
CANADA / JUDGMENT

Fox v. Fox

2011 BCSC 72

COURT

Supreme Court of British Columbia

DECIDED

24 January 2011

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2011 BCSC 72 Fox v. Fox

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fox v. Fox,

2011 BCSC 72

Date: 20110124

Docket: 42746

Registry: Kamloops

Between:

Victoria Michelle Fox

Plaintiff

And

Clinton Heath Fox

Defendant

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Victoria Michelle Fox appeared on her own behalf:

Clinton Heath Fox appeared on his own behalf:

Place and Date of Trial:

Kamloops, B.C.

October 18 & December 15, 2010

Place and Date of Judgment:

Kamloops, B.C.

January 24, 2011

[1] Before the Court are two applications: one by the claimant, Victoria Michelle Fox, and one by the respondent, Clinton Heath Fox. Mrs. Fox seeks a divorce, division of her's and Mr. Fox's remaining assets, child support, arrears of child support, a division of the time that each of them spend with their children, and costs.

[2] Mr. Fox seeks joint guardianship and joint custody (shared custody) of his and Mrs. Fox's children, and:

That the remainder of the household assets be distributed as per the court order dated April 9/2009 as Victoria has NOT yet provided me with ALL of these items as she was ordered to do so.

[3] The order of April 9, 2010 does not distribute household assets. However, the order of Master Bishop granted October 7, 2009 makes reference to household assets.

[4] Mr. Fox also seeks that his obligation to pay arrears of child support be cancelled.

[5] Mr. Fox seeks reapportionment of the sale proceeds of the Sylvan Lake rental residence ("rental residence").

Is this Action Suitable for Summary Trial?

[6] This action was heard by summary trial over a period of two days. Mr. Fox, in his affidavit sworn December 6, 2010, states the following:

22 Your Ladyship, we disagree on the facts and evidence. If you are unable to sort this out, today it should be sorted out at trial. This is [premature]! She wants pieces of the pie to be [carved] out now, when the pie should be carved (if it's not already carved and eaten); it should be decided at a trial based on evidence.

[7] This was not pursued by Mr. Fox in his oral submissions. I have concluded that this matter is suitable for disposition under Rule 11-3 of the Supreme Court Family Rules (the "Rules") as it will become evident in this judgment. Further, the issues involved require:

Object

- (1) The object of these Supreme Court Family Rules is to
 - (a) help parties resolve the legal issues in a family law case fairly and in a way that will
 - (i) take into account the impact that the conduct of the family law case may have on a child, and

- (ii) minimize conflict and promote cooperation between the parties, and
- (b) secure the just, speedy and inexpensive determination of every family law case on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a family law case on its merits includes, so far as is practicable, conducting the family law case in ways that are proportionate to
 - (a) the interests of any child affected,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the family law case.
- [8] A summary trial in this case meets the objectives of proportionality of the Rules.
- [9] Mr. and Mrs. Fox both agree to joint custody and joint guardianship of their children. They disagree as to when each of them will have the children.
- [10] The amount of money involved is not large. There are registered retirement savings plans ("RRSP") in each of Mr. and Mrs. Fox's names. Before the withdrawal of funds from each of their plans, the total amount of Mr. and Mrs. Fox's RRSPs was approximately \$46,000.00. There is, held in trust in Alberta, the sum of a little over \$30,000.00 to be distributed. This is not a complex family law case.
- [11] When this matter first came before me, it was clear after hearing submissions that both Mrs. Fox and Mr. Fox expected to be divorced. There was no evidence at that time on which I could grant a divorce. Further, I explained to them that some of the relief sought required a divorce to be granted before corollary relief could be considered. Mrs. Fox has now provided that evidence by affidavit for purposes of seeking a divorce.
- [12] In the absence of Mrs. Fox, Mr. Fox sought and was granted short leave on December 7, 2010 to file his application and affidavit to be heard on or about December 13, 2010, which was a continuation of this summary trial started on October 18, 2010.
- [13] As a result, Mrs. Fox did not have an opportunity to respond to Mr. Fox's application and affidavit.
- [14] I suggested to Mrs. Fox, and she agreed, that she respond to new matters raised in Mr. Fox's affidavit by giving sworn oral evidence. In addition, I asked Mrs. Fox questions about new matters raised by Mr. Fox. I did not permit cross-examination.
- [15] At the end of the summary trial, I dealt with the children's time between their parents during the Christmas school vacation.

[16] On December 20, 2010, Mr. Fox delivered to the court registry a letter addressed to me, and attached to the letter were re-assessments for his income tax returns for the years 2006 and 2007. Mr. Fox claimed that I required these documents. I had not asked for them, but Mr. Fox did state on October 18, 2010 that the Canada Revenue Agency ("CRA") had re-assessed him \$32,000.00, but he expected to reduce this amount to \$0. As a result, I asked that both Mr. Fox and Mrs. Fox appear before me by telephone. I ordered that Mr. Fox prepare an affidavit and provide to the court information that was within his own knowledge as to his CRA obligations, together with all assessments, re-assessments and income tax returns. This affidavit was to be filed and delivered to Mrs. Fox by December 31, 2010. Mrs. Fox could respond to the affidavit by January 10, 2011. She could provide further details of her CRA obligations as referred to her in her existing affidavits. Those affidavits have been filed.

