

CANADA / JUDGMENT

Gaiga v. Hawkins

2020 BCSC 1563

COURT

Supreme Court of British Columbia

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2020 BCSC 1563 Gaiga v. Hawkins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gaiga v. Hawkins,

2020 BCSC 1563

Date: 20201023

Docket: E82460

Registry: Nanaimo

Between:

Marina Gaiga

Claimant

And

Joseph Douglas Hawkins

Respondent

Before: The Honourable Mr. Justice Thompson

Reasons for Judgment

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Place and Dates of Trial:

Nanaimo, B.C.

July 30-31, 2020

August 4-7, 2020

Place and Dates of Pleadings Application:

Nanaimo, B.C.

September 11 & 17, 2020

Place and Date of Judgment:

Nanaimo, B.C.

October 23, 2020

- [1] This trial arises from the parties' brief marriage-like relationship that began in 2014 and ended in 2017. The issues are property division, whether a compensation order for a breach of a restraining order against disposition of property ought to be made and if so in what amount, and whether the existing protection order ought to be extended indefinitely. Three witnesses testified at trial: each party and Scott Clydesdale, a mechanic who related what occurred during a visit to the property owned by the parties.
- [2] Having heard and considered the evidence of the claimant and the respondent, I am left with little confidence in the reliability or veracity of the testimony of either party. This makes fact-finding difficult, especially where additional witnesses who might have helped clear the fog were not called by either party. To add to the challenge, documents that might have helped corroborate evidence have in some instances gone missing. When making findings of fact in this case, I have kept in mind the instructions from the Supreme Court of Canada on the balance of probabilities standard. To satisfy the onus of proof on the balance of probabilities standard, the evidence must be sufficiently "clear, convincing and cogent": *F.H. v. McDougall*, 2008 SCC 53 at para. 46. However, the quality of evidence necessary to meet the "clear, convincing and cogent" standard depends on the "nature of the claim and of the evidence capable of being adduced": *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 40.
- [3] In her amended notice of family claim, Ms. Gaiga seeks a "determination of excluded assets in her favour" and an "unequal division of family property and family debt" based on s. 95(2) of the Family Law Act -- in particular, "the short duration of the parties' relationship and damage caused to the property by [Mr. Hawkins'] negligent or deliberate acts."

- [4] In his response to family claim, Mr. Hawkins indicates disagreement with Ms. Gaiga's property claims. In the course of closing argument, counsel for Mr. Hawkins advised of his intention to apply for leave to file a counterclaim. In due course, this application was brought and heard; my reasons for extending time to file a counterclaim appear near the end of these reasons.
- [5] In his counterclaim, Mr. Hawkins seeks an equal division of family property and debt. He also claims compensation for excluded property, alleging that he invested significant funds from the sale of his previous home into the property that constitutes the family home. Further, he seeks to be compensated for the disposal by Ms. Gaiga of items of his business and personal property.

I

- [6] The claimant Marina Gaiga is 52 years old. For the last 15 years she has owned and operated a small transportation company. Since 1992, she has lived on a three-acre property on Cypress Boulevard in a neighbourhood on the outskirts of Port Alberni. Her parents owned the property before she acquired it in 1999.
- [7] The respondent Joseph Hawkins is a 50-year-old diesel mechanic. He does this work despite a serious work injury thirty years ago that left him without effective use of his legs. He gets around using leg braces and, when his work day is done, he uses a wheelchair. In the years before moving in with Ms. Gaiga, he lived on Walmer Road, in the same neighbourhood. He ran his business, Off Road Diesel Ltd., out of a two-hoist shop on the Walmer Road property.
- [8] The parties met in late 2011 through their work. Mr. Hawkins' shop was doing repairs and maintenance on Ms. Gaiga's company's buses. They began dating in 2012. While they were dating and living on separate properties, the parties formed a plan to build a large standalone shop on Ms. Gaiga's property. Relatedly, Mr. Hawkins took steps to sell his Walmer Road property: the parties' plan was that Mr. Hawkins would live with Ms. Gaiga on Cypress Boulevard and carry on his business in the newly built shop.
- [9] These plans were carried out: the Cypress Boulevard shop was brought to a substantially complete state over the months between October 2013 and March 2014, the sale of the Walmer Road property completed in March 2014, and Mr. Hawkins moved into the Cypress Boulevard home on 1 April 2014. The parties agree that their marriage-like relationship began when Mr. Hawkins moved in with Ms. Gaiga on Cypress Boulevard, i.e. on 1 April 2014.
- [10] The parties intended to use the large shop on Cypress Boulevard for commercial purposes. Mr. Hawkins would carry on his diesel mechanic business there, and Ms. Gaiga planned to make some use of the shop for her buses. However, when Ms. Gaiga completed the application for a building permit in October 2013 as the owner of the Cypress Boulevard property, she applied on the basis that the new building was not for commercial use and would contain no overnight accommodation. The estimated construction value for the

