

CANADA / JUDGMENT

Creelman v. Heuser

2024 BCSC 754

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 754 Creelman v. Heuser

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Creelman v. Heuser,

2024 BCSC 754

Date: 20240502

Docket: E24422

Registry: Port Alberni

Between:

Kenneth Wayne Creelman

Claimant

And

Cheryl Roxanne Heuser

Respondent

Before: The Honourable Justice Whately

Reasons for Judgment

Counsel for the Claimant:

C.H. Beckingham

The Respondent, appearing in person:

C. Heuser

Place and Date of Trial:

Port Alberni, B.C.

October 17-20, 2023

Place and Date of Judgment:

Port Alberni, B.C.

May 2, 2024

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Introduction

- [1] This is a family law matter that came before me for trial in Port Alberni in October of 2023. The parties separated in March of 2020 after being married for approximately 27 years. This was a second marriage for both, and they had no children together. At the time of trial, the claimant Kenneth Creelman was 72, and the respondent Cheryl Heuser was 69.
- [2] The only issues to decide at trial pertain to the division of family property and debt, with some ancillary orders flowing from those decisions. Mr. Creelman seeks an order for equal division of family property and family debt. Ms. Heuser seeks an unequal division of family property in her favour, which she says reflects her greater contribution to the family business both before and after separation. She agrees with an equal division of some debt, particularly that relating to the family business, but not Mr. Creelman's personal tax liability.
- [3] Both parties seek an order for divorce based on the ground that they have lived separate and apart since March 20, 2020. At the outset, I am satisfied that the parties should be divorced from each other, and I grant that order.
- [4] Mr. Creelman was represented by Mr. Beckingham throughout all legal proceedings, up to and including trial. While Ms. Heuser had legal representation at earlier stages of the proceedings, she represented herself at the trial. Despite early struggles with the trial procedure and rules, Ms. Heuser proved to be, for the most part, organized and efficient in presenting her evidence to the court.
- [5] That said, there were issues with document disclosure, as well as either a lack of evidence, or ill-advised focus on irrelevant evidence with respect to various issues by both parties. I listened carefully to the testimony of both Mr. Creelman and Ms. Heuser, but much of it I will not recount here. The details surrounding the deterioration of the parties' relationship was, for the most part, not relevant or helpful to the issues before me. I was not provided with written submissions, or a detailed summary of certain financial details as of the date of trial by either side. In the result, there will necessarily be some "rough justice" applied to certain aspects of the property and debt division.
- [6] The disparity between the positions of the parties is relatively small, in terms of monetary value. Mr. Beckingham candidly stated to the court that this matter likely could or should have settled before trial. As is often the case in family disputes, economic efficiency and the realities associated with the cost of litigation may not carry sufficient weight when it comes to reaching compromise.
- [7] It was clear during the trial that there is no love lost between Mr. Creelman and Ms. Heuser, nor between Ms. Heuser and Mr. Beckingham. This mutual dislike and distrust likely scuppered the chances of settlement, which would have been a much-preferred result.

Background

- [8] Mr. Creelman and Ms. Heuser were married on July 31, 1993, and separated on March 19, 2020.
- [9] On February 1, 2005, the parties purchased a property located at 5769 River Road, Port Alberni, BC (the "Property") after moving from Alberta to embark on what they anticipated would be a retirement "project". The Property was both the parties' primary residence and the family business, as they soon began operating a bed and breakfast style establishment out of the home, called the Hummingbird Guesthouse.
- [10] Prior to the move to BC, Mr. Creelman and Ms. Heuser owned a trucking business that did oil and agricultural hauling, which operated through a company they originally incorporated in Alberta called C&W Oil and Agri Services Ltd ("C&W"). Mr. Creelman and Ms. Heuser were, and continue to be equal shareholders in C&W. Ms. Heuser states she contributed \$60,000 from the sale proceeds of her pre-relationship home to purchase C&W's first two assets, a horse trailer, and a freightliner semi truck.
- [11] Both parties described their individual contributions to the purchase of the Property. In any event, they had been married in Alberta for several years prior to moving to BC and purchasing the Property. There is no dispute that the Property is a family asset. It is a large home that was most recently appraised in 2023 at \$1,100,000.
- [12] The parties lived in the Property and ran the guesthouse together. There was some disagreement about whether the guesthouse was "run under the name" of C&W, but the expenses and financial transactions were run through the C&W bank account and the taxes paid under the C&W business name.
- [13] Initially, Mr. Creelman also ran a fish boat charter business to augment the services provided to the guesthouse customers, until that business was shuttered. The guesthouse has been in operation since 2005 and continues to be operated by Ms. Heuser to the present date. The tasks and roles each party took on with respect to the running and maintenance of the business before separation are in dispute.
- [14] Mr. Creelman described his role with respect to the business as being the "greeter", in charge of breakfast, lawn maintenance, guest check-in, and some occasional cleaning. He also said he did general property maintenance, and had an extensive array of tools, including a lawn tractor, mowers, blowers, weed-eaters, trimmers, air compressors, specialty wrenches, and welding equipment.
- [15] Mr. Creelman's evidence was that he was the "friendly face" of the business, in contrast to what he described as Ms. Heuser's irascible and difficult manner. He described Ms. Heuser as a good general manager and cleaner, but a terrible bookkeeper. He said she was often argumentative and rude to guests.

