with holidays approaching, and given the limited time that the father has with the children, I will make an order to accord with the father's wishes for overnights on Wednesdays.
- [9] The parties are, of course, free to change the schedule at any time by agreement to accommodate their individual schedules. There is a suggestion that there may be a necessity for the children to be with their father on Tuesday overnights. The parties can agree on their own to any change in the schedules. It is also foreseeable that there would likely have to be a change in the parenting schedule once September 2008 arrives. Heather will then be in school as well, and hopefully by that time Mr. Chester will have been able to find accommodation more suitable than a one bedroom apartment. He needs to have living accommodations that will afford the children their own bedroom, living accommodations more comparable to those that the children have with their mother. The parties may want to look at a split week type of schedule at that time.
- [10] At this point in time, it is obvious that both parents are putting the needs of their children first, and they are to be congratulated for reaching a consensus with regard to custody, guardianship and parenting time.

Background

- [11] The defendant, Ms. Lin, is from Taiwan. Before coming to Canada in 1989, at the age of 24 or 25 years, she worked for two years in Taipei, apparently teaching English. She had obtained a bachelor's degree, majoring in English, in 1989.
- [12] Then from 1989 to 1994, in British Columbia, she obtained her master's degree from Regent College, a Christian college associated with the University of British Columbia. During that time she was a volunteer instructor in ESL at St. Chad's Anglican Church in Vancouver, and she was also a part time student library helper. In addition to some ESL teaching at St. Chad's, she was also coordinating the Sunday School and bible study for St. Chad's. During all this time, the defendant was being supported by her father in Taiwan, who would send her \$10,000 or \$12,000 from time to time. She testified that when she asked, he gave. In April 1995, she stopped her work at St. Chad's, as she was "burned out".

- [13] In June 1995, Ms. Lin began working as a lay counsellor with Burnaby Christian Counselling. She then took a two year course from September 1996 to June 1998 through North Shore Counselling to obtain qualifications as a clinical counsellor. However, in April 1999, she ceased her association there. Her supervisor at that time had said that she was not ready to be an independent counsellor. She still hopes to be a registered clinical counsellor.
- [14] Her earnings were modest in those years. She was not financially self-sufficient, and was obviously being supported by her father. The exception to that might be the year 1994 when Ms. Lin had an income of \$22,800.
- [15] Mr. Chester is an architect. He has nine years of post-graduate study. From 1979 to 1981 he attended BCIT and received a diploma in building technology, which included studies in construction project management. He then worked for five years for the City of Vancouver and an architect. Returning to school in 1986, he obtained his Bachelor of Architecture from Carlton University in Ottawa in 1991. From 1991 to 1993 he attended the University of Texas in Austin where he received his Master of Architecture in Urban Design. His most recent studies were 1995 to 1998 at the University of British Columbia where he received a diploma in Urban Land Economics.
- [16] Throughout those years of post-graduate education, Mr. Chester worked part time and incurred student loan debts of \$85,000. At the time of his marriage in 1997, he still owed approximately \$22,000 in student loans.
- [17] Since 1993, Mr. Chester's income has varied, and has included a number of months of employment insurance from time to time. Those figures are approximately as follows:

Year

Employment Income

Employment Insurance

1993

\$3,000

\$4,994

1994

\$11,160

\$5,044

1995

\$18,409

\$6,906

1996

\$26,386

\$4,169

1997

\$38,451

1998

\$39,110

1999

\$41,581

2000

\$30,860

\$4,130

2001

\$41,606

\$413

2002

\$21,084

\$9,086

2003

\$6,499

\$13,440

2004

\$54,309 (gross)

\$39,038 (net)

2005

\$72,331 (gross)

2006

\$50,369 (gross)

\$34,633 (net)

2007

\$25,298 (contract work)

\$43,728 (gross)

\$29,652 (net)

