
CANADA / JUDGMENT

Ernst v. Carmichael

2019 BCSC 68

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Supreme Court of British Columbia

DECIDED

22 January 2019

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2019 BCSC 68 Ernst v. Carmichael

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ernst v. Carmichael,

2019 BCSC 68

Date: 20190122

Docket: E52781

Registry: New Westminster

Between:

Deborah Louise Ernst

Claimant

And:

Brian Keith Carmichael

Respondent

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Claimant:

Deborah Louise Ernst

Counsel for the Respondent:

S. O'Mahony

Place and Date of Trial:

New Westminster, B.C.

February 13-16; 19-22, 2018

July 25, 2018

Place and Date of Judgment:

New Westminster, B.C.

January 22, 2019

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Introduction

- [1] The claimant Deborah Louise Ernst and the respondent Brian Keith Carmichael were in a marriage-like relationship of a relatively short duration. Both parties were mature individuals who had been in prior marriages. Their relationship broke down and family law proceedings were commenced. Ms. Ernst seeks equal division of all family property, spousal support in either a lump sum or on a periodic basis, and occupational rent from the date of separation to the date of judgment. Mr. Carmichael contends that equal division of all family property would be significantly unfair, that Ms. Ernst has not established any entitlement to spousal support taking into account the short duration of the relationship and the financial independence of the parties, and that the claim for occupational rent is equally without merit.

Facts

The Relationship

- [2] Ms. Ernst and Mr. Carmichael met and began dating in 2007. For several years, they were in a long distance relationship, with Ms. Ernst living in Edmonton, and Mr. Carmichael living in Surrey. In June of 2009, Ms. Ernst relocated to Surrey, where she purchased a townhouse. Within about one month, Mr. Carmichael moved in with her. The parties lived together more or less continuously from August of 2009 until December of 2012, a period of about three and one-half years. The relationship came to a conclusive end in January of 2013,

when Mr. Carmichael sent an email notifying Ms. Ernst that he had removed her belongings from the house they had been residing in together and placed them in storage.

Ms. Ernst's Background

- [3] At the beginning of 2007, Ms. Ernst was 49 years old. She was living in Edmonton, where she owned a duplex and worked as a self-employed real estate agent. In addition to her income from real estate commissions, Ms. Ernst also made money buying and selling properties. She testified that she generally had two or three properties on the go at any one time.
- [4] By the time that she began to live in a marriage-like relationship with Mr. Carmichael in 2009, Ms. Ernst was 52 years old. She considered herself to be a "retired" real estate agent, although she still earned relatively small amounts of money as "referral commissions" in connection with property sales that she referred to other real estate agents. Going forward, Ms. Ernst's intention was to earn money by continuing to buy, renovate, and sell properties. Ms. Ernst owned two properties, namely: (i) the Edmonton Property (described in paragraph 8(b) below), (ii) the Pebble Creek (described in paragraph 8(c) below), and she had a controlling interest in a company that owned a large parcel of undeveloped land in Sturgeon County, Alberta (described in paragraph 8(s) below). She also owned two vehicles, investments and retirement savings totalling \$92,000, and some 20 ounces of silver.

Mr. Carmichael's Background

- [5] At the beginning of 2007, Mr. Carmichael was 46 years old. He was living in Surrey. He worked full time as a firefighter. He admitted in cross-examination that he supplemented his employment income by doing drywalling work on residential renovation projects. Mr. Carmichael lived in a house at 16592 78 Avenue in Surrey (the "78 Avenue Property"), which he owned jointly with his brother.
- [6] Mr. Carmichael sold his interest in the 78 Avenue Property in the spring of 2009, shortly before moving in with Ms. Ernst. He testified that he did not sell his interest in the house with the intention of moving in with Ms. Ernst; things just unfolded that way.
- [7] By the time that he began to live in a marriage-like relationship with Ms. Ernst in 2009, Mr. Carmichael was 48 years old. He did not own any real property, but he had approximately \$150,000 in the bank, from the sale of his interest in the 78 Avenue property. Mr. Carmichael owned one vehicle, and had no other significant assets, apart from the accrued value in his firefighter's pension, and an RRSP fund established for the benefit of his daughter from a prior relationship.

Chronology

- [8] Based on the evidence adduced at trial, I would describe the relationship chronology as follows:

- a) In April 2007, Ms. Ernst and Mr. Carmichael met in Mexico and began dating. At the time, Ms. Ernst's principal residence was in Edmonton, and Mr. Carmichael's principal residence was in Surrey. For the next two years, the parties were in a long-distance, dating relationship.
- b) During 2008 and 2009, while the parties were still dating, Mr. Carmichael travelled to Edmonton on multiple occasions. During these visits, Mr. Carmichael provided substantial assistance to Ms. Ernst in making renovations to her half duplex at 7547 80th Avenue in Edmonton (the "Edmonton Property"). Both parties testified at length about the nature of the work done on the property. Although the parties did not agree on the extent or value of Mr. Carmichael's contribution, by either party's account it is clear that Mr. Carmichael devoted a fair amount of time and effort to assisting Ms. Ernst with the renovations.
- c) On 30 June 2009, Ms. Ernst purchased a townhouse in the Pebble Creek townhouse complex at 16335 14 Avenue in Surrey (the "Pebble Creek Property" or "Pebble Creek"). She purchased the Pebble Creek Property in her own name. She testified that she viewed it as her property and did not consider Mr. Carmichael to have any interest in it. Ms. Ernst planned to live in the property while renovating it. Once again, the parties gave extensive evidence about the nature of the work done on the property, and while the parties were at odds about precisely who did what, I am satisfied that both Ms. Ernst and Mr. Carmichael were heavily involved in the renovations.
- d) On 5 August 2009, Mr. Carmichael sold his interest in the 78 Avenue Property, located at 16592 78 Avenue in Surrey, which he owned jointly with his brother. Thereafter, Mr. Carmichael moved into Pebble Creek, where he lived together with Ms. Ernst for the following six months, as the renovation work on that property continued.
- e) On 23 February 2010, Mr. Carmichael purchased a house on Maple Street in Surrey (the "Maple Street Property", or "Maple Street"). Both parties relocated from Pebble Creek to Maple Street, and thereafter both of them basically used Maple Street as their primary residence or home base in Canada until the end of their relationship in late 2012 or early 2013.
- f) On 21 October 2010, Ms. Ernst sold the Edmonton Property.
- g) On 28 September 2011, while on a vacation in Europe, the parties had a disagreement and went their separate ways. Ms. Ernst cut her trip short and returned to Canada. The parties did not live together for a time, although neither party moved out of their shared residence at Maple Street.
- h) By February 2012, having resolved their differences, the parties took a vacation together in Mexico. While there, Ms. Ernst explored the possibility of purchasing a property at Romanita de la Pena in Mazatlan (the "Romanita Property" or "Romanita").
- i) On 27 July 2012, Ms. Ernst sold the Pebble Creek Property.

- j) On 13 August 2012, Mr. Carmichael and his brother received a vacation property at located on Loon Lake Road in Ashcroft, British Columbia (the "Loon Lake Property" or "Loon Lake"), as a gift from their parents. Mr. Carmichael and his brother later put a mortgage on the property and used all of the proceeds to pay their parents for the property. The property was a 2.3 acre plot of land with a 900 square foot cottage. Mr. Carmichael and Ms. Ernst occasionally stayed there for vacations.
- k) On 31 October 2012, Ms. Ernst completed the purchase of Romanita, and subsequently took possession of the property a few days later, at the start of the trip to Mexico as described in the following sub-paragraph.
- l) On 1 November 2012, the parties embarked on a trip to Mexico, intending to have a three week vacation. They drove from Surrey to Mazatlan in Ms. Ernst's car, taking some household goods for Romanita. It was anticipated that at the end of the vacation, Mr. Carmichael would return to Surrey, and Ms. Ernst would stay on in Mazatlan until the end of the year.
- m) On 23 November 2012, which was supposed to be the last day of Ms. Ernst and Mr. Carmichael's three week vacation in Mexico, Ms. Ernst left abruptly for Edmonton after learning that her son had been hospitalized and was in critical condition. He passed away one week later. Meanwhile, Mr. Carmichael followed through on his plan to fly back to Vancouver. Mr. Carmichael declined to change his plans by accompanying Mr. Ernst to Edmonton. When Mr. Carmichael tried to contact Ms. Ernst several days later, he was led to believe that she did not want to speak with him. Mr. Carmichael did not attend the funeral for Ms. Ernst's son, believing he was not welcome.
- n) On 22 December 2012, after her son's funeral in Edmonton, Ms. Ernst flew back to Mazatlan.
- o) On 30 January 2013, Mr. Carmichael sent an email to Ms. Ernst advising that he wanted to end the relationship. Mr. Carmichael's email also stated that he had removed Ms. Ernst's belongings from Maple Street. Mr. Carmichael asked Ms. Ernst to "respect his privacy" by not attending the property.
- p) After the breakdown of the relationship, Ms. Ernst used the Romanita Property as her primary residence, although she traveled back and forth between Mexico and Canada quite frequently. Ms. Ernst made some attempts to rent the Romanita Property out on a seasonal basis, but this proved to be impractical.
- q) On 15 March 2013, Ms. Ernst commenced family law proceedings in the Victoria Registry of the Supreme Court of British Columbia, seeking spousal support and interest in property under the Family Relations Act.
- r) On 3 October 2013, Ms. Ernst filed an amended claim seeking multiple forms of relief including but not limited to property division and spousal support under the Family Law Act, as well as occupational rent.

