
CANADA / JUDGMENT

French v. French

2013 BCSC 837

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 837 French v. French

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

French v. French,

2013 BCSC 837

Date: 20130513

Docket: E34078

Registry: New Westminster

Between:

Susan French

Plaintiff

And

Trevor John French

Defendant

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for the plaintiff:

G.K. Thomas

E. Chapman

Counsel for the defendant:

L.N. MacLean, Q.C.

M. Ostrow

Place and Date of Trial:

New Westminster, B.C.

February 27-29;

March 1-2, 5-9, 21;

May 22, 28, 31;

October 15, 2012

Place and Date of Judgment:

New Westminster, B.C.

May 13, 2013

Introduction

- [1] These are matrimonial proceedings. The parties started living together in 1987, were married in 1992, and separated in November 2009. Mrs. French is 54 years old. Mr. French is 50 years old. They have no children.

Credibility and Findings of Fact

- [2] The primary issue in this case is the enforceability of certain marriage agreements, which turns on the facts in this case. I will set out my findings of fact and credibility.
- [3] First, I must note that I did not find Mr. French to be a reliable historian or a credible witness. He was evasive and argumentative. He answered questions in whatever manner he thought would assist his case. Instead of providing evidence, he stated and restated his position. He also gave evidence that was internally inconsistent, and many of his answers were patently untrue.
- [4] On the other hand, I found Mrs. French to be a credible witness who was doing her best to give accurate evidence. Much of her evidence was supported by documents or by credible witnesses. I accept the evidence set out below.

Education and Work History

- [5] Susan French was born in 1958. She graduated from high school in 1976. By 1986, Mrs. French was working full time with the Scotia Bank, earning approximately \$25,000 per year. In the fall of 1987, she returned to school, initially attending Douglas College for two years and later the University of British Columbia for three years. She remained at the Scotia Bank during school, working two weekday shifts of five hours per shift and all day Saturday. She also worked full time in the summer. She earned approximately \$12,000 to \$14,000 per year.
- [6] She obtained her Bachelor of Education degree in 1992. It was a difficult time to find a position as a teacher, however, so she took additional courses to teach English as a second language. She obtained a teaching position in Surrey to start December 1992. She continues to work there full time.
- [7] Trevor French was born in 1962. Mr. French worked full time for Pacific Press until 1992. He worked the night shift, which ran from 11:00 p.m. until 8:00 or 9:00 a.m. That job ended in August 1992, leaving him unemployed until he started working in the film industry doing craft services (providing food for the crew) and first aid. That business evolved over time.
- [8] I have not been provided with all of Mr. French's tax returns. In 1995, Mr. French earned employment income of \$11,014.77 from TVD Televector Enterprises. In 1996, he had self-employed/business income in the amount of \$29,932.65; in 1997, he had \$28,800; and in 1998, he had \$29,400. It is my understanding that these are his earnings from the film business. I have not been provided with financial statements for Golden Ground, the company that Mr. French incorporated to conduct the craft services business. After he stopped working in the film business, he took dividends of \$40,000 in 2003 and \$33,069 in 2004, presumably from retained earnings of Golden Ground.
- [9] Mr. French worked in the film business until October 1998 when he was involved in a serious car accident. He broke both ankles and one arm. As a result, he was in hospital for two weeks. He then spent a significant amount of time recovering at home. He was initially bed-ridden, then able to use a wheel chair, and finally he could walk with a cane. He was not able to work for about one year. ICBC provided home assistance, initially twice per day for two hours, then once per day. Mrs. French performed the household chores, with some help from the home care worker.
- [10] After he recovered, Mr. French returned briefly to the film business, but he found the work was too physically demanding. ICBC provided Mr. French with retraining, initially as a truck driver. Later, he attended the University College of the Fraser Valley to obtain agricultural training.

- [11] In 1999, Mr. French started the process of becoming an ambulance attendant. This involved volunteer shifts outside the lower mainland over several years, and some paid shifts. Until 2006, when he became a full-time employee earning \$49,733, Mr. French had modest or negligible employment income from B.C. Ambulance Service: \$229.32 in 1999, \$13,342 in 2000, \$2,406 in 2001, and \$2,080 in 2002.
- [12] On April 18, 2002, the parties purchased a hobby farm in Aldergrove. Mr. French has received all of the farm income and has claimed all of the farm expenses. In some years, this has resulted in a net loss, which is then offset against his other income. For example, in 2002 Mr. French declared farm income of \$212.50 and expenses of \$7,923.25, for a net loss of \$7,710.75.