- [18] At the time of their marriage in July 1997, Ms. Lin was 33, and Mr. Chester was 36. Mr. Chester brought no financial assets to the marriage, except his education, professional degrees and qualifications. He had a 1988 Ford Escort that his father had given him, and debts of approximately \$25,000, including his student loans.
- [19] Ms. Lin had purchased a condo, 404 - 937 West 14th Avenue in Vancouver in June 1995 for \$144,545. Her father had given her the money for the purchase. There was no mortgage or recorded debt against the condo. She also had \$80,000 in what she referred to as her "savings account", which was primarily money that had been given to her by her father.
- [20] The parties met and began dating in 1994. When Ms. Lin purchased the condo in June of 1995, Mr. Chester looked at the property for her prior to the purchase. In the summer of 1996, Ms. Lin obtained her landed immigrant status, and was assisted, but not sponsored by Mr. Chester.
- [21] Two days prior to the marriage on July 12, 1997, Ms. Lin was in a motor vehicle accident, and then a second motor vehicle accident in November of that year. She ultimately received \$28,000 for those two accidents, but did not receive those funds from ICBC until May 23, 2001, at which time the money went to reduce a mortgage held by the parties.
- [22] Within a month of their marriage, Mr. Chester had converted his bank account at VanCity into joint names, and from then on deposited his cheque either in that bank account or gave the cheque to his wife. Ms. Lin managed the money from that point on. She has demonstrated throughout the years that she is astute in financial matters. That was not Mr. Chester's forte. For example, at the end of 1997, Ms. Lin prepared Mr. Chester's income tax return. At her suggestion, he invested in an RRSP of \$10,000, with a resulting refund to him of \$5,690. That refund, along with subsequent refunds went into either the joint bank account or into Ms. Lin's savings account. A refund also occurred in 1998 when an RRSP was purchased by Mr. Chester of \$6,921, resulting in a refund of \$3,489.
- [23] In 1998, Mr. Chester made his first trip to Taiwan with his wife. It was his initial meeting with his wife's father, Mr. Lin, and the rest of the family. Unable to speak Mandarin, Mr. Chester could not communicate directly with Mr. Lin, and all interpreting had to be done by Ms. Lin. During that trip they took a tour of a factory owned by Mr. Lin. The parties also travelled to Hong Kong, Japan and England. In December of that year they also took a trip to Texas.

- [24] The parties lived in Ms. Lin's condo after their marriage. By the spring of 1999, when Ms. Lin was pregnant, they decided to embark on a project, building a duplex, where they would sell one half and live in the other half. In April 1999 they put a deposit on the duplex lot of \$20,000, which came from the wife's savings account. Also in that month Mr. Lin, the wife's father, sent \$150,000 U.S. (\$220,000 Can.) to the parties for the duplex project. The lot purchase closed in July 1999 for \$375,000, \$220,000 of which had come from Mr. Lin, \$175,000 was from the bank, and the initial \$20,000 from the wife's savings account. The parties also arranged two building mortgages for the duplex for a total of \$500,000.
- [25] Emma was born on September 3 of that year. By October, the parties were running short of funds, and Mr. Lin sent a further \$30,000. In addition, Mr. Chester cashed in \$17,000 of his RRSP and Ms. Lin cashed in \$3,000 of her RRSP.
- [26] In late 1999 or early 2000, Mr. Chester wrote out a letter for his wife to translate to send to Mr. Lin. Mr. Lin had been asked to pick Emma's Chinese name, which he had done. The draft letter, placed in evidence, was a personal and courtesy letter to Mr. Lin. It talked of the pride in their new daughter, and the importance of her knowing both cultures. It thanked Mr. Lin for finding a beautiful and appropriate name for her. Then the letter contained the following paragraph:
- I am sorry that I am late in thanking you for helping us financially to build a new home. Starting this project would not have been possible without your generous financial backing of a very considerable loan to us. Thank you. We appreciate that you have made this money available to us, and consider it our responsibility to use it wisely and carefully, while we have use of it, before we return it to you.
- [27] The defence contends that this note is proof that the \$220,000 sent by Mr. Lin was a loan, and not a gift. Mr. Chester testified at trial that this was no agreement to repay, "But I thought it was a significant amount of money and we'd repay it." There was never a response to this letter. Nor has there ever been any partial repayment of this or any other amount of money sent by Mr. Lin.
- [28] The parties were able to move into the duplex by May 2000. Prior to that, leaky condo problems had arisen with the 14th Avenue condo, and those continued from 2000 to 2003.
- [29] Prior to moving into the duplex, the parties made a trip to Taiwan in February 2000, introducing Emma to her grandfather and the rest of the family. They also showed Mr. Lin a video of their duplex project. According to Mr. Chester, nothing was said with regard to repayment of the money at that time, or at any other time. The evidence of Ms. Lin is that her father constantly asked her about repayment. Mr. Chester felt he was always at a disadvantage, or a "fifth wheel" when in Taiwan, as he did not speak the language, and could communicate only through the translations of his wife.