planned 1903 sq. ft. shop is stated on the permit application as \$42,284.66, and the contractor named is "John Versteeg Construction." Ms. Gaiga testified that this estimated value was based on an estimate provided by Mr. Versteeg, who she described as a friend of Mr. Hawkins. She testified that she recalls seeing a written estimate but cannot locate the document in her files.

- [11] This estimated shop construction value, attended by a missing estimate document, is puzzling evidence. On its face, the amount seems patently inadequate to build such a large shop. The evidence on the eventual total cost of the shop is imprecise, but I am satisfied that it cost many multiples of the amount set down on the building permit application. Mr. Versteeg would surely have been able to provide useful evidence on this (and other) issues, but he was not called as a witness by either party.
- [12] Ms. Gaiga testified that she first planned to build a shop on the Cypress Boulevard property in 2009, a time when she was in the midst of making renovations to her house. To facilitate the option of building a shop, she arranged to have capacity to have power delivered to the site on the property where the shop was eventually built. I wonder whether this to-the-penny missing estimate of \$42,284.66 was an estimate that Ms. Gaiga obtained for an earlier plan to build a much smaller building, and this amount was provided to the regional district in 2013 so as to obtain a building permit for a lesser fee than would be payable by offering a true estimate. On reflection, I do not think there is enough evidence to draw this inference. However, I am able to say that whatever the source of the to-the-penny estimate provided by Ms. Gaiga to the regional district, it was never a true estimate of the construction value of this shop. Further, there is no doubt that Ms. Gaiga knew that the building permit was issued on the basis of there being no overnight accommodations or commercial use. When asked about the permit application in cross-examination, she sought to excuse the dishonesty about commercial use of the building with the dissembling assertion that the intended commercial use was only "small scale."
- [13] According to an appraisal report, the shop building as constructed is a 2348 sq. ft. building, with 891 sq. ft. of finished space including a bedroom, a bathroom, a rec room, and an office. Ms. Gaiga testified that she was surprised to see the shop being constructed larger than the permit allowed, and she worried that the regional district might order that the building be taken down; she testified that she did nothing about it because she was mollified by Mr. Hawkins' assurances that he would "look after it."
- [14] Ms. Gaiga testified that she and Mr. Hawkins agreed to contribute equally to the cost of building the shop and she paid \$40,000 of what she said was the \$80,000 total cost. She testified that she would pay Mr. Hawkins whenever he asked for money. She said she paid him with post-dated cheques and cash that she sometimes received from customers for work such as providing transportation in relation to weddings. There is no clear, convincing and cogent evidence that the total cost of the shop was \$80,000 or that she made contributions to the cost of building the shop in materially significant amounts.