- [16] Ms. Heuser claims that they hired outside workers and contractors to do most of the work Mr. Creelman claimed to do, including landscaping, mowing, and any minor or major household repairs. She said they had a housekeeper, and that she and the housekeeper did the cleaning. She said that she planned and managed the profitability of the breakfasts that Mr. Creelman spent a small portion of the morning cooking. She did all the advertising, guest management, booking, business finances, and purchased the supplies for the business and gifts for the guests.
- [17] According to Ms. Heuser, Mr. Creelman's contributions to the success of the business were piecemeal at best, and entirely inconsequential at worst. Ms. Heuser said that the fish boat charter failed due to Mr. Creelman's general ineptitude. She said that for all intents and purposes, even long before the separation in 2020, she ran the guesthouse with little help from Mr. Creelman, and after the separation, she ran it entirely on her own.
- [18] Over the years, both parties suffered serious and debilitating health issues. Both parties have bitter memories about how the other acted towards them during their various illnesses or during other times of need. The parties do not agree about when the marriage began to fail, but the date of separation is not in dispute.

Separation and Legal Proceedings

- [19] The separation was precipitated by a regrettable physical altercation between the parties in March of 2020, resulting in Ms. Heuser calling the RCMP and making serious allegations of violence against Mr. Creelman. The RCMP removed Mr. Creelman from the home and charged him with assault.
- [20] The parties tell opposing stories about what occurred that day, but in the result, Mr. Creelman agreed to enter into a peace bond requiring him to stay away from Ms. Heuser and not to contact her. This initially posed a barrier to negotiation and settlement. The peace bond was eventually amended to allow communication between the parties for the purpose of dealing with the dissolution of the marriage and the division of property.
- [21] I do not want to diminish any incidents of violence, nor underestimate the impact of this event on the parties, particularly on Ms. Heuser. However, from the evidence before me, it appears that this incident was isolated and was not a regular occurrence during the marriage.
- [22] Since March of 2020, Ms. Heuser has remained in the family home and continues to run the guesthouse. Mr. Creelman, who was not permitted to return to the home, lived for a time in a friend's motor home before ultimately moving back to Alberta.
- [23] Mr. Creelman filed a notice of family claim in November 2020. Ms. Heuser filed her response and counterclaim in April 2021. Mr. Creelman filed his response to the counterclaim in September 2023.

[24] There have been various interim orders pertaining to the family assets and property made in the course of the litigation that are relevant to the issues before me:

- In April of 2021, the parties appeared at a judicial case conference and consented to various orders, including one preventing either party from dissipating family assets other than for the day-to-day operation of the business, or necessary repairs or maintenance to the Property, except with the written consent of the other party or by court order.
- In December of 2021, a justice of this Court ordered the Property sold, with both Mr. Creelman and Ms. Heuser having joint conduct of sale. Other ancillary orders were made with respect to what would be considered unreasonable behaviour pertaining to the joint conduct of sale, including failing to respond to the other party's communications, or taking unreasonable actions that may have a negative effect on the sale price or timely sale of the Property. According to that order, the proceeds of the sale are to be held in trust by Mr. Creelman's counsel, not to be disbursed except by agreement of the parties or by court order.
- In November of 2022, after unsuccessful efforts to sell the Property, the parties again appeared before a justice of this Court and various orders were made, including: that the parties not remove any funds from the business or the Property; that Ms. Heuser make best efforts to arrange for the completion of financial statements for C&W dba Hummingbird Guesthouse and provide copies to Mr. Creelman; and, that the parties make best efforts to arrange for the Property to be listed for sale.
- At a trial management conference in April of 2023, the parties were ordered to jointly obtain and pay for an appraisal of the Property.
- In June of 2023, on the application of Ms. Heuser, a justice of this Court ordered Mr. Creelman to produce documents relating to his claims of a loan received following separation, tools and a trailer he stated he owned, and the sale of a motorhome.

[25] In the years since the December 2021 order, the parties have not been successful in selling the Property.

[26] Mr. Creelman squarely places the blame for this lack of success on Ms. Heuser. He states that the orders for joint conduct of sale have been and will continue to be unworkable due to her unreasonable refusal of offers, failure to communicate about offers, and unwillingness to negotiate or compromise. Going forward, Mr. Creelman says that while he welcomes Ms. Heuser's input, she should not have the final say with respect to offers. As a result, he seeks sole conduct of the sale.

[27] Ms. Heuser states that she does not understand why the Property hasn't sold. She said that perhaps it is because the Property is too big, or is on the highway, or because people only see it as a bed and breakfast and not a home. She says that she wants to sell the Property and has worked hard to get it in shape to sell. She said that she is ready to retire and is tired of running the guesthouse. She says that the parties agreed together to refuse offers below an initial appraisal amount, any failure to communicate with Mr. Creelman about other offers

is the responsibility of the realtors and Mr. Creelman.