- s) On 31 December 2013, Ms. Ernst caused her numbered company, 1067042 Alberta Ltd., to sell its primary asset, a parcel of undeveloped property located in Sturgeon County, Alberta (the "Sturgeon County Property"). Ms. Ernst later wound up the company.
 - t) On 2 June 2015, Ms. Ernst purchased four adjacent undeveloped lots at 56-62 Pedregosa in Mazatlan (the "Pedregosa Property" or "Pedregosa"). Ms. Ernst's long-term plan was to use these adjacent properties to build four separate residences, sell three of them, and retain the fourth for herself.
- [9] By the time that the trial began in February 2018, Ms. Ernst was still residing in Mazatlan, at Romanita, with no mortgage on the property. Ms. Ernst continued to travel back and forth between Mexico and Canada with some degree of regularity, generally staying with relatives while in Canada. Sometimes she stayed with an aunt in Richmond, and other times she stayed in a vacant condominium owned by her parents in Victoria. She is retired. Her most recent financial statement indicates an annual income of \$5,112.
- [10] Meanwhile, Mr. Carmichael continued to live in the Maple Street Property. He had sole responsibility for the mortgage and property taxes. He continued to work as a firefighter. His most recent financial statement indicates annual income of \$143,867.

The Applicable Family Law Statute

- [11] The relationship between Ms. Ernst and Mr. Carmichael began and ended prior to the coming into force of the Family Law Act, S.B.C. 2011, c. 25 [FLA] on 18 March 2013. However, under the reasoning in *Meservy v. Field*, 2013 BCSC 2378 and *Newton v. Crouch*, 2016 BCCA 115, the FLA applies because relief was sought under the Act within two years of the date of separation.

The Duration of the Relationship

- [12] The parties agree that they were in a marriage-like relationship for a continuous period of more than two years and as such each of them is a "spouse" within the meaning of s. 3(1)(b) (i) of the FLA. However, the parties are not in agreement as to the duration of the relationship. Ms. Ernst says the marriage-like relationship began when she and Mr. Carmichael started living together at Pebble Creek on 5 August 2009. Mr. Carmichael says he and Ms. Ernst did not enter a marriage-like relationship until they began to live together at Maple Street on 23 February 2010.
- [13] Under s. 3(3) of the FLA, a relationship between spouses who are not formally married begins on the date when they began to live together in a marriage-like relationship. Whether the parties are living in a marriage-like relationship requires an examination of their intentions. Objective factors are relevant to determining the intentions of the parties. See *Takacs v. Gallo* (1998), 157 D.L.R. (4th) 623 (B.C.C.A.) at para. 55. The presence or absence of any particular factor is not determinative of a marriage-like relationship, and it is not possible to identify an invariable "checklist" of features found in such relationships, given

the diverse and varied characteristics of contemporary spousal arrangements: *Austin v. Goerz*, 2007 BCCA 151 at para. 58.

- [14] The formal starting point of a marriage-like relationship is sometimes difficult to ascertain. As explained in *Yakiwchuk v. Oaks*, 2003 SKQB 124 at para. 10, people sometimes begin relationships with little foresight or planning, and their motivation is nothing more than wanting to be "together", with no express discussion or agreement as to how their relationship will operate. What is required is a "holistic" assessment focused on the point at which the parties began living together in a committed relationship. Factors such as intimacy, sleeping arrangements, economic interdependence, pooling of resources and efforts, common recreational and social activities, vacations, and celebration of holidays and special occasions may all be considered, although as explained above the presence or absence of any one or more of these factors could by no means be regarded as dispositive.
- [15] In this particular case, Ms. Ernst and Mr. Carmichael were in a long distance relationship until 5 August 2009, when Mr. Carmichael started living with Ms. Ernst at Pebble Creek. Mr. Carmichael testified that he did not move into Pebble Creek with the intention of entering a long-term relationship; he says things just unfolded that way, and he had no plan to enter a committed relationship at that point in time. However, the objective evidence does not fit with Mr. Carmichael's stated intention given in testimony nine years after the fact. The parties had been in a long distance relationship for over two years. Then, within one month of Ms. Ernst's move from Edmonton to Surrey, Mr. Carmichael moved out of his house on 78 Avenue and into Pebble Creek, where he cohabitated with Ms. Ernst. In short, within less than one month of Ms. Ernst's move from Edmonton to Surrey, Mr. Carmichael gave up his own residence and moved in with her. My conclusion is that this was the point in time when the parties formed an intention to live together in a committed marriage-like relationship.
- [16] There was some suggestion in argument that the parties were formally separated for a period of some five months, after a falling out in the midst of their vacation in Europe in September 2011. The evidence is clear that there was discord between the parties and that they were physically apart for a number of months. However, the evidence does not show that the parties were "separated" during this period of time. There is no evidence that either party formally communicated an intention to separate to the other party, nor is there any evidence that either party was seeking to end the relationship. Both of them continued to use Maple Street as their principal residence and "home base". The fact that Ms. Ernst and Mr. Carmichael were having difficulties in their relationship does not mean that they were separated. The essential inquiry is the existence of the relationship, not the quality of that relationship: *J.J.G. v. K.M.A.*, 2009 BCSC 1056 at para. 71. When the parties reunited in February 2012, they continued the relationship in more or less the same form that it had taken before the disruption.
- [17] Finally, I have no difficulty concluding that the marriage-like relationship ended on 30 January 2013. The parties were living separate and apart since 23 November 2012. On 30 January 2013, Mr. Carmichael expressly informed Ms. Ernst by email of his intention to end

the relationship, and he acted on that intention by removing Ms. Ernst's belongings from Maple Street and placing them in storage. Whatever one might say about the manner in which Mr. Carmichael communicated this to Ms. Ernst, his conduct leaves no room for debate about the status of the relationship.

Property Division

- [18] Part 5 of the FLA sets out the rules governing division of family property following the breakdown of a spousal relationship. Madam Justice Sharma provided the following succinct and helpful overview of the statutory rules in *A.M.D. v. K.R.J.*, 2015 BCSC 1539 at para. 51-52:
- [51] Upon separation, each spouse has a right to an undivided half interest in all family property regardless of their respective use or contribution and is equally responsible for family debt: s. 81. Family property is, inter alia, all real and personal property owned by at least one spouse on the date of separation: s. 84(1)(a). Property acquired by a spouse before the relationship began is excluded from family property: s. 85(1)(a). However, its increase in value during the relationship is family property: s. 84(2)(g).
- [52] The court may only order an unequal division of family property or family debt if it would be significantly unfair to equally divide it, considering a number of factors such as the length of the relationship between the parties, a spouse's contribution to the career of the other spouse or a tax liability that may be incurred by a spouse as a result of a transfer or sale of property: s. 95.
- [19] The purpose of the exercise is to identify, value, and divide all "family property", which under s. 84(2)(a) of the FLA includes all property owned by at least one spouse as of the date of separation, except that which qualifies as "excluded property" under s. 84(1)(a). The statute also allows for division of excluded property in some circumstances, but neither party seeks an order of that nature in this case.
- (1) Property Disposed of Prior to Separation
- [20] I heard evidence about several real properties that were disposed of prior to separation. Since these properties were no longer "owned by at least one spouse as of the date of separation", they are not subject to division. However, the manner in which the parties dealt with these previously held properties may still be relevant, because the proceeds may be excluded property used to acquire property held by one of the parties at the date of separation was derived.
- (1.1) Mr. Carmichael's Interest in the 78 Avenue Property
- [21] The relevance of Mr. Carmichael's interest in the 78 Avenue Property is straightforward and does not appear to be in dispute between the parties. On 22 June 2009, prior to the date on which he started to cohabitate with Ms. Ernst, Mr. Carmichael sold his interest in the 78 Avenue Property to his brother for \$150,891. Mr. Carmichael later used a large portion of these funds to purchase Maple Street. As discussed below, the portion of the Maple Street

purchase price that came from the sale of Mr. Carmichael's interest in the 78 Avenue Property is excluded property under s. 85(1)(g) of the FLA.