- [30] Just prior to moving into the duplex, in April 2000, Mr. Chester went on parental leave, and according to his testimony, used that time not only to bond with his new daughter and help out his wife, but also work on the duplex project. He was also involved in the condo, which was rented. While Ms. Lin handled the rental money, Mr. Chester looked after the repairs and complaints, and throughout the years 2000 to 2003, was very involved in many meetings of the strata condo, and was part of the condo committee. He was asked to formulate a plan for remediation, in view of his professional background, and he worked on that.
- [31] In February 2001, the parties travelled again to Taiwan. Also in that month, the other half of their duplex sold for \$432,415. The mortgage on that part of the duplex was discharged; the balance due on closing was \$117,671. \$100,000 of that went to reduce the mortgage on the part of the duplex owned by the parties. Nothing was sent to Mr. Lin. Nor was that ever discussed.
- [32] Heather was born December 31, 2002. Mr. Chester began another parental leave on employment insurance for six months. By this time the marriage was running into difficulties, and sexual relations between the parties had ceased.
- [33] On June 28, 2003, the parties negotiated a mortgage of \$70,000 on their duplex, for funds to deal with an assessment for the leaky condo of \$59,000, plus an additional \$11,000 in household expenses.
- [34] The parties went to marriage counselling from August 2004 to the spring of 2005. In 2004 they went to Taiwan again. At that time, Mr. Chester testified that he made a special appointment so that he could talk to Mr. Lin on his own, without other members of the family, other than his wife there to translate. Mr. Chester testified that he wanted to ask his father-in-law "whether we should be repaying him". He said that Mr. Lin had never asked for repayment. "I wanted to know where we stood. I asked, what should we do about this money?" According to Mr. Chester, Mr. Lin said "Do your best", or "Do the best you can". Mr. Chester testified that he felt Mr. Lin "was leaving it up to us."
- [35] The building of the duplex project had put a strain on the relationship between the parties. Marriage counselling had not been successful. By mid-2005, the parties stopped doing anything together as a family, including eating together. Although they were still living in the same home, Ms. Lin cooked only for herself and the children, not for her husband. She testified that he was removing himself from family activities.
- [36] By November 2005, the parties re-mortgaged the \$70,000 mortgage to a \$125,000 mortgage. This consolidated what was left of their building mortgage as well as the previous \$70,000 mortgage that had been taken out in June 2003.
- [37] By January 2006, Mr. Chester had gone to see a lawyer with regard to the marriage.

- [38] In mid-2006, the parties again increased their mortgage, this time from \$125,000 to \$165,000, to pay for the line of credit that they had and for two automobiles they had purchased. In her testimony, Ms. Lin acknowledged that the marriage was in trouble in 2006.
- [39] On September 13, 2006, Ms. Lin's father, Mr. Lin, died in Taiwan. The parties separated on November 24, 2006, although Mr. Chester did not leave the matrimonial home until June 2007.

Money from Mr. Lin and His Estate

- [40] It is the position of the defendant, Ms. Lin, that she owed her father, and now owes her father's estate the following funds: \$145,000 for the purchase of the West 14th condo in 1995; \$220,000 which was a loan from her father in April 1999 for the duplex project; \$30,000 loan from her father in July 1999, also for the duplex project, for a total of \$395,000.
- [41] The position of the plaintiff husband is that none of those funds are debts that have to be repaid. With regard to the \$220,000 particularly, it was not a loan to be repaid or an advance on inheritance. It was a gift, a gift invested in a joint asset. If it was a gift to the wife only, it was given in 1999, and is now part of the family assets.
- [42] If the \$220,000 was a debt, there is no documentary evidence. Ms. Lin testified that she and Mr. Chester signed a document when the \$220,000 was wired to them, and this document set out terms of repayment. However, Ms. Lin, who has saved an impressive volume of background material, documents and minutiae, cannot produce a copy of such a document or the original. Nor apparently can the estate of Mr. Lin. Mr. Chester testified that no such document ever existed, and on this point, I accept his evidence in preference to the evidence given by Ms. Lin.
- [43] It is acknowledged by both parties that there has never been any repayment of any amount on this or any other money given by Mr. Lin. When Ms. Lin was asked in cross-examination why she did not pay her father something when the other side of the duplex sold, she stated, it was "not up to me".
- [44] In assessing whether the \$220,000 or any other payments are debts that must be repaid, it is helpful to look at the relationship between Ms. Lin and her father and siblings. Immediately upon the death of her father, Ms. Lin went to Taiwan for two weeks. Mr. Chester remained home with the children.
- [45] Mr. Lin apparently had four wives and two mistresses. One of the wives predeceased him. From these four wives, there are eight siblings. Ms. Lin is a child of the third wife, along with a sister and a brother. To make things even more challenging, Mr. Lin apparently died with no Will. When asked at trial what the value of her father's estate would be, Ms. Lin answered that she did not know.