- [28] There is evidence that both parties relied to their detriment on an early appraisal that suggested the Property could be worth almost \$1.4 million, as well as evidence of low or incomplete offers that would have been reasonable to reject. There is also evidence that poor communication between the parties hampered discussion and agreement, and that both parties can be difficult to work with for various reasons, leading to less than ideal relationships with realtors.
- [29] I need not determine what offers were made and who refused them, reasonably or unreasonably, in order to divide the Property now. However, I considered this history, and other issues relating to the relationship between the parties into consideration when determining how to facilitate the conduct of sale and division of proceeds.

Assets and Debts at Separation

- [30] I will summarize the assets and debts of the parties as set out in their respective financial statements. I will then discuss one of the primary areas of contention: the debt arising from recent Canada Revenue Agency ("CRA") income tax assessments with respect to the claimant, respondent, and C&W. The documents were not always complete or clear in all respects in terms of assets and debts at the time of separation, and by the date of trial.

Assets

Real Estate

- [31] The Property is the primary family asset. It was the family home and the location of the guesthouse. Once jointly owned, the Property is now owned by the parties as tenants in common.
- [32] In the initial financial statements filed by the parties in 2021, the value of the Property was listed at \$708,000 (claimant) and \$950,000 (respondent). In subsequent financial statements filed (or submitted) in 2023, following an updated appraisal, both parties listed the value of the Property at \$1,100,000.
- [33] The mortgage registered against the Property as of October 2023 was somewhere in the range of \$293,047 to \$296,500. Therefore, if the parties are able to sell the Property at the current appraised value, the proceeds available to divide would be approximately \$800,000.
- [34] Both parties provided evidence at trial relating to the difficulties already experienced in selling the Property. Putting aside the ongoing conflict and communication issues, the evidence establishes that this is a unique property that may be difficult to sell regardless of the state of the market. This could significantly reduce the proceeds ultimately available to the parties.

Vehicles

- [35] Mr. Creelman lists two vehicles in his most recent financial statement: a 1998 Dodge Durango in the possession of Ms. Heuser valued at \$3,000, and a 2007 Ford Exposition valued at \$5,000.
- [36] Ms. Heuser lists only the Dodge Durango at \$3,000.

Bank Accounts

- [37] Mr. Creelman lists two bank accounts acquired in September and October of 2023, respectively:
- Scotiabank Base Plus Account - \$5,562.18
 - RBC Chequing Account - \$2,200.00
- [38] Ms. Heuser lists the following in her financial statement:
- CIBC Savings Account - \$46,772.89 (as of the end of September, 2023)
- [39] Ms. Heuser further lists an RBC account and a Scotia Day-to Day account in her Scott Schedule, but does not reveal the balances in those accounts. She indicates in the Scott Schedule that she considers these accounts to be exempt from division.
- [40] Ms. Heuser also lists the CIBC savings account as "excluded property" in her 2023 unfiled financial statement, with a note explaining that it contains a one-time payment of \$11,000 from "Old Age Allowance" in March of 2021, and \$11,600 in "B&B revenue". It is not clear whether these details were provided in order to support the claim to exclude this account from the family assets or for another purpose. She also claims it was opened post separation.

Investments

- [41] Mr. Creelman lists an Industrial term life insurance policy, which has his adult children as beneficiaries. He provides no value for this policy.
- [42] Ms. Heuser lists a Sun Life insurance policy, which has her daughter-in-law, listed, as a beneficiary. She states the total benefit is \$100,000.
- [43] Ms. Heuser had an RRSP with a value of \$32,596.80 until September of 2023. She advised the court that she cashed in the RRSP in order to pay down a portion of C&W's CRA debt. Ms. Heuser also claims that this RRSP originated from a \$10,000 gift from her mother, and ought to be excluded in any event. The proceeds of this RRSP appear to have been deposited into Ms. Heuser's CIBC account.

Property Disposed of since Separation and Miscellaneous Assets

- [44] Mr. Creelman lists two vehicles under the "disposal of property" category: a 2001 Dodge Dakota for \$4,000; and a 1989 Bounder Motorhome for \$5,000. Generally, he does not list any other property or valuables in his financial statement, save for "all antiques and artwork and precious metal [that] are all in Cheryl's possession and no idea what is there and value."
- [45] Ms. Heuser lists a table hutch as donated (no monetary return) and "shop tools, equipment, 2004 flat deck trailer" for \$2,250 as property that she has disposed of since separation.
- [46] The tools were a subject of contention during the trial, as Mr. Creelman claimed these tools as his own, and said he was not consulted about their removal or sale. He estimated that his tools were worth approximately \$10,000.
- [47] Both parties agree that the contents of the house should be divided evenly. Neither stated a burning desire for specific items during trial, other than Ms. Heuser expressing a passing wish for the bedroom furniture. I note that in her Scott Schedule, Ms. Heuser says she wishes to keep "both bedroom furnishings and kitchen."