- [15] Mr. Hawkins testified about his role in the building of the shop, its cost, and his contributions. I accept his evidence that he did a significant amount of the organization of the tradespeople despite the involvement of Mr. Versteeg. I also accept that he spent a considerable number of hours working heavy equipment in connection with the foundation, underground wiring, plumbing and drainage, and the driveway. Mr. Hawkins gave some hearsay evidence about his discussions with Mr. Versteeg before commencement of the project about the cost of building. Mr. Hawkins also referred to a detailed written "estimate" prepared by Mr. Versteeg in 2020 for use in this case. Including labour and GST, the total on the "estimate" document comes to \$258,575. It would seem that what Mr. Versteeg told Mr. Hawkins and this "estimate" document were put forward as Mr. Versteeg's evidence about what it would cost or did cost to build this shop in 2013-2014. Unfortunately, Mr. Versteeg was not called to give evidence, and his evidence cannot be admitted in this second-hand and unsworn fashion.
- [16] Mr. Hawkins testified that he paid all of the bills to build the shop, without contribution from Ms. Gaiga, making use of a line of credit on the Walmer Road property until this property was sold in March 2014, at which time he began making use of the Walmer Road net sale proceeds to pay the costs of building the shop. He put into evidence invoices from suppliers, and invoices from Mr. Versteeg's company and other contractors. The invoices are made out to Mr. Hawkins. I accept that he paid them from his own resources, without significant contribution from Ms. Gaiga. These invoices are summarized on a spreadsheet at tab 34 of Exhibit 4. The total shown on this document is \$149,088.25, but the invoices in fact total \$171,650.97. (Perhaps the total on the document is intended to indicate the total of the invoices up to the time the marriage-like relationship began on 1 April 2014. In any event, as will be seen, the difference between the two figures is not material because of the view I take of the case.)
- [17] Other than the installation of siding and some other cosmetic work, the new shop was completed by March 2014. By that time, the parties had decided to demolish the house on the Cypress Boulevard property and build a new home with mortgage financing to be obtained. Title to the Cypress Boulevard property was transferred into joint tenancy on 27 March 2014, a few days before their marriage-like relationship began. Ms. Gaiga gave no evidence about the reason for the transfer. When Mr. Hawkins was asked about it, he said that he was told by Ms. Gaiga that he should be on title to the property since he had put so much into the shop, and that the transfer was also related to their intention to arrange a building mortgage.
- [18] It is true that around this time in late March 2014, the parties were in the process of attempting to secure construction financing for the planned new home, and one reason for transfer of title into joint tenancy may well have been to advance this cause. I find, however, that this was not the entire reason, and probably not the principal reason for the transfer. The transfer of the Cypress Boulevard property into joint tenancy was a natural reflection of the parties' plans and how they had been carried out to that point in time:

- a. the parties had agreed to build the shop on this property and had done so;
- b. Mr. Hawkins had sold his Walmer Road property and had injected substantial funds and effort into building the new shop without significant contribution from Ms. Gaiga;
- c. at the time of the transfer there was a rough equivalency between the equity that Ms. Gaiga had accumulated in the property prior to erection of the shop, and what Mr. Hawkins had paid to build the shop;
- d. Mr. Hawkins was about to move in with Ms. Gaiga at Cypress Boulevard; and
- e. the parties had agreed that they would demolish the existing house and build a new one.

[19] It is unsurprising in these circumstances that existed in the time immediately before the beginning of their marriage-like relationship that Ms. Gaiga would see to it that title to the property reflected the parties' roughly equal contributions to the Cypress Road property.

[20] The demolition of the house occurred in April or May 2014, and the parties moved into temporary rental accommodation until they were able to move into their newly built home. Ms. Gaiga testified that she did not want to go along with Mr. Hawkins' wish to build a new home, but did so because he said he could not be with someone who would not respect his needs for proper wheelchair accessibility. I doubt that Ms. Gaiga was as reticent about building a new home as she now claims. In any event, whether she agreed enthusiastically or reluctantly to demolish the existing house and build a new home is not material to the property division issue.

[21] Mr. Versteeg's company was involved in building the new home. In late March 2014, the parties obtained a written estimate of the expected cost of the new home from Mr. Versteeg in order to obtain construction financing from CIBC. Mr. Hawkins testified that the parties "threw in a few extra things that had already been done" such as the septic tank and field so as to inflate the expected cost and thereby obtain a larger construction loan. This evidence is one of the reasons that makes me leery about accepting either party's uncorroborated testimony.

[22] The CIBC loan funds were paid to the parties in four instalments. The first instalment of \$207,436, paid in September 2014, retired the balance of \$202,905 on the existing RBC mortgage on the property. Three further draws, totaling \$171,382 were paid over the following four months.

[23] Each party testified about the breakdown of their relationship. This evidence is, for the most part, immaterial to the property division issue. One aspect of the evidence is, however, relevant to credibility. Ms. Gaiga testified that an important reason for the erosion of her trust in Mr. Hawkins was her discovery in early 2017 that his legs allowed him more mobility than she had previously understood. She testified that she felt deceived into demolishing her house to build a wheelchair-accessible home for a man who did not need a wheelchair. I reject this evidence. I am quite sure that in the five years from the time she became

acquainted with Mr. Hawkins, including nearly three years living together, Ms. Gaiga became intimately familiar with the limits of Mr. Hawkins' physical capabilities.