- [46] Ms. Lin testified that when she was in Taiwan immediately after her father's death, she decided that her brother, Lin Cheng-I was the best one to "protect her". She thus signed over her entire inheritance to her brother 16 days after her father's death. She did so at a time when she had no idea what value there was in her father's estate or what her share might be. She was apparently motivated to sign over her inheritance to her brother in case "they" came after her. By "they" she said she meant her other brothers and sisters.
- [47] The one page document Ms. Lin signed on September 30, 2006 was entitled "Inheritance Allotment Agreement". She was listed as Party A, and her brother, Lin Cheng-I is Party B. The agreement states as follows:

Both Parties agreed on the following items for the inheritance allotment of Lin Qi-Quan's property,

1. Party A has given all inheritance allotment from Father Lin Qi-Quan to Party B.
2. The inherited object mentioned above is included but not limited to all active properties such as estate, chattel, and other rights which need to claim to others; and passive properties such as debt coming with inheritance.
3. All arguments or disputes in the future caused by inheritance are all taken by Party B.
4. All taxes derived by inheritance are paid by Party B with the transferred allotment. Party A is not obligated by any responsibility.
5. Before completion of paying inheritance tax, Party can still withdraw this agreement. But for the distributed inheritance, Party B does not bear the obligation to return.

[Emphasis added]

- [48] Although requested by counsel for the plaintiff, there have been no documents produced or placed in evidence with regard to the father's estate. However, the plaintiff, on March 21, 2007, while still residing in the matrimonial home, copied a number of his wife's emails onto a disk from their computer. Those emails were all in Chinese, which he was unable to read. They are dated in English, but other than that, they are apparently in Mandarin.
- [49] Mr. Chester did not disclose these emails to his lawyer until March 2008, at which time the possession of those emails was brought to the attention of Ms. Lin. Of the 23 Chinese emails that were placed in evidence, only four were translated. The emails were between Ms. Lin and one or more of her brothers in Taiwan. Many of the emails were to all eight of the siblings. The emails were dated as follows: September 23, October 4, 8, 12, 28; November 1, 2, 3, 17, 18, December 22, 23, 25 (four on December 25 between 4:00 a.m. and 6:30 a.m.). All these were in 2006.

- [50] In 2007 there were emails dated February 13, March 5, 6, 8, 13 (two), 21. No emails are available after March 21, the date when Mr. Chester copied the emails onto a disk. According to Ms. Lin's testimony, she was unable to retrieve any other emails from her computer. She testified it was an old computer, and she had "no idea how to use it." She also said that the emails do not exist anymore, that she had "deleted stuff", to make room on the old computer. She now has a new computer.
- [51] An email dated November 1, 2006 from a brother to all the siblings, including the defendant, discusses calculations and payment of inheritance tax on their father's estate. The email says that the accountant has agreed to take on these calculations. And that there was discussion on several matters, including "methods of distributions after paying the tax."
- [52] The email of November 3, 2006 is from the same brother, also to the same siblings. The brother writes that he is summarizing briefly his speech at a meeting that occurred. The email states, in part, as follows:
1. Other inheritors should not claim any rights of the allowances or presents that our father gave to some of his children when he was alive...
 2. As to the after-tax estate, it should include, in total, six industrial buildings of armoured concrete structure and eight estate properties and the leftover funds will all be redeemed and converted into cash . All of these should be divided into eight parts to be inherited by the inheritors through lot drawing the estate properties are to be disposed, after the completion of inheritance process, by the respective inheritors themselves
 3. Since our father had said that the operation of plant at Kuo Yang should continue, I suggest that the inheritors hold their shares and the company rent it from the inheritors in the future, paying a monthly or semi-annual rent
 4. The stock equities of three companies should be divided into eight parts and the inheritors each will inherit one part .