Background

- [17] Mrs. Fox is aged 37; Mr. Fox is aged 35. They were married on June 9, 2006 and lived together in a marriage-like relationship since November of 1996. They are the parents of two young children; a girl, Trystan Frances Fox, born April 28, 2005, and a boy, Talin James Fox, born January 9, 2007.
- [18] Mr. and Mrs. Fox separated on January 20, 2009. They continued to reside in the family home located at Blind Bay, British Columbia until October 7, 2009, when Mr. Fox was ordered from the matrimonial home by Master Bishop.
- [19] Since February of 2008, Mrs. Fox operated a daycare business in the Blind Bay home. On May 28, 2010, Mrs. Fox moved to Kamloops where she established another daycare business in a rented residence.
- [20] On October 7, 2009, Master Bishop ordered that Mr. Fox was restrained from contacting Mrs. Fox except for arranging access for the children. He was further restrained from entering any residence in which Mrs. Fox resided.
- [21] It was alleged that Mr. Fox assaulted Mrs. Fox's mother. As a result, Mr. Fox was placed on a peace bond, which at the time of this summary trial, had expired.
- [22] Mr. Fox has a lengthy resume. His most recent employment was from June 2010 to September 2010 at car dealerships in Kamloops. He is presently receiving employment insurance. Mr. Fox worked as a financial consultant for two years in Salmon Arm from July 2007 to July 2009. From 2005 to 2007, Mr. Fox was employed in the oil patch in Alberta and British Columbia.
- [23] Mr. Fox has training as a teacher and holds a Bachelor of Education. He is experienced in teaching a wide variety of topics which are set out in his resume.

[24] He has numerous certifications also listed in his resume. These include a license to sell motor vehicles and mutual funds. He holds various certificates in education from: BCIT, Aspen Education and the University College of the Cariboo, as well as educational specialities in digital arts, design and fine arts. He also has occupational certificates in driver's training, level I first aid, and transportation of dangerous goods.

Divorce

[25] The evidence establishes the marriage, the grounds for divorce, and the absence of any bars. A divorce is granted.

Household Items

[26] The respondent claimed that he had not received any household items that Master Bishop ordered on October 7, 2009:

8. the plaintiff shall have the sleigh bed with attachments and the defendant shall have the king sized bed, otherwise, the parties shall attempt to work out between themselves the division of furniture and personal possessions, with liberty to apply to this court for direction;

[27] In response, Mrs. Fox presented a three-page list of items that she and Mr. Fox had divided. This list was lengthy and detailed.

[28] During the break, I asked Mr. Fox to make a list of the things that he wanted. At the end of the hearing, I divided some of those items. That disposes of the household items. One of the items on the list is the children's passports which I will deal with later on in these reasons.

Division of Family Assets

[29] Some of the family assets have been sold and the proceeds divided. I will review the disposition of those assets and those not yet divided. A s. 57 declaration was granted under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] on September 15, 2009.

Family Home

[30] Mrs. Fox applied for and was successful in obtaining an order to sell the family home located at Blind Bay, British Columbia. Mr. Fox opposed its sale.

[31] Mrs. Fox, from October 2009 to the sale of the family home, was carrying the debt on the family home, which included two lines of credit which were secured by a mortgage registered against the family home, insurance on the family home and the rental property, as well as an overdraft on a joint bank account and Visa charge accounts. Upon the sale of the family home, Mrs. Fox paid one-half of Mr. Fox's judgment for legal fees which had been secured against Mr. Fox's interest in the family home. Mrs. Fox has provided proof of these payments. I accept her evidence. Mrs. Fox makes it clear that she is seeking only one-half of the remaining family assets.

- [32] The net proceeds of the family home, after the payment of all debt, was divided equally between Mr. and Mrs. Fox. Mrs. Fox seeks reimbursement of one-half of Mr. Fox's legal bill, which is \$944.97. Mr. Fox threatened to hold up the sale of the family home if Mrs. Fox did not agree to pay one-half of the cost of the judgment, which was for his legal bill. I order that Mr. Fox reimburse and pay to Mrs. Fox the sum of \$944.97.

Boat

- [33] Mr. Fox sold the Bayliner boat. Mr. Fox told Mrs. Fox he had sold it for \$4,000.00. Mr. Fox did not provide Mrs. Fox proof of the sale in this amount. Of this amount, Mrs. Fox received \$900.00, with Mr. Fox deducting the remaining amount of \$1,100.00 due to her as her share of the taxes due on the Sylvan Lake rental property.

Registered Retirement Savings Plans

- [34] At the time the parties separated they each held an RRSP with Investors Group. Mr. Fox's account had total value of \$40,779.02. Mrs. Fox's RRSP total value was \$5,426.18. I am using, in the case of Mr. Fox, a statement dated from July 1, 2009 to September 30, 2009, and in the case of Mrs. Fox, a statement dated October 1, 2009 to December 31, 2009. This is the only evidence I have close to their separation and the time of Mr. Fox's departure from the family home. For purposes of the division of the RRSPs, I have ignored the withdrawals made by Mr. and Mrs. Fox for purposes of calculating an equal division.
- [35] Mrs. Fox sought and was granted permission by the Court to withdraw and did withdraw \$5,000.00 from her RRSP. Mr. Fox disputed this application.
- [36] Mr. Fox, despite an order restraining the disposal of assets, withdrew \$11,169.76 (it may be that the withdrawal was made before the order was made).
- [37] Mr. Fox did not dispute that the RRSPs were family assets.
- [38] An RRSP is a family asset by definition under the FRA:
- 58 (1) Subject to section 59, this section defines family asset for the purposes of this Act.
- (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.
- (3) Without restricting subsection (2), the definition of family asset includes the following:
- ...
- (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
- [39] There is no evidence before me as to when Mr. and Mrs. Fox made his or her respective contributions to their plans.

- [40] Neither Mr. or Mrs. Fox sought reapportionment of any portion of their RRSPs. The total of Mr. and Mrs. Fox's RRSPs, using the 2009 statements that I have referred to, is \$46,205.20.
- [41] Mr. Fox shall transfer from his RRSP to an RRSP in the name of Mrs. Fox the sum of \$17,676.42 ($\$40,779.02 + \$5,426.18 = \$46,205.20 \div 2 = \$23,102.60$, less $\$5,426.18 = \$17,676.42$). This transfer is to occur as a spousal roll over pursuant to the Income Tax Act, R.S.B.C. 1996, c. 215.