(1.2) Ms. Ernst's Edmonton Property

- [22] As of the date of cohabitation, Ms. Ernst owned and lived in the Edmonton Property. At that time, the property value was \$348,500, and it was subject to a line of credit in the amount of \$242,000. Thus, the net equity in the property was some \$106,500. Over the course of the next two years, the equity in the property was reduced somewhat as Ms. Ernst drew down money on the line of credit. Of this increased indebtedness, a sum of \$28,000 was drawn down by Ms. Ernst and then deposited into to Mr. Carmichael's Scotiabank chequing account, prior to Mr. Carmichael's acquisition of the Maple Street Property. Ms. Ernst sold the Edmonton Property for \$404,000 on 21 October 2010, at which time the mortgage was \$316,220, such that the equity in the property was some \$87,780. The net proceeds from the sale of the property were \$73,377 which Ms. Ernst deposited into her TD Canada Trust account in two deposits dated 27 September 2010 and 22 October 2010 respectively.
- [23] It is common ground that the Edmonton Property itself is excluded property. However, that is where the common ground ends. The parties take divergent positions as to how the handling of this property and the proceeds from its disposition should impact on the property division analysis.
- [24] I will deal firstly with Mr. Carmichael's position. While accepting that the initial value of the Edmonton Property at cohabitation is excluded property under s. 85(1)(a) of the FLA, Mr. Carmichael asserts that the increase in value from the date of cohabitation to the date of disposition is family property under s. 84(2)(g). I cannot agree with this submission, for two reasons. First, while the value of the property itself increased between the date of cohabitation and the date of disposition, the corresponding debt associated with the property also increased. The increase in the value of the property was exceeded by the increase in corresponding debt, and the net effect is that the equity in the property actually decreased from the date of cohabitation to the date of disposition. This leads to a second and more fundamental point. To quote from Madam Justice Choi in *Zellweger v. Zellweger*, 2018 BCSC 1227 at para. 51: "Only on separation does an entitlement to an increase in the value of excluded property, pursuant to s. 84(2)(g), crystallize". Thus, "[a]s a general rule, fluctuations in value throughout the relationship are not directly relevant to a determination of family or excluded property".
- [25] I turn now to Ms. Ernst's position. Ms. Ernst asserts that the property itself was acquired by her prior to the relationship and thus falls into the definition of excluded property which can be traced through the proceeds of sale and then into the Maple Street Property acquired by Mr. Carmichael in the course of the relationship. In support of this position, Ms. Ernst relies on s. 85(1)(g) of the FLA, which as explained by Choi J. in *Zellweger* at para. 37, "allows the court to trace the value of the original exclusion to other property derived from excluded property or its disposition".

- [26] Zellweger contains a helpful discussion of the applicable legal principles. After reviewing the onus of proof resting upon a party who makes a claim to excluded property as set out in the leading case of *Shih v. Shih*, 2017 BCCA 37 at para. 42-44, Choi J. went on at para. 47 of Zellweger to summarize the "emerging principles for tracing excluded property under the FLA's excluded property regime". Choi J. quoted extensively from her previous summary of those principles in *C.P. v. K.W.A.*, 2018 BCSC 332 at para. 90-100. The central theme I draw from the case law is that while the onus rests on the party seeking to prove the existence of excluded property, the court is not required to apply formal common law "rules for asset tracing". Rather, the FLA contemplates a "more flexible approach" to the following of excluded property into derivative property. This approach is justified by the objectives of the excluded property regime under which parties should generally be allowed to keep what was theirs going into the relationship, and the reality that parties will often "co-mingle excluded property with family property over time, including using excluded property to purchase other property or refinancing excluded property to purchase other property": *C.P. v. K.W.A.* at para. 93.
- [27] Examining the evidence in view of the applicable onus and the legal principles discussed above, my conclusion is twofold.
- [28] First, the evidence satisfies me on a balance of probabilities that the \$28,000 drawn down on the line of credit associated with the Edmonton Property can be traced or followed into Mr. Carmichael's acquisition of the Maple Street Property. In particular:
- a) The funds were deposited into the Scotiabank account, which eventually became a joint account, and Mr. Carmichael admits receiving the funds. Mr. Carmichael testified that Ms. Ernst gave him the \$28,000 as payment for the renovation work he had done at the Edmonton Property and the Pebble Creek Property. He said that was "all Ms. Carmichael could afford" and he was "glad to receive it". Based on my assessment of all of the evidence as discussed in the following sub-paragraphs, I do not accept that characterization of the transaction.
 - b) I note that two copies of the deposit slip for the \$28,000 were marked into evidence. The original contains no reference in the memo line. The second version contains a handwritten notation re: "Maple Street" on the memo line. I am satisfied that at some point, presumably after the litigation commenced, Ms. Ernst wrote the handwritten notation onto her copy of the deposit slip. This was misleading and did not help Ms. Ernst's cause.
 - c) Nonetheless, given the source of the funds and the timing of the transfer, I accept Ms. Ernst's testimony that she intended this \$28,000 to be a contribution toward the purchase of the Maple Street Property. This is consistent with Mr. Carmichael's testimony that Ms. Ernst was hoping the parties would renovate the Maple Street Property with a view to flipping it, repeating the pattern she had followed (with Mr. Carmichael's assistance) in relation to the Edmonton Property and the Pebble Creek Property. In summary, I accept that the \$28,000 was a contribution by Ms. Ernst toward the acquisition of the Maple Street Property.

- d) Although the \$28,000 was actually "debt" and not "property", the debt produced \$28,000 in funds derived from the property, and in a general sense it represented some \$28,000 in equity which Ms. Ernst effectively contributed to Mr. Carmichael's purchase of the Maple Street Property. I conclude that this \$28,000 is excluded property within the meaning of s. 85(1)(g).
- [29] Second, even using a "flexible approach" to tracing as contemplated in the case law, the evidence does not satisfy me on a balance of probabilities that the \$73,377 in net proceeds from the sale of the Edmonton Property were used to contribute, either directly or indirectly, to the acquisition or increase in value of the Maple Street Property. Ms. Ernst did not receive the proceeds from the sale of the Edmonton Property until some six months after Mr. Carmichael purchased Maple Street, meaning that these proceeds were clearly not used to acquire Maple Street. When Ms. Ernst received the proceeds, she deposited them into the TD Canada Trust account. Ms. Ernst later transferred some \$55,297 of those funds into Mr. Carmichael's Scotiabank line of credit. This account was used to pay for things like meals, travel, and other living and family expenses. There is no evidence that any of the \$73,377 in proceeds from the sale of Ms. Ernst's Edmonton Property was ever used to pay down the mortgage on the Maple Street Property. Thus, while the \$73,377 clearly qualified as excluded property, these funds were spent or dissipated over the course of the relationship. The proceeds cannot be traced or followed into any identifiable personal or real property owned by either party at the date of separation.

(1.3) Ms. Ernst's Pebble Creek Property

- [30] Ms. Ernst acquired the Pebble Creek Property on 30 June 2009, just prior to the commencement of the marriage-like relationship. The price was \$380,000, funded by a down payment of \$133,000, and a mortgage in the amount of \$247,000. Ms. Ernst was unable to recall or explain where the \$133,000 down payment came from, and she presented no documentary evidence as to the sources of the funds. This is troubling because it is indicative a lack of disclosure of assets and sources of funds. It also weighs against the reliability of Ms. Ernst's evidence more generally. However, whatever the source of the funds, it does not alter the fact that Ms. Ernst effectively brought the \$133,000 into the relationship, and it therefore qualifies as excluded property under s. 85(1) of the FLA.
- [31] Ms. Ernst sold the Pebble Creek Property on 23 July 2012, for \$475,000. After paying out the mortgage, real estate commission, and closing costs, the net proceeds were \$227,000. Ms. Ernst used somewhere between \$205,000 and \$207,000 to purchase the Romanita Property, and the balance of some \$20,000 to cover living expenses.
- [32] Mr. Carmichael once again asserts that while the initial value of Pebble Creek at cohabitation is excluded property, the increase in value up to the date of disposition is family property. Again, I cannot accept that submission. The property was disposed of prior to separation. To paraphrase the words of Choi J. in Zellweger, entitlement to an increase in value of excluded property does not "crystallize" until the date of separation, and

fluctuations in the value of property prior to separation are "not directly relevant to a determination of family or excluded property".

- [33] To the extent that the increase in Pebble Creek's value is relevant to the property actually owned by either party at the date of separation, it will be taken into account. Some of the increase in Pebble Creek's value was used to cover living expenses, and its dissipation has rendered it unavailable for division between the parties. The rest of the increase in Pebble Creek's value made its way into the Romanita Property, a property acquired in the course of the relationship and thus subject to presumptive equal division between the parties, with the exception of the \$133,000 traced back to Ms. Ernst's initial investment in Pebble Creek. Thus, to the extent that the increase in Pebble Creek's value was still in existence at the date of separation, it took the form of other family property subject to equal division as discussed below.
- [34] My conclusion regarding the relevance of the Pebble Creek Property is that the \$133,000 used by Ms. Ernst to purchase Pebble Creek is excluded property. As described below, these funds can be traced or followed into the subsequent purchase of the Romanita Property.

