

CANADA / JUDGMENT

Ferreira v. Peloquin

2012 BCSC 1952

COURT

Supreme Court of British Columbia

DECIDED

21 December 2012

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2012 BCSC 1952 Ferreira v. Peloquin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ferreira v. Peloquin,

2012 BCSC 1952

Date: 20121221

Docket: E36380

Registry: New Westminster

Between:

Tito Jose Rodrigues Ferreira

Claimant

And

Diane Rolande Peloquin also known as

Diane Rolande Ferreira

Respondent

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for the Claimant:

R. Brajovic

Counsel for the Respondent:

L. Gagnon

Place and Date of Trial:

New Westminster, B.C.

March 5-9, 2012,

March 16, 2012

Submissions:

October 29, 2012

Place and Date of Judgment:

New Westminster, B.C.

December 21, 2012

I INTRODUCTION

- [1] The principal issues in this family law proceeding are:
- (a) whether the real property situated at 1736 East 63rd Avenue, Vancouver, BC (the "Vancouver Property") is a family asset. This property was acquired well before the parties' relationship and is in the sole name of the claimant, with members of his family having a beneficial interest therein;
 - (b) if the claimant's interest in the Vancouver Property is a family asset, its value and whether there should be re-apportionment in the claimant's favour;
 - (c) the respondent's entitlement to spousal support and, if so, the amount and duration; and
 - (d) whether certain automobiles are family assets.

II BACKGROUND

- [2] The claimant and respondent are 58 and 54 years old respectively. There is a dispute as to when they commenced cohabiting. The claimant says it was in late 2002; the respondent says it was in 2001. They were married on August 14, 2004. It was the claimant's first marriage and the respondent's third. They separated in July 2010.
- [3] The claimant is the eldest son in a Portuguese family which was originally comprised of his parents and eight siblings. The claimant's family background is relevant with respect to the acquisition of the Vancouver Property and the beneficial interests in that property.
- [4] The claimant's father passed away before the Vancouver Property was purchased. Prior to his father's passing, the claimant's parents lived together in a residence located on Argyle Street in Vancouver (the "Argyle Property"). In 1993, the Vancouver Property was purchased. The claimant's mother, Matilda Ferreira, contributed the net sale proceeds of the Argyle

Property to the acquisition of the Vancouver Property. The claimant and his elder sister, Delores, contributed the net sale proceeds of a property which they had owned jointly, located on Fleming Street in Vancouver (the "Fleming Property"), to the acquisition of the Vancouver Property. Delores is now 72 years old.

- [5] Legal title to the Vancouver Property has been in the claimant's name since it was purchased. It was his evidence his family members trusted him. Although title is in his name, the property was originally owned beneficially for himself, Mrs. Ferreira and Delores, each having an equal one-third share.
- [6] The claimant lived at the Vancouver Property until January 2004, when he and the respondent commenced residing in an apartment in Surrey. In 2003 he had spent a part of the year at the respondent's condominium in Surrey, B.C., but maintained his primary residence at the Vancouver Property. Between 1993 and 2004 various members of the claimant's family also lived at the Vancouver Property. This included his mother until her death in January 2011.
- [7] The Vancouver Property is currently occupied by the claimant, Delores and the claimant's nephew, Elvis. Delores has been on a disability pension since 1969. She has recently been diagnosed with Alzheimer's disease. Elvis, who is 32 years old, was disabled in a motor vehicle accident in 1992. He assists with Delores' care.
- [8] The claimant worked as an electrician until 2002. He was earning approximately \$40,000 per year. At that time, he became involved in Multi-Perils Inc. ("Multi-Perils"), which was a business that sold replacement cost on auto insurance. He had a partner by the name of Mr. Gooliaeff. Multi-Perils, over time, produced a considerable amount of income for the claimant. In 2006, his income was approximately \$89,500, in 2007, \$220,000 and in 2008, \$142,000.
- [9] In 2008, there was litigation between the claimant and Mr. Gooliaeff. In 2009, the claimant's income tax return showed a loss of approximately \$40,000 from Multi-Perils. There is an outstanding debt with respect to the Multi-Perils business in the amount of approximately \$94,000. This debt is secured by a mortgage registered against the Vancouver Property. The claimant's liability is approximately \$47,000. That is because Mr. Gooliaeff has assumed responsibility for the other 50% of this debt.
- [10] The parties met in 1998. They had a relationship at that time. The respondent then moved to Vancouver Island for approximately two years. According to the claimant, they started dating again in late 2001. In October or November 2002 they started a relationship when he moved into the respondent's condominium in Surrey, BC. They lived there until May 2003, when he moved back to the Vancouver Property. He testified that the respondent stayed in Surrey, although she would occasionally stay at the Vancouver Property since it was located close to her place of work, being the Seven Seas Fish Company ("Seven Seas").