Sale Proceeds of the Rental Property

- [42] Mr. and Mrs. Fox were the registered owners of the rental property located at Sylvan Lake, Alberta, which was rented to tenants at the time of their separation. Mrs. Fox's evidence is that the rent took care of the mortgage and all expenses of the units except the water bill, which was about \$120.00 per quarter.
- [43] When Mr. and Mrs. Fox met in September of 1996, Mr. Fox had just purchased a residence at Pinantan Lake, near Kamloops, British Columbia. Mr. Fox purchased the property for \$92,000.00. The down-payment was approximately \$6,000.00 and the property was mortgaged for \$87,400.00. In November of 2006, Mr. and Mrs. Fox commenced living together at the Pinantan Lake property. At that time, Mr. and Mrs. Fox shared the expenses of the Pinantan Lake property equally, including the payment of the mortgage.
- [44] The following year, Mr. and Mrs. Fox moved to Vancouver. The Pinantan Lake property remained rented to tenants for a monthly amount of between \$600.00 and \$700.00 per month, until it was sold in 2006.
- [45] The money from the sale proceeds of the Pinantan Lake property was used to purchase RRSPs, a van and a hot tub, and some of the money was used to purchase the rental property. None of this evidence is disputed by Mr. Fox.
- [46] The rental property was sold. The sale closed on August 3, 2010. After the payment of the first mortgage, real estate commission, the joint RBC line of credit, a \$500.00 holdback for the mortgage, legal fees and disbursements, the balance held by the Alberta lawyers in trust for Mr. and Mrs. Fox is \$30,758.95.
- [47] Mr. Fox suggests that he may have paid certain expenses for the rental property. He does have accounts; however, these accounts are directed to either a tenant or the property management firm who manage the rental property. I conclude that these expenses were paid out of the rental income and one account was paid by the tenant.
- [48] In his submissions on October 18, 2010, Mr. Fox sought reapportionment from the rental property proceeds and the down-payment of the Pinantan Lake property, which he says was approximately \$6,000.00.
- [49] During their relationship, Mr. and Mrs. Fox have owned other real properties in addition to the rental property and the Blind Bay home.

- [50] Mr. and Mrs. Fox built a house in Salmon Arm in 2004, and shared all the costs of the house. The cost of building the house was \$190,000.00, and they sold it in 2005 for \$280,000.00, making a gross profit of \$90,000.00. A third property was also purchased at Sylvan Lake which was purchased in 2005 for \$237,000.00 and sold in 2007 for \$386,000.00, realizing a gross profit.
- [51] No evidence was before me as to whether there were mortgages registered against these properties. I have assumed there were. Nor is there evidence before me that Mr. and Mrs. Fox resided in these residences, although Mr. and Mrs. Fox did reside in Alberta for a period of approximately two years from 2005 to 2007, when Mr. Fox was working in the oil patch.

Income Tax Debt Owning to Canada Revenue Agency by Mr. and Mrs. Fox

- [52] Mr. Fox is seeking reapportionment of the sale proceeds of the rental property to cover tax that he owes to the Canada Revenue Agency ("CRA"). Mrs. Fox has paid and does owe CRA money for unpaid taxes. If I consider Mr. Fox's claim for reapportionment, I should also consider Mrs. Fox's CRA obligations.
- [53] Mr. Fox alleged, in his oral submissions, that he owed CRA \$32,000.00 and expected to reduce it down to \$0.
- [54] In the letter dated December 20, 2010, and directed to me, Mr. Fox alleges that he owes CRA \$23,058.31. This is a result of re-assessments for the taxation years 2006 and 2007. Attached to the letter to me are partial copies of the re-assessment notices for those years; both dated December 13, 2010. The 2006 re-assessment is page 2 and the 2007 re-assessment is page 4. There is no explanation as to why all the pages of these documents are not disclosed. A review of those incomplete documents state that Mr. Fox was re-assessed \$12,353.81 for the taxation year 2006. In handwriting, and below the numbers \$12,353.81, are the numbers "\$6,121.26 Reduction". Mr. Fox gives no explanation as to its meaning.
- [55] It appears that Mr. Fox was assessed for and was given credit of \$6,121.26. This explains the \$12,353.81 he alleges that he owes.
- [56] The balance owing of \$12,353.81 is carried forward from the 2006 re-assessment notice to the 2007 re-assessment notice.
- [57] The words "\$1,649.30 Reduction" on the 2007 re-assessment notice probably reflect a credit. This means that on December 13, 2010, Mr. Fox owed CRA \$10,704.50 for the taxation years 2006-2007, and not the \$23,058.31 that he alleges.
- [58] Had the entire document been disclosed the required information would have been before me.
- [59] As stated earlier, I requested Mr. Fox file an affidavit for purposes of giving me the entire picture of his CRA debt.

- [60] In his affidavit sworn December 31, 2010, Mr. Fox attaches pages 1 and 2 of the 2006 re-assessment notice and pages 1 to 4 of his 2007 re-assessment notice. The 2007 re-assessment notice does give Mr. Fox a credit of \$1,649.31. Thus, as at December 13, 2010, Mr. Fox owes a total of \$10,704.50 for the taxation years 2006 and 2007, not the amounts he initially alleged as owing.
- [61] In his affidavit sworn December 31, 2010, Mr. Fox attaches a letter from CRA dated November 22, 2010 - only page 1. The first page of this letter confirms the taxable income set out in the re-assessments to which I have already referred.
- [62] Mr. Fox's income tax returns for the years 2006, 2007 and 2008 are attached to his financial statement sworn September 15, 2009.
- [63] On June 1, 2009, Mr. Fox filed his 2008 tax return prepared by the same accountants who prepared his tax returns for the years 2006 and 2007. Mr. Fox should have received an assessment notice by now and probably a re-assessment notice if one was to be issued. In 2008, Mr. Fox's Line 150 income was \$12,089.19, after taking a loss of \$1,096.66 on the rental property. Mr. Fox declared the income and resulting loss on his tax return despite the rental property being also owned by Mrs. Fox. This is not a criticism of Mr. Fox. Both Mr. and Mrs. Fox have their income tax returns prepared by the same accountants. The rental loss taken by Mr. Fox may have been advantageous to the Fox family.
- [64] According to Mr. Fox's 2008 tax return, he was obliged to pay \$289.04 in income tax. There is no evidence before me that this amount has not been paid.
- [65] Mrs. Fox states that she has been assessed tax by CRA in the amount of \$4,618.41 and \$749.34 the latter an over-payment of child tax benefits to Mrs. Fox. To support this claim, Mrs. Fox attaches a notice from CRA dated August 19, 2010. There is nothing in that notice indicating the year for which the assessment is made.
- [66] The documents supporting the assessment of the child tax benefit and dated August 20, 2010 relates to the family net income; obviously an over-payment in 2010.
- [67] Mrs. Fox filed a further affidavit sworn January 10, 2011. It was to be in response to Mr. Fox's affidavit referred to earlier, and to provide evidence relating to her past and present income tax obligations. Mrs. Fox, in her affidavit sworn January 10, 2011, states:
5. The last court date was the first I had heard of the 2008 audit. I have submitted my taxes for 2009 and owe Revenue Canada \$4600.00, as submitted in prior affidavit. Attached as exhibit A is a copy of my notice of assessment for my 2008 tax return. ...
- [68] I translate this to mean that she filed her 2009 income tax return and that she owes \$4,618.41 for the taxation year 2009.