Mr. French's Property Acquisitions

- [13] Mr. French has bought and sold several properties since the mid-1980s.
- [14] Mr. French first bought a house at 2779 East Avenue on May 28, 1986 for \$89,500. He sold it in November 1989 for \$188,000.
- [15] While Mr. French worked at Pacific Press, he met Robin Graham, another driver there. Mr. Graham owned residential rental properties. Starting in 1982, he would acquire properties, make improvements to them himself, and then rent them, with a view to acquiring a substantial asset base and an ongoing source of income. He encouraged Mr. French to do the same: buy rental properties, fix them himself, and use the income from the tenants to pay down the mortgage, while benefitting from increasing property values. He assisted Mr. French in repairing and renovating his acquisitions.
- [16] In November 1988, Mr. French purchased 1200 - 1206 Woodland Drive for \$261,900. He did so with a second mortgage over the 2779 East Avenue property in the amount of \$45,200. Mr. and Mrs. French moved into this property in November 1989 after the 2779 East Avenue property was sold. They initially lived in an apartment in one of the buildings on the property while the house (the other building on the property) was renovated. They then moved into that house.
- [17] On November 30, 1989, Mr. French purchased 1950 Adanac Street for \$195,000. He paid \$45,000 as the down-payment with proceeds from the 2779 East Avenue property.
- [18] On January 27, 1992, Mr. French purchased 2026 Franklin Street for \$400,000. He had a first and a second mortgage on that property as well as vendor financing of \$50,000. That property was sold in 1995 for \$485,000.
- [19] On December 20, 1993, Mr. French acquired recreational property at Deka Lake. One half of the property was gifted to Mrs. French in March 1999.
- [20] At the date of trial, Mr. French held the Woodland Drive and Adanac Street properties as revenue properties.

Matrimonial Homes

[21] The parties have had two matrimonial homes since their marriage. They bought their first home in Surrey in 1993. They later sold that home and bought the hobby farm. Since separating, Mr. French has continued to live at the Aldergrove property.

The Parties' Roles

[22] The parties started dating in April 1986. In 1987, Mrs. French moved in with Mr. French at the 2779 East Avenue property. While living together, Mrs. French paid Mr. French \$400 per month and contributed to groceries, cleaning products, and the like. She said that she thought that they were building a life together and that the \$400 was going toward paying the mortgage. She took care of the cooking, dishes and cleaning; he took out the garbage.

[23] While they lived at the Woodland Drive property, Mrs. French continued to pay \$400 per month, which Mr. French applied to the mortgage. She also contributed to groceries and she continued to do the cooking, cleaning, and laundry, as she did throughout their relationship.

[24] The Woodland Drive property required fairly extensive repair and renovation. Mrs. French helped with cleaning, painting, moving things, sweeping, removing debris, and providing lunches and dinners.

[25] Mrs. French also generally helped with the rental properties, though in a minor way, such as by answering calls from tenants.

[26] In 1988, Mr. French persuaded Mrs. French to buy a car, although she did not have a driver's license at the time. From then until around 1992, Mr. French drove the car himself and used it, among other things, to travel to and transport items for the rental properties.

[27] On March 31, 1993, Mr. and Mrs. French purchased a matrimonial home in Surrey in joint tenancy for \$244,000. Each paid one-half of the down-payment. They lived there until April 2002. In 2002, they purchased the hobby farm in Aldergrove with the proceeds from the sale of the Surrey house and a mortgage from Vancouver City Savings Credit Union ("Vancity").

[28] I accept Mrs. French's evidence that she did the vast majority of the household chores while they lived together. She did the cooking, dishes, cleaning, and laundry. Mr. Graham and Mr. Mocyk both testified that the household chores were divided along "traditional" roles, in that she prepared the meals, did the dishes, and cleaned the house.