Debt (Other than Mortgage)

- [48] Mr. Creelman lists a \$13,000 loan from his friend, Mr. Derkson, as a family debt. Ms. Heuser states that this debt was incurred following separation and ought not to be divided between the parties.
- [49] Mr. Derkson testified at the trial about the nature of this debt, confirming that he at first offered \$10,000, then provided an additional \$3,000 shortly thereafter for a total of \$13,000 in or around April of 2021. He testified that he provided the funds to Mr. Creelman as a personal loan, interest free, because he was struggling to get on his feet following his removal from the family home and business.
- [50] Mr. Derkson also testified at some length about his review of the C&W bank account and his opinion about the propriety of certain of Ms. Heuser's spending or expenses. It was not made clear to me why Mr. Derkson was asked to review the accounts or what I should make of his evidence. He was not qualified as an expert in business finances or accounting, and he was not retained as an expert to provide an opinion to the court. As far as I am aware, he had no involvement whatsoever in the guesthouse, or with C&W as a business.
- [51] I accepted Mr. Derkson's evidence with respect to the loan he provided to Mr. Creelman. I disregarded the remainder of Mr. Derkson's testimony concerning his purported review of the C&W bank account.
- [52] Ms. Heuser lists the following as unsecured debts existing as of the date of trial:
- \$950 for corporate PST and MRDT tax remittance due October 2023
 - \$1,640 paid for Booking.com commissions in September 2023

· \$22,817.75 paid to the CRA for the "corporate tax debt"

- [53] I consider the first two items to be business expenses that ought not to be treated differently than other similar expenses that have been paid out of the C&W account since separation. The last bullet, however, represents the tip of the proverbial iceberg arising from a CRA audit of C&W, and subsequent assessments of individual income tax liability particularly that of Mr. Creelman.
- [54] The evidence provided to me during the hearing regarding the parties' tax situation was incomplete. I was not provided information or evidence regarding the current state of the C&W audit, nor am I able to comment on how the C&W audit impacts on each party's individual income taxes going forward. I was advised that there was an accountant retained either by Ms. Heuser, or C&W, who could have shed light on this and other financial issues, but the accountant was not called as a witness, I was provided with some limited documents, which I will rely on insofar as I am able.
- [55] The parties appear to agree that a portion of the sale proceeds of the Property should be set aside for the purpose of dealing with pending or future tax liabilities assessed by the CRA, but disagree as to how much, and which tax debt should be included in the family debt assessment.
- [56] I was provided documents showing initial audit results for C&W. In a letter dated January 2, 2020, the CRA concludes that for the tax years 2012-2015, C&W reported unsubstantiated credit balances in the shareholder loan account, which was used to pay for personal expenditures of the shareholders, namely, Mr. Creelman and Ms. Heuser. There were also discrepancies regarding the deduction of mixed personal and business expenses which failed to account for the shareholders' portion of those expenses. As a result, for the years 2012-2015 the CRA determined that C&W underreported its income to the personal benefit of the shareholders in the amount of \$302,652.
- [57] Ms. Heuser's Scott Schedule lists "CRA Assessment" for C&W as "\$95,000+". She lists "Income Taxes and GST for years yet to be filed" for C&W as "\$100,000+". I was not provided with documents specifying or explaining the basis for the potential liabilities, but the initial C&W audit letter from 2020 showed a total adjustment of \$92,785.
- [58] In his most recent financial statement, Mr. Creelman included four of his recent notices of assessment ("NOAs"), all dated October 5, 2023, pertaining to the tax years 2019, 2020, 2021, and 2022. The NOAs show \$179,604.75 as a balance due for the 2022 tax year, although it appears the bulk of the balance due (\$167,701.84) comes from the 2021 tax year.

- [59] Mr. Creelman also submitted a copy of a personal audit letter into evidence, dated November 25, 2021, under objection from Ms. Heuser, who stated she had not been provided with a copy prior to trial. As the NOAs showing the result of the audit were in the trial record, I admitted Mr. Creelman's personal audit letter into evidence. The letter showed that for the years 2012-2015, the CRA upwardly adjusted Mr. Creelman's income by a total of \$341,677, resulting in an outstanding balance due of \$175,984.52.
- [60] A note on the letter states: "Calculated based on transfers between corporate bank account and taxpayer's personal." A further note states: "We made a change based on our recent letter. Part of the arrears interest will be cancelled at a later date."
- [61] The letter also indicates that the CRA sent a proposal letter to Mr. Creelman on or around January 2, 2020, but received no response. I note that the C&W audit letter was dated January 2, 2020, and was addressed to C&W attn. Mr. Creelman at 5769 River Road in Port Alberni. Mr. Creelman was still living in Port Alberni at the Property at this time. The personal audit letter of November 2021 was addressed to Mr. Creelman at his address in Alberta
- [62] Mr. Creelman appeared to be entirely befuddled by the tax situation he finds himself in. However, despite his confusion, Mr. Creelman was firm in assigning the blame for his predicament entirely to Ms. Heuser, who he says was in charge of the finances for the family and the business throughout their marriage.
- [63] He says that Ms. Heuser claimed the improper expenses, filed incorrect tax returns, and then unilaterally negotiated with the CRA, which, he assumes, has somehow resulted in his own six-figure personal tax debt.
- [64] For her part, Ms. Heuser states that she took responsibility for any mistakes made with claimed expenses, dealt with the auditors the best she could, and corrected the filing errors. One of the steps she took was cashing in her RRSP in order to pay part of C&W's tax debt in September of 2023. She says that Mr. Creelman is entirely responsible for his personal tax debt.
- [65] This depiction of events, wherein Ms. Heuser has primary control and decision-making power and Mr. Creelman denies any knowledge or understanding regarding the details of the business or the family's finances, is a common theme of this trial, and forms part of the context in which I must determine the division of property and debt.