- [11] The respondent's evidence was to the effect that the parties lived together as a couple from the fall of 2001 onwards, including a period of time in 2003 at the Vancouver Property. She also testified that after they were married, the claimant had referred to the Vancouver Property as being the couple's "safety net". He denies saying that.
- [12] In January 2004, the parties jointly rented a townhouse in North Delta. In June 2004, they purchased and moved into a residence located in Surrey (the "Matrimonial Home"). They were married in August 2004.
- [13] The Matrimonial Home was purchased for \$405,000. The Vancouver Property was used to secure a loan of \$280,000, which paid for part of the cost to acquire the Matrimonial Home. The balance of the purchase price was paid by a \$10,000 deposit, contributed by the claimant, and a \$160,000 payment, which was secured by a mortgage registered against the Matrimonial Home.
- [14] At about the time the parties were married, the respondent gave the claimant \$10,000. He had told her he needed some assistance to pay the mortgages. In addition, while the respondent was employed at Seven Seas, her salary was partially used to pay for the loans that were secured by the Vancouver Property and the Matrimonial Home.
- [15] The respondent graduated from high school in 1977. She then attended university for one semester. She worked as a secretary performing administrative work for some years. By 1995 she owned her own business. She performed administrative work for realtors. In 1998 she obtained her real estate agent's license. She worked as a realtor for approximately one year.
- [16] In 2001 the respondent commenced working with Seven Seas. Her responsibilities were aimed at streamlining the company's administrative procedures. Her 2001 line 150 income was approximately \$37,500. Her reported T4 income was \$52,000 in 2002, \$48,000 in 2003, in 1994 it was \$40,500 and in 2005 \$40,000. The respondent lost her employment with Seven Seas that year.
- [17] At the time of the marriage, the respondent had no significant assets. The claimant, however, possessed a one-third beneficial interest in the Vancouver Property.
- [18] From 2007 until 2009 the respondent was involved in a number of "at home" direct sale businesses, none of which were profitable. The claimant provided funds from time to time to assist her with these business ventures.
- [19] In 2009 the respondent, with the claimant's financial support, decided to open a coffee shop named Café Pelorina. It was located in Surrey BC. Opening the café involved incorporating a company and entering into a lease, which was guaranteed by the claimant. The claimant stated that the financial assistance he provided with respect to both the at-home businesses and Café Pelorina was in order "to help my wife out as best I could".
- [20] It took several months for the leasehold improvements at Café Pelorina to occur. Those improvements included the claimant performing some electrical work.

