
CANADA / JUDGMENT

Fuscaldo v. Stewart

2010 BCSC 1585

COURT

Supreme Court of British Columbia

DECIDED

8 November 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 bcsc 1585 Fuscaldo v. Stewart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fuscaldo v. Stewart,

2010 BCSC 1585

Date: 20101108

Docket: E27261

Registry: New Westminster

Between:

Clara Teresa Fuscaldo

Plaintiff

And

Vincent James Stewart

Defendant

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:

R. S. Tretiak, Q.C.

E. Chapman

Appearing on his own behalf:

Vincent James Stewart

Place and Date of Trial/Hearing:

New Westminster, B.C.

March 15 - 19 and May 25, 2010

Place and Date of Judgment:

New Westminster, B.C.

November 8, 2010

Introduction

- [1] Ms. Fuscaldo and Mr. Stewart began living together in September 1994. They separated in May 2007. They never married. They have two children, a daughter aged 15 and a son aged 13. The issues are:
1. Ms. Fuscaldo's claim for an interest in various properties and assets by way of constructive trust;
 2. Ms. Fuscaldo's claim for spousal support and child support, which requires the determination of Mr. Stewart's income for such purposes; and
 3. A continuing restraining order.
- [2] The parties have agreed to joint custody and joint guardianship on the Joyce Model. Their agreement is attached as Appendix A.

Disclosure

- [3] At the commencement of the trial, Mr. Stewart sought an adjournment. The basis of his application was that he had insufficient time to produce documents that had been requested by Ms. Fuscaldo and/or were relevant to the matters in issue. Ms. Fuscaldo objected to the adjournment. I ordered that the trial proceed.
- [4] There were several orders made requiring Mr. Stewart to make full disclosure of his assets:
1. On November 7, 2007, during the judicial case conference, an order was made for both parties to produce documents.
 2. On February 1, 2008, Master Keighley referred to the parties agreeing, on a without prejudice basis, that the defendant's guideline income was \$300,000 annually. He also ordered that the defendant provide to counsel for the plaintiff a sworn Form 89 financial statement together with his 2006 and 2007 tax returns by April 30, 2008.
 3. In August 2008, the plaintiff applied for disclosure and an adjournment of the trial date on the basis that the defendant had not produced sufficient documents.

4. On February 18, 2010 Master Caldwell made specific orders for the production of specific documents. He ordered Mr. Stewart to provide documents pertaining or relating to Jeffries Landing; account statements for Mr. Stewart's margin short account; account statements for Mr. Stewart's deferred share plan; bank account statements for any bank accounts owned by the defendant from September 2008; and account statements for the National Bank financial account under a numbered company care of Mr. Stewart. Master Caldwell also ordered the defendant to attend an examination for discovery on March 4, 2010 and to deliver his updated Form 89 financial statements by March 2, 2010.
- [5] At the commencement of the trial, Mr. Stewart had not made full disclosure. Despite the orders of Master Caldwell, and the general obligation on a party to a family matter make full and complete disclosure, Mr. Stewart has not provided income tax returns for 2008 and 2009, information regarding his deferred profit sharing and information concerning his investment portfolio and loan which he had (and paid off) from his employer, National Bank. During trial, it became clear that Mr. Stewart had not disclosed investments in certain developments known as Jeffries Landing and Clayton Property.
- [6] Mr. Stewart's response is that he provided "reams of material" and he has not deliberately concealed any documents. He says that until the trial commenced he expected that the parties would settle, the trial would not proceed, and his obligations regarding disclosure would cease.
- [7] Ms. Fuscaldó asserts that where there is a conflict in the evidence between herself and Mr. Stewart, an adverse inference should be made against Mr. Stewart. She relies on *Cunha v. da Cunha* (1994), 99 B.C.L.R. (2d) 93, 51 A.C.W.S. (3d) 277 (S.C.), where Fraser J. stated at para. 9:

Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done. Non-disclosure also has a tendency to deprive children of proper support.

- [8] Ms. Fuscaldó also relies on *Blitz v. Blitz*, [1998] B.C.J. No. 1949 (S.C.), where the Court concluded that an adverse inference should be drawn from the fact that the respondent did not make full disclosure of all documents relating to every matter in question in the action (at para. 166).

Discussion

- [9] Mr. Stewart's reference to "reams of material" does not satisfy his obligation to make full and frank disclosure of his documents. As the trial proceeded, it was clear that there were still documents that Mr. Stewart had not disclosed. At other times during the trial, Mr. Stewart attempted to introduce and rely on documents that he had not disclosed prior to the trial. I restricted him from doing so.
- [10] In some circumstances, this will lead me to make an adverse inference against Mr. Stewart. I will address those circumstances as they arise.

Property Division

- [11] The properties and assets in issue are attached as Appendix B. Appendix B includes references to the evidence concerning the acquisition, title, mortgage, and appraised value of these properties. The value of the real estate holdings of which Ms. Fuscaldo has knowledge of the details is approximately \$3,000,000. There are other real estate holdings or investments that she became aware of immediately before the trial, when Mr. Stewart swore his Form 89 financial statement. The value of the investment assets known to Ms. Fuscaldo is approximately \$2,500,000. Ms. Fuscaldo has debts of \$164,850; Mr. Stewart claims debts of \$334,830.