Summary

- [66] The parties agree that the Property is a family asset.
- [67] There is an extant order that the Property be sold, and the proceeds be held in trust by Mr. Beckingham's firm. Ms. Heuser asks me to vary this order to have independent counsel assume responsibility for keeping the sale proceeds in trust, as opposed to Mr. Beckingham. This is due to the acrimonious and mutually distrustful relationship that has developed between Ms. Heuser and Mr. Beckingham..

- [68] Mr. Creelman seeks a 50% interest in the proceeds of all the family assets, particularly the Property. Ms. Heuser seeks a 70% reapportionment in her favour in the Property, citing Mr. Creelman's unjust enrichment as a result of her greater participation in and contribution to the running of the home and the guesthouse. She also asks that certain assets be excluded from division, including her \$60,000 contribution to the purchase of equipment when C&W was created, certain bank accounts, and an inheritance from her mother.
- [69] There are various debts incurred, assets sold, and payments received or made by both parties following separation for which they both seek redress. Most of these are minor in nature, and some are poorly documented or not documented at all.
- [70] Ms. Heuser has solely occupied the home since March 19, 2020. She has also solely run the business, paid the bills, and maintained the Property since that time. Mr. Creelman has moved away and had to fend for himself, incurring debt and having to rely on others for assistance. He has not received any benefit from his interest in the business since separation. He also has not contributed to the business, nor has he paid any of the bills for the family or guesthouse.
- [71] Mr. Creelman seeks occupational rent from Ms. Heuser. Ms. Heuser seeks Mr. Creelman's 50% financial contribution to the maintenance of the family assets, including the mortgage.
- [72] Finally, in addition to the mortgage registered against the Property, and some miscellaneous smaller debts, there is a large tax liability to the CRA both for the business and Mr. Creelman that may be subject to change. The parties agree that a portion of the sale proceeds of the house should be preserved or set aside in order to deal with the tax liability. However, Ms. Heuser suggests that only the corporate tax is a family debt, and Mr. Creelman's debt is his own responsibility.

Issues

- [73] The issues arising for determination are:
- a) How should the family assets and debts be divided? In particular, should there be any reapportionment or unequal division of assets or debts?
 - b) Should the existing order for joint conduct of sale be varied, and if so, how?

Law

- [74] The rules for property and debt division are set out in Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [75] Section 81 of the FLA provides that, subject to an agreement or order that provides otherwise, spouses have a presumptive entitlement to an equal interest in all family property, and are equally responsible for family debt on separation.

- [76] Section 84 of the FLA broadly defines family property to include all real and personal property that is owned by at least one spouse on the date of separation, or in which at least one spouse has a beneficial interest, that is not excluded property under s. 85.
- [77] The categories of excluded property include property acquired by a spouse before the relationship began (s. 85(1)(a)), and money paid or payable under an insurance policy, other than any portion which compensates loss to both spouses or lost income of a spouse (s. 85(1)(d)). Family property includes the amount by which the value of excluded property has increased since the later of when the property was acquired or the relationship began (s. 84(2)(g)).
- [78] Section 86 of the FLA defines family debt to include all financial obligations incurred by a spouse during the relationship, and also after separation if incurred for the purpose of maintaining family property.
- [79] Pursuant to s. 87 of the FLA, the value of family property or family debt is to be determined, based on its fair market value, as of the date of an agreement dividing family property and debt or as of the date of the hearing before the court regarding the division of property and debt.
- [80] Section 92 of the FLA allows spouses to make agreements about the division of family property or debt, including to divide it equally or unequally, exclude it from division, or value it differently than it would be according to s. 87. Unfortunately, the parties in this case have not come to any agreements about any family assets or debt.
- [81] Section 95 of the FLA provides that a court may order an unequal division of family property or family debt, or both, if an equal division would be "significantly unfair". Section 95(2) enumerates factors that may be considered by a court in ordering an unequal division:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or

- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

Division of Family Property and Debt

Real Estate

- [82] The best evidence before me pertaining to the value of the Property is the 2023 appraisal, which states that its market value is \$1,100,000. For the purposes of property division, the Property will be valued at \$1,100,000.
- [83] Given Ms. Heuser's assumption of responsibility for paying the bills related to the Property since separation, I accept that she has the more accurate number with respect to the mortgage registered against the Property at or around the time of trial, which is \$293,047.14. This leaves potential equity of approximately \$807,000.
- [84] To justify an unequal division, the court must find that the unfairness is "compelling or meaningful having regard to the factors set out in s. 95(2)": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 41 [*Jaszczewska*], citing *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44.
- [85] Ms. Heuser claims Mr. Creelman was unjustly enriched by her efforts in the guesthouse business, both before and after separation, that she says far exceed those of Mr. Creelman. To make out a claim of unjust enrichment, Ms. Heuser must show Mr. Creelman's enrichment and her corresponding deprivation.
- [86] In the context of asking for unequal division of the primary family asset, which was also a family-operated business, Ms. Heuser's claim might be restated as follows: it would be significantly unfair to order equal division of the primary family asset because Ms. Heuser contributed far more to the success of the home and the business than Mr. Creelman.
- [87] In addition, Ms. Heuser points to the fact that the claimant has not paid any expenses for the home and business, including mortgage and property tax payments since March of 2020. Since separation, Ms. Heuser has been solely responsible for the mortgage, property tax, maintenance, and utilities with respect to the Property. She has also run the guesthouse on her own, the proceeds of which go towards the Property and other expenses.

- [88] Mr. Creelman says that he was forced out of the home and business, did not leave by choice, and had to stay with friends and family and pay rent. He did not have the option of working at the guesthouse, or obtaining financial benefit from it, from which he could have paid his share of costs. He states that Ms. Heuser has had sole enjoyment of the home, and has been able to run all her expenses through the business as she sees fit.
- [89] Because the Property is to be valued as of the date of trial, the parties are presumptively entitled to share in any post-separation increase in the value of the Property. This entitlement exists independent of the parties' respective contributions to the post-separation increase in value: *Jaszczevska* at para. 39. This is not to say that post-separation contributions are irrelevant, but rather that courts must be constrained in relying on post-separation contributions as warranting a departure from the presumption of equal division: *Jaszczevska* at para. 41. This is also the case for post-separation decline in property value.
- [90] *Jaszczevska* provides an example of exceptional circumstances that may warrant an unequal division of family property based on post-separation contributions. In that case, one spouse had designed and rebuilt a new residence on the family property after separation, which enhanced the value of the property beyond market trends.
- [91] The present case, by contrast, concerns the more typical scenario in which one spouse has remained in the family home post-separation, prompting debate as to the relative economic advantages of staying in the home, or having to find new accommodations.
- [92] I also acknowledge, but dismiss Ms. Heuser's assertion that Mr. Creelman has been unjustly enriched by her pre-separation contributions. While Ms. Heuser may feel strongly that her contributions were more valuable, or that Mr. Creelman's efforts were less than satisfactory in her estimation, this is not sufficient to support a claim of unjust enrichment, or that equal division would be "significantly unfair". The evidence is that both parties purchased the Property together, started the business, and contributed to the business and the Property both financially and with their labour. Ms. Heuser accepts this premise to some extent, even if she minimizes the value of Mr. Creelman's contributions, particularly in the latter years of the marriage.
- [93] I conclude that in all the circumstances, an equal division of the proceeds of the sale of the Property would not be significantly unfair to either party. While Ms. Heuser has made a disproportionate contribution to maintaining the Property, reducing the mortgage debt, and running the guesthouse business post-separation, she has also had sole enjoyment of, and access to, benefits derived from the Property, including the revenue derived from the guesthouse business, since early 2020.

- [94] Mr. Creelman had to find alternate accommodations that, for at least some portion of time, required him to pay rent. He has not had access to the Property as a residence, nor has he had access to income or revenue from the guesthouse, which is, ultimately, a family business. Conversely, he has also been free from the burdens and responsibilities of running the business, making decisions, maintaining the large property, and dealing with guests for the past four years.
- [95] Similarly to Ms. Heuser's claim for unjust enrichment, I have considered Mr. Creelman's claim for occupational rent as relevant to the issue of whether the Property should be unequally divided. For clarity, to the extent that Mr. Creelman still seeks compensation from the respondent for occupational rent as an independent claim, I dismiss the claim. To the extent that Ms. Heuser seeks unequal division due to unfairness or unjust enrichment, I dismiss the claim.
- [96] Ms. Heuser also claimed \$60,000 she put into the C&W hauling business at the beginning of the marriage as excluded property. I was not provided with sufficient evidence from either party with respect to property or assets they brought into the marriage, and I am therefore to unable make such determinations relating to the division of the Property as of the date of trial.