- [69] Mrs. Fox, in 2008, was operating her daycare. In her first year of operation at Blind Bay, her Line 150 income was \$18,241.79. Her notice of assessment for the year 2008 states that her income tax is paid in full. However, Mrs. Fox was re-assessed income tax in the amount of \$1,205.16, which she has paid with borrowed money.
- [70] There are no income tax returns before me for either Mr. or Mrs. Fox for the taxation year 2009. In that year, Mr. Fox removed from his RRSP the sum of \$11,169.76. This will have tax consequences. These consequences should not be borne equally by Mrs. Fox. Similarly, Mrs. Fox, who removed in 2010 \$5,000.00 from her RRSP, will have the tax consequences for that taxation year. The tax consequences for the years 2009 and 2010 should not be borne equally between Mr. and Mrs. Fox, as the removal of money from their individual RRSPs were independent actions by each of them and not for any joint family purpose. The tax liability for Mrs. Fox for 2008 and Mr. Fox for 2006 and 2007 is \$11,909.66.
- [71] This is the amount that should be considered in any reapportionment. Although Mr. and Mrs. Fox may each have further income tax liability in future taxation years after 2008, there is no reason to consider them in any reapportionment claim.

Reapportionment of the Rental Property Sale Proceeds

- [72] Mr. Fox, in his counterclaim, seeks an unequal division of family assets in his favour based on the following:
31. (b) The defendant seeks an order for unequal division of family assets in the Defendant's favour based on the following grounds:
- (i) duration of the marriage;
 - (ii) the needs of each spouse to become, or remain economically independent, or self-sufficient; and
 - (iii) any other circumstances relating to the acquisition, preservation, maintenance, improvement, or use of the property, or the capacity, or liabilities of the spouse.
- [73] There are no specifics as to the basis of this claim. The specifics of Mr. Fox's claim for reapportionment is revealed in his affidavit sworn December 6, 2010 and his submissions made to me on October 18, 2010. Mr. Fox's claim for reapportionment is based on his ownership of the Pinantan Lake property; that is the return of the down-payment of \$6,000.00 he paid for its purchase. He further expanded his claim for reapportionment to take into consideration his tax debt owed to CRA.
- [74] Once the court has established the identity of the family assets pursuant to s. 58 of the FRA and each spouse is given a one-half interest under s. 56 of the FRA, the court may consider, if pled, s. 65 of the FRA.
- [75] Mr. Fox relies on s. 65(1)(a)(e) and (f) of the FRA:

Judicial reapportionment on basis of fairness

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

...

(e) the needs of each spouse to become or remain economically independent and self sufficient, or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

[76] The Court, in exercising its discretion under s. 65, must conclude that an equal division of the family assets would be unfair having regard to the factors set out in s. 65.

[77] In making this determination, the court starts with the position equality and then considers whether it is unfair: *S.B.M. v. N.M.*, 2003 BCCA 300.

[78] The onus is on Mr. Fox who is seeking reapportionment: *MacNeil v. MacNeil* (1995), 14 R.F.L. (4th) 24 (B.C.S.C.).

[79] The asset I am to consider for reapportionment is the sale proceeds of the rental property. The rental property is a residence owned by Mr. and Mrs. Fox. The property management company collected the rents, looked after the repairs and paid its taxes. There are statements that Mr. Fox attaches to his affidavit from the property management company that suggests that the property management company looked after these obligations. I find that the rental property is a family asset.

[80] Mr. Fox is seeking reapportionment for the rental property based on the sale of the Pinantan Lake property in 2006. The proceeds of the Pinantan Lake property were disbursed to purchase certain assets, one of which was the down-payment for the rental property. There is no evidence before me as to what portion of the Pinantan Lake property proceeds were used as part of the down-payment for the rental property.

Section 65(1)(a) of the FRA - Duration of the Marriage

[81] Mr. and Mrs. Fox were married in 2006 after the birth of their first child and before the birth of their second child. They had lived together since November of 1996. The period of their marriage is short. The length of their relationship is eleven to twelve years. Pre-marital cohabitation is not relevant under s. 65(1)(a). A contribution made prior to marriage may be taken into consideration under s. 65(1)(f): *Piskor v. Piskor* (1981), 22 R.F.L. 2nd 257 (C.A.).

[82] The duration of the marriage is a factor to support reapportionment in favour of Mr. Fox. However, the \$30,758.90 is the net proceeds from the sale of the rental property, and not the sale proceeds from the Pinantan Lake property. I am not prepared to reapportion the rental property proceeds based on this section of the FRA.