- [24] After the breakdown of the relationship in 2017, Ms. Gaiga began to suspect that Mr. Hawkins' business activities on the property had produced environmental contamination. She had this investigated and has taken recommended remediation steps. The total cost of investigation and remediation to date of trial is \$34,824.
- [25] Based on appraisal evidence, the parties reached agreement on the value of the Cypress Boulevard property at material points in time. On 1 October 2013, prior to the construction of the shop, its value was \$365,000. On 1 March 2014, a time when the shop was substantially completed and just before transfer of the property into joint tenancy, its value was \$462,500. The current value of the property is \$740,000.
- [26] The original mortgage loan on the Cypress Boulevard property had a balance of \$202,905 when it was repaid as part of the September 2014 refinancing. At the end of June 2020, the mortgage loan on the property had a balance owing of \$337,885.
- [27] The parties agree that neither Ms. Gaiga's company nor Mr. Hawkins' company are to be treated as family property. The property under consideration for division is the Cypress Boulevard property and the increase in value of the modest investment accounts that Mr. Hawkins had prior to the commencement of the relationship.

II

- [28] This extended passage from *Venables v. Venables*, 2019 BCCA 281, is instructive on the property division regime under the Family Law Act:
- [84] . . . [T]he new property regime under the FLA was drafted to create more certainty by identifying two categories of property and a starting point for what would typically happen on separation of spouses, married and common law: family property, which generally would be divided equally between spouses on separation; and excluded property, which a spouse would generally keep upon the breakdown of a spousal relationship.
- [85] The category of "family property" in s. 84 of the FLA recognizes that many modern relationships are like a partnership or joint venture, with give and take and various forms of contribution, including indirect contribution through child care, household management and other means, and so presumptively any acquisition or growth in assets during that relationship should be shared equally upon the relationship ending. Because of the wide variety of indirect contributions made during a spousal relationship, a spouse is not required to directly contribute to family property in order to be entitled to a presumptive equal share in it.

- [86] The category of "excluded property", established by s. 85 of the FLA, carves out certain types of property from the family property category. It is meant to cover property a spouse acquired to which the other spouse did not contribute, because either the property was acquired before the relationship or it came about by inheritance or certain other specified means (gifts from a third party, settlement of a claim, insurance proceeds, discretionary trusts and property derived from excluded property).
- [87] The excluded property regime reflects the reality that many modern relationships do not last a lifetime and the perspective that, since the other, non-acquiring spouse had nothing to do with the acquisition of the excluded property, it is presumptively fair that the non-acquiring spouse should not share in the other's excluded property upon the relationship ending.
- [88] The notion that excluded property should remain excluded property, even if transformed into other property, is captured by s. 85(1)(g) of the FLA, which includes in the category of excluded property, "property derived from" excluded property.
- [89] The onus to show that property owned by one of the spouses is excluded property is on the party claiming the exclusion: FLA, s. 85(2).
- [90] While striving for more certainty and less litigation in property division, the FLA did not get rid of all flexibility. The FLA provides for judicial discretion, allowing for judicial reapportionment of either category of property, family property or excluded property, if to not do so would be "significantly unfair": FLA, ss. 95 and 96, respectively.
- [91] The "significantly unfair" language requires a higher threshold of unfairness before judicial discretion to reapportion is engaged, as compared to the discretion that existed under the predecessor FRA, which allowed for reapportionment in the case of "unfairness". Generally this will require "something objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 41-42.
- [92] The FLA does not expressly address what to do in a situation where property that is in the category of "excluded property" changes ownership during the relationship, from one spouse to the other spouse, the issue at the center of this appeal.
- [93] Two questions arise under the FLA when ownership of excluded property is transferred from one spouse's name to the other spouse's name, solely or jointly, and remains in that form of ownership at the time of separation:
- a) first, does the "excluded property" become "family property", or does s. 85(1)(g) apply with the result that it continues to be excluded property; and,
 - b) second, if it does become family property, on relationship breakdown, can the origins of the property that previously made it excluded property be considered as a factor that might make it "significantly unfair" to divide the family property equally, justifying judicial reapportionment of the family property under s. 95?

- [94] This Court has already spoken on this first question in *V.J.F.*, which was followed in *Pisarski v. Piesik*, 2019 BCCA 129 and *Namdarpour v. Vahman*, 2019 BCCA 153.
- [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property: *V.J.F.* at paras. 74-79; *Namdarpour* at para. 46.