[29] After they moved to the hobby farm, there were many more outdoor jobs. Again, I accept Mrs. French's evidence that although Mr. French did the majority of the outdoor jobs, she did a significant amount of outdoor work as well. She helped with such things as haying, lambing, and taking care of the chickens and turkeys. In addition, she sold the chicken eggs at her school and helped with the annual turkey sales. She also looked after the animals when Mr. French was out of town working for B.C. Ambulance Service.

[30] Finally, while Mr. French ran the craft services business, Mrs. French also helped him with purchasing and preparing food.

The Parties' Finances

[31] Mr. French maintained a bank account at the Toronto Dominion Bank, where he deposited his employment income and rent receipts. He also paid his rental expenses from that account.

[32] Mrs. French maintained a bank account at Scotiabank, which she deposited her employment income into.

[33] The parties had three facilities at Vancity:

1. A residential mortgage approved at \$319,000.00 as of April 16, 2002.
2. A joint account labelled "summer savings", which was used to pay the mortgage. During their cohabitation, each contributed equally to mortgage payments for the Surrey residence and the Aldergrove hobby farm.
3. A line of credit taken in 2006 in the amount of \$74,236, which was secured by the residence. This was initially used to make a loan to Mr. French's mother. After the initial loan was repaid in October 2008, the line of credit was used from time to time to reduce the mortgage. And on June 19, 2009, the parties used \$63,800 to make a lump-sum payment on the mortgage.

[34] Mrs. French testified, and I accept, that when they moved into the Surrey property, they shared all expenses equally. Mrs. French would give Mr. French a cheque for her half of the mortgage payment, which would be deposited into the mortgage account, and he would reimburse her for half of the household expenses. The expenses were never paid in proportion to employment income.

[35] When they moved to the Aldergrove property, they still divided all expenses equally for the first couple of years before Mr. French took over paying the property taxes and insurance. As noted above, Mr. French also claimed all farm income and expenses on his tax return.

[36] The parties had one credit card, a Mastercard, which they both used. Mrs. French held the primary card and Mr. French had a supplemental card, which he used for business, personal reasons, and some family purposes. At the end of each month, Mrs. French would review the card statements and determine the amounts to be allocated to each.

[37] The parties never opened a joint account to pay household or living expenses, although at some point they started using Mrs. French's Mastercard for family purposes.

[38] The parties separated in November 2009. Mrs. French was effectively ousted from the home on November 4, 2009. She has indicated that she wanted the Aldergrove property to be sold from the outset.

- [39] After the parties separated, Mrs. French made some contribution to the mortgage payments. Payments ceased in March 2010, however, when Mrs. French advised Mr. French that she wanted the Aldergrove property to be sold.
- [40] At that time, the parties agreed to reduce the usual monthly mortgage payment from \$2,800 to \$2,400. Subsequently, Mr. French unilaterally reduced the mortgage payments, a fact which Mrs. French discovered only when she received a letter from Vancity advising that payments were in default. After various discussions with the bank, however, Mr. French brought the mortgage into good standing.
- [41] In June 2011, Mrs. French reluctantly agreed to reduce the mortgage payments to approximately \$1,100 per month, plus a monthly payment towards the line of credit of \$150. The total obligation on the mortgage and line of credit at that point was \$1,284 per month.
- [42] In the summer of 2011, the parties agreed to list the Aldergrove property for sale and signed a listing agreement with a realtor. After signing the agreement, however, Mr. French refused to permit the property to be shown.
- [43] On the date of separation, November 4, 2009, the outstanding balance on the mortgage was \$47,899.66. The outstanding balance on the line of credit was \$63,259.88.
- [44] As of January 18, 2012, the mortgage had an outstanding balance of \$15,496.56. The line of credit had an outstanding balance of \$49,853.41.

The Agreements

- [45] Mr. French first raised the topic of a prenuptial agreement about a year before the marriage. Mrs. French said that she was surprised and hurt. The topic was not raised again until very shortly before the wedding. At that time, Mr. French said that if Mrs. French did not sign the agreement, the wedding was off. She complied. The agreement was executed on December 15, 1992, and they left Vancouver the next day to Edmonton for the wedding.
- [46] This is not the only marriage agreement executed between the parties, however. Mr. French alleges that the parties entered into a second agreement dated December 9, 1993. But Mrs. French does not recall signing this agreement. Further, she and Patricia Bond, her solicitor and the purported witness to the agreement, do not recognize their signatures. There are further issues with this agreement; namely, it is internally inconsistent. The recitals indicate that it was executed after the one-year anniversary of the first agreement, while the execution date clearly falls before the one-year anniversary. As set out below, I am not satisfied that this document was executed by Mrs. French.