Section 65(1)(e) of the FRA - the needs of each spouse to become or remain economically independent and self-sufficient

[83] The date that the court considers s. 65 is the date of the triggering event. The triggering event is when I declared, on September 15, 2009, that Mr. and Mrs. Fox had no reasonable prospect of reconciliation.

[84] At that time, both Mr. and Mrs. Fox were residing in the family home. Mrs. Fox was self-employed in her daycare operation. Mr. Fox was working or was about to go to work for a car dealership. In 2010, the family home was sold and the proceeds divided equally after payment of debt. Any other assets were dealt with equally and I have in this judgment equalized their RRSP. There is no evidence before me on which I conclude that s-s. (e) can be invoked by Mr. Fox for reapportionment.

Section (65(1)(f) of the FRA - any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse

[85] Although Mrs. Fox is liable to pay her tax debt to CRA as is Mr. Fox, debts that had been incurred for a family purpose may be taken into consideration under s. 65(1)(f). Income tax debt incurred prior to the triggering event is a debt that may be equally apportioned between spouses: *Mallen v. Mallen*, 40 R.F.L. (3d) 114.

[86] Mr. and Mrs. Fox, prior to their separation, incurred debt and prior to their separation were unable to meet that debt, except by incurring further debt. I am able to conclude that Mr. and Mrs. Fox used their income for the years 2006, 2007 and 2008 for family purposes. It is clear that Mr. and Mrs. Fox were having difficulties meeting their debts. This required the sale of their assets to meet those debts. Mr. Fox's income was diminishing. There was not enough money for Mr. and Mrs. Fox to meet their CRA debts.

[87] Mr. Fox has met the onus and the total CRA debt of \$11,909.66 will be reapportioned in favour of Mr. Fox in the amount of \$10,704.50, and Mrs. Fox in the amount of \$1,205.16. As a result, the sale proceeds of the rental property are reapportioned and the balance divided equally between Mr. and Mrs. Fox, subject to Mr. Fox paying Mrs. Fox the \$944.97 which she paid for Mr. Fox's judgment for his legal fees and other payments that Mr. Fox must pay Mrs. Fox.

Post-Separation Relationship of Mr. and Mrs. Fox

- [88] Prior to the separation and during the time that Mr. and Mrs. Fox resided in the family home together, despite their separation, Mrs. Fox described Mr. Fox as angry and verbally abusive to her.
- [89] Mrs. Fox described certain events where Mr. Fox was angry and abusive.
- [90] This behaviour has continued towards Mrs. Fox and her mother by Mr. Fox. Evidence of this is the communication between Mr. and Mrs. Fox in text messages. The abuse runs unabated and continues to this day. Mrs. Fox will ask an innocent question relating to the children. The response by Mr. Fox is an attack on Mrs. Fox and her mother, using foul language. It is not uncommon for Mr. Fox to refer to Mrs. Fox as a "whore".
- [91] On July 19, 2010, after a court application, text messages came in from Mr. Fox for most of the day. In one text message, Mr. Fox questions the paternity of the children and calls Mrs. Fox a "hoe" a number of times.
- [92] On September 10, 2010, text messages directed to Mrs. Fox started at 1 a.m. and ended at 11:30 a.m. There were 25 separate text messages. Mr. Fox threatened to take action against Mrs. Fox as it relates to her daycare business. Mr. Fox threatened to use up all Mrs. Fox's share in the rental property proceeds in litigation. He then declares that Mrs. Fox is "... A FUCKING TRAILER TRASH CUNT". Mrs. Fox responded:
- So again what time can you pick kids up Sunday? Or Saturday if possible? And what time r u dropping them off Monday? Or do you want me to meet you at Beattie at noon?
- [93] In Mr. Fox's submissions in court describing some actions of Mrs. Fox, it was often prefaced by stating: she was "returning from her boyfriend's".
- [94] Mr. Fox tried to put in as evidence a plastic surgery account dated 1999 for plastic surgery that Mrs. Fox had. I ruled it irrelevant. Mr. Fox's reasoning was that it should show how Mrs. Fox spent the family money. I find it solely for the purpose of embarrassing Mrs. Fox.
- [95] Mrs. Fox had a miscarriage in January of 2009. Mr. Fox, without proof, calls it in his affidavit "miscarriage/abortion". This is all intended to humiliate Mrs. Fox and for no other purpose.
- [96] Mrs. Fox finds it convenient to use texting with Mr. Fox as to matters relating to the children. She would like to continue texting as a means of communication with Mr. Fox, so long as the name calling and abuse stops.

Custody and Guardianship of the Children

- [97] On October 7, 2009, Master Bishop granted a consent interim order, granting interim custody of the children Trystan Frances Fox ("Trystan"), born April 28, 2005 and Talin James ("Talin"), born January 9, 2007. The children's principal and primary residence was that of Mrs. Fox. The order granted joint guardianship of the children in the Master Joyce form.

Mrs. Fox stated that she is prepared to consent to joint custody and guardianship of the children with Mr. Fox. She confirmed this on appearances before the court on October 18th and December 14th of 2010. Mrs. Fox is not agreeable to Mr. Fox's proposal of shared custody, which is alternating weeks with each parent. The children are ages 5 and 4. The eldest attends kindergarten and the youngest child attends pre-school.