[Emphasis Added]

- [53] On December 23, 2006, an email stated that all of eight votes are now in agreement. Then in an email of December 25, 2006, the brother who has Ms. Lin's power of attorney indicates that any cheque for Ms. Lin is to be written to be payable to him.
- [54] Shortly after her father's death, Ms. Lin received \$33,000 as her share of an asset that had been sold. This amount apparently did not go to her brother.
- [55] The parties separated on November 24, 2006. Ms. Lin has not done income tax returns for either herself or Mr. Chester for 2006 or 2007. In both 2006 and 2007, Ms. Lin testified that she has donated over \$3,000 to charities in each of those years.

[56] Ms. Lin remains in the matrimonial home, their half of the duplex. There is a suite for rent in the basement of the duplex which yields \$955 a month in rent, which is received by Ms. Lin. She also receives the rent from the condo of \$1,050 a month. In July 2007, Ms. Lin, accompanied by her mother and brother went on a cruise to Alaska. Ms. Lin paid \$7,830 from an account, in part for the cruise.

The Position of the Plaintiff

[57] The husband seeks an order that the parties share joint custody and joint guardianship of the children with the defendant to have primary residence. The parties have agreed on the parenting time set out earlier in this judgment, with the exception of Wednesday overnight. The father would like Wednesdays from 6:00 p.m. to Thursday morning, when he would either return the children to school or to their mother's residence.

[58] Each party should be entitled to travel outside B.C. with the children for the purpose of temporary vacations, and each should execute the necessary travel authorizations. If the children's passports are required, then they would be provided to the travelling parent seven days before the vacation. Otherwise, the passports of the children would remain with the defendant wife.

[59] Mr. Chester is agreeable to paying child support to his wife pursuant to the Child Support Guidelines. The health premiums for B.C. Medical should be an extraordinary expense. Summer camp for one to two weeks each summer may be an extraordinary expense, as well as Mandarin classes, provided both parties agree. The net costs of any counselling for the children would also be an extraordinary expense, and any daycare that may be necessary while either party works or takes training.

[60] In the calculation of the plaintiff's Guidelines income, his professional dues would be deducted first, for purposes of calculation.

[61] The RESPs for the children are to be retained and held in trust for the children in the joint names of the parties. Neither party would be entitled to withdraw monies from the RESP without the written consent of the other party.

[62] The assets of the parties are as follows, with the plaintiff's suggested division:

- (a) Joint CIBC account - \$1,600 - no division;
- (b) Wife's CIBC account - \$1,000 - divide equally;
- (c) Wife's ING Direct account, to be divided equally as of the amount in that account on January 1, 2007;
- (d) Edward Jones account - \$14,000 - divide equally;
- (e) Plaintiff's VanCity account - \$3,594 - plaintiff retains to assist in Visa debt;