- [21] The costs associated with Café Pelorina turned out to be significantly higher than originally anticipated. In February 2010, the Women's Enterprise Centre provided a loan of \$120,000 for leasehold improvements to the Café. This loan was secured by the Vancouver Property.
- [22] The Café opened in March 2010. It had significant operating losses in its first few months of business. The claimant had been, and continued to be, advancing funds to the business until shortly before it closed in October 2010. At that time, the respondent moved to Gabriola Island.
- [23] In 2010, the claimant commenced working as an electrician. He earned \$40,000 in 2011. Due to a shortage of work, however, he has been unemployed in 2012.
- [24] The respondent is currently enrolled in a degree program in Political Studies at Vancouver Island University in Nanaimo BC. Her intention is to obtain a master's degree. This will take four and a half years. Her ultimate career goal is to become a university professor or to work for the United Nations. She also views writing as a potential career choice. She has not worked since Café Pelorina closed.
- [25] At the time the parties separated, the Vancouver Property was encumbered by an umbrella mortgage which secured the following:
- credit line number 1: this credit line was used by the claimant as his operating account for family expenses, including mortgage payments, credit card payments and other pre-authorized payments. It was also used to pay for legal expenses incurred with respect to the Multi-Perils litigation. At the time of separation the amount owing was approximately \$45,000. This credit line was subsequently paid off out of the net sale proceeds of the Matrimonial Home;
 - Vancity mortgage number 2: this related to the business loan taken in April 2001 to acquire Multi-Perils. As at January 2012, the amount owing was approximately \$95,000. As noted above, 50% of this amount is the claimant's responsibility;
 - credit line number 3: this related to a \$15,000 loan which was used, essentially, to increase the credit line number 1 account when it had reached its borrowing limit. This occurred prior to the parties' separation. This credit line was also paid out of the net sale proceeds of the Matrimonial Home;
 - Vancity mortgage number 4: as at January 16, 2012, the amount outstanding was approximately \$176,500. This represents the remaining balance of approximately \$280,000 which was borrowed to purchase the Matrimonial Home in June 2004.
- [26] When the Matrimonial Home sold, \$90,000 remained after the payment of all adjustments and encumbrances. By court order the funds were paid to the claimant to be paid on account of Vancity mortgage number 4. Pursuant to the terms of the mortgage, \$26,200 was applied to the outstanding principal. The balance of funds, being \$63,800, was used by the claimant to pay down credit line number 1 and credit line number 3. The respondent seeks a compensation payment of \$10,000 on the basis that the claimant has benefited from the full

amount applied to these credit lines in order to pay for some of his personal expenses incurred since the date of separation.

III THE ISSUES TO BE DETERMINED

A. Divorce

[27] Subject to section 12 of the Divorce Act, R.S.C.1985, c.3 (2d Supp.), there will be an order that the parties are divorced.

B. The Claimant's Union Pension

[28] The parties agree that the claimant's pension through his union should be divided in accordance with Part 6 of the Family Relations Act, R.S.B.C. 1996, c.128, as the date of the section 57 declaration.

C. The Vancouver Property

(i) Is the Vancouver Property a Family Asset?

[29] The issues of family property and whether there should be re-apportionment is to be considered before that of spousal support: see *Narayan v. Narayan*, 2006 BCCA 561 at para. 33.

[30] Family assets are defined in section 58 of the Family Relations Act. The definition includes:

58 (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

[31] The claimant's position is that the Vancouver Property is not a family asset. He alleges the respondent made no contribution to it. Furthermore, it was acquired well before the marriage. In addition, the parties did not live in the Vancouver Property during their relationship. At most, the respondent spent nights there on occasion since it was located close to her place of work.

[32] In any event, the claimant says the Vancouver Property was owned by the claimant, his mother and Delores for several years prior to his relationship with the respondent. Since its acquisition in 1993, virtually all of the Ferreira family had lived in and/or contributed in some way to the Vancouver Property.

[33] The respondent's position is that the Vancouver Property satisfies the definition in section 58(2) of the Family Relations Act because it was used for family purposes, primarily as a financial resource. This submission is based, in large part, on the fact that when the parties purchased the Matrimonial Home, they used the claimant's equity in the Vancouver Property to do so. In addition, funds from credit line number 1 were used to buy furnishings for the Matrimonial Home. This line of credit, which was secured by a mortgage on the Vancouver Property, was later converted into another mortgage, being mortgage number 4.