[47] There is also a third agreement. It was executed by Mr. and Mrs. French on April 22, 1994. Although she has little recollection of the events, she does not dispute her signature on the document. Donna Burke, who witnessed Mrs. French's signature, also recognized her own signature and address. Although she did not recognize Mrs. French's signature, Mrs. French would have signed before her or she would not have signed as witness. I am satisfied that Mrs. French executed the third agreement.

Positions of the Parties

- [48] Mrs. French first argues that none of the contracts are valid and enforceable. She says that the first agreement, even if it is assumed to be valid, was no longer operative after December 9, 1993. She says that the second agreement is a forgery. As for the third agreement, she says that it should be set aside for lack of disclosure of Mr. French's assets.
- [49] Furthermore, she argues that the agreements are procedurally and substantively unfair for several reasons. In particular, Mr. French brought undue pressure on Mrs. French to sign the first agreement, and she did not have independent legal advice for the third agreement. In addition, Mr. French did not adequately or accurately disclose his assets before execution of any of the agreements. Finally, Mrs. French was not compensated for her contribution to Mr. French's separate property or for her presumptive 50 percent interest in his rental properties at the time the third agreement was signed.
- [50] She says that if the third agreement is otherwise enforceable, the parties mutually rescinded their agreement.
- [51] Alternatively, she says that even if the third agreement was valid and enforceable, in order to remedy unfairness, it should be varied pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. In terms of the unfairness that she suffered by way of the agreements, she says that they did not recognise any of the following: her contribution to Mr. French's separate property; the length of the co-habitation, during which almost all of the wealth was accumulated; or Mr. French's failure to perform his obligations under the agreement, which permitted him to focus on his separate property.
- [52] She further argues that if any of the agreements are enforced without variation, so that Mr. French keeps his separate property, then he has been unjustly enriched and she should receive a monetary award to compensate for her contributions to the properties that he has received.
- [53] Lastly, she submits that she should receive occupational rent for the period that Mr. French ousted her from the matrimonial home and occupied it himself.
- [54] In response, Mr. French argues that the parties entered into, at a minimum, two validly executed agreements, the December 15, 1992 agreement and the April 22, 1994 agreement, which together bind Mrs. French. In his submission, none of these agreements should be set aside by reason of the parties' failure to perform "minor covenants".

- [55] He further argues that the two agreements are fair. He says that the parties received independent legal advice from lawyers in the negotiation and on the execution of the agreements. Moreover, given that she was legally represented by a lawyer who was eminently qualified in the practice of family law, and given that the agreements were negotiated over a period of several months, he says that there is no evidence establishing that she was somehow coerced into signing the agreements, which she also stands to benefit from. He submits that she has failed to provide any positive evidence that there was duress, undue influence, or unconscionability in the formation of the agreements.
- [56] In addition, in response to Mrs. French's alternative claim for variation under s. 65 of the FRA, he says that the agreements are not unfair, as the parties anticipated their current circumstances at the time of execution. In his submission, in the absence of a very convincing reason, courts should respect the parties' right to freely contract and should be loath to interfere with a domestic contract validly executed between them. Here, the agreements were fairly negotiated and their substance did not depart substantially from the overall objectives of the Divorce Act, R.S.C. 1995, c. 3 (2nd Supp.), being certainty, finality, and autonomy.
- [57] Lastly, he asserts that Mrs. French's claim for occupational rent is entirely unfounded.

Validity and Enforceability of Marriage Agreements

- [58] As already stated, there are three purported agreements in issue: (1) the December 15, 1992 agreement; (2) the December 9, 1993 agreement; and (3) the April 22, 1994 agreement.

- [59] Firstly, the December 15, 1992 agreement provides:

In the event that the parties fail to renew or revise this Agreement in writing annually, this Agreement shall be terminated and be of no force and effect.