- (f) Plaintiff's VanCity account - \$142 - plaintiff retains;
 - (g) Honda Civic - husband's possession - \$15,000 - husband keeps this vehicle;
 - (h) Toyota Camry - wife's possession - \$18,000 - wife retains;
 - (i) Wife's inheritance - \$33,333 - wife retains, plus all other assets from her father's estate, to be determined.
- [63] With regard to household furnishings, the plaintiff is in agreement the items in the children's room shall remain with the wife. The furnishings in the other areas of the home or furniture removed from the home by the plaintiff should be divided equally, with each party picking an item on a hockey pool basis. If the parties cannot agree on a buyout amount of furnishings in lieu of actual division, then a buyout will be considered. There should be liberty to apply if the parties are unable to agree.
- [64] The plaintiff has an RRSP with Edward Jones in the amount of \$54,000. The defendant has an RRSP in the amount of \$12,820. The husband suggests that the RRSPs be divided and shared equally, pursuant to spousal rollover provisions of the Income Tax Act.
- [65] Photographs are in issue. The plaintiff asks that the defendant be ordered to release all family photograph albums, loose photographs, photographic CDs and camcorder videotapes to the plaintiff on the following basis: that any duplicates would be shared between the parties. Otherwise, the plaintiff will duplicate the CDs, or make copies at his own cost of photographs or albums. The plaintiff will have 30 days to copy and return the photograph albums, loose photographs, photographic CDs and camcorder videotapes to the defendant.
- [66] The husband suggests that the tax debt for the year 2006 be divided equally between the parties, and thereafter, each party pays their own. He seeks a declaration that there is no other debt reapportionment.
- [67] With regard to spousal support, the plaintiff will pay spousal support pursuant to the Child Support Guidelines. He seeks an order for spousal support of \$743 retroactive to June 1, 2007. However, counsel for the husband suggests that current spousal support would have to be determined after the division of assets and determination of income earning assets has been decided, as the plaintiff is unaware of what income the defendant will receive. He is also unaware of inheritance funds for the wife.
- [68] The plaintiff has made voluntary spousal support payments since separation. He now seeks an order retroactive to June 2007 for those spousal support payments.
- [69] The two pieces of real estate constitute the main family assets. There is the one-half of the duplex on West 16th in Vancouver and the condo on West 14th Avenue in Vancouver. The duplex is appraised at \$930,000, with an existing debt as of December 2007 of \$160,317.

- [70] The condo has an appraised value of \$400,000, with no debt against it. The current value, less real estate commission to sell of \$14,500 is \$385,500. There will be certain tax implications on the sale of this property, as it ceased to be a principal residence and became a rental property.
- [71] The plaintiff seeks an equal division of real estate, with a 5% reapportionment to the defendant, leaving 45% of the real property to the husband and 55% to the wife.
- [72] The contentious issue of the \$220,000 received from the wife's late father is one of the main issues between the parties. The husband contends this is not a debt; there is no obligation on the wife to repay this to her father's estate. It is a gift at this point in time, and forms part of the family assets.
- [73] The plaintiff relies on the case of *Locke v. Locke*, supra, where the husband's parents and grandparents loaned \$30,000 to the parties for the purchase of the matrimonial home. A note was signed by the husband and wife acknowledging the payment. The wife argued that the funds were a gift, an advancement on the husband's inheritance from his grandparents.
- [74] The court dismissed the claim by the parents and grandparents, and said that they had failed to prove that the advancement of funds was a bona fide debt. The note signed was an acknowledgement of receipt of funds, but not a promise to repay. The court found that the money was intended as an advance on inheritance. The court also referred to the case of *Wiens v. Wiens* (1991), 31 R.F.L. (3d) 265 (B.C.S.C.). That case dealt with the situation where the parents of a married child advance money for the couple to purchase or make improvements on the matrimonial home, and the spouses later do not agree as to the nature of the advancement. The court stated at page 271:

... 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.

[Emphasis added]

- [75] In the *Locke* decision, it set out seven factors that courts look at in cases such as this:
- (1) Are there any contemporaneous documents evidencing a loan?
 - (2) Is the manner for repayment specified?
 - (3) Is there security held for the loan?
 - (4) Are there advances to one child and not others, or advances of unequal amounts to various children?
 - (5) Has there been any demand for payment before the separation of the parties?
 - (6) Has there been any partial repayment?

(7) Has there been any expectation, or likelihood, of repayment?

[76] Counsel for the plaintiff contends that the consideration of the facts here leads to the conclusion that this was not a loan, but rather a gift.

[77] The case of *Cunha v. da Cunha*, supra, was cited by the plaintiff for its discussion of non-disclosure. The plaintiff contends that the defendant wife has failed to disclose any details or documents with regard to her father's estate. *Cunha* stands for the proposition that the onus of satisfying the court that there has been full disclosure should be on the non-disclosing party. While the facts are quite different in that case from this case, the plaintiff argues that the non-disclosure does put an onus on the wife.

The Position of the Defendant

[78] The wife's position is that the \$220,000 received from her father was a loan, one that she may well have to account for in her father's estate. She seeks a 75/25 reapportionment of family assets in her favour.

[79] There is no basic problem with the Wednesday overnight access as far as the children are concerned, although it might have to be another night in the week, to accommodate the parties' schedules, depending on the courses and upgrading that the wife intends to take to position herself to go back into the workforce.