- [34] The respondent submits that the principal owing on mortgage number 4 at the time of its conversion was \$275,000. The claimant made the bi-weekly payments on the mortgage during the marriage. The principal owing had been reduced to approximately \$176,500 as at January 16, 2012. This took into account a lump sum payment of \$26,200 on July 22, 2011, from the proceeds of the sale of the Matrimonial Home.
- [35] The respondent also relies on the evidence that when the costs of establishing Café Pelorina far exceeded what had been originally anticipated, the "parties again resorted to the Vancouver Property using its equity to obtain a \$120,000 loan from the Women's Enterprise Center".
- [36] In *Smith v. Smith*, 2008 BCCA 245, Newbury J.A. summarized the applicable legal principles as follows:
- [20] In *Evetts v. Evetts* (1996) 85 BCCA 19, the majority of this court dealt with a slightly different question - whether the "occasional" use of income from a capital asset for family purposes made the asset itself a family asset. Lambert J.A. for the majority concluded that the distinction between income and capital was not itself determinative and stated:

The use of the asset to provide financial security and protection against erosion of income or other family misadventure in the future may constitute a present ordinary use for a family purpose (*Tezcan v. Tezcan*; *Folk v. Folk*). The fact that the words "ordinarily used ... for a family purpose" are the governing words in the statute means that the use pattern must be examined in each case to determine whether, in the ordinary course, the present use commitment to meet a present or future need includes a use for a family purpose. Ordinary use for a family purpose is not inconsistent with ordinary use for other purposes. [At para. 23; emphasis added.]

- [21] The "use pattern" of the Cornwall property or the Cornwall shares in the case at bar does not lend itself easily to analysis. Certainly the family did not reside in the building or use the rental income to defray family expenses. But as we have seen, when Dr. and Mrs. Smith wanted to build a new house, they increased an existing line of credit that was secured by mortgage against the Cornwall property. Dr. Smith testified that a portion of CML's debt relating to the house was paid off, after which he was able to write off the entire mortgage interest expense for tax purposes. He did not say over what period this had occurred, but it would seem that it was not only a temporary or 'bridge' arrangement. (Of course, the arrangement meant that the house was not mortgaged - a fact that was obviously beneficial to Ms. Smith as well as Dr. Smith.) As well, the corporate vehicle of CML was evidently used to hold two insurance policies, one for personal disability for Dr. Smith and one on his life, under which Ms. Smith was the beneficiary. Dr. Smith contemplated that in the event of his death, she would have been able to pay off the debt, or most of it, on the Cornwall property.
- [22] On all the evidence, counsel for Ms. Smith submits that the trial judge committed a palpable error of fact in finding that the Cornwall property was "never used for a family purpose", and that in fact, it was ordinarily used for family purposes. In light of the 'mixed' borrowing for family and business purposes that was secured against CML's main asset, the use of the

corporate vehicle to hold personal insurance policies, and the onus on Dr. Smith under s.60 of the Act to show that the property was not ordinarily used for family purposes (see *Rytir v. Rytir* (1987) 11 R.F.L. (3d) 239 at 241), I agree. Applying the definition at s. 58(3)(a) of the Act, I would allow the appeal to the extent of declaring that Dr. Smith's shares in CML do qualify as family assets for purposes of the Family Relations Act. (The value of those shares was contested, and may lie between \$1,241,000 and \$1,663,000.)