CRA Debt

- [97] I need not determine who is responsible for tax liabilities of C&W or Mr. Creelman, or for the decisions made by the CRA as to how to allocate the balances due. Mr. Creelman's personal income tax debt is linked to the C&W audit. The tax years giving rise to both C&W and Mr. Creelman's tax liabilities are 2012-2015, which fall squarely within the marriage.
- [98] Section 95(2)(d) of the FLA provides that whether a family debt was incurred "in the normal course of the relationship" is a factor to consider where unequal division is sought. The evidence at trial did not demonstrate anything other than a usual commingling of finances, including assets and debts, in the normal course of the relationship, even if the parties were increasingly estranged over time.
- [99] In *Neely v. Neely*, 2019 BCSC 610 at paras. 42-64, the contingent tax liabilities of the respondent incurred prior to separation were a family debt pursuant to s. 86(a) of the FLA. In that case, the court referred to *Stein v. Stein*, 2008 SCC 35, where the Supreme Court of Canada found that a husband's tax liabilities accrued during the marriage could be divided equally between the spouses under the terms of the [then] Family Relations Act, R.S.B.C. 1996, c. 128. In *Stein*, the SCC held that contingent liabilities of the parties that could not be valued at the time of the trial could be shared by spouses on an "if and when" basis (i.e., if and when the liability materializes).

- [100] Stein was also applied in *Jaszczevska*, where the Court of Appeal ordered the wife's share of her husband's contingent tax liability to be paid into her solicitor's trust account pending proof of the husband actually incurring the liability. In that case, there was a two-year sunset period ordered, after which the funds were to be released to the wife with no further responsibility for taxes incurred at a later date: paras. 69-70.
- [101] Similarly, in *Namdarpour v. Vahman*, 2019 BCCA 153, the Court of Appeal upheld an equal division of the husband's income tax liabilities. The husband failed to declare cash sales from his kiosk business, which his wife helped run and which they operated through a company they had incorporated together. This resulted in a tax liability of \$12,000. The court held equal division of the debt was appropriate as the wife participated in the cash transactions, and even if she did not, she derived a benefit from them in the form of increased funds during the marriage: para. 97. As the liabilities were contingent, referring to *Stein*, the court followed the remedy set out in *Jaszczevska*: paras. 98-100.
- [102] Therefore, I will treat the entirety of the CRA liability, personal and corporate, as family debt to be allocated between the parties. This includes balances due, or still to be assessed, whether owed by C&W, Mr. Creelman, or Ms. Heuser as of date of trial.
- [103] As the amounts owing to the CRA are not yet finalized (to the best of my knowledge), a portion of the proceeds from the sale of the Property will be set aside to address any outstanding balances owed by either of the parties or by C&W to the CRA, or to repay any amounts paid against those debts by the parties out of funds that are not family assets. I order that \$275,000 of the proceeds of sale be set aside for this purpose, with the remainder to be equally divided once the CRA debts are satisfied or forgiven.
- [104] Given the circumstances of the parties since separation, I also find that the loan from Mr. Derkson to Mr. Creelman should be a debt equally divided between the parties.

Miscellaneous Assets

- [105] The proceeds of all corporate and personal bank accounts in the amounts that existed as of the date of trial, will be equally divided between the parties.
- [106] I acknowledge Ms. Heuser's argument that the CIBC account under her name was opened after separation and therefore should be excluded from division. Given the clear commingling of family assets and business revenues, the lack of helpful evidence or argument regarding how I ought to view transfers to this account from the C&W account and others, and the findings of the CRA regarding the conflation of business and personal expenses, I am going to treat all bank accounts as family assets.

- [107] The exception to this will be the proceeds of the RRSP Ms. Heuser redeemed in September 2023, and deposited into her CIBC account for the purpose of making a payment against C&W's CRA debt. The entirety of the proceeds from the RRSP, which originated as a gift from Ms. Heuser's mother is excluded from the equal division of assets. The payment made from those funds towards the C&W tax debt will be credited to Ms. Heuser, from the funds set aside from the Property sale.
- [108] Ms. Heuser will pay to Mr. Creelman (by way of set off, if preferred by the parties) 50% of the value of the tools that were sold without seeking his input or giving him an opportunity to reclaim them. Mr. Creelman estimates the tools were worth \$10,000. Ms. Heuser states that she sold certain tools for approximately \$2,250. I set the value of the tools at \$5,000.
- [109] Mr. Creelman will pay to Ms. Heuser (by way of set off, if preferred by the parties) 50% of the proceeds obtained from the sale of the Dodge Dakota and Bounder Motorhome, which Mr. Creelman says was \$9,000 in total. The other two vehicles currently in the possession of each party will remain in their respective possession, with no set off for any difference in value.
- [110] The parties will each retain 100% of their respective life insurance policies.
- [111] The parties' pensions will be divided pursuant to federal legislation.
- [112] The parties will retain the vehicles currently in their possession. The parties will divide the furniture and other personal items in the Property evenly. Ms. Heuser may retain the bedroom furniture as "first choice" of her part of the personal property.
- [113] The parties will retain their equal shares of C&W until such time that the CRA debt incurred in the course of the marriage is paid, or the business is wound up.

Conduct of Sale

- [114] The parties will retain joint conduct of sale for a period of 4 months from the date of this decision. If the Property remains unsold after the 4-month joint sale period, sole conduct of sale will revert to Mr. Creelman. The list price will be based on the advice of the realtor and all showings, expressions of interest and offers will be immediately brought to the attention of both parties.
- [115] If the Property remains unsold after 4 months of Mr. Creelman's assumption of sole conduct of sale, Ms. Heuser will vacate the property within 30 days, unless otherwise agreed to by the parties. For clarity, if the Property is not sold by the end January 31, 2025, Ms. Heuser is ordered to vacate the property by no later than March 2, 2025., unless otherwise agreed to by the parties.