[Emphasis added.]

III

- [29] Each party envisions a property-division outcome whereby Ms. Gaiga acquires sole ownership of the Cypress Boulevard property and Mr. Hawkins retains ownership of his investment accounts; this will require a compensatory payment to Mr. Hawkins. The parties' positions are far apart on the amount of this compensatory payment.
- [30] Ms. Gaiga submits that the equity in the Cypress Boulevard property at the outset of the marriage-like relationship, which she calculates as \$259,595, ought to be either excluded from family property or, in the alternative, that if this equity is not excluded property then a significant unfairness finding ought to be made to achieve the same or substantially the same result.
- [31] Ms. Gaiga concedes that Mr. Hawkins' investment accounts are excluded property. She submits that the evidence indicates investment gains in these accounts of at least \$12,222 since the beginning of the relationship, and these investment gains are family property. Mr. Hawkins made no contrary submission.
- [32] Ms. Gaiga submits that after her exclusion portion, the remaining equity in Cypress Boulevard is family property. After accounting for the increased value of Mr. Hawkins' investments, she submits that a notional equal division of family property would lead to a \$71,260 payment from Ms. Gaiga to Mr. Hawkins. However, she argues that an equal division would be significantly unfair. She relies on the short term nature of the relationship contrasted with her long term occupation and ownership of the Cypress Boulevard property, the damage done to this property, the work done on the property since the end of the relationship, and the expected expense of further remediation. She contends that she ought to receive 75% of family property, which she submits ought to result in a payment to Mr. Hawkins of \$35,630.
- [33] Mr. Hawkins submits that an equal division is appropriate and that Ms. Gaiga has not carried the heavy burden of establishing that an equal division is significantly unfair. He points to his substantial financial and "sweat equity" contributions to the building of the shop,

reflected in the transfer to him of an equal interest in the property prior to the beginning of the marriage-like relationship. With regard to the remediation done to the Cypress Boulevard property, an asset owned by both parties, he emphasizes that this work was done after he was barred from the property and without consultation with him. He also relies on Ms. Gaiga's disposal of some of his business and personal chattels as a relevant fact to be weighed in the analysis of whether an equal division would be substantially unfair.

IV

- [34] Subject to the excluded property provisions in s. 85 of the Family Law Act, both the Cypress Boulevard property and Mr. Hawkins' investment accounts are family property. Each party advances excluded property claims in relation to the Cypress Boulevard property. In my view, these claims are ill-conceived. The Cypress Boulevard property was contributed to by both parties, and, as a result of the pre-relationship transfer of the property into joint tenancy, it was brought into the marriage-like relationship by both parties. Section 85 is not intended to encompass property jointly held by spouses at the time of the commencement of their relationship. As Justice Griffin said in *Venables*, at para. 86, the excluded property provisions in s. 85 are intended to address property that one spouse acquired to which the other spouse did not contribute.
- [35] I have considered whether Ms. Gaiga might be entitled to exclusion of the pre-relationship equity in the Cypress Boulevard property on the basis that Mr. Hawkins held his interest in this property on trust. This position was not pressed in argument, and for good reason. Again, the purpose of s. 85 is important: it is not intended to encompass property acquired through the contribution of both spouses, and I find that the equity in Cypress Boulevard was acquired via substantial contributions from each party. Moreover, I have found that these roughly equivalent contributions were reflected in the state of title at the time of the commencement of the marriage-like relationship.
- [36] The Cypress Boulevard property is valued at \$740,000. The balance on the mortgage is \$337,884. The equity in the property is the difference of \$402,112, and this is family property. Mr. Hawkins' investment accounts, conceded to be excluded property, have appreciated by \$12,222 and this increase in value is family property.
- [37] I reject Ms. Gaiga's contention that an equal division of family property is significantly unfair. Section 95(2) of the Family Law Act lists factors that may be considered when addressing alleged significant unfairness. The factors relied on by Ms. Gaiga are the short duration of the relationship compared to the many years that she owned the Cypress Boulevard property (s. 95(2)(a)); and damage allegedly done to the Cypress Boulevard property by Mr. Hawkins' business, and remediation work paid for by Ms. Gaiga (ss. 95(2)(f), 95(2)(g), and 95(2)(i)).