- [37] In *Wang v. Poon*, 2008 BCCA 442, Prowse J.A. having cited and placed "particular emphasis" on the passage from *Evetts* referred to in *Smith* above, stated:
- [19] Mr. Poon and Ms. Wang relied on the HSBC accounts to provide them with the bulk of their income for family purposes. The fact that Mr. Poon also used those accounts for other purposes, including payment of his personal expenses and to pay the deposits for the Yaletown condominiums, does not detract from its principal use as a vehicle to pay family expenses over the seven years of marriage. Those accounts were, to adopt the colourful analogy of Chief Justice McEachern in *Starko v. Starko*, [1986] B.C.J. No. 2341 (S.C.), at para. 15: "a cow to be milked, rather than a heifer to be bred."
- [38] *Devine v. Devine*, 2012 BCCA 509, is the most recent consideration of this issue. Kirkpatrick J.A., for the Court, having reviewed certain of the leading cases, including *Evetts*, concluded:
- [39] The onus is on the spouse seeking to oppose a claim under s. 56 to prove that the property in question is not ordinarily used for a family purpose: Family Relations Act, s. 60. In my opinion, the appellant has met this onus: the use of dividends from 812Co on two occasions during the eight year marriage cannot reasonably be said to constitute "ordinary use" as contemplated by s. 58(2) of the Family Relations Act.
- [39] In applying these principles to the facts of this case, I conclude that the claimant's interest in the Vancouver Property was used for a family purpose and accordingly is a family asset. In particular, the claimant permitted the Vancouver Property, which was registered solely in his name and in which he owned a significant beneficial interest, to be used to acquire the Matrimonial Home.
- [40] The claimant, furthermore, allowed the equity in the Vancouver Property to be used to acquire financing for Café Pelorina. The Vancouver Property also secured a line of credit from which funds were drawn to invest in or cover expenses not only for Café Pelorina, but also for the various direct sales home businesses in which the respondent had been engaged during the course of the marriage. In so far as Café Pelorina was concerned, the claimant testified "it was going to be a big asset for us". The respondent did acknowledge on cross-examination that the claimant "did not want to give [her] the money from the very beginning".
- [41] The use of the Vancouver Property was not an "occasional" or "casual" use, but rather one which was "ordinary" in the sense it was "customary", *Devine v. Devine*, at paras. 35 to 39.

(ii) The Value of the Claimant's Interest in the Vancouver Property and His Claim for Re-apportionment

- [42] The claimant's position is that he has had a one-third beneficial interest in the Vancouver Property since it was acquired, Delores has a one-third interest as does Mrs. Ferreira's estate. As one of eight of Mrs. Ferreira's estate's beneficiaries, he has an additional interest of approximately 4%.
- [43] The respondent submits that Mrs. Ferreira's contribution to the Vancouver Property amounted to 31% of the total cost. The remaining funds came from the sale of the Fleming Property, which had been jointly owned by the claimant and Delores.
- [44] The respondent's position is that the claimant and Delores own 69% of the Vancouver Property. That share was increased to 76.75% when Mrs. Ferreira's share of 31% was divided between the eight beneficiaries of her estate.
- [45] The respondent submits that the claimant purchased the shares of three of his siblings in the Vancouver Property in 2007 by paying them, in different ways, the sum of \$20,000 each. The respondent also takes the position that Delores' share was diluted over time. This submission is made on the basis that the claimant testified he has managed Delores' funds. The respondent says it was simply not possible for Delores, with the income she had received over the years, to be contributing to the maintenance and mortgage payments in the manner suggested by the claimant. In the result, the respondent submits the claimant's interest in the Vancouver Property is in fact approximately 62.5%.
- [46] The claimant asserts that the funds he paid to his siblings were on account towards the purchase of their respective interests. Nothing has yet been finalized. In so far as Delores' interest is concerned, it was always intended she be a one-third beneficial owner. In fact, his position is that when the Vancouver Property was acquired, he, Delores and his mother each contributed approximately one-third of the cost. This was a family decision to provide a home for various members of the Ferreira family from time to time, including Mrs. Ferreira while she was alive.
- [47] When I consider all the evidence on this issue, I make the following findings of fact:
- (a) when the Vancouver Property was acquired, the claimant, Delores and his mother each contributed approximately one-third of the cost. Mrs. Ferreira contributed approximately \$240,000. The claimant and Delores contributed the net purchase proceeds of the Fleming Street Property (\$348,000), \$20,000 in cash and also borrowed \$120,000, for a total of approximately \$488,000, or \$244,000 each;
 - (b) the intention at all times was for the claimant, Delores and Mrs. Ferreira to each have a one-third interest in the Vancouver Property;