(2) Property and Debt Held by Ms. Ernst at Separation or Thereafter

(2.1) The Romanita Property

- [35] Ms. Ernst first became interested in the Romanita Property when she and Mr. Carmichael were vacationing in Mazatlan in February 2012. On 16 March 2012, Ms. Ernst made a purchase deposit of \$1,000. She testified that the formal offer to purchase was made in the summer of 2012. The sale completed on or about 5 November 2012. Ms. Ernst purchased the Romanita Property for \$205,000. At various points during the trial, Ms. Ernst asserted that the purchase price was negotiated in US dollars. However, the contract marked in evidence lists the purchase price as \$205,000 Canadian dollars. Ms. Ernst funded the purchase of Romanita with the proceeds from the sale of the Pebble Creek Property.
- [36] Ms. Ernst testified that she purchased Romanita with the intention of using it as a vacation property for herself, Mr. Carmichael, and Mr. Carmichael's extended family. Mr. Carmichael testified that Ms. Ernst purchased the Romanita Property on her own. Mr. Carmichael made no financial contribution to the purchase of the property, and there was never any discussion about putting his name on the title. I find that Ms. Ernst's plan was to purchase the Romanita property on her own, intending to use it as a vacation property for herself and Mr. Carmichael's family, and believing it would be a good long term real estate investment.
- [37] Ms. Ernst's plan was to install a rooftop pool. She testified that she asked Mr. Carmichael to pay for the pool construction and he agreed to do so. She said that when they went to Mazatlan in November 2012, Mr. Carmichael met with the engineer to discuss the pool project. Mr. Carmichael denied having any discussion about paying for the pool, explaining that he mostly just observed the pool work as it was being done, and his only personal involvement was in helping to move bricks or equipment in the course of the construction.

Ultimately, Ms. Ernst paid for the pool construction herself, spending a total of \$13,992 between 14 November 2012 and 24 December 2012. The source of the funds is unclear. Ms. Ernst initially testified that she paid for the pool with funds obtained from her son's education savings plan, after he passed away. However, the first payment of \$4,800 was made on 15 November 2012, before Ms. Ernst's son passed away.

- [38] Ms. Ernst had moved some household goods and personal belongings into Romanita when she and Mr. Carmichael drove to Mazatlan in early November 2012. Ms. Ernst testified that Mr. Carmichael also took some things to Romanita, including a television and a stereo system. Ms. Ernst testified that Mr. Carmichael also installed a satellite dish to receive satellite television service from British Columbia.
- [39] Ms. Ernst's initial plan was to stay in Mazatlan through the New Year. However, she had to fly back to Edmonton on 23 November 2012, upon learning that her son was in the hospital. She then returned to Mazatlan until 22 December 2012, after her son's funeral.
- [40] After Mr. Carmichael formally ended their relationship on 30 January 2013, Ms. Ernst considered renting out the Romanita Property on a seasonal basis. She listed it on several short term accommodation websites, and was able to arrange a short term rental for a party of five, but the rental agency cancelled the arrangement after learning that there were some 25 people staying in the property. Ms. Ernst also considered renting out portions of the property to vacationers, but determined that it was unsuitable for that purpose because it was a large house with no separate units.
- [41] Having abandoned her plan to rent out the Romanita Property, Ms. Ernst ultimately used it as her primary place of residence from January 2013 until she sold the property in June 2018. She estimated that she travelled back and forth between Canada and Mexico some 17 times between the beginning of 2013 and the end of 2017. She stayed in the Romanita Property for as much as one month at a time. She explained that she had to take multiple trips back to Canada to deal with lawyers and to take various steps in this family law litigation.
- [42] Ms. Ernst listed the Romanita Property for sale in 2016, at a list price of \$229,000 US. Ms. Ernst considered this to be a reasonable list price, given that she had invested a total of \$225,000 Canadian in the property. Ms. Ernst testified that by the time the trial began in February 2018, the property has been viewed by at least 60 potential buyers, but only one party expressed interest in purchasing it. In the end, no formal offer was made because the person was unable to secure financing.
- [43] When the trial in this matter continued in July 2018, Ms. Ernst disclosed that she had accepted an offer to purchase the Romanita Property for \$210,000 US on 8 February 2018. Ms. Ernst explained that she did not disclose this fact during the first five days of the hearing, because she thought that by that point in time it was too late to add new evidence, and because the sale of the property had not yet completed. By the time that the trial continued in July 2018, Ms. Ernst had completed the sale of the Romanita Property, and she

disclosed this fact to Mr. Carmichael's counsel shortly after the final arguments got underway. In the end, no harm came from the late disclosure of these developments, because the fact of the sale was disclosed and an admission was made to this effect.

- [44] Having reviewed the evidence with respect to the Romanita Property, I will now address its legal status and the issues pertaining to its division.
- [45] The purchase of the Romanita Property was completed on 5 November 2012, a mere eight to ten weeks before the end of the relationship on 30 January 2013. Mr. Carmichael contributed nothing to the purchase of the property, had very little involvement in the subsequent improvements, and had literally no connection to the property after he left Mazatlan at the end of his vacation on 23 November 2012. Nevertheless, because the Romanita Property was owned by one of the parties as of the date of separation, it fits within the definition of family property in s. 84(1)(a) of the FLA, subject of course to Ms. Ernst's excluded property claim.
- [46] In the circumstances, Mr. Carmichael did not argue with any degree of vigour that he should be entitled to an interest in the Romanita Property. (Indeed, Mr. Carmichael's position is that the fairest or most equitable arrangement would be for him to receive 100% of the increase in value of the Maple Street Property from the date of separation onward, and for Ms. Ernst to receive 100% of the increase in value of the Romanita Property.) Nevertheless, the case law instructs that the Court must first determine what an equal division of all family property would look like, in order to then consider whether some other division of property is appropriate in order to avoid significant unfairness.
- [47] Ms. Ernst argues that the entire Romanita Property is excluded property, since all of the funds used to purchase it came from the disposition of Pebble Creek. I do not agree with this submission. In my analysis above, I determined that, of the \$220,000 in net proceeds from the sale of Pebble Creek, only \$133,000 (representing Ms. Ernst's initial down payment on that property) was excluded property. The same amount, \$133,000, can be traced or followed into Ms. Ernst's acquisition of the Romanita Property. The balance of the initial investment in the Romanita Property is, I conclude, family property that is presumptively subject to equal division. The increase in value of the Romanita Property from the date of acquisition to the date of disposition is also family property presumptively subject to equal division. Another way of putting it would be to say that the entire Romanita Property is family property, subject to an adjustment of \$133,000 in favour of Ms. Ernst on account of her excluded property claim.
- [48] The Romanita Property was ultimately sold, effectively in the midst of the trial, for \$210,000 U.S. Based on the exchange rate as of 8 February 2018, this converts to \$263,112 Canadian. Under an equal division, after taking into account Ms. Ernst's \$133,000 excluded property claim, Ms. Ernst would be entitled to \$198,056, and Mr. Carmichael would be entitled to \$65,056, in respect of the Romanita Property. Another way of describing Mr. Carmichael's entitlement would be to say that it is one-half of \$77,000 (representing his share of the net purchase price of the Romanita Property after deducting Ms. Ernst's excluded property

claim), plus one half of \$53,112 (representing his share of the increase in value of the Romanita Property).

- [49] I should point out that even if I had accepted Ms. Ernst's argument that at the time of its acquisition the entire Romanita Property was excluded property, then the increase in the value of the property from the date of acquisition up to the date of trial would still constitute family property under s. 84(2)(g) of the FLA. The difference between the purchase price of \$205,000 and the sale proceeds of \$263,112 is \$58,112. Thus, in order to achieve an equal division of the Romanita Property on this alternative approach, Ms. Ernst's entitlement would be \$234,056, and Mr. Carmichael's entitlement would be \$29,056.

(2.2) 1067042 Alberta Ltd.

- [50] Ms. Ernst incorporated 1067042 Alberta Ltd. in 2003, intending to use it for land development. From the date of incorporation to the date when it was ultimately wound up, Ms. Ernst was the sole director and only shareholder of the company. Ms. Ernst described the company as a business venture, not a full time job.
- [51] The company's sole or principal asset was the Sturgeon County Property, which as noted above was a parcel of bare land that the company had acquired from Ms. Ernst's father in law in 2007, for \$250,000. Ms. Ernst testified that the land purchase was financed with \$50,000 provided to the company from her own personal savings, and a further \$200,000 loaned to the company by four relatives who invested \$50,000 each.
- [52] Ms. Ernst testified that, over a number of years prior to the commencement of her relationship with Mr. Carmichael, she personally invested a further \$144,000 into the company to cover land development costs. Ms. Ernst says that the company's records include receipts and financial statements verifying those expenses. Ms. Ernst did not disclose these corporate records prior to trial, although she did bring a collection of materials to court with her and made these materials available to counsel for Mr. Carmichael.
- [53] Ms. Ernst's intention or hope was to develop a residential subdivision on the Sturgeon County Property. However, she encountered challenges because the property straddled a number of different municipal boundaries making it difficult to secure proper zoning.
- [54] By the time that Ms. Ernst and Mr. Carmichael began to cohabitate in 2009, the Sturgeon County Property had a value of \$298,400.
- [55] Ms. Ernst ultimately caused the company to sell the Sturgeon County Property on 31 December 2013, for \$406,000. Ms. Ernst testified that after paying out the investors and various costs associated with the sale, she was left with \$194,000. An extract from the company's bank records verifies that as of 31 January 2014, the account balance was \$194,285. Ms. Ernst did not regard this as a profit, because she had personally invested a total of \$194,000 over the life of the company. Ms. Ernst later wound up the company.