Legal Principles

- [12] A recent decision of the B.C. Court of Appeal in *Wilson v. Fotsch*, 2010 BCCA 226, outlines the proper approach to claims for division of property in a common law relationship. Madam Justice Huddart, for the majority, describes these claims at para. 4:
- [4] These claims derive from characteristics common to family relationships identified in the authorities in various terms, all reflective of an on-going partnership in which each partner benefits the other: sharing of love and mutual trust, sharing of expenses, reasonable expectation of sharing in the economic fruits of a union (*Peter v. Beblow*, [1993] 1 S.C.R. 980 at 1013-16, 1018 (Cory J.)), and looking towards the long term (*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436). Although the specifics will vary from relationship to relationship and from individual to individual, a marriage-like relationship is infused with mutuality.
- [13] Madam Justice Huddart sets out a basic outline for unjust enrichment analysis at para 11. Before I address the facts before me, I will summarize the unjust enrichment analysis in *Wilson*.
1. Benefit/Enrichment

[14] The court must define the benefit at the outset, as the definition will inform the rest of the analysis. A benefit can be positive or negative; one example of a negative benefit would be saving the other party an otherwise inevitable expense. The court must take a "straightforward economic approach" in ascertaining benefit: para. 12, citing Peter at 990. Some benefit will usually be conferred in a marriage-like relationship, but this is not the stage of the analysis for balancing mutual enrichments.

2. Detriment

[15] At this stage, the court should identify and define the detriment corresponding to the enrichment. As long as the plaintiff can establish a causal link between the contribution and the enrichment, it is unusual to find a benefit without a deprivation: Wilson at para. 17, Peter and Pettkus v. Becker [1980] 2 S.C.R. 834. Full time devotion of one's labour and earnings with less than complete remuneration may be considered deprivation: Wilson at para. 18, Sorochan v. Sorochan [1986] 2 S.C.R. 38 at 44-45 and Panara v. Di Ascenzo, 2005 ABCA 47.

3. Absence of a Juristic Reason for Enrichment

[16] In Garland v. Consumers' Gas Co., 2004 SCC 25, [2004] 1 S.C.R. 629 at paras. 44 and 45, the Court set down a two-step categorical approach to this part of the analysis. Several cases have suggested that in a relationship where there are reciprocal benefits received by the plaintiff from the defendant, this can constitute a juristic reason for enrichment. However, reciprocal benefits do not fit well in the established categories in Garland: Wilson at para 23.

[17] The purpose of this stage of the analysis is to establish whether there is a reason for the defendant to retain a proven enrichment, and not to determine its value or off-set reciprocal enrichment. To begin considering the extent of the enrichment at this stage, or to address set-offs, would circumvent the full unjust enrichment analysis.

a. Established Categories

[18] The first step of this stage of analysis is to determine whether there is a juristic reason under an established category for the enrichment. The established categories are:

- (i) Contract;
- (ii) Disposition of law;
- (iii) Donative intent; and
- (iv) Other valid common law, equitable, or statutory obligations.

[19] Casual family arrangements do not constitute a contractual reason to retain an enrichment, but a written contract may. In Peter at 991-95, the Court explained that natural love and affection do not provide a juristic reason for enrichment flowing from domestic services. In Garland terms, love and affection do not ground a "donative intent".

- [20] A reciprocal benefit that the plaintiff receives is not a juristic reason; it is inherent in a marriage-like relationship. It does not fall into the "other valid obligations" category as it is not of the same "judicial force" as the three established categories. "Any reciprocal benefit qualifying for the application of equitable set-off should be treated as such in an unjust enrichment analysis and brought into account after the enrichment has been valued": Wilson at para. 28.
- [21] The only onus on the plaintiff at this stage of analysis is to show the absence of a juristic reason within these established categories. If the plaintiff establishes the absence of a juristic reason under one of these categories, a prima facie case is made out under this first step.
- b. Reason to deny recovery
- [22] The second step allows the defendant to rebut the prima facie case by establishing another reason to deny recovery. The onus is now on the defendant to show why enrichment should be retained.
- [23] The existing reasons to deny recovery are:
- a) public policy considerations;
 - b) the reasonable or legitimate expectations of the parties; or
 - c) a potential new category.
- [24] The reasonable or legitimate expectations should not be confused with the search for "phantom intent" necessary for a resulting trust: Wilson at para. 33, citing Rathwell at 443. There is no presumption or default position regarding expectations when considering a marriage-like relationship. Rather, the proper approach is to find the parties' expectations from the evidence of their particular relationship. The questions at this step are: Did the plaintiff suffer prejudice in the expectation of an interest in property or a monetary reward? Did the defendant accept the benefit in circumstances where its retention would be unfair given his or her knowledge of that expectation?: Pettkus at 848-49.
- [25] The assessment stage of the analysis provides the correct opportunity to consider the value of the enrichment, thereby preventing unfair effects from the unjust enrichment award.
4. Defences
- [26] Madam Justice Huddart lists six general defences to an unjust enrichment claim: change of position; estoppel; statutory defences; laches and acquiescence; limitation periods; and the impossibility of counter-restitution.
5. Remedy