- [98] Mrs. Fox lives in a rented house from which she operates her daycare. Mr. Fox resides in a basement suite in a private residence.
- [99] Mrs. Fox has given notice to her landlord that she intends to leave this residence. Mrs. Fox will move when her landlord finds another tenant. She is moving to her mother's home which is not occupied. By moving to her mother's home, her living costs will decrease. She intends on continuing her daycare business from her mother's home. There will be no changes to the schools the children attend.
- [100] Mr. Fox attaches to his affidavit sworn December 6, 2010, business cards of various counsellors that he has consulted. He completed "Parenting After Separation" and a "Respectful Relationship" programs. He attaches these certificates to his affidavit. These courses appear to have had no impact on Mr. Fox's behaviour.
- [101] Mr. Fox attached monthly calendars to his affidavit, marking those days he has had the children. Mrs. Fox states that they do not accurately mark the time Mr. Fox has had the children.
- [102] Mr. Fox complains that Mrs. Fox does not allow him enough time with the children. When Mrs. Fox proposes additional time, above that to which she and Mr. Fox have agreed, Mr. Fox argues that this is evidence of Mrs. Fox's inability to look after the children. Such an example occurred when Mrs. Fox, while driving in her van with her children was struck by a deer on the highway. She called on Mr. Fox for assistance as she lacked transportation. Mr. Fox, in his affidavit, swore the following:

I/Clinton Fox have as well been there for my children to take care of them when "things have came up" for Victoria, as late as November 29th & 30th & December 1, 2010, when I reluctantly agreed (due to Victoria's behaviour) to drive both children to and from school (My days without children) as Victoria Fox had No means of transportation to get our children to their TWO DIFFERENT SCHOOLS (out of our catchment area). I ASKED VICTORIA Fox for help caring for the kids before with no luck, the latest, Saturday night (Nov, 27, 2010) Victoria flat out refused to help. I advised her of this event two months prior. I/Clinton Fox was advised of this on November 26th (Friday) by my daughter/Trystan Fox that she had missed school, Wednesday and Thursday November 24 & 25/2010. Victoria Fox damaging her vehicle traveling (where? Out of town) to/ from her new boyfriends place? On November 30, 2010, Victoria Fox did not plan adequate coverage/care for our children. I was asked to help pick up and drop off our children to and from school. Victoria Fox chose to contact me/Clinton Fox, 1st, rather last.

- [103] Mr. Fox is not paying child support to Mrs. Fox though he was ordered to do so. When Mr. Fox has the children, Mrs. Fox has an opportunity to work shifts in a private homecare setting. Without having a firm schedule, Mrs. Fox cannot take advantage of the opportunity to earn more money for the support of herself and her children and meet her debt obligations. It became apparent to me when Mrs. Fox was attempting to settle the times when each parent spent with the children during the Christmas school vacation, that Mr. Fox may be scuttling these opportunities for Mrs. Fox.
- [104] Mrs. Fox has, since the birth of each child, looked after their day-to-day care. There were times during their relationship and marriage that Mr. Fox worked away from home. Mrs. Fox operated a daycare at Sylvan Lake, Blind Bay and operates and continues to operate her daycare in Kamloops. There is no evidence before me that alternating weeks with each of their parents is in the best interests of the children.
- [105] There is no evidence before me that Mrs. Fox is not a good mother. There is no evidence that she does not meet the physical and emotional needs of her children.
- [106] Mr. Fox undermines Mrs. Fox as a parent. He is abusive towards her and the children's grandmother, which is clearly done in anger, and sometimes in front of the children. This is not in the best interests of the children.
- [107] Mr. Fox will be required to obtain employment. If he had the children alternate weeks, he would require daycare for them when he is working. I doubt he would permit Mrs. Fox to care for the children while he is working.
- [108] Mr. and Mrs. Fox had a disagreement about the school the children would attend. Mr. Fox enrolled Trystan in kindergarten and Talin in pre-school in Albert McGowan Elementary School ("McGowan"). He claims Mrs. Fox removed the children from the school without his consent. What he failed to disclose, and which he knew, was that Trystan was on the wait-list to be enrolled at Beattie School of the Arts ("Beattie"). Within the first day of attendance at McGowan, Trystan was accepted for enrolment at Beattie, which was why Trystan was then enrolled at Beattie.
- [109] Another example of Mr. Fox undermining Mrs. Fox revolves around a toboggan. Mr. Fox in his affidavit swears the following:

December 1, 2010 - I/Clinton Heath Fox picked up my children to take them to school when my son Talin Fox advised me that they had just went tobogganing. Immediately after he advised me that he had just gotten a New Toboggan. I/Clinton Fox stated "great from where?" Talin Fox stated we/Talin, Trystan, and mommy (Victoria Fox) found it at the water park sledding, and "mommy said we could take it home". Victoria Fox is now teaching our children that it is okay to steal and lie! I explained to the kids (Talin, Trystan) the importance of leaving some lost things where they are. When, left where it (toboggan) lies, it has a much better chance of finding its way back to its rightful owner. If you/Trystan and Talin Fox take the sled home with you the little boy or girl who lost it will not be able to find it. As it was stolen. For these reasons I/Clinton Fox are SEEKING

JOINT [GUARDIANSHIP] and SHARED CUSTODY OF BOTH TRYSTAN [FRANCES] FOX
(DAUGHTER) AND TALIN JAMES FOX (SON).

- [110] Mrs. Fox stated that the toboggan was abandoned at the side of the road and was worth about \$5.00. Mr. Fox, in his discussion with his children, has labelled Mrs. Fox a thief. Had he thought that the matter was important, he should have contacted Mrs. Fox to obtain the circumstances of finding the toboggan.
- [111] I order that Mr. Fox will have the children every other weekend, starting on Friday, when he will pick up Trystan after school and then pick up Talin from Mrs. Fox's residence; he will then return the children Monday morning to their school, in the case of Trystan, and pre-school in the case of Talin. If Talin is not attending pre-school on Monday morning, then Talin will be returned to the home of Mrs. Fox.
- [112] In the event that Monday is a statutory holiday, or Trystan is not required to attend school, then Mr. Fox's time with the children will be extended to Tuesday morning.
- [113] On the alternate week that Mr. Fox does not have the children, Mr. Fox will have the children on the following Wednesday, to be picked up from school or pre-school, or Mrs. Fox's home, depending on where they are, and return them the following morning to school and pre-school, or Mrs. Fox's residence, depending on where the children are scheduled to be.
- [114] I order that Mrs. Fox will have the care of the children at all other times when Mr. Fox does not have the children, except the times when Mr. Fox has the children during Christmas, spring and summer school vacations.
- [115] Christmas and spring break school vacations will be divided equally between Mr. and Mrs. Fox. Christmas school vacation is from the day the children are out of school until noon the day before the children are to return to school. That period is to be divided equally between Mr. and Mrs. Fox with the children being exchanged between Mr. and Mrs. Fox at noon on the half-way day. The second half of Christmas school vacation will commence at noon on the half-way date and end at noon the day before the children are to return to school. Mr. Fox will have the children on the first half of Christmas vacation on odd number years and Mrs. Fox will have the children on the first half of Christmas vacation on even numbered years. It is the intention of this order that Christmas Day be alternated annually between Mr. and Mrs. Fox.
- [116] When Mrs. Fox has the children on the second half of the Christmas school vacation, she will keep the children until the following Wednesday, when Mr. Fox will have the children when his regular scheduled time with the children will start.