- [56] Ms. Ernst used the bulk of the proceeds from the company's sale of the Sturgeon County Property to acquire the Pedregosa Properties in Mazatlan on 2 June 2015. The Pedregosa Properties are dealt with in more detail below.
- [57] On the basis of this evidence, the Court must assess the manner in which Ms. Ernst's handling of company and its assets impacts upon the division of family property. The difficulty with the evidence pertaining to 1067042 Alberta Ltd. is that the Court does not have the benefit of financial statements to assess the company's assets and liabilities over time. For example, while Ms. Ernst claims that she personally invested a total of \$194,000 over the life of the company, no documents have been tendered to establish this. I note that this figure, \$194,000, is more or less exactly equal to the balance in the company's account, characterized by Ms. Ernst as the net proceeds after selling the Sturgeon County Property and paying out all of her investors. It is theoretically possible that the amount of money Ms. Ernst invested over the life of the company is, coincidentally, exactly equal to the net proceeds she had left at the end of the land development venture. The problem for Ms. Ernst is that there is little or no contemporaneous documentary evidence to support her viva voce testimony, and I have concerns about both the credibility and reliability of her after-the-fact account of the company's finances.
- [58] Counsel for Mr. Carmichael argues that, in view of the lack of timely disclosure of the company's financial records, the Court should draw an adverse inference against Ms. Ernst on this particular point. There is legal support for the proposition that non-disclosure or late disclosure of relevant financial information can lead to a negative inference, as discussed in *Nearing v. Sauer*, 2015 BCSC 58 at para. 134.
- [59] Counsel for Mr. Carmichael further argues that, in the absence of financial statements on which to properly assess the value of Ms. Ernst's interest in the company, the Court should in effect use the value of the company's sole asset - that is, the Sturgeon County Property - as a surrogate. There is some appeal to this approach, since Ms. Ernst is admittedly the sole shareholder of the company, and since the Sturgeon County Property is the company's sole asset. It is relatively easy to determine the value of the Sturgeon County Property at various points in time based on annual property tax assessments and the sale price of the property.
- [60] In terms of the legal characterization of Ms. Ernst's interest in the company, it is common ground that since Ms. Ernst owned the company prior to the relationship, her shareholdings are excluded property under s. 85(1)(a) of the FLA. Mr. Carmichael argues that the increase in value of the company - or, on the unique facts of this case, the increase in value of the company's sole asset - is family property under s. 84(2)(g) of the FLA. I am in substantial agreement with Mr. Carmichael's position.
- [61] At cohabitation in 2009, the company's principal asset (the Sturgeon County Property) was worth \$298,400. The company sold that asset in December 2013 for \$406,000. The increase in value was therefore \$107,600. Since the principal asset has been sold and the company has now been wound up, neither the company nor the asset are available to be divided between

the parties. However, under s. 84(1)(b)(i) of the FLA, the proceeds from the sale of the Sturgeon County Property can be traced or followed into the Pedregosa Properties acquired by Ms. Ernst in June 2015.

(2.3) The Pedregosa Properties

[62] On 2 June 2015, Ms. Ernst acquired the Pedregosa Properties, four adjacent lots of bare land with an address at 56-62 Pedregosa, Mazatlan, for a total purchase price of \$147,893 Canadian. Part of the purchase funds came from a transfer of \$133,059.60 Canadian to the vendor from the account of 1067042 Alberta Ltd.

[63] Ms. Ernst testified that she purchased the Pedregosa Properties for investment purposes. Her intention was to develop the properties by constructing separate residences on each of the four lots, with the expectation of renting three of them out and keeping the fourth as a personal residence. As of the date of trial, Ms. Ernst still owned the Pedregosa Properties. There is no evidence as to their current value, but I have no reason to believe that they are worth less than the amount which I have found to be family property as discussed in the following paragraph.

[64] Applying s. 84(1)(b)(i) of the FLA, a total of \$107,600 of the funds which Ms. Ernst transferred from the account of 1067042 Alberta Ltd. (representing the increase in value of the company over the course of the relationship between Ms. Ernst and Mr. Carmichael) for the purchase of the Pedregosa Properties is family property. Under an equal division, Mr. Ernst would be entitled to \$53,800 in respect of the Pedregosa Properties, with Ms. Carmichael entitled to the balance of the value in respect of those properties.

(2.4) Other Properties and Debts Held by Ms. Ernst

[65] I heard evidence about some additional property and debt held by Ms. Ernst over the course of the relationship. This additional property and debt does not factor significantly in the division of properties analysis, but it nevertheless requires some comment. I would group this additional property and debt into five discrete categories.

[66] First, Ms. Ernst gave viva voce testimony and presented a significant body of documentary and photographic evidence about certain household effects and other personal property that was not returned to her following the breakdown of the relationship with Mr. Carmichael. Recall that on 30 January 2013, Mr. Carmichael sent Ms. Ernst an email ending the relationship and advising her that her things had been removed from the Maple Street Property and placed in storage. Ms. Ernst testified that some of the property which she considered to be hers was not returned to her. Although Mr. Carmichael denied intentionally keeping any personal property belonging to Ms. Ernst, his denials were somewhat perfunctory, and not particularly convincing. Mr. Carmichael unilaterally removed the property that he considered to be Ms. Ernst's from the Maple Street Property, and placed it in storage. In doing so without consulting with Ms. Ernst as to what property should or should not be returned to her, he took the risk that she would later take issue with

his decision about what to return to her and what to keep. I am satisfied, based on Ms. Ernst's detailed testimony and supporting documentation, that some of the personal property and household effects that Ms. Ernst brought into the relationship was not included amongst the property that Mr. Carmichael placed in storage. At trial, Ms. Ernst did not make any serious effort to prove the value of this property to support an argument related to property division. Rather, she asserted that Mr. Carmichael's conduct in keeping some of her property and his refusal to admit the same in his testimony was relevant to Mr. Carmichael's credibility as a witness. I have taken this point into account in assessing Mr. Carmichael's credibility, although in the end I am satisfied that Mr. Carmichael did not intentionally keep or withhold any property from Ms. Ernst. Rather, he acted unilaterally by deciding what he would and would not return to her, in a process that was somewhat unfair and put him at risk that it would become an issue between the parties, which it clearly did.

- [67] Second, I will address Ms. Ernst's RRSPs. As of the date of cohabitation, Ms. Ernst had RRSPs totalling some \$66,000. She liquidated them in 2012, and the funds were dissipated or used to cover living and travel expenses. Since these RRSPs were disposed of prior to separation, they do not fit within the definition family property in s. 84(1) of the FLA, and since they were dissipated and did not lead to the acquisition of any other real or personal property, they do not factor in the division of property analysis.
- [68] Third, there are other investments, namely some London Life financial instruments of unspecified value, and a number of ounces of silver. There was little evidence as to the value of this property at the date of cohabitation, and no evidence as to the increase in value over the course of the relationship. Mr. Carmichael asserts no interest in, and does not seek division of this property.
- [69] Fourth, over the course of the relationship, Ms. Ernst owned two vehicles, a Honda Element and a PT Cruiser. There was no evidence as to the history or value of these vehicles. Mr. Carmichael asserts no interest in, and does not seek division of this property.
- [70] Fifth and finally, Ms. Ernst gave viva voce evidence about a number of loans she obtained from friends and family since the date of separation. Ms. Ernst sought to tender documents to establish the amount of the loans (totalling \$73,200), but the documents were hearsay and the individuals who created the documents were not called as witnesses. Accordingly, these documents were ruled inadmissible. I do accept Ms. Ernst's testimony that she has borrowed certain amounts of money from friends and family since her separation from Mr. Carmichael. However, I have no reliable evidence as to the value of the debts. And in the absence of any evidence that the loans were documented by formal agreements signed by both the borrower and the lender, there is no real assurance that these loans will ever be repaid by Ms. Ernst. Finally, even assuming these debts were proven, they arose after the date of separation and there is no evidence that they were incurred for the purposes of maintaining family property. These debts do not qualify as family debt within the meaning of s. 86(b) of the FLA.

(3) Property and Debt Held by Mr. Carmichael at Separation or Thereafter

(3.1) The Maple Street Property and Associated Debt

- [71] Mr. Carmichael purchased the Maple Street property on 24 February 2010. The total purchase price was \$789,000, funded in part by a mortgage in the amount of \$620,000. The total equity in the property as of the date of purchase was \$168,000.
- [72] Mr. Carmichael was the sole registered owner of the Maple Street Property. Ms. Ernst testified that she and Mr. Carmichael first took note of the Maple Street Property while on a walk together, and they planned from the outset to make it their family home. She said in her testimony that they discussed whether Ms. Ernst's name should be on the title along with that of Mr. Carmichael, but she decided against it, at least in part because the Pebble Creek Property was registered in her name and she wanted to be able to characterize it as her principal residence for tax purposes.
- [73] According to Mr. Carmichael, his intent all along was to purchase the Maple Street Property on his own, as his house. He points out that the offer to purchase was made in his name, he was recorded as the sole registered owner on the certificate of title, and the mortgage was solely in his name. Mr. Carmichael denied that there was ever any discussion about whether Ms. Ernst's name should be recorded on the title to the property. He says all of the funds used to purchase the property came from him. I will deal with that issue below.
- [74] The parties lived in and used the Maple Street Property as their principal residence from February 2010 until November 2012. Mr. Carmichael paid the mortgage, property taxes, and utilities. He says the funds required to cover these costs came from his salary as a firefighter, although he also acknowledged in cross-examination that he collected and retained rent for the two bedroom suite in the basement of the property.
- [75] There are two main issues before the Court as far as the Maple Street Property is concerned. The first issue is the extent of each party's "excluded property" claim in relation to this particular property. The second issue is the valuation date to be used for the purposes of dividing their interests in this property.
- [76] Mr. Carmichael's excluded property claim is straightforward and does not appear to be disputed. The parties paid a total of \$168,000 toward the purchase of the Maple Street Property. Of this, \$140,000 was paid by Mr. Carmichael, with funds available to him as a result of the sale of his interest in the 78 Avenue Property.
- [77] With regard to Ms. Ernst's excluded property claim, I have found above that Ms. Ernst transferred \$28,000 into Mr. Carmichael's control in the weeks before his purchase of Maple Street. As explained in my discussion of the Edmonton Property above, I accept that this is excluded property in respect of which she will be entitled to an adjustment in the division of the Maple Street Property.