- [27] A proprietary interest will only be merited if a monetary award is inadequate and there is a "sufficiently substantial and direct" contribution to the acquisition, preservation, maintenance or improvement of the property: *Pettkus* at 852. A minor or indirect contribution is insufficient: *Peter* at 997. One of the main considerations in determining whether a monetary remedy is sufficient is whether or not it would actually be paid. A monetary remedy may be most appropriate where:
- (1) The plaintiff's entitlement is relatively small in relation to the value of the whole property in question;
 - (2) The defendant is able to satisfy the plaintiff's claim without a sale of property;
 - (3) The plaintiff has no special attachment to the property in question; or
 - (4) The fact of the plaintiff obtaining certain rights flowing from the award of a property interest may cause the defendant hardship.
- [28] "A constructive trust should only be awarded if there is reason to grant the plaintiff the additional rights that flow from recognition of a right to property:" *Wilson* at para. 48, citing *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 678. A constructive trust also requires "a link between the contribution that founds the action and the property in which the constructive trust is claimed:" *Wilson* at para. 48, citing *Peter* at 988. However, if that link is not made out, but a monetary award will not suffice, a proprietary remedy may be ordered.
- [29] Most of the time, a monetary award will be more desirable: "most plaintiffs in family cases claim a constructive trust, and then ask for an award of damages on a value survived basis as at the date of trial:" *Wilson* at para. 50.
- (a) Quantification of Remedy
- [30] The two methods of quantification are: value received (quantum meruit basis), and value survived (proportionate share basis).
- a) Value received looks to the value of the benefits determined by their cost on the open market. The preferred method of quantification is the annualized approach, which calculates the annual earnings of equivalent occupations (housekeeper, for instance) based on available data over the term of the relationship. It should be equal to the benefit received by the defendant, and if the parties had made an agreement with regard to the scope of their respective roles, the court should not compensate out of proportion to those roles. However, there should be no consideration of the plaintiff's proportionate share in an asset, or of the increase or decrease in the value of an asset. Inflation from the time of the enrichment to the time of the plaintiff's claim will be taken into consideration.
 - b) Value survived looks to the value created in an asset by the plaintiff's contributions. As a general rule, a proportionate contribution will yield a corresponding proportionate share in value. For example, an input of ten percent of the value will result in a ten percent share.

There is no presumption of equality: Wilson at para. 61, citing Rathwell at 447-49. The fact that an asset has decreased in value may militate in favour of a quantum meruit award, but that is not the object of the inquiry at this stage. The length of the relationship will also be a factor at the apportionment stage, with long marriages suggesting a family venture and equality of all the family's assets. Factors that would permit the imposition of a constructive trust will commonly support the value survived approach; otherwise, the value received approach is generally taken: Wilson at para 51; Soroohan; Pickelien v. Gillmore, [1997] 5 W.W.R. 595, 30 B.C.L.R. (3d) 44 (C.A.). Where damages are awarded as an alternative to a proprietary award, inflation or deflation will be considered.

[31] The consideration of the adequacy of a monetary award must include not only an award assessed based on value received, but also value survived.

(b) Set-Off (Equitable and Legal)

[32] This is the stage at which the court considers reciprocal claims pleaded or mutual benefits conferred. Specifically pleaded reciprocal claims can be set-off against each other at the quantification stage of the analysis, but not where mutual claims of unjust enrichment are not pleaded: Wilson at para. 66. The nature of the set-off taking place in unjust enrichment cases has never been defined as either legal or equitable, but it does not seem that it can be true legal set-off in the context of a marriage-like relationship.

[33] True legal set-off has two principal requirements: both obligations must be debts; and both debts must be mutual cross obligations. There may be legal debts between the parties within the family relationship, and the court should adjust the amount of the final judgment to take such debt into account. However, although legal set-off is a defence, it is more practical to deal with it at the damages assessment stage.

[34] Equitable set-off is less clear cut than legal set-off. The authorities "are clear that a defendant's claim will not be viewed as an equitable set-off ... unless it is closely or intimately connected with, or directly impeaches, the plaintiff's claim": Wilson at para. 71 citing Cam-Net Communications v. Vancouver Telephone Co., 1999 BCCA 751 at para. 44.

[35] *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 (C.A.) at para. 38, sets out five requirements for a claim of equitable set-off:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands;
2. The equitable ground must go to the very root of the plaintiff's claim;
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim;
4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and

5. Unliquidated claims are on the same footing as liquidated claims.

[36] The Coba requirements will be met in family situations where mutual unjust enrichment is found, even if only the plaintiff pleaded the cause of action. The court must consider whether the plaintiff has been unjustly enriched and must be addressed with the same analysis as for unjust enrichment. The Coba requirements will also be met even where mutual unjust enrichment has only been found but not pleaded.

[37] Once the value to be set-off has been quantified, it will be deducted as a dollar figure from the plaintiff's award if the value received approach has been used. If the value survived approach is used, the set-off amount may be deducted as a percentage from the plaintiff's proportionate share.

[38] "Equitable set-off provides the doctrinal and juridical basis for what has proven to be a necessary exercise in family cases": Wilson at para. 79.