- [117] Spring break starts after school on the day the children are out of school until noon the day before the children are to return to school. Mr. Fox will have the children from the first half of spring break which will end at noon at the half-way mark. Mrs. Fox will have the children the second half of spring break. Mr. Fox's regular scheduled time with the children will start on the following Wednesday.
- [118] Summer school vacation will comprise of the months of July and August of each year. By May 1, 2011, and each year thereafter, Mr. and Mrs. Fox will advise each other of two one-week periods, not to be consecutive when they would like to have the children. One week will be in August and one week will be in July. Each of the two one-week periods will commence on a Monday at 10:00 a.m. and end on a Sunday at 7:00 p.m. The balance of the summer school vacation will revert to Mr. Fox's regular scheduled time with the children. As the children become older the time periods should increase, resulting in the children spending equal time with each of their parents during the summer school vacation.

Children's Passports

- [119] So long as there are current and valid passports issued for each child, Mrs. Fox will hold these passports. Mrs. Fox will release the children's passports to Mr. Fox upon Mr. Fox advising her in writing as to where Mr. Fox and the children are travelling, where passports are required. He will provide to Mrs. Fox, in writing, the date and time that he and the children are leaving, the date and time when they are returning and where he and the children will be, providing addresses and telephone numbers for those places.
- [120] Similarly, should Mrs. Fox and the children travel where the use of their passports are required, she will provide to Mr. Fox, in writing, all the information that Mr. Fox is to provide her when he is using the passports.

Arrears of Child Support and Ongoing Child Support

- [121] Master Bishop, on October 7, 2009, by consent, ordered that Mr. Fox pay to Mrs. Fox the sum of \$378.00 on the 1st day of November and December of 2009 and January 1, 2010, and continuing each month thereafter. At "any time after January 1, 2010 the issue of child maintenance can be set for review". It was never reviewed.
- [122] Mr. Fox swore in his financial statement that his income was \$24,000.00 per year. The amount of \$378.00 is the amount required under the tables of the Federal Child Support Guidelines for two children. Mr. Fox has not paid any amount under Master Bishop's order voluntarily, which he acknowledges.

- [123] At the hearing of the summary trial, Mrs. Fox swore that Mr. Fox owes her the sum of \$4,536.00 for child support, which covers the period from October 2009 to October 2010 - a period of twelve months. The child support order was to start as of November 1, 2009 not October 1, 2009. The amount owing under Master Bishop's order from November 1, 2009 to and including January 1, 2011 is fifteen months. The amount owing is \$5,670.00.
- [124] Mrs. Fox registered with the Family Maintenance Enforcement Plan ("FMEP"). The FMEP has been garnisheeing Mr. Fox's employment insurance benefits. Mr. Fox attaches to his affidavit his employment insurance stubs showing some of those garnishees.
- [125] Mr. Fox attaches to his affidavit the expenses that he has paid for the children, which includes the food that they eat when the children are with him, dental treatment, recreational activities, haircuts, daycare, a used bicycle purchased for \$10.00 and some clothing.
- [126] Mr. Fox's explanation as to why he has not been paying child support is found in his second affidavit at paragraph 15:

I/Clinton Heath Fox have Employment Insurance garnishing my monthly income @ \$354.00 every month Since September 1/2010 to current date. I have been put in a position where I live on \$1,000.00/month. MARKED AS EXHIBIT "BB". I have not made all of my scheduled child maintenance payments to Claimant/Victoria as I/Clinton Heath Fox have been utilizing any extra money to pay off family debts/monthly bills and interest payments, to avoid ruining our personal credit and to avoid [BANKRUPTCY]. I HAVE HELPED PAY or I [HAVE] PAID for children's schooling, medical & dental bills, extracurricular activities, sports, clothes and food. MARKED AS EXHIBIT "C, H, I, N". I/Clinton Heath Fox have provided cash to Victoria whenever I have sold family assets(s) MARKED AS EXHIBIT "P" from Oct 18, 2010 AFFIDAVIT. Due to the lack of monthly income I have been able to generate due to medical restraints "Torn MCL & ACL) and parenting; I have just been staying alive myself, and have helped out when I am able. I/Clinton Heath Fox am NOT against financially supporting my children. MARKED AS EXHIBIT "M", "N", "O", AND "P" from Oct 18, 2010 AFFIDAVIT. This is why I am today applying for hardship/relief of my monthly child maintenance payments.

- [127] Mr. Fox attaches to his second affidavit a copy of a short and illegible note dated November 4, 2010, apparently from Dr. Langevin. Mr. Fox has a torn MCL and ACL - which relates to his knee.
- [128] There is no medical evidence before the court as to when the condition was detected, whether it prevents Mr. Fox from working, and whether the condition is treatable and can be repaired. I do not accept this as an excuse for not being employed and not paying child support.