- (c) although the claimant may have made certain payments on account to some of his siblings with respect to their interests in the Vancouver Property, the total compensation has been neither finalized nor paid;
- (d) since the Vancouver Property was acquired, Delores has made financial contributions to the property. These contributions include payments on account of the mortgages registered against the property from time to time in relation to its acquisition;
- (e) it may well be that Delores' contributions over the years have been less than the claimant's, but this does not dilute the one-third interest she initially acquired when the property was purchased. The most that can be said is that Dolores may owe certain funds to the claimant, should he ever seek an accounting. That is highly unlikely in light of the fact that the Vancouver Property has been used over the years for the overall benefit of the Ferreira family;
- (f) accordingly, the claimant's interest in the Vancouver Property is 37.5%, being his initial one-third interest plus the approximately 4% interest he has acquired in his capacity as one of Mrs. Ferreira's children.

[48] The only evidence of value of the Vancouver Property was a "drive by" appraisal conducted on October 2, 2011. That appraised value was \$1.25 million.

[49] In light of my conclusion that the claimant has a 37.5% interest in the Vancouver Property, the value of his interest is \$468,750. It is the date of the triggering event at which the Court must assess the determination and division of assets. In terms of valuing those assets, however, the general rule is that this should be the date of trial unless there is reason to depart from that rule: *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.).

[50] Joyce J., in *N.M.M. v. N.S.M.*, 2004 BCSC 346, at para. 76, summarized the principles which apply to the division of family assets:

1. Because it is the triggering event that gives each spouse a prima facie equal interest as tenants in common in each family asset the circumstances as they exist at that date are to be considered in determining whether the prima facie equal division would be unfair.
2. Generally speaking, the spouses will share any increase or decrease in value of a family asset that occurs after the triggering event because their interests in the asset have vested.
3. Valuation at the date of trial is generally appropriate when considering the mechanism under s.66 to achieve the division of family assets, for example by dividing the assets in species by vesting the various assets in the names of the parties or by vesting an asset in the name of one party in exchange for an order compensating the other for the divested interest.

4. While generally the appropriate date for valuing family assets will be the trial date it appears there is discretion to fix another date, not earlier than the triggering event, if that is necessary in order to achieve fairness.
 5. Discretion may exist to reapportion assets or to vest title in one spouse while awarding the other compensation taking into account events following the triggering event where, for example, the conduct of one party alone has caused the asset to increase or decrease in value and it would create unfairness and injustice if those events were ignored.
 6. Where it is established that one spouse has disposed of a family asset or caused it to decrease significantly in value it is open to the court to order compensation for that loss. Such a compensation order will be based on the loss in value and will necessarily involve determining the value of the asset prior to the loss.
- [51] From the amount of \$468,750, in my view, should be deducted the outstanding amount secured by mortgage number 4, of \$176,500 being the parties' joint obligation in relation to the purchase of the matrimonial home and 50% of mortgage number 2, which secured the amount invested in Multi-Perils, being \$47,500. The income earned by Multi-Perils benefitted both parties. This would leave a net value of the claimant's interest in the matrimonial home insofar as the respondent's claim is concerned of approximately \$244,750.
- [52] Regarding reapportionment, the court is empowered to reapportion either individual family assets or all family assets if it finds that equal division would be unfair having regard to the factors listed in s. 65(1)(a) through (f) of the Family Relations Act. The factors are:
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.
- [53] Under section 65(1)(f), the court can take into account the pre-marriage cohabitation of the parties: *Piskor v. Piskor* (1981), 27 B.C.L.R. 231 at 233 (C.A.), *Sangster v. Sangster* (1984), 55 B.C.L.R. 251 at 256 (C.A.).
- [54] In this case, the factors which apply under section 65(1) are (a), (c), (d), (e), and (f).
- [55] Section 65(1)(f) has been described as the "basket clause" (*Piskor* at 233):

Under this heading one must consider the substance of the relationship and the respective contributions of the parties, including their respective contributions during the period... of cohabitation prior to the marriage.