6. Pre-Judgment Interest

[39] Huddart, J.A. indicates that "for monetary awards, pre-judgment interest runs from the date the duty to make restitution arose ... For an award in lieu of a proprietary award, risk is shared by the parties and should be reflected by valuation at the date of trial with adjustments as between tenants-in-common from the date of separation until the date when the property is sold and the proceeds divided": Wilson at para. 93.

Application to this case

Evidence

[40] The parties are now in their early 40s. They met in their early 20s, when they were both working for RBC Dominion Securities in New Westminster. Ms. Fuscaldo was a receptionist and Mr. Stewart was an investment advisor. They started dating in February of 1994.

[41] When Ms. Fuscaldo learned that she was pregnant in September 1994, she moved in with Mr. Stewart to Bosun Place in Coquitlam. Mr. Stewart had a half interest in that property with another couple who also lived there.

[42] Their oldest child was born in March 1995 and their second child was born in December 1996. With Mr. Stewart's express agreement, Ms. Fuscaldo quit her job and undertook all the home and childcare responsibilities. Mr. Stewart continued as an investment advisor.

[43] The parties established a joint bank account. Mr. Stewart's employment income was deposited in that account and all their financial dealings, including property purchases, were managed through that account.

[44] Ms. Fuscaldo says that she and Mr. Stewart shared a philosophy that real property was a good investment. Mr. Stewart would find property deals and properties, and the parties would discuss them before making a purchase as an investment.

- [45] When the parties began co-habitation, Mr. Stewart had an interest in a property on Clarke Road in Coquitlam. The mortgage was paid from the parties' joint bank account. Ms. Fuscaldo was involved in the rental of the property, paying maintenance cheques, interviewing prospective tenants, paying the utilities, and inspecting and advertising the property for rent. The property was sold in 2007 for \$155,000. Mr. Stewart says that he received \$55,300 profit from the sale and put the funds into another investment. He has not provided the details or documents regarding the sale or the new investment.
- [46] Mr. Stewart also owned property on Olson Avenue in Mission when the parties began living together. Mr. Stewart owns a third of the property, along with his father and another non-party. Mr. Stewart's father has a mortgage loan of \$23,000 against his share of the property. Ms. Fuscaldo is the mortgagee. The parties agree that the value of the Olson Avenue property is \$600,000; Mr. Stewart's interest is \$200,000.
- [47] In April 2000 the parties purchased the interest of the other owners of Bosun Place. The title is in joint names. The parties resided there with their children until they separated in 2007. Ms. Fuscaldo remains with the children at the Bosun Place property. The property has an appraised value, as of September 2008, of \$650,000, with a mortgage of \$26,000 charged against it. Mr. Stewart believes that value is low, but he has not provided any evidence of the value.
- [48] In October 2003, the parties bought an investment property on Highland Way in Port Moody. The title is in joint names. The mortgage was paid from their joint account. This was also a rental property and Ms. Fuscaldo was involved to the same extent as she was in the Clarke Road property. Mr. Stewart moved from the family home to that property and continues to reside there. The value of that property is agreed at \$205,000.
- [49] Also in 2003, Mr. Stewart purchased a condominium on Coquitlam Avenue in Port Coquitlam. The title is in his name. Ms. Fuscaldo paid the mortgage, utilities and taxes on that property from the joint account. She would check the property and meet tenants from time to time. The parties agree that the value of the property is \$160,000, less the mortgage of \$48,732.
- [50] In November 2004, the parties acquired a recreational property at Big White near Kelowna, British Columbia. The title is in the name of Mr. Stewart, who owns 75 percent of the property, and a non-party, Scott Connelly, owns the remaining 25 percent. There is a mortgage against that property. Ms. Fuscaldo and Mary Connelly (Mr. Connelly's ex-wife) are guarantors on the mortgage. The evidence of Ms. Fuscaldo and Ms. Connelly is that the property was to be held in the names of four individuals, including Ms. Fuscaldo and Ms. Connelly. They were both surprised to learn that they were not on title, but are guarantors of the mortgage. They all used the property along with their families and each contributed to the maintenance and upkeep of it. The parties agree that the value of the property is \$545,000 with a mortgage of \$288,583.