The agreement was not renewed annually. Accordingly, the first agreement lapsed and is not binding on the parties.

- [60] Next, I am not satisfied that the second purported agreement, dated December 9, 1993, is an agreement executed between the parties. Mrs. French and the purported witness, Patricia Bond, both testified. Neither remembers signing the document, and neither recognized the signatures as theirs, although they are similar to each of their respective signatures. Furthermore, as noted above, the date of the document is clearly incorrect. It is dated December 9, 1993, but reference is made in the body of the agreement to it being made after the first anniversary of the marriage, which would have been December 15, 1993. Mr. French bears the burden of satisfying me that this is an agreement executed by the parties. He has failed to do so. I am not persuaded that it is an agreement validly executed between the parties.

[61] I turn now to the April 22, 1994 agreement. That agreement refers to the December 15, 1992 agreement and provides:

It was a term of the marriage agreement that it be reviewed by the parties on an annual basis and be renewed or revised in writing by the parties prior to each anniversary of the marriage. The parties enter into this agreement to renew and revise the marriage agreement.

[62] The first clause of the April 22, 1994 agreement further states:

Notwithstanding that this renewal to the marriage agreement is being made after the first anniversary of the marriage, the parties mutually acknowledge and agree to renew the marriage agreement on the terms and conditions contained therein, save as varied herein for an indefinite term.

Accordingly, the April 22, 1994 agreement effectively incorporated the December 15, 1992 agreement, with some amendments.

[63] The significant terms of the April 22, 1994 agreement are as follows:

1. Each party would retain the real and personal property that they brought into the marriage as well as the real and personal property that they acquired after the marriage, including pensions and retirement savings plans, inheritances, gifts, damages, and so on: Clause 2(b).
2. Property would be owned equally as tenants in common if it was acquired by either or both parties after the marriage as a result of contributions made by both parties from income earned by either party for the purpose of purchasing that property: Clause 2(e).
3. The parties would contribute equally to the purchase price of the matrimonial home. Otherwise, they would pay financial encumbrances and taxes and for upkeep and maintenance of the matrimonial home in a manner proportional to their employment income: Clauses 3(a) and (b).
4. On separation, the matrimonial home would be sold and the proceeds would be divided equally between the parties. However, either party would have the option of purchasing the other party's one-half interest within 180 days of the first of any of the following events occurring: separation, an order for the dissolution of marriage, an order for judicial separation, or a declaration of nullity of the marriage: Clause 3(c).
5. During the marriage, the parties would share living expenses in a manner proportional to their employment incomes. They would pay their share of the living expenses into a joint bank account on a monthly basis, to be used by either of them for specified living expenses: Clause 4(a).
6. Twenty-five percent of the parties' employment income would be deposited into a joint bank account in the names of both parties: Clause 5. The money from that bank account would be used for their living expenses.

7. So long as both parties were working full time, each party was to be equally responsible for housekeeping and general maintenance of the matrimonial home. If one party stopped working full time, then housekeeping and general maintenance of the matrimonial home would be shared, taking into account the working hours of each party: Clause 6.
 8. Except in exceptional circumstances, each party was to support and maintain him or herself by remunerative employment: Clause 9(a).
- [64] The terms of the agreement were largely, if not entirely, ignored.
- [65] At the time of executing the marriage agreement in December 1992, Mr. French was unemployed and thus had no employment income. Indeed, for much of the couple's history, Mr. French had little employment income. Had the agreement been followed, Mrs. French would have paid more than half of the mortgage and living expenses. Mr. French would have protected his income from rental properties and the properties themselves, but would still be entitled to half of the matrimonial home.
- [66] The parties never opened a joint account to deposit 25 percent of their employment income for the purpose of covering their living expenses. Nor were their living expenses shared in a manner proportional to their employment incomes. Rather, generally, each paid half of the mortgage payments and half of the living expenses. Further, Mr. French used his income from his commercial properties, not simply his employment income, to pay his 50 percent of the expenses.
- [67] The parties did not divide household chores as contemplated by the agreement. During their marriage, the parties enjoyed what has been referred to as a "traditional" arrangement, where Mrs. French was responsible for the "inside chores", such as cooking and cleaning, while Mr. French did more of the "outside chores", which chores increased after the parties moved to the hobby farm. At no time, however, did the parties allocate household tasks based on whether Mr. French was working full time or not, which he has not always done. Again, the parties did not turn their minds to the agreement when allocating responsibility for chores.
- [68] After the parties bought the Aldergrove property, Mr. French, without considering the agreement, took all of the "farm" income and claimed all of the "farm" expenses as deductions from his income.
- [69] When the parties separated, Mr. French remained in the matrimonial home. Further, he blocked Mrs. French's efforts to have the matrimonial home sold, as required by the agreement. Yet he did not exercise the option of purchasing her half-interest within 180 days of their separation.
- [70] From the foregoing, it is clear that the agreement was steadfastly ignored. But what effect does this have on the enforceability of the agreement?