- [116] This timeline is meant to recognize the unique nature of the Property in a challenging real estate market. It also provides a long runway for Ms. Heuser to prepare to leave the Property and to wrap up the guesthouse business. It would certainly be to the parties' advantage to cooperate in the short term as this will inevitably result in the greatest return in the shortest amount of time.
- [117] Ms. Heuser has been responsible for paying the expenses of the Property and the guesthouse while she has been sole occupant, with the ability to control and manage the revenue derived from the business. In the event that the Property has not sold before January 31, 2025, or if Ms. Heuser chooses to move out and close the business prior to that date, the parties are at liberty to seek further direction from the Court regarding their respective obligations for ongoing mortgage, home insurance, and property tax payments.
- [118] The issue of family violence does not bear on the division of property or debt in this case; however, I have taken Ms. Heuser's concerns about her personal safety, and her wishes under serious consideration.
- [119] Ms. Heuser asks that the previous order stating that any proceeds of sale of the Property be deposited into Mr. Beckingham's trust account be varied such that an independent third party, presumably another legal counsel will hold the proceeds of sale. Ms. Heuser has 30 days from the date of this order to retain new counsel for this purpose, at her expense. If she does so, then the order is varied such that any proceeds of sale will be deposited and held in that new counsel's trust account. If she does not retain counsel within 30 days, the previous order will remain in place.
- [120] I make this order in an effort to remove any barriers to the efficient division of property, given the challenging relationships that have developed, and not as a result of any concern I have regarding Mr. Beckingham's ability to hold funds in trust.
- [121] Similarly, if the parties choose to divide the contents of the Property by choosing specific items, Mr. Creelman will retain and pay for an independent third party to enter the property to obtain his chosen items. The independent third party will not be Mr. Beckingham or any other person previously involved in these proceedings, such as Mr. Derkson.
- [122] If the parties cannot agree on a division of the furniture and other personal property, all items will be sold and the proceeds divided evenly.

Conclusion and Orders

[123] In summary, I make the following orders:

- The parties are divorced, to take effect 31 days from the date of this order.
- The Property will be sold.

- The parties will retain joint conduct of sale for a period of 4 months from the date of this decision.
- If the Property remains unsold after the 4-month joint sale period, sole conduct of sale will revert to Mr. Creelman.
- The list price will be based on the advice of a realtor, and all offers, showings and expressions of interest will be communicated to both parties, regardless of who has conduct of sale.
- Ms. Heuser is ordered to vacate the Property by no later than March 2, 2025 if the Property remains unsold by January 31, 2025.
- The net proceeds from the sale of the Property shall be equally divided between the parties, after the payment of the mortgage and other crystallized family debts.
- The amount of \$275,000 shall be set aside from the sale proceeds of the Property to deal with outstanding tax liabilities of the parties and C&W;
- Ms. Heuser has 30 days from the date of this order to retain new counsel for the purpose of holding the proceeds from the sale of the Property in trust. If she does so, the existing order is varied such that any proceeds of sale will be deposited and held in that new counsel's trust account. If she does not retain counsel within 30 days, the previous order will remain in place and the proceeds from the sale of the Property will be deposited and held in Mr. Beckingham's trust account.
- All remaining family assets and debt will be divided evenly, with the exception of the proceeds of Ms. Heuser's RRSP, which is excluded, and the required set off payments for the tools and vehicles disposed of by the parties. The family debt includes all outstanding CRA liabilities of C&W, Mr. Creelman and Ms. Heuser and the loan from Mr. Derkson.
- If Mr. Creelman wishes to claim specific items as part of his equal division of the furniture or other family property, he will retain an independent third party to remove them from the property.
- The parties will retain their respective life insurance policies, personal vehicles, and their pensions will be divided according to federal legislation.
- The parties are at liberty to seek further direction from the court regarding the parties' respective obligations for ongoing mortgage, home insurance, and property tax payments if the Property has not sold before the end of January 2025, or if Ms. Heuser can no longer operate the guesthouse.

[124] Costs will generally follow the event (see *Khatkar v. Khatkar*, 2022 BCSC 1927 at paras. 49-50), but given the unique problems presented in family law cases involving multiple issues, a more flexible "substantial success" test is applied (see *Litt v. Gill*, 2016 BCCA 288). The court may take into account the following factors in deciding whether to award costs:

- hardship that an order for costs might impose;
- the earning capacity of each spouse;
- the conduct of the parties in the litigation; and
- the importance of not upsetting the balance achieved by the award itself.

[125] I consider all of these factors to be relevant in this case. Given the manner the legal proceedings developed over time, with acrimony from all quarters, some unreasonable positions and actions taken by both parties, but with some challenging issues to decide, I consider it appropriate to order that each party bear their own costs.

"J. Whately J."

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