- [78] The balance of Ms. Ernst's excluded property claim is not as straightforward. Ms. Ernst says that while she was only able to contribute \$28,000 toward the purchase of Maple Street, the "plan" was that she would be able to make a further financial contribution to the Maple Street Property upon the sale of the Edmonton Property. Ms. Ernst testified that between March 2010 and June 2012, she made a total of \$160,000 in financial contributions to Maple Street. There is evidence that between March 2010 and June 2012, Ms. Ernst had access to substantial sums of money from various sources including the sale proceeds from the Edmonton Property, a large gift of money from her father, and an inheritance from the death of her stepfather, all of which were transferred into various accounts in Mr. Carmichael's name. However, none of these funds were in fact used to pay down the mortgage on the Maple Street Property. Rather, the funds were paid into Mr. Carmichael's line of credit, chequing, and credit card accounts. These accounts were used to cover living expenses and travel expenses of both parties over the course of the relationship.
- [79] Applying the legal principles set out in Zellweger as discussed at paragraph 26 above, I find that although the \$160,000 that Ms. Ernst paid into Mr. Carmichael's accounts was initially excluded property when Ms. Ernst brought this money into the relationship, these funds were ultimately spent or dissipated over the course of the relationship. This money cannot be traced or followed into the Maple Street Property, or any other family property owned by the parties at the date of separation. Even under the "flexible approach" articulated in the case law, I am not satisfied on a balance of probabilities that - beyond the \$28,000 contribution described above - Ms. Ernst has established any further excluded property claim in connection with the Maple Street Property.
- [80] I turn next to the valuation date issue. The starting point is s. 87 of the FLA, which provides that unless an agreement or court order provides otherwise, the value of family property is based on its fair market value as of the date of trial. Thus, the default rule is that the court is to divide family property based on its market value as of the date of trial. However, the court has a discretion to order a different valuation date. The case law indicates that the court's discretion to order a different valuation date should only be exercised where the threshold of "significant unfairness" under s. 95(2) of the FLA has been met. "To conclude otherwise would allow for an earlier valuation date resulting in a radical departure from an equal division as of the date of trial in circumstances where the significant unfairness threshold in s. 95 is not met": *E.H.H. v. C.L.M.*, 2017 BCSC 1299 at para. 93.
- [81] In this particular case, the parties are in agreement as to the underlying figures relevant to the value of the Maple Street Property at various points in time. In particular, the parties agree that at separation on 30 January 2012, the Maple Street Property had a market value of \$890,000, and an outstanding mortgage of \$599,693, such that the net equity in the property at that time was \$290,307. The parties further agree that as of the date of trial, Maple Street's market value had increased to \$1,360,000, and the outstanding balance of the mortgage was \$539,240, meaning that the net equity in the property was \$820,000.

- [82] The question is whether the property should be divided based on its value as of the date of trial, or its value as of the date of separation. As noted above, the property should be divided equally based on its fair market value at the time of trial unless using that valuation date would be significantly unfair. In addressing the issue of significant unfairness, I will follow the approach advocated by Mr. Justice Skolrood in *Kuhberg v. Hall*, 2015 BCSC 2230 [Kuhberg] at para. 62, by first determining "the full extent of the family property and debt", and then going through the "notional exercise of dividing the property equally". Having done so, I will then consider whether an equal division using the valuation date provided for in s. 87 of the FLA would result in significant unfairness within the meaning of s. 95.
- [83] Using the market value of \$1,300,000 as of the date of trial, the net equity in the property is \$820,000. Each party's share would be \$410,380. From this figure, an adjustment of \$112,000 in favour of Mr. Carmichael is required to account for each party's excluded property, namely Mr. Carmichael's initial investment of \$140,000 and Ms. Ernst's initial investment of \$28,000. Thus, under an equal division, Ms. Ernst would be entitled to \$298,000, and Mr. Carmichael would be entitled to \$522,000 in respect of the Maple Street Property. The question is whether this outcome would result in "significant unfairness". This question can only be answered based upon a consideration of "the full extent of family property and debt" as contemplated in *Kuhberg*.

(3.2) The Loon Lake Property and Associated Debt

- [84] In the summer of 2012, Mr. Carmichael's parents gifted the Loon Lake Property to Mr. Carmichael and his brother. On 13 August 2012, the property was registered in the name of Mr. Carmichael and his brother as tenants in common. In his trial testimony, Mr. Carmichael described the property as a 2.3 acre lakefront plot of land with a 900 square foot cottage.
- [85] At the time of acquisition, the Loon Lake Property was worth \$209,000. Although the property was a gift, Mr. Carmichael and his brother believed they should pay their parents something for it. On 1 March 2013, the two brothers placed a \$100,000 mortgage on the property, and gave the proceeds to their parents. I accept that the mortgage funds were used by Mr. Carmichael and his brother to pay their parents in exchange for the property. In the net result, taking into account the value of the Loon Lake Property and the associated mortgage, there was some \$109,000 in equity in the property at the time of its acquisition. Mr. Carmichael's share of the equity was \$54,000.
- [86] Mr. Carmichael and his brother still own the Loon Lake Property. It now has a value of \$229,000. The mortgage has been paid down somewhat, and the most recent balance is \$85,530. Based on these figures, I conclude that the net equity in the property as of the date of trial was \$143,470, with Mr. Carmichael's share of the equity being \$71,735.
- [87] The Loon Lake Property was initially gifted to Mr. Carmichael by his parents and is therefore excluded property under s. 85(1)(b.1) of the FLA. After accounting for his brother's interest, Mr. Carmichael's share of the increase in the value of the property from the date of

acquisition to the date of trial is family property under s. 84(2)(g). Over that time frame, the value of Mr. Carmichael's interest in the property increased by \$17,735. Ms. Ernst would be entitled to half of the increase in value, or \$8,867. Therefore, to achieve an equal division of the Loon Lake Property, after taking into account Mr. Carmichael's \$54,000 excluded property claim, Ms. Ernst's entitlement would be \$8,867 and Mr. Carmichael's entitlement would be \$62,875.

(3.3) Firefighter's Pension

[88] Throughout the relationship, Mr. Carmichael was employed as a Battalion Chief for the Surrey Fire Department. Mr. Carmichael concedes that Ms. Ernst is entitled to a portion of his firefighter's pension as provided for under Part 6 of the FLA. Applying my findings as to the duration of the marriage-relationship, the division of Mr. Carmichael's pension is to be divided under Part 6 of the FLA, based on a cohabitation date of 5 August 2009, and a separation date of 30 January 2013.

(3.4) Other Properties Held by Mr. Carmichael

[89] I heard evidence about a number of other properties held by Mr. Carmichael over the course of the relationship. Three of them warrant at least some comment.

[90] First, there are Mr. Carmichael's Canaccord Capital investments. Mr. Carmichael testified that he held these investments as of the date of cohabitation, but he had no specific recollection and no evidence to offer with respect to their value at that time. Mr. Carmichael testified that he did not contribute to or withdraw anything from his Canaccord Capital account over the course of the relationship. The account records marked in evidence indicate that as of 2013 these investments were worth some \$4,700, and that their value was more or less constant in the following two years. On the evidence presented at trial, I conclude that these investments did not materially increase in value over the course of the relationship. Accordingly, they do not have any bearing on the property division analysis.

[91] Second, Mr. Carmichael had one vehicle over the course of the relationship, a GMC Sierra truck. He owned the truck as of the date of cohabitation, and its value has only decreased since then. This vehicle has no impact on the property division analysis.