[80] Counsel for the wife submits that the husband brought no assets into the marriage, but only debts, primarily \$25,000 still owing in student loans. Whereas the defendant brought in about \$80,000 in her savings account, and the West 14th Avenue condo worth \$145,000, paid for by her father. Counsel claims that a debt for the wife at the time of the marriage would be the amount that she would have to repay her father for the condo purchase, \$145,000.

[81] After the marriage, counsel points to the earnings of the two parties, and the number of times that Mr. Chester drew employment insurance. According to counsel, he "takes opportunity of every chance he can".

[82] The defendant argues that she has been disadvantaged by her husband taking advantage of all of the cash that she has brought into the marriage. And that during the marriage, he had to pay off his student loans, and then they incurred very large bank loans in the project, the duplex that they built. The wife alleges she now finds herself in a precarious position, between her father's estate, and her husband. While Mr. Chester took time off from work, went on employment insurance, for parental leave, for example, the defendant plugged the financial holes from her savings account.

[83] As for future employment, the defendant says that she has to take her two years' training over again to become a clinical counsellor. She needs reapportionment of family assets in order to become self-sufficient.

- [84] It is the desire of the wife to keep the matrimonial home. If the condo is to be sold, the wife seeks joint conduct of the sale.
- [85] Counsel for the wife referred to a number of authorities. In *Toth v. Toth*, supra, it was a long marriage, and there was a reapportionment in favour of the wife, 80/20, after a 23 year marriage.
- [86] In the *Wilson*, supra, decision, it was a 27 year marriage. The wife was 57, and there were two sons who were grown up by the time of the separation. The court ordered a 75/25 split in that case. The wife had kept moving with the husband's career moves, and had, in effect, given up her own chances to develop a career. In the *Samson*, supra, case, it was a 13 year marriage. The wife worked at clerical work earning \$28,000 a year. The husband was a CGA earning \$59,000 a year. The duplex that they owned was on land that had been a gift from the wife's parents. The court in that case ordered a 75/25 split, in favour of the wife.
- [87] In *B.J.A. v. P.R.A.A.*, supra, it was another long marriage, 27 years. Toward the end of the marriage the wife inherited \$360,000, shortly before separation. That money was used for renovation and mortgage on the matrimonial home. The court ordered a 70/30 split in favour of the wife. The wife had been out of the work force for ten years, and indefinite support was ordered.
- [88] The *Ostrom*, supra, case is not very applicable to this situation. That was a 15 year marriage where there were four children, with two of the children residing with the husband.
- [89] In *S.R. v. N.R.*, supra, the marriage lasted for 11 years. There was one child, age 11. The wife was one year shy of her Ph.D. She was described as a professional student. The husband was very successful in his own engineering business. The court was not satisfied that the husband had made all the necessary disclosures that he should have with regard to his business. There was reapportionment in favour of the wife, but again, here the facts differ widely from the ones before this court.

Analysis

- [90] First of all, both these parties brought a lot into the marriage. The husband brought his profession as an architect, two professional degrees, after nine years of university. The wife did not bring in the type of education assets that the husband did, but she did bring financial assets, thanks to the generosity of her father. Both husband and wife over the years of their marriage took advantage of employment insurance and tax benefits, with the husband using student loans to supplement his work as he worked his way through university. He also had some help from his family, although nothing like the help that the wife received from her family. The husband was on employment insurance, sometimes because he was between jobs, and twice because he took parental leave. During the time that he took parental leave he was doing it for the normal reason, to bond with and take care of a newborn, assist his wife in childcare, and at the same time, he was involved in management of the condo, and applying his expertise to the project, the duplex that the parties were building.