- [38] It is true that this was a short relationship that lasted only three years and Ms. Gaiga had owned the Cypress Boulevard property since 1999; further, she had conducted repairs and renovations to the property, and she had substantial equity in the property. In October 2013 (i.e., just before the shop was built), the property was valued at \$365,000. The amount owing on the RBC mortgage at that time is not in evidence, but the balance on the loan was \$202,905 when it was repaid as part of the September 2014 refinancing -- this fact allows for the making of a reasonable approximation of what Ms. Gaiga's equity in the property would have been had the shop not been built. I think it is likely that Ms. Gaiga's equity on this notional basis would have been approximately \$155,000 to \$160,000.
- [39] I have found that Mr. Hawkins' contribution to the property before the relationship began on 1 April 2014 was substantial and roughly equivalent to Ms. Gaiga's accumulated equity had the shop not been built. In coming to these conclusions, I have not lost sight of the evidence that the property value was \$462,500 in March 2014 after the shop was built, an appreciation in value of just under \$100,000 in this five-month period. It might be argued that the addition to value is a better measure of Mr. Hawkins' contribution than the greater amount that he spent building the shop, but the principal purpose of building the shop was not to add value to the property but to provide a place for Mr. Hawkins to carry on his diesel mechanic business. I think the fair measure of his contribution is the amount he paid in furtherance of the parties' plans rather than the amount by which the property value increased as a result of building the shop.
- [40] As part of her case for an unequal division, Ms. Gaiga complains of environmental damage done to the property by his business, and investigation and remediation costs of nearly \$35,000 she has incurred in the midst of this litigation since Mr. Hawkins stopped operating his business on the property. She submits that there is further remediation required. She also refers to other work she has had done in relation to the property, including roofing work, and installation of security cameras.
- [41] There are problems with this argument. Ms. Gaiga and Mr. Hawkins gave conflicting evidence about whether Mr. Hawkins was consulted about environmental and cleanup costs. I am not satisfied on the balance of probabilities that he was consulted about the environmental costs or any of these other expenses. In any event, I am quite sure that he did not agree to the expense of these monies. After Mr. Hawkins was barred from the property by a protection order made on 13 November 2018, she treated the property as hers alone. Perhaps understandably, given the length of time she lived on the property and the short-term nature of the relationship, Ms. Gaiga failed to come to grips with the reality that Mr. Hawkins also owned the property and, pending agreement or order, he was entitled to be treated as a co-owner.

- [42] Mr. Hawkins contests the need for these expenditures. The environmental consultant's reports are not before me as expert opinion evidence. There is no body of admissible evidence that establishes on a balance of probabilities that Ms. Gaiga's expenditures increased the value of the property or were necessary to prevent wasting. In these circumstances, Ms. Gaiga's unilateral expenditure of money on the property does not make an equal division of the equity in the property substantially unfair.
- [43] The circumstances weigh against a finding of substantial unfairness, especially considering Mr. Hawkins' substantial contribution to the Cypress Boulevard property by paying for and helping build the shop. I bear in mind that one of the operating principles behind Part 5 of the Family Law Act is that judges are not to embark on a quest to do perfect justice. An equal division of the family property may not be perfect justice, but it has not been shown to be significantly unfair.
- [44] If I am wrong and Ms. Gaiga is entitled to a s. 85 exclusion of the equity she had accumulated before title was transferred into joint tenancy in the days before the relationship began, then Mr. Hawkins would have a meritorious claim for a s. 85 exclusion of his contributions -- both financial and by way of "sweat equity" -- to the property via the building of the new shop. In the alternative, if a s. 85 exclusion is not available to him, then significant unfairness would result and I would put in place an order that would restore equality. In other words, the destination is the same regardless of the doctrinal path: equal division of the current equity in the Cypress Boulevard property, and an equal division of the gains in the investment accounts that Mr. Hawkins owned before the relationship.