[92] Third, Mr. Carmichael testified that about five years before the commencement of his relationship with Ms. Ernst, he invested money in an RESP account for his daughter Jenna, who was in junior high school at the time. Account records marked in evidence indicate that as of 1 July 2009, Mr. Carmichael had \$4,941 in a TD Mutual Funds RESP account with his daughter listed as the beneficiary. Mr. Carmichael testified that he never withdrew or transferred any of the funds out of the RESP account. When referred to the transaction history for the RESP account showing that on 26 August 2013 the funds in the RESP account were transferred into the TD chequing account used jointly by Mr. Carmichael and Ms. Ernst, Mr. Carmichael said he had no involvement in transferring the funds, and he did not authorize it. Mr. Carmichael concluded that Ms. Ernst must have withdrawn the RESP funds

and placed them in the TD chequing account, without his knowledge. I note from the date of the transfer that this transaction took place some six months after the parties separated. Mr. Carmichael testified that since the litigation had already commenced, he did not attempt to recover the RESP funds, thinking that he would not longer be able to get them out of the joint account. He decided to leave it to the lawyers. When asked about the transfer of the RESP funds, Ms. Ernst said she had no recollection of it, but did not deny doing so. I conclude that Ms. Ernst withdrew the funds from Mr. Carmichael's RESP account, and used them for her own purposes. These RESP funds existed prior to the date of cohabitation, and were excluded property. The funds are no longer in existence, but Mr. Carmichael is entitled to a credit of \$5,000 on account of Ms. Ernst's appropriation of these funds after the breakdown of the relationship.

(4) Equal Division of Property and Debt Based on Value at the Date of Trial

[93] An equal division of all family and property and debt based on market value as of the date of trial, would take the following form:

- a) The Romanita Property: Ms. Ernst's entitlement would be \$198,056, and Mr. Carmichael's entitlement would be \$65,056.
- b) The Pedregosa Properties: Mr. Carmichael's entitlement would be \$53,800, and Ms. Ernst would be entitled to the balance of the properties or their value (approximately \$100,000) as excluded property.
- c) The Maple Street Property: Ms. Ernst's entitlement would be \$298,000, and Mr. Carmichael's entitlement would be \$522,000.
- d) The Loon Lake Property: Ms. Ernst's entitlement would be \$8,867, and Mr. Carmichael's entitlement would be \$62,875.
- e) Firefighter's Pension: Ms. Ernst would be entitled to a portion of Mr. Carmichael's firefighter's pension as provided for under Part 6 of the FLA, based on a cohabitation date of 5 August 2009, and a separation date of 30 January 2013.
- f) Mr. Carmichael's RESP: Mr. Carmichael would be entitled to a credit in the amount of \$5,000 on account of Ms. Ernst's appropriation of Mr. Carmichael's RESP funds.

(5) Significant Unfairness Analysis

[94] Mr. Carmichael argues that an equal division of family property and debt would be significantly unfair within the meaning of s. 95(2) of the FLA. More specifically, Mr. Carmichael contends that equal division of the Maple Street Property based on its value at the time of trial would be significantly unfair in the circumstances of this case. He argues for a different valuation date as a means of addressing the unfairness. As explained above, the court has the discretion under s. 87 of the FLA to use a valuation date other than the date of trial, but the case law holds quite conclusively that this discretion will only be exercised where the threshold of significant unfairness under s. 95(2) is met.

[95] The case law under s. 95(2) is clear that "the general rule of equal division" must prevail "unless persuasive reasons can be shown for a different result". Unequal division can only be ordered where there is significant unfairness within the meaning of s. 95 of the Family Law Act. The unfairness must be "weighty, meaningful, or compelling", having regard to the factors set out in s. 95(2): *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44. The threshold of "significant unfairness" will only be met in limited circumstances where equal division would produce "obvious or compelling unfairness": *Hodel v. Adams*, 2016 BCSC 910 at para. 37.

[96] After considering the arguments of both parties, my conclusion is that an equal division of the Maple Street Property based on its market value at the time of trial would be significantly unfair within the meaning of s. 95(2). I reach this conclusion based on three factors, namely (i) the short duration of the relationship, (ii) the significant passage of time between the date of separation and the date of trial, and (iii) the fact that the relationship began and ended prior to the enactment of the FLA, and the legitimate expectations of the parties arising therefrom.

(i) The Short Duration of the Relationship

[97] The duration of the relationship is a relevant factor under s. 95(2)(a) of the FLA. The case law recognizes that where the relationship is of short duration, this may weigh heavily in favour of a finding of significant unfairness: *Davie v. De Mark*, 2017 BCSC 872 at para. 171-172; *A.M.D. v. K.R.J.*, 2015 BCSC 1539 at para. 69.

[98] In this particular case, the relationship lasted a mere three and one-half years. The most significant piece of family property - Maple Street - was acquired part way through the relationship. Its value increased somewhat over the course of the relationship, but has increased much more substantially since separation, owing to passive market forces.

(ii) Significant Passage of Time Between Separation and Trial

[99] This leads to the second consideration, namely the significant passage of time between the date of separation and the date of trial. The parties separated on 30 January 2013. The litigation was commenced by Ms. Ernst, in Victoria, on 15 March 2013. The trial, which took place in New Westminster after considerable delay associated with transferring the case, did not begin until 13 February 2018. Relying on s. 95(2)(i) of the FLA, I consider this passage of time between the separation date and the trial date to be an important factor in the significant unfairness analysis.

[100] Mr. Carmichael says Ms. Ernst was the "architect of the delay" and should not be allowed to benefit from it due to the increased market value of the Maple Street Property over that period of time. Ms. Ernst denies that she is personally responsible for the delay. She explained in her testimony that she has had five separate lawyers in this case, and that she has faced other challenges, including the fact that her primary place of residence is in Mexico, and the fact that she has been in several motor vehicle accidents over the past

number of years. In the end, I need not pass judgment on the cause of the delay in this matter coming to trial. It is the sheer duration of the delay that is most telling in this case, particularly when considered in the context of the change in the value of the Maple Street Property over that time frame.

- [101] The reality is that more than five years passed between the date of separation and the date of the trial. This is longer than the duration of the relationship itself. Over that time frame, the value of the Maple Street Property in particular has increased substantially. Mr. Carmichael has had a substantial amount of his personal capital tied up in the property, and has been solely responsible for the carrying costs. However, to be fair, he has also been able to reside in the property, and has been collecting and retaining the rent from the basement suite. In the meantime, Ms. Ernst lived mortgage free in the Romanita Property up until the date that she sold that property, and has had access to substantial amounts of capital which she has used to make investments since the date of separation.

(iii) Relationship Began and Ended Prior to the FLA

- [102] Finally, there is the fact that the relationship began and ended prior to the coming into force of the FLA. In that era, individuals in a common law relationship may not have anticipated that if their relationship later broke down, it would be governed by a property division regime which includes presumptive equal splitting of all family property. I find this to be an important consideration, under s. 95(2)(i).
- [103] I find the reasoning of Madam Justice Griffin in *Bressette v. Henderson*, 2013 BCSC 1661 helpful. *Bressette* was similar to the case at bar in that it involved a common law relationship that began and ended prior to the coming into force of the FLA. Griffin J. (as she then was) was reluctant to decide whether the FLA applied in these circumstances, an issue that has since been conclusively resolved in *Meservy and Newton* as cited in paragraph 12 above. However, Griffin J. went on to hold that even if the FLA applied, it would be "significantly unfair" within the meaning of s. 95(2) to disregard the reasonable expectations of the parties during the currency of a relationship that began and ended before the coming into force of the FLA's new property division regime.
- [104] The reasoning in *Bressette* is apt in the case at bar. During the relationship, each of the parties bought and sold property in their own name, largely using their own financial resources. Although there was some intermingling of finances for the purposes of covering living expenses, travel expenses, and even renovation costs with respect to some of the properties, the parties generally treated their respective properties as their own. For example, Ms. Ernst considered the Pebble Creek property to be hers, even though Mr. Carmichael lived there and helped her to renovate it. Similarly, she considered the Romanita Property to be hers, even though she acquired Romanita in the course of the relationship and intended for it to be used and enjoyed by Mr. Carmichael and his adult children.

[105] With regard to the Maple Street Property, Ms. Ernst testified to a belief that it was acquired as a family home or a family investment. However, Mr. Carmichael was listed as the sole owner of the property, the mortgage was in his name, and the vast majority of the funds used to acquire it came from him. I am satisfied that Mr. Carmichael's bona fide view at the time was that he was purchasing the Maple Street on his own. Ms. Ernst may not have shared that view, but the objective facts do not fit well with her assertion that Maple Street was intended to be a family asset. My conclusion is that the legitimate expectations of the parties was to keep their properties separate, despite the contributions each of them may have made to the other's properties in the course of the relationship. This factor weighs in favour of a finding of significant unfairness, tied specifically to the increase in value of the Maple Street Property between the date of separation and the date of trial.

(iv) Cumulative Effect

[106] I conclude that the cumulative effect of the considerations discussed above is that it would be significantly unfair to require an equal division of the Maple Street Property based on its fair market value as of the date of trial. This is an appropriate case for the Court to exercise its discretion under s. 87 of the FLA to avoid this significant unfairness.

[107] However, that is not the end of the matter. Recall Mr. Carmichael's position, recounted above, that if he received the entire benefit of the increase in value of the Maple Street Property from the date of separation onward, he would be content for Ms. Ernst to receive the entire benefit of the increase in value in the Romanita Property from the date of separation onward. This position is appropriate on the basis that "what is sauce for the goose is sauce for the gander".