- [91] The wife was very astute in setting up RRSPs for herself and her husband from her husband's earnings, taking advantage of income splitting tax refunds, and using the rents from the condo and the basement suite in the duplex.
- [92] To say the husband brought nothing into the marriage except debts is to ignore the extraordinary advantage of bringing professional degrees and a profession into a marriage.
- [93] The parties have agreed for the most part on a parenting schedule for the children. That will necessitate some changes as the wife begins to retrain, and as the children begin school in September. If the parties are unable to agree on the schedule change that was outlined in court, there will be liberty to apply.
- [94] On the issue of the money that the wife received from her father, both for the condo, and later the \$220,000 plus an additional \$30,000 for the duplex project, I regard these monies as gifts and they form part of the value of the family assets. And as such, they do not constitute debts that are to be repaid.
- [95] In looking at the seven factors set out in *Locke v. Locke*, there were no contemporaneous documents evidencing a loan. Not in the normal and formal sense of a document confirming a loan, such as a mortgage or a promissory note, for example. There was no manner of repayment specified, ever. There was no security held for the loans, such as a mortgage back. There is no way of comparing what advances or gifts Mr. Lin made to the defendant, as opposed to advances or gifts made to his other children. But it seems clear that there were monies given to other children, from the emails that were placed in evidence.
- [96] If the monies given by Mr. Lin to the defendant were not originally given or intended as gifts, then after Mr. Lin's death, it would appear they were confirmed as gifts. As set out in the November 3, 2006 email from the defendant's brother, the siblings, the beneficiaries of the intestate father, were not claiming any rights over "allowances or presents that our father gave to some of his children when he was alive...".
- [97] There was never any demand for payment to Mr. Lin before the separation of the parties. I accept the husband's evidence with regard to this, and where there is a difference between his evidence and the wife's, I accept the husband's evidence. There is certainly no documentary evidence with regard to any demand for payment before or after separation.
- [98] There has been no partial payment on either the condo money or the duplex money. There was ample opportunity for repayment in part, when the other side of the duplex sold. The wife's explanation as to why no money was repaid to her father was inconsistent with her other evidence, and lacking in credibility.

[99] There was no evidence that there was any expectation or likelihood of repayment to the father. I accept the husband's evidence with regard to the meeting that he had with Mr. Lin in Taiwan in 2004, when Mr. Lin said, "Do the best you can." I do not accept the wife's evidence that her father was constantly asking for repayment of the \$220,000. That is not consistent with the rest of the evidence, and certainly not consistent with his financial generosity to his daughter previously, or the lack of documentation.

Conclusion

[100] Section 65 of the Family Relations Act is set out as follows:

65 (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.

In view of the extent to which the properties were acquired through gifts to the wife, and the need of the wife to become self-sufficient, in my view a reapportionment of the real estate in favour of the wife of 65/35 is appropriate.

[101] As to all other assets and debts, there will be a 50/50 division, with the following exceptions:

1. The piano will be excluded from the division of furniture. The piano will remain in the home of the wife, and remain her property.
2. The RESPs will stay as they are, for the benefit of the children. Both parties will have control of the RESPs, and no decisions or withdrawals can be made on the RESPs without the written consent of both parties.

3. Each party will keep as their own property the vehicle which is currently in their possession. There will be no setoff.

All assets are valued as of the date of the triggering event, June 5, 2007. Any assets or debts acquired by either party after that date remain the property and/or responsibility of that individual party.

4. The RRSPs will be divided equally, with a spousal rollover pursuant to the Income Tax Act.

[102] Child maintenance will be paid by the plaintiff on the basis of his Guidelines income, less allowable deductions. There have been conflicting figures given for the husband's Guidelines income. If the parties are unable to agree, there can be a reference to the Registrar or liberty to apply.

[103] With regard to extraordinary expenses, Mandarin classes will be an extraordinary expense, the cost to be shared equally between the parties. Any other extraordinary expenses will be agreed upon between the parties, with the cost to be shared equally. The health premiums for B.C. Medical are also an extraordinary expense, to be shared equally.

[104] Spousal maintenance is ordered to be based on the Guidelines, to be determined after the assets have been divided. There is liberty to apply. There will be an order for retroactive spousal support payable by the plaintiff beginning June 2007.

[105] The children's passports will remain with their mother. Neither party will take the children out of the jurisdiction of British Columbia for a period of longer than three days, unless it is with the written authorization of the other parent. In the event that the children need their passports to travel with their father, their mother will ensure that the passports are in the father's possession seven days before the vacation.

[106] The defendant will provide to the plaintiff forthwith, all family albums, loose photographs, photographic CDs and camcorder videotapes. Any duplicates will be shared between the parties. Otherwise, the plaintiff will duplicate the CDs, or make copies at his own cost of all photographs, albums, CDs and videotapes. The plaintiff will have 30 days to copy and return all the original material to the defendant.

[107] As for costs, each party will pay their own costs.

"Morrison J."

Madam Justice Morrison

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Prepared on 29 October 2026 · Esheria