- [129] Mr. Fox claims that he did not pay child support because he was paying family debt. At the time that Master Bishop made the interim order, Mr. Fox, in the same order, had been ordered from the family home. Mr. Fox stopped paying anything to do with ongoing expenses of the family home and joint debt. Further, these debts were eliminated from the sale of the family home and the rental property both in 2010 leaving Mr. Fox with his CRA debt.
- [130] At the time Master Bishop ordered that Mr. Fox pay interim child support, he was working at a car dealership as a sales person. He had employment with two different dealerships after Master Bishop's order. According to the exhibits attached to Mr. Fox's affidavit #1, Mr. Fox had employment up to September of 2010. There is simply no explanation as to why he is not employed other than the excuses to which I have referred to above.
- [131] Mr. Fox has an impressive resume. Much of the employment to which he is suited and qualified can be pursued, even if he has a damaged knee.
- [132] The consent interim order for child support as ordered by Master Bishop does not state whether the order was made under the FRA or the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The test for cancellation of arrears of child support under both acts is similar. Madam Justice Martinson in *Earle v. Earle*, [1999] B.C.J. No. 383, stated at para. 23:
- The courts are generally reluctant to reduce or to cancel arrears. Under the Family Relations Act arrears will not be reduced or cancelled unless it is grossly unfair not to do so. This principle is similar to the one applied to the Divorce Act, which requires a material and long lasting change.
- [133] Mr. Fox is presently receiving employment insurance benefits of \$380.00 weekly. Calculated annually this is \$19,760.00.
- [134] I have concluded that Mr. Fox has refused to meet his obligations to pay child support under the order of Master Bishop. The onus rests on him to provide facts sufficient to cancel the arrears of child support. He has not met the onus. The majority of the arrears accumulated when Mr. Fox was employed.
- [135] Mr. Fox has the ability to meet his child support obligations. I dismiss Mr. Fox's application to cancel arrears accumulated under Master Bishop's interim order dated October 7, 2009.

Ongoing Child Support

- [136] Mr. Fox has the ability to earn more than his present employment insurance benefits. He has not disclosed his 2009 income tax return, nor has he disclosed all of his earnings for 2010. I impute an annual income to Mr. Fox of \$24,000.00 for purposes of child support.
- [137] I order that Mr. Fox pay to Mrs. Fox the sum of \$378.00 per month, on the first day of each and every month, commencing February 1, 2011, pursuant to the Divorce Act, until further order of the court.

- [138] I also order that Mr. Fox provide Mrs. Fox with a full copy, together with all attachments, of his 2009 income tax return, its assessments and re-assessments by January 31, 2011.
- [139] I order that by June 1, 2011, Mr. Fox provide a copy to Mrs. Fox of his 2010 income tax return, together with all copies of attachments by June 1, 2011. On receipt of CRA assessments and re-assessments, he will immediately, give copies to Mrs. Fox. Mr. Fox will have a continuing obligation to provide to Mrs. Fox, so long as he is obliged by court order to pay child support to provide Mrs. Fox by June 1st of each year a full copy of his tax return, copies of all attachments and copies of CRA assessments and re-assessments as received.

Costs

- [140] Mrs. Fox is seeking costs in the amount that she paid her lawyer. It would appear that Mrs. Fox is not familiar with the variety of costs that the court is called upon to order. There was nothing in either Mr. or Mrs. Fox's behaviour in the conduct of this case that would require the court to award special costs.
- [141] Mr. and Mrs. Fox agreed on joint guardianship and joint custody. They could not agree on the periods of time when the children were with each of them. Neither the position of Mr. Fox or Mrs. Fox prevailed. Mr. and Mrs. Fox had mixed success in the disposition of the remaining family assets. Mrs. Fox had success on the issues of arrears of child support. Mr. Fox had success on reapportionment of the sale proceeds of the rental property for the payment of his CRA debt.
- [142] Mr. Fox opposed Mrs. Fox's application to have released from her RRSP the sum of \$5,000.00, when at that time Mr. Fox had already removed a little over \$11,000.00 from his RRSP. Mr. Fox also opposed the sale of the family home. It was essential to sell the family home as Mr. and Mrs. Fox could not service their debt.
- [143] I order that Mr. Fox pay Mrs. Fox lump sum costs in the amount of \$1,500.00 inclusive of disbursements and tax.
- [144] I order that the amounts that Mr. Fox is to pay Mrs. Fox will be paid from Mr. Fox's share of the sale proceeds of the rental property held by the Alberta lawyers. The disposition of the Alberta trust funds of \$30,758.95 shall be dispersed as follows:

Mrs. Fox:

Mr. Fox:

Held in trust by Alberta lawyers:

\$30,758.95

Payment to CRA on behalf of Mr. Fox:

\$10,704.50

Payment to Mrs. Fox to reimburse her for her CRA debt:

\$1,205.16

Sub-Total:

\$18,849.29

Balance $\$18,849.29 \div 2 = \$9,424.65$:

\$9,424.65

\$9,424.65

Payment to Mrs. Fox for arrears of child support (payable to FMEP):

\$5,670.00

(\$5,670.00)

Payment to Mrs. Fox for reimbursement of Mr. Fox's judgment:

\$944.97

(\$944.97)

Payment to Mrs. Fox for costs:

\$1,500.00

(\$1,500.00)

Total Owing to Mrs. Fox:

\$17,539.62

Balance to Mr. Fox:

\$1,309.68

Summary

[145] I order that Mr. and Mrs. Fox will prepare and sign an irrevocable direction to the Alberta lawyers directing the disposition of the funds in trust as set out above. If either Mr. or Mrs. Fox refuse to sign such a direction, then the registrar is authorized to sign the direction in the place of the person refusing to sign the direction.

[146] In summary:

- Mr. and Mrs. Fox are the joint custodians and guardians of their children;

- Mr. and Mrs. Fox will have the children during the periods of time at Christmas, spring and summer school vacations as set out in paras. 111 - 118 of these reasons;
- Mr. Fox will pay to Mrs. Fox the sum of \$378.00 per month for support of the children, payable on the 1st day of each and every month commencing February 1, 2011 pursuant to the Divorce Act until further order of the court;
- The net sale proceeds of the rental property will be paid in accordance with para. 144 of these reasons which includes costs payable to Mrs. Fox;

[147] I am seized of any further applications brought by Mr. or Mrs. Fox for a period of one year from the date of these reasons.

"H.C. Hyslop J."

HYSLOP J.

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