(6) Conclusion as to Division of Property

[108] The net result is an order, under s. 87 of the FLA, that both the Maple Street Property and the Romanita Property are to be divided on the basis of their fair market value as of the date of separation. All other property is to be divided equally, based on its fair market value as of the date of trial. On this approach:

- a) The Maple Street Property is to be divided as follows. As of the date of separation, Maple Street had a market value of \$890,000, and an outstanding mortgage of \$599,693, such that the net equity in the property at that time was \$290,307. After the \$112,000 adjustment in Mr. Carmichael's favour on account of the excluded property claims, Ms. Ernst would be entitled to \$33,153. Mr. Carmichael's entitlement is calculated as the sum of \$257,154 (representing the remainder of the value of the property as of the date of separation) plus \$530,000 (representing the entire increase in the value of the property from the date of separation to the date of trial), for a total of \$787,154.
- b) The Romanita Property is to be divided as follows. Ms. Ernst's entitlement is calculated as the sum of \$133,000 (representing her excluded property contribution to the purchase price for Romanita), plus \$38,500 (representing half of the balance of the purchase price), plus

\$53,112 (representing the entire increase in the value of the Romanita Property, which was acquired a mere six weeks before the date of separation) for a total of \$224,612. Mr. Carmichael's entitlement is \$38,500 (representing half of the purchase price, after the deduction of Ms. Ernst's excluded property claim).

[109] All other aspects of the property division discussed above would remain the same. For the sake of completeness the outcome can be summarized as follows:

- a) The Romanita Property: Ms. Ernst's entitlement is \$224,612, and Mr. Carmichael's entitlement is \$38,500.
- b) The Pedregosa Properties: Mr. Carmichael's entitlement is \$53,800, and Ms. Ernst is entitled to the balance of the properties or their value (approximately \$100,000) as "excluded property".
- c) The Maple Street Property: Ms. Ernst's entitlement is \$33,153, and Mr. Carmichael's entitlement is \$787,154.
- d) The Loon Lake Property: Ms. Ernst's entitlement is \$8,867, and Mr. Carmichael's entitlement is \$62,875.
- e) Firefighter's Pension: Ms. Ernst is entitled to a portion of Mr. Carmichael's firefighter's pension as provided for under Part 6 of the FLA, based on a cohabitation date of 5 August 2009, and a separation date of 30 January 2013.
- f) Mr. Carmichael's RESP: Mr. Carmichael is entitled to a credit in the amount of \$5,000 on account of Ms. Ernst's appropriation Mr. Carmichael's RESP funds.

Spousal Support

[110] Ms. Ernst seeks spousal support on either a periodic or a lump sum basis. Mr. Carmichael disputes Ms. Ernst's entitlement to support, arguing that it was a very short relationship, both parties were mature and had established career paths and stable financial circumstances when the relationship began, and neither suffered any particular economic disadvantage as a result of the relationship or its breakdown.

[111] To briefly review the relevant facts:

- a) The parties were in a marriage like relationship for some three and one-half years. Both were mature, and had been previously married and divorced.
- b) Ms. Ernst is now 61 years old. She is retired and, as of the date of trial, had recently disposed of her primary residence. Since then, she has been staying at various locations, including her aunt's residence in Richmond, and an unoccupied condominium in Victoria owned by her parents. Her most recent financial statement indicates that she has pension income of \$5,112 per year, and annual expenses of \$32,228.

- c) Mr. Carmichael is now 58 years old. He still works full time as a Battalion Chief for the Surrey Fire Department. He lives in the main level of the Maple Street Property. He has to pay the mortgage, but he also received rental income from a basement tenant. His financial statement indicates annual income of \$143,867 (which does not include the rental income from the basement suite).
- [112] It is against this backdrop that I consider Ms. Ernst's claim for spousal support.
- [113] Section 161 of the FLA provides that, in considering entitlement to spousal support, the court must have regard to the objectives of: (a) recognizing economic advantages or disadvantages to a spouse arising from the relationship or its breakdown, (b) apportioning financial consequences arising from care of children, a consideration which has no application here, (c) relieving economic hardship arising from the breakdown of the relationship, and (d) promoting, insofar as is possible, economic self-sufficiency of each spouse within a reasonable period of time. This list of objectives is comparable to the objectives of spousal support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [114] The case law outlines three bases for spousal support: (i) compensatory entitlement, (ii) non-compensatory or needs-based entitlement, and (iii) contractual entitlement: *Lee v. Lee*, 2014 BCCA 383 at para. 25 [Lee]. Only the first two of these have any possible application in the case at bar.
- [115] Dealing firstly with compensatory support, Ms. Ernst has not established an entitlement to spousal support on this basis. This was a relationship of three and one-half years, involving spouses who were mature and financially stable when the relationship began. Ms. Ernst has not presented any evidence to show that she gave up, compromised, or significantly altered her career or her income earning potential as a result of the relationship or its breakdown.
- [116] Turning to non-compensatory entitlement, Ms. Ernst has a stronger case under this heading. Mr. Carmichael has a stable income from a well-paying job, and he will have a pension upon retirement. By contrast, Ms. Ernst has minimal income. Ms. Ernst is potentially employable, but she is now 61 years old. And while she will be entitled to a portion of Mr. Carmichael's pension, the amount will be small given the short duration of the relationship.
- [117] Mr. Carmichael says there is no reliable evidence as to Ms. Ernst's standard of living either before or after the breakdown of the relationship. He points out that even after separation, Ms. Ernst lived mortgage free in a five bedroom house in Mazatlan, and traveled back and forth between Mexico and Canada some 17 times. In cross-examination, Ms. Ernst had no explanation as to the source of a number of large deposits into her bank accounts. She also failed to disclose documents relevant to the assets and liabilities of her company, and failed to disclose that she had accepted an offer to sell one of her properties right before the trial. Mr. Carmichael says Ms. Ernst was not a credible witness, and suggests that she may well have assets or sources of income that are not listed in her financial statement. For all of these reasons, Mr. Carmichael says Ms. Ernst has not established a non-compensatory

entitlement to spousal support.

- [118] I have carefully considered the quality of Ms. Ernst's evidence concerning her current financial situation and standard of living. The non-disclosure of information related to 1067042 Alberta Ltd. was addressed by using the demonstrated value of the company's principal asset as a surrogate for the value of Ms. Ernst's shareholdings. The late disclosure of the accepted offer to sell Romanita was remedied prior to the conclusion of the trial. Although Ms. Ernst was unable to explain certain financial transactions involving large sums of money, in my view this goes more to the reliability of her testimony than to her credibility. Whatever the source of the funds in those transactions, I am not prepared to infer that at this point in time, Ms. Ernst has substantial undisclosed income or assets. While Ms. Ernst may have lived mortgage free and traveled frequently between Canada and Mexico, I would not expect that to continue in the wake of her sale of the Romanita Property.
- [119] Mr. Carmichael relies on Lee at para. 60-63 for the proposition that entitlement to support is not made out by either disparity in income, nor ability to pay, standing alone. Nevertheless, the majority judgment in Lee also makes it clear (at para. 55-59) that the concept of "need" must be interpreted broadly, and must take into account the relative standards of living of the spouses following the breakdown of the relationship. The majority went on to observe (at para. 66) that "transitional" awards of spousal support have been made in cases where one spouse experiences a notable decline in standard of living after the relationship.
- [120] In the case at bar, the totality of the evidence satisfies me that Ms. Ernst has diminished assets and limited income. Although six years have passed since the date of separation, Ms. Ernst has been in somewhat of a holding pattern due to the litigation, and the fact that much of her net worth was tied up in the Romanita Property. In any event, her diminished assets and limited means will undoubtedly impact upon her standard of living. Nevertheless, given the short duration of the relationship, the relative maturity and financial stability of the parties at the time it began, and the fact that Ms. Ernst still has considerable assets and is theoretically able to work, I would not consider Mr. Carmichael to have a significant obligation to provide Ms. Ernst with support on an ongoing basis. My conclusion is that a lump sum transitional support award of \$15,000 is appropriate.

Occupational Rent

- [121] Ms. Ernst also advanced a claim for occupational rent in respect of the Maple Street Property. It is true that since separation Mr. Carmichael has had exclusive occupancy of the Maple Street Property, which served as the principal residence of both parties during the relations. However, most of the purchase price for Maple Street came from funds that were excluded property in Mr. Carmichael's hands, and since separation Mr. Carmichael has borne sole responsibility for the carrying costs for the property (mortgage, property tax, insurance). Meanwhile, Ms. Ernst lived mortgage free in the Romanita Property until she sold it part way through 2018. In these circumstances, there is no merit in Ms. Ernst's

occupational rent claim, and I hereby dismiss it.

Costs

[122] If the parties are unable to agree on costs, they can file written submissions. Ms. Ernst may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within three weeks of the release of these reasons. Mr. Carmichael may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within two weeks of receiving Ms. Ernst's written submissions. Ms. Ernst may file a reply of two pages or less (plus any reply affidavit material) within one week of receiving the written submissions of Mr. Carmichael. If either party takes the view that submissions on costs cannot effectively be dealt with in writing, that party may, within the time limits set out above, submit a request to schedule a further appearance for oral submissions on costs.

"Riley J."

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Prepared on 29 October 2026 · Esheria