- [51] Since the parties separated, Mr. Stewart made other property investments. He purchased a property on Grace Street in Port Moody. He has title to half the property and Scott Connelly has title to the other half. Mr. Connelly is living there. The parties agree that the value of the property is \$475,000, and the mortgage is \$339,600.
- [52] Mr. Stewart apparently invested in Cloverdale Development Limited Partnership - Cloverdale Division (The Highlands) in Ms. Fuscaldo's name. She is a limited partner, has received \$5,200 back on her original investment and is required to make certain declaration on her 2009 tax return to reflect that investment. Ms. Fuscaldo is unaware of the details.
- [53] Mr. Stewart disclosed that he had invested in two projects known as Jefferies Landing and Clayton Property Developments through his holding company, which he disclosed for the first time in his financial statement of March 2010. He did not provide any corporate documents or financial records of the holding company. He provided some information and documents about the property developments but did not make full disclosure regarding his investment or the return on his investment. He called his cousin as a witness. His cousin was also an investor in these properties but was vague about his involvement and the return, and did not have any information about Mr. Stewart's investments.
- [54] In addition to the properties, Mr. Stewart has shares in the National Bank as part of a deferred profit sharing program. Ms. Fuscaldo is aware of the value of the shares as of December 31, 2009, but is not aware of any of the details. Mr. Stewart did not provide full disclosure of these. He also has an investment portfolio and two margin accounts with the National Bank. Ms. Fuscaldo believes that she is aware of the value of each but has no other knowledge of them. Her lack of knowledge of the details is due to Mr. Stewart's non-disclosure.
- [55] Mr. Stewart claims that he owes \$67,000 to his employer, secured by a promissory note; he expects an assessment on his condominium of approximately \$20,000; he has one or more lines of credit with the National Bank upon which he has drawn \$184,000; there is \$49,000 owing on the parties' joint line of credit at RBC; and Mr. Stewart has drawn \$15,000 on a line of credit he has at RBC. Mr. Stewart did not provide evidence to support these debts.

Discussion and Analysis

Unjust enrichment

- [56] The evidence is unequivocal that each of the parties contributed to this partnership. Ms. Fuscaldo worked at home and cared for the children. Mr. Stewart earned income from outside employment. Ms. Fuscaldo made direct and indirect contributions to the accrual of real estate holdings and assets.

- [57] The contribution of an unpaid homemaker in a long term, marriage-like relationship is a contribution to the estate of her partner, thus enriching that partner (Peter). The parties' property and asset acquisitions reflected their joint philosophy concerning real estate as an investment and their expectation to share in each other's property.
- [58] Ms. Fuscaldo also described her direct contributions to the rental properties; she is a guarantor of the mortgage on the Big White property and a mortgagee on the Olson Avenue property. In some cases she owned the property and was required to declare the income from it on her income tax return. The fact that the parties were never married is insignificant in this analysis. It is clear that the parties embraced their individual strengths in their marriage-like relationship; Ms. Fuscaldo as a homemaker and mother, and Mr. Stewart as a business person.
- [59] The obvious conclusion is that Mr. Stewart was enriched by the many contributions made by Ms. Fuscaldo to the family and to Mr. Stewart's business over the years of their relationship. Through this enrichment, Mr. Stewart was enabled to pursue his business interests, including the accrual of significant real estate and investment holdings.

Deprivation

- [60] I am satisfied that there was a corresponding deprivation to Ms. Fuscaldo. In long term relationships, deprivation is often presumed once enrichment is found: Peter at 1012-1013. Ms. Fuscaldo's full time devotion of her labour without remuneration is deprivation.

Juristic Reason

- [61] The primary concern in determining whether there is a juristic reason for the enrichment is the expectation of the parties. Ms. Fuscaldo has demonstrated that there was an absence of juristic reason within the three established categories, contract, disposition of law, donative intent or any other similar obligation. There is no basis to deny recovery to Ms. Fuscaldo. As I have stated, these parties' expectations can be gleaned from the evidence of their relationship. Ms. Fuscaldo suffered prejudice in the expectation of an interest in the property or a monetary reward; Mr. Stewart accepted the benefit provided by Ms. Fuscaldo such that his retaining the property and assets would be unfair given his knowledge of the expectation.

Defences

- [62] Mr. Stewart has not provided a defence to Ms. Fuscaldo's unjust enrichment claim.

Remedy

- [63] As noted in Wilson, there are two possible remedies: a monetary award to reflect the value of Ms. Fuscaldo's contribution; and a constructive trust that awards her an interest in a particular asset based on the value of her contribution. A two step process is required to impose a constructive trust. First, there must be a reason to grant Ms. Fuscaldo the

additional rights that flow from the recognition of a right to property. A monetary award must be inadequate. Second, the court must determine the value of the trust based on an assessment of each party's contribution. As Wilson points out, most of the time a monetary award will be more desirable. Ms. Fuscaldo has claimed a constructive trust and is asking for an award of damages on a value survived basis as of the date of trial.

[64] I find that a monetary award is not adequate in this case, given the value of Ms. Fuscaldo's contribution and the significant assets that were accumulated, maintained and acquired during the parties' relationship. It is therefore appropriate to grant the constructive trust remedy. The approach is described in Peter at para. 105:

...the value surviving approach will often be the preferable method of determining the quantum of a claimant's share. This method will usually be more equitable and will more closely accord with the expectation of the parties as to how the assets, which they have accumulated should be divided upon termination of the relationship. Further, the utilization of the value surviving method will avoid the difficult task of assigning a precise dollar value to the services provided by someone who has dedicated him or herself to raising children and caring for a home. Instead, the contributions of the parties can more accurately be expressed as a percentage of the accumulated wealth existing at the termination of the relationship. Thus, for pragmatic reasons, the value surviving method may be the preferable one in many cases. No matter which method is used, equity and fairness should guide the court in determining the value and contributions made by the parties...

[65] There is no presumption of an equal division of assets. A longer marriage will suggest a family venture and equality of all the family assets.