- [56] In considering whether re-apportionment in the claimant's favor is appropriate in this case, I view the following factors to be relevant:
- (a) on all the evidence I find that the parties commenced cohabiting at some point in 2003. Accordingly this was a short to medium length relationship/marriage of approximately seven to seven and a half years;
 - (b) the Vancouver Property was purchased in 1993, well before the relationship started and the marriage itself in August 2004;
 - (c) a portion, albeit a small one, of the claimant's interest in the Vancouver Property comes by way of inheritance;
 - (d) the claimant's interest in the Vancouver Property was acquired, preserved and maintained almost entirely through his financial efforts;
 - (e) the claimant's interest in the Vancouver Property is encumbered by the amounts which remain outstanding on the mortgages referred to above. As at January 2012 these totalled approximately \$271,000, although only \$47,500 of the \$94,500 mortgage relating to the Multi-Perils matter is the claimant's responsibility. These amounts were incurred predominantly during the time the parties were in their relationship/marriage. They were used to acquire the Matrimonial Home and pay for the parties' living expenses and to assist both of them in their business ventures. Although the respondent did contribute some funds during this timeframe they were significantly less than the claimant's;
 - (f) although I have taken these amounts into consideration when valuing the claimant's interest in the Vancouver Property in relation to the respondent's claim to an interest in that asset, the reality is that the claimant will be making interest payments on that debt until it is paid.
 - (g) the claimant liquidated over \$80,000 of his RRSP's, which resulted in approximately \$63,000 being applied to servicing the family debt obligations and advancing funds for Café Pelorina;
 - (h) in her written submissions, the respondent acknowledges that the outstanding balance on credit line number 1 was a family debt for which both parties were responsible. She takes issue, however, with the balance of the net sale proceeds of the Matrimonial Home, \$63,800, being used to pay down credit line number 1 and credit line number 3. She submits the claimant used these funds to pay down his expenses and seeks a compensation order in the amount of \$10,000. I disagree. Notwithstanding the reduction of these credit lines, the claimant is still left with approximately \$223,500 of family debt which is secured by the Vancouver Property. Fifty per cent of that debt is the respondent's responsibility but it will be the claimant who will have to pay it, since the respondent has no assets and the debt is secured by the Vancouver Property;

- (i) the claimant, for his part, also seeks a compensation order with respect to the fact that he has personal liability for the family debt which will have to be paid by him, since it is secured by the Vancouver Property;
 - (j) although I have found the Vancouver Property was a family asset, the basis for this finding was its use by the claimant as a source of financing for the parties living expenses and business ventures during the marriage. To that extent, both parties have already benefitted from its use;
 - (k) the needs of each spouse to become or remain economically independent and self-sufficient: the claimant is 57 years old, the respondent 54. Neither has a significant working life remaining. Both are currently unemployed. They both, however, do have the ability to earn an income in the future. For the claimant, that may arise if economic circumstances improve and work becomes available to him as an electrician. That is also the case with the respondent for the reasons I shall outline below. The claimant's ability to become economically self-sufficient is, however, compromised by the significant personal liabilities he carries in relation to the family debts referred to above.
- [57] The authorities which consider the issue of re-apportionment are highly fact specific. A summary of certain cases in which re-apportionment has been ordered is found in *Yin v. Yin*, 2011 BCSC 1301 at paras. 32-36.
- [58] In this case the respondent concedes there should be some re-apportionment in the claimant's favor. She submits 60% to the claimant and 40% to her would be appropriate.
- [59] The claimant's position is that if the Vancouver Property were found to be a family asset, then there should be re-apportionment. No specific submission was made, however, as to the appropriate percentage.
- [60] In applying the applicable legal principles to the factors I have referred to above, I order a re-apportionment of 80% to the claimant and 20% to the respondent. Accordingly, there will be an order that the claimant pay to the respondent 20% of \$244,750, being \$48,950.
- [61] Since I have considered the parties' respective claims for compensation orders within the context of the "basket clause" provision of the Family Relations Act, being s. 65(1)(g), it follows that both these claims are dismissed.