- [71] Mrs. French argues that Mr. French did not follow the terms of the agreement and that he has therefore continuously repudiated the contract through his actions. She says that the agreement should be set aside on the basis that it has been mutually rescinded.
- [72] Mr. French says that he paid more than what was required by the agreements, that tasks were shared equally, and that the bank account provisions were complied with. He says that any non-compliance was minor and does not amount to a fundamental breach.
- [73] There are two concepts at play here: repudiation through fundamental breach and implied rescission. I will first consider implied rescission.
- [74] The law with respect to implied rescission is set out in *Barnett v. Rademaker, et al*, 2004 BCSC 1060 at paras. 119-120, as follows:
- [119] Chitty on Contracts, 27th ed. (London: Sweet & Maxwell, 1994) vol. 1 introduces rescission by agreement at para. 22-022 as follows:

Where a contract is executory on both sides, that is to say, where neither party has performed the whole of his obligations under it, it may be rescinded by mutual agreement, express or implied.

- [120] Chitty describes implied rescission at para. 22-025 as occurring where "the parties have effected such an alteration of [a contract's] terms as to substitute a new contract in its place." It goes on:

The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances. Rescission will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it.

- [75] Thus, where neither party has performed the whole of his obligations under an agreement, that agreement may be rescinded by mutual agreement of the parties, express or implied, to be gathered from their words or conduct. The consideration for the discharge is found in the abandonment by each party of his right performance or his right to damages, as the case may be: Chitty on Contracts, 29th ed., vol. 1 (London: Sweet & Maxwell, 2004) at para. 22-025.
- [76] The question then is: did the parties, by their words or conduct, rescind or vary the contract? In my view, looking at their conduct, the parties intended to rescind the contract. As I have stated, over the 18 years that they were married, the parties did not comply with any of the significant terms of the contract. From inception, the agreement was not performed.

- [77] Although the matrimonial home is held in joint tenancy, the mortgage and other living expenses were not paid in proportion to employment income. Contrary to the agreement, these were shared equally.
- [78] The parties have never had a joint bank account into which they deposited 25 percent of their employment income to pay their living expenses. Instead, living expenses and other expenses were divided equally. Furthermore, for several years, expenses were paid with Mrs. French's Mastercard and divided at the end of each month, such that shared expenses were divided equally and personal expenses were paid fully by the responsible individual.
- [79] Chores were also not divided as contemplated by the agreement. The parties clearly did not consider the agreement when performing chores. Mrs. French performed the traditionally "female" tasks and Mr. French the "male" tasks, particularly after they moved to the hobby farm. This allocation of chores did not change, even though Mr. French had more time without employment than did Mrs. French.
- [80] Furthermore, in breach of Clause 9(a) of the agreement, Mr. French was underemployed or unemployed for several years. He therefore did not "maintain himself by remunerative income". Although Mrs. French did not take exception to this, in her mind, the agreement no longer applied, so it not surprising that she did not insist on enforcing its covenants. But this is not without consequence. For example, Mr. French's educational efforts may well have caused her financial detriment. The parties were in the habit of paying off their mortgage as quickly as possible. If Mr. French had employment income as well as rental income, they may have paid down the mortgage faster, freeing up more money in the long term for Mrs. French.
- [81] In clear breach of Clause 3(c), Mr. French refused to sell the matrimonial home when the parties separated. In addition, in breach of Clause 7(b), Mr. French used the joint line of credit to pay the mortgage without Mrs. French's consent. Therefore, not only did the parties ignore the written agreement for their entire married life, Mr. French refused to comply with the agreement even after separation.
- [82] Their conduct demonstrates such a thorough and long-standing non-compliance with the agreement that I conclude that the parties intended not to perform or to be bound by the agreement. Their conduct satisfies me that the agreement was rescinded by mutual agreement.
- [83] Having found that the parties mutually rescinded the agreement, it is not necessary to consider the issue of repudiation through fundamental breach.
- [84] I also do not need to address the other alternative arguments raised by Mrs. French.