[66] Huddart J.A. addresses this issue at para. 64 in Wilson:

As it is in the choice of remedy, the length of a relationship will also be a factor at the apportionment stage. Although the significance of the length of the relationship depends to some extent on the age of the parties at its beginning, my review of the case law suggests that marriages can be categorized for this purpose into at least three groups: long (12 or more years); medium (6 to 11 years); and short (5 or fewer years). Long marriages are more likely to suggest a family venture and equality of sharing of all the family's assets. The same can be said of marriage-like relationships.

[67] These parties enjoyed a long marriage-like relationship. They have two children. According to the evidence they both contributed to the relationship and to the acquisition of assets. An equal division of assets is fair and reasonable in the circumstances.

Set-off (equitable and legal)

[68] As Wilson indicates, this is a stage where the court considers reciprocal claims pleaded and mutual benefits conferred. In this regard, I will take those debts which have been proven into consideration. I have no basis to find that there should be an equitable set-off.

Conclusion

[69] Based on the above, and accepting the values agreed to by the parties (excepting Bosun Place) and referring to Appendix B, I order the following disposition :

1. Bosun Place, Coquitlam B.C.: Ms. Fuscaldo is entitled to a half interest in it by virtue of the joint tenancy. I will deal with Mr. Stewart's 50 percent interest further in this judgment. The value of the property is the appraised value as of September 2008.
2. Highland Way, Port Moody: this property is also registered in joint names. Ms. Fuscaldo is therefore entitled to 50 percent equity in this asset. The asset will be vested in the defendant.
3. Big White property: Ms. Fuscaldo is entitled to 37.5 percent of the equity in this property, which reflects half of Mr. Stewart's 75 percent interest.
4. Coquitlam Avenue, Port Coquitlam: this property is registered in the name of the defendant only. It was acquired as an investment property. Ms. Fuscaldo is entitled to 50 percent of the equity in that property. Mr. Stewart will retain the asset and pay compensation to Ms. Fuscaldo.
5. Grace Street, Maple Ridge: although this property was purchased in 2009, after the parties separated, I am satisfied that Ms. Fuscaldo's unjust enrichment claim on a value survived basis should apply. The defendant will retain the asset with compensation of 25 percent of the equity in the property to Ms. Fuscaldo.
6. Olson Avenue, Mission: Mr. Stewart owns one-third of this property. I am satisfied that Ms. Fuscaldo has established her unjust enrichment claim on the property on a value survived approach. Mr. Stewart will retain the asset and compensate the plaintiff for 16.5 percent of the equity, in addition to the \$23,000 mortgage which Ms. Fuscaldo holds.
7. National Bank shares: these are owned entirely by the defendant. Ms. Fuscaldo has established an unjust enrichment claim on that asset on a value survived basis. She is entitled to 50 percent of the value of those shares
8. National Bank Investment Portfolio Accounts: these are in Mr. Stewart's name exclusively. Ms. Fuscaldo has established an unjust enrichment claim on a value survived basis. She is entitled to 50 percent of the value of that investment portfolio.
9. National Bank Margin Account: this account is owned by Mr. Stewart's holding company. Ms. Fuscaldo has established her unjust enrichment claim on a value survived basis. She is entitled to 50 percent of the value of that margin account.
10. Margin Accounts for the children: these will be jointly controlled by the parties for the benefit of the children and do not count towards either party's asset allocation.
11. Plaintiff Spousal RRSP: Mr. Stewart established this as a vehicle to reduce his taxable income. The plaintiff is entitled to retain her RRSP.

12. Debts alleged by Mr. Stewart: I have no documentary proof of any of the debts which are claimed by Mr. Stewart. He has made reference to them in his evidence, but has not provided sufficient disclosure to satisfy me on a balance of probabilities that the debts exist or that they ought to be deducted. I therefore decline to deduct them from the value of the assets.
- [70] Mr. Stewart is declared a trustee of Ms. Fuscaldo's 50 percent interest in the properties and assets in which he holds title or owns. Neither party shall be entitled to sell any of the properties or the assets without the consent of the other. The parties have liberty to apply for directions, including an order for partition and sale, and I remain seized of any dispute arising out of this part of the order.
- [71] Mr. Stewart is under an ongoing obligation to disclose information and documentation about the Cloverdale Development Limited partnership, Jeffries Landing and Clayton Property Developments. He is also required to make full disclosure of all of his accounts including his deferred shares in the deferred profit sharing program, his investment portfolio at the National Bank, and his margin accounts with the National Bank.
- [72] Because of Mr. Stewart's nondisclosure, I am prepared to find that he has other assets which he has not disclosed. He is therefore ordered to disclose all of his financial assets.
- [73] I remain seized concerning any dispute arising out of further disclosure.
- [74] I refer this matter to the Registrar for an accounting in accordance with Rule 18-1. I invite the parties to make submissions to me concerning the terms of the reference.

Child Support and Spousal Support

- [75] On February 1, 2008 the parties agreed, on a without prejudice basis, that Mr. Stewart's guideline income was \$300,000 and on that basis, Master Keighley ordered him to pay \$3,891 per month as child support and \$6,539 per month as spousal support to Ms. Fuscaldo, commencing the first month after the parties' separation. Mr. Stewart did not make support payment on a regular ongoing basis. By the time the trial commenced in March 2010, Mr. Stewart had paid \$128,257.85 in support. His court ordered obligation to that date amounted to \$219,030.00. He was in arrears of \$90,772.15.