D. Spousal Support

- [62] The respondent seeks spousal support on both the compensatory and non-compensatory grounds under the Divorce Act. Her position is that a monthly amount of \$600 to \$800 for a period of four to eight years is appropriate. The claimant's position is that there is no entitlement to spousal support.

- [63] I have considered *Chutter v. Chutter*, 2008 BCCA 507, at paragraphs 45 to 61 which provides a helpful summary of the relevant statutory provisions and case authorities which pertain to compensatory and non-compensatory spousal support.
- [64] In applying these principles, it is my view the respondent has not demonstrated entitlement to compensatory spousal support. Specifically, it cannot be said she sustained an economic disadvantage from the marriage. In fact, the exact opposite is the case.
- [65] What the evidence does indicate is that during the relationship, it was the claimant who conferred significant financial benefits on the respondent. Nor was there a significant economic advantage to the claimant arising from the marriage.
- [66] As noted in *Chutter*, where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support. Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown.
- [67] In my view, this case falls very close to the line as to whether entitlement on a non-compensatory basis has been established by the respondent.
- [68] As at the time of trial, the claimant was an unemployed electrician. If employed on a regular basis, his historical earnings indicate a capacity to earn an annual income of \$40,000 - \$60,000.
- [69] For her part, the respondent has worked at a variety of occupations. These include an administrator at a real estate office, a realtor and an administrator at a wholesale fish sales company for several years. Her historical earning capacity was \$40,000 to \$50,000 per year.
- [70] Since the failure of Café Pelorina, the respondent has moved to Gabriola Island. Her attempts to find work have been restricted to conducting a job match on a website. She has not provided any evidence about applying for specific job opportunities or contacting employment agencies, be it in British Columbia or elsewhere.
- [71] She is currently enrolled in an extended program of university studies. It is not her intention to seek employment during this timeframe. I agree with the claimant's submission that the respondent's course of action in so far as securing employment or retraining is concerned "expresses a naive expectation that she will, upon achieving her Master's Degree be able to get work as a professor or with the United Nations".
- [72] As was noted in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10, and referred to in *Chutter* at paragraph 55, "[n]eeds is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted".

- [73] What does separate the claimant's means and needs on the one hand from those of the respondent is his interest in the Vancouver Property. It provides a place for him to live. In addition, he has some remaining equity in that property which does provide him with the ability to access funds, if necessary, in order to meet his ongoing obligations and living expenses while he is not working.
- [74] Under the circumstances, I have concluded that a modest lump sum spousal support payment in the amount of \$7,500 is appropriate. Its purpose is to provide the respondent with some funds to make the ongoing transition to her non-married status.

E. Motor Vehicles

- [75] The parties each own a 2002 Jeep Cherokee automobile. The claimant also owns two hobby cars, being a 1997 and 1998 Mustang. Both were acquired prior to the marriage.
- [76] The respondent claims the Mustangs are family assets. I disagree. I accept the claimant's evidence that these vehicles were only occasionally used with the respondent. They were not used as part of the parties' ordinary or customary lifestyle: *Elsom v. Elsom* (1982), 35 B.C.L.R. 293 at 306-307, *aff'd.* (1983), 49 B.C.L.R. 297 (C.A.).

IV CONCLUSIONS

- [77] The claimant will pay the respondent the sum of \$48,950 for her interest in the Vancouver Property and \$7,500 as lump sum spousal support for a total of \$56,450.

V COSTS

- [78] There has been divided success. Accordingly, each party is responsible for their respective costs.

"Abrioux J."

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