Relief Sought

Division of Family Assets

- [85] Mrs. French says that the family assets should be shared equally. She says that these include any pensions or RRSPs held by the parties, all real property, and all financial accounts. I agree.
- [86] A section 57 declaration was made November 5, 2010. As of that date, each party had a one-half interest in all family assets.
- [87] Mr. French testified that the rental properties were to provide financial security in his retirement. Throughout the marriage, he has used the income from those properties for living expenses, particularly when he had little or no income from employment. His excess income has been saved as RRSPs and other savings. These are family assets, as they are assets used for a family purpose. Mr. French does not argue otherwise.
- [88] Mrs. French acknowledges that her RRSPs, savings and teacher's pension are family assets, to be divided equally.
- [89] As Mr. French has shown that he is unwilling to facilitate sale of the matrimonial home, Mrs. French will have sole conduct of the sale of this property.
- [90] The other family assets will be divided equally. The parties did not address the mechanics of the division in detail, and they may make further submissions if they are not able to agree.

Occupational Rent

- [91] The uncontradicted evidence shows that on November 4, 2009, Mr. French woke up Mrs. French at night to confront her about whether she was planning to move out. She attempted to avoid any further escalation of the argument, but Mr. French threw a phone at her and struck her in the left forearm. Frightened of Mr. French, she decided to call her sister and brother-in-law, Mr. Wong, for help. Before Mr. Wong could attend the home, however, Mr. French chained and locked the front gate and parked his truck and trailer in front of it. He then attempted to prevent or obstruct her from taking belongings out of the home. What she did manage to take away that night, she had to throw over the locked gate.
- [92] Thereafter, Mr. French generally secured the gate to prevent Mrs. French from entering. He also took the position that unless she agreed to resume the relationship with him, she was not allowed back into the home. She refused to return on those terms. As a result, since separation, she has rented property, while Mr. French has had the benefit of living in their residence. Further, at the time of trial, she still had not received her share of the furnishings.
- [93] In these circumstances, I find that Mrs. French was ousted from the family home. Although Mr. French did not physically oust her initially, his conduct made conditions intolerable for her to remain in the home: *Baker v. Baker*, [1976] B.C.J. No. 1269. Furthermore, thereafter, he would allow her to come back to the home only if she returned to him. In that sense, he

intended to deprive her of occupation so long as she refused to resume their relationship. Mr. French had no right to impose that condition on Mrs. French. Accordingly, in my view, after she left the home on November 9, 2009, Mr. French would not permit her to come back to live in the home.

- [94] From separation to January 2012, Mr. French reduced the mortgage and the line of credit by approximately \$44,000. Mrs. French will have the benefit of one-half of that amount, through the increased equity in the house, as will Mr. French. However, over that time, Mrs. French paid approximately \$23,000 in rent. To equalize their positions, Mr. French will pay \$11,000 as compensation to Mrs. French for occupation rent.

Costs and Cunha Damages

- [95] Mr. French did not provide accurate financial statements and failed to fully disclose his financial records, so that Mrs. French was forced, amongst other things, to subpoena bank records and have bank witnesses attend at trial. This, of course, added to Mrs. French's litigation expense and made conduct of the litigation more difficult and prolonged. This must be addressed in costs. In my view, Mrs. French should have costs of the proceeding at Scale B because she has been successful in the litigation (unless there are matters of which I am unaware). To address the additional costs incurred through Mr. French's misconduct in the litigation, I agree with Mrs. French's submission that her costs should be increased by \$5,000.
- [96] However, I am not satisfied that Mr. French has actively hidden assets, such that Cunha damages would be appropriate.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown

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