Mr. Stewart's income

- [76] Mr. Stewart's lack of disclosure of his income tax records for 2008 and 2009 means that I must impute income to him. His five-year tax summary from 2002 to 2006 produces an average annual income of \$312,493.40. In 2007, Mr. Stewart's line 150 income (total income) was \$593,549 and his net income was \$486,797. In 2008 Mr. Stewart's employment income was \$360,579.56. In 2009, Mr. Stewart's employment income was \$308,970.99. If I average the total income from 2007 with the employment income of 2008 and 2009, Mr. Stewart's average income is \$367,449. Mr. Stewart maintains that he had deductions from his income of over

\$100,000. He did not produce tax returns to corroborate this. I am unable to determine if these expenses are legitimately deducted from his income for support purposes.

- [77] As an enticement to join the employment of National Bank, Mr. Stewart received a loan of \$817,000 in 2002 from his employer. The terms of the loan are that one-seventh was forgiven each year subject to the defendant meeting certain sales quota. Based on those terms, the loan was extinguished in 2009; although Mr. Stewart maintains that approximately \$67,000 remains outstanding. He has not provided any evidence or documents to support that assertion.
- [78] Based on the limited financial information provided by Mr. Stewart, I impute his income to be \$360,000 per year. It is on that basis which I will calculate spousal and child support.

Child Support

- [79] Based upon that imputed annual income, and using the DivorceMate guideline calculator for 2010 for the calculation of child support according to the child support guidelines, Mr. Stewart shall pay \$4,630 per month to Ms. Fuscaldo for child support, retroactive to February 1, 2008. Mr. Stewart has paid some child support but is currently in arrears. The Family Maintenance Enforcement Program (FMEP) has collected some portion of those arrears by garnishment of Mr. Stewart's salary. Mr. Stewart is entitled to credit for child support payments which he has made. He is ordered to pay the arrears of child support forthwith.
- [80] I refer the reconciliation of child support ordered and that which has been paid to the Registrar for an accounting. FMEP shall be provided with the reconciliation in order to adjust its records and enforcement of arrears.

Spousal Support

- [81] Section 89 of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA") defines the obligation to support a spouse in s. 89:

Obligation to support spouse

89 (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) the role of each spouse in their family;
- (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
- (c) custodial obligations respecting a child;
- (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;

- (e) economic circumstances.
- (2) Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

[82] The criteria are set out in s. 93(4):

If a spouse will be living separate and apart from the spouse against whom the application is made, the court may, as it considers appropriate, adjust the amount of its order under subsection (1) (b) to take into account the needs, means, capacities and economic circumstances of each spouse, including the following:

- (a) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;
- (b) any other source of support and maintenance for the applicant spouse;
- (c) the desirability of the applicant spouse having special assistance to achieve financial independence from the spouse against whom the application is made;
- (d) the obligation of the spouse against whom application is made to support another person;
- (e) the capacity and reasonable prospects of a spouse obtaining education or training.

[83] I find that Ms. Fuscaldo is entitled to spousal support in accordance with s. 93(4)(a) and (e) of the FRA. The nature of Ms. Fuscaldo's contribution was to the maintenance and care of the home and the family, as she and Mr. Stewart agreed when their first child was born. The result is that she lost the opportunity to become economically independent. This has a significant impact on her employability and her future earning capacity, even with further education and training.

[84] The fact the Ms. Fuscaldo will receive substantial assets as a result of this decision does not eliminate her entitlement to spousal support. As noted in *Chutter v. Chutter*, 2008 BCCA 507, at para. 82:

[T]he appellant is entitled to compensatory spousal support on the basis that she has been economically disadvantaged and the respondent advantaged by the marriage and its breakdown. The appellant's role in the marriage reflected the parties' joint decision that her career would be secondary to the respondent's and secondary to her role as wife and mother. As a consequence of their respective roles in the marriage, the appellant's earning capacity has been negatively affected, and conversely, the respondent's earning capacity has been enhanced. In cases such as this, the courts have recognized that the fact that the wife continues to earn a reasonable income post-separation does not disentitle her to spousal support. Similarly, the fact that the appellant has received substantial assets does not of itself operate to deny her claim to spousal support. The respondent received roughly the same value in assets, and the asset division did not take into account the question of entitlement to spousal support. [citations omitted]

- [85] The DivorceMate spousal support guidelines calculator 2010, spousal support advisory guidelines "with child support" formula, support an award of spousal support of between \$7,867 and \$9,501 per month for a maximum duration of 12 years from the date of separation.
- [86] Ms. Fuscaldo claims that spousal support should be paid in a lump sum, based on Mr. Stewart's record of not providing consistent monthly payments.
- [87] I agree that a lump sum for spousal support is appropriate. Based on the calculations at the middle level I fix spousal support in the amount of \$6,539 per month from June 2008 to the date of trial. Mr. Stewart must pay the arrears of spousal support to that date forthwith.
- [88] I order a lump sum amount for spousal support, based on the spousal support advisory guidelines and the calculations produced. The lump sum support will be paid by the 50 percent share Mr. Stewart has in the Bosun Place property being transferred to Ms. Fuscaldo. Ms. Fuscaldo is entitled to retain all the contents of the Bosun Place property.

Restraining Order

- [89] Ms. Fuscaldo seeks to continue the restraining order in effect, based upon Mr. Stewart's conduct after the separation.
- [90] I am of the view that it should not be continued. As a result of this judgment Mr. Stewart and Ms. Fuscaldo should not have any continuing difficulties with each other. Although I was unimpressed by Mr. Stewart's lack of disclosure, I am prepared to give him a chance to conduct himself respectfully and reasonably. Ms. Fuscaldo can make application to the court for a new restraining order if Mr. Stewart rejects that chance.

Summary

- [91] I award joint custody and guardianship in accordance with the terms of Appendix A.
- [92] Each party shall have an equal share of the property and assets listed on Appendix B, excepting Bosun Place. Mr. Stewart is declared a trustee of Ms. Fuscaldo's 50 percent interest in the properties and assets in which he holds title or owns. Neither party shall be entitled to sell any of the properties or the assets without the consent of the other. The parties have liberty to apply for directions, including an order for partition in sale, and I remain seized of any dispute arising out of this part of the order.
- [93] Mr. Stewart is under an ongoing obligation to disclose information and documentation about the Cloverdale Development Limited partnership, Jeffries Landing and Clayton Property Developments. He is also required to make full disclosure of all of his accounts including his deferred shares in the deferred profit sharing program, his investment portfolio at the National Bank, and his margin accounts with the National Bank. He is ordered to disclose all of his financial assets, including those about which he has not disclosed before December 31, 2010. I remain seized concerning any dispute arising out of further disclosure.

[94] I refer this matter to the Registrar for an accounting in accordance with Rule 18-1. I invite the parties to make submissions to me concerning the terms of the reference.

[95] Mr. Stewart is ordered to pay child support in the amount of \$4,630 per month retroactive to February 1, 2008, subject to reconciliation of the amounts paid to date, and a Registrar's accounting if necessary.

[96] Ms. Fuscaldo is entitled to spousal support which shall be satisfied by the transfer of Mr. Stewart's one-half interest in Bosun Place to Ms. Fuscaldo.

Costs and Court Order Interest

[97] The parties have leave to schedule a hearing to address court order interest and costs.

"Gropper, J."

Appendix A

Appendix B

SCOTT SCHEDULE

OF MAJOR ASSETS AND DEBTS

Asset or Debt

Present Title and Mortgage

Plaintiff Value

Defendant Value

Bosun Place, Coquitlam, BC

50% Acquired by defendant 1994 prior to cohabitation, remainder purchased thereafter by parties; family home for parties and the children

50% Plaintiff

50% Defendant

\$26,000 Mortgage

\$650,000 September 2008 appraisal

Net after mortgage \$624,000

\$775,000 Alleges appraisal in Form 89, if such exists has not served it

Net after mortgage \$749,000

Highland Way, Port Moody, BC; purchased 2003; defendant resides there

50% Plaintiff

50% Defendant

No mortgage

\$205,000

\$205,000 (Form 89)

Big White, BC, purchased 2005, both parties have contributed to physical maintenance and improvement of property

75% Defendant

25% non-party

Plaintiff jointly on mortgage, thought she was supposed to be on title; defendant had documents drawn up.

Mortgage \$288,583

\$545,000 (Defendant's form 89)

Net interest after mortgage \$192,312.75

\$545,000 (Form 89)

Net interest after mortgage \$192,312.75

Coquitlam Avenue, Port Coquitlam, BC

Purchased by defendant during course of relationship as investment property; plaintiff contributions indirect, maintaining home and children while defendant accumulated assets

100% defendant

Mortgage \$48,738

\$160,000

Net after mortgage \$111,262

\$160,000 Form 89

Net after mortgage \$111,262

Grace Street, Maple Ridge, BC

Investment property purchased in 2009 by defendant with the co-owner of the Big White property; co-owner is presently living there and paying the whole mortgage

50% Defendant 50% non-party

Mortgage \$339,600 according to Defendant

\$475,000 (Per: Defendant's form 89)

Defendant interest after alleged mortgage \$67,700

\$475,000 (Per: Defendant's form 89)

Defendant interest after alleged mortgage \$67,700

Olson Avenue, Mission, BC

33% Defendant 67% non-parties

No bank mortgage

\$600,000 total; \$200,000 defendant interest

\$600,000 total; \$200,000 defendant interest

National Bank Shares bought pursuant to profit sharing program

100% defendant

\$332,242.97 as at December 31, 2009

\$332,242.97 as at December 31, 2009

National Bank investment portfolio account

100% defendant

\$488,250.97

\$488,250.97

National Bank margin acct.

100% defendant

\$77,463.50

\$77,463.50

National Bank margin acct.

100% owned by # company owned by defendant

\$167,398.34

\$167,398.34

Plaintiff Spousal RRSP

100% Plaintiff

\$127,879

\$130,000

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/10/15/2010BCSC1585.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/fuscaldo-v-stewart-2010>

Prepared on 29 October 2026 · Esheria