V

- [45] Mr. Hawkins claims an adjustment to the compensation order to account for Ms. Gaiga's breach of Master Dick's order of 12 December 2017. It was a term of this order that each party is prohibited from disposing of property in which either party may have an interest. Sections 97(1)(b) and 97(2)(c) of the Family Law Act authorize a compensation order for the purpose of giving effect to division of property.
- [46] Ms. Gaiga acknowledges that she acted contrary to the s. 91 order. The concession is appropriate: I am satisfied on a balance of probabilities that the chattels Ms. Gaiga disposed of were property of Mr. Hawkins' company, and therefore Ms. Gaiga disposed of property in which Mr. Hawkins held an indirect interest. The issue is the extent to which Mr. Hawkins ought to be compensated; Ms. Gaiga does not accept Mr. Hawkins' claims that she sold or otherwise disposed of the vast number of items alleged by him, or his valuation evidence.

- [47] I begin the summary of the facts bearing on this issue with the judicial case conference order of 4 September 2018. This order required Mr. Hawkins to deliver a list of documents within two weeks, and required the parties to exchange documents related to the purchase of any property worth more than \$500 (other than furnishings and TVs) within 30 days. The failure by Mr. Hawkins to abide by the terms of this order has added to his difficulties in proving the extent of his losses.
- [48] I turn to the circumstances in which the breach of the s. 91 order occurred. The regional district was unhappy with Mr. Hawkins' business continuing to operate from the Cypress Boulevard property. By October 2018 the parties knew that Mr. Hawkins would have to take imminent steps to carry on his business elsewhere.
- [49] On 6 November 2018, Ms. Gaiga filed an application for a protection order that, when granted on 13 November 2018, had the effect of giving her exclusive possession of the Cypress Boulevard property. In her notice of application, she also sought orders permitting her to remove any and all of Mr. Hawkins' business equipment and items. These latter orders were not made. Nevertheless, Ms. Gaiga contacted a moving company the next day to begin the process of moving Mr. Hawkins' business chattels.
- [50] In the days after the 13 November 2018 order, Mr. Hawkins' father and sons came to the Cypress Boulevard property and moved many of Mr. Hawkins' belongings. On 20 November 2018, a towing company arrived to remove some of the many vehicles from the property -- it was in the nature of Mr. Hawkins' business that there were almost always several trucks on the property awaiting repair. On 21 November 2018, a representative of the moving company engaged by Ms. Gaiga came by the Cypress Boulevard property and prepared an estimate. Ms. Gaiga testified that the moving company was not prepared to move all of the remaining material: for instance, they were not prepared to move and store machinery and other items that had oil or grease on them.
- [51] On 22 November 2018, the moving company packed up and moved the items that they had agreed to move. Ms. Gaiga paid for the move. She also paid in advance for three months' storage of this material, which I infer was necessary because Mr. Hawkins' temporary new living arrangements did not make it possible for him to accept delivery of these business chattels.
- [52] In January 2019, Ms. Gaiga contacted a firm to give an estimate to move the two hoists and related equipment from the shop. She hoped that Mr. Hawkins would agree to pay for this move and take possession of this equipment, but he did not. Ms. Gaiga testified that she also tried to make inquiries of another firm about delivery of two large containers to Mr. Hawkins, but her calls to this firm were not returned.
- [53] Ms. Gaiga testified that by February 2019 she had sought and received information about the value of the two hoists and the two large containers, and sold these items to Kelly Moyen for \$8000, an amount in line with the valuation advice she had received. Copies of two cheques from a Moyen company are in evidence, each for \$4000 and dated in February 2019. Mr.

Moyen also took away several motors and two equipment attachments, a soil conditioner and a forestry cutter. These items were outside the shop and Ms. Gaiga testified that she had taken advice that they all amounted to scrap. Two motors that Mr. Gaiga had been told might have value were moved inside the shop. A Comox Valley towing company removed other material that Ms. Gaiga regarded as scrap.

- [54] In February 2019, Mr. Hawkins arranged to have a towing company pick up various vehicles such as jet skis, quads, a boat, and a vintage truck. At some time during February 2019, Ms. Gaiga phoned the owner of a vehicle parked on the property and received permission to have his vehicle towed off the property. On 28 February 2019, counsel for Mr. Hawkins sent an email to Ms. Gaiga's former counsel identifying 56 items that he contended had not been delivered to him at that point in time.
- [55] In April 2019, Ms. Gaiga testified that the RCMP came calling on her in relation to a report made by Mr. Hawkins about stolen firearms. In fact, Mr. Hawkins' firearms were where they always had been: securely stored in the shop. In due course, the RCMP took possession of the firearms and they were eventually passed along to Mr. Hawkins.
- [56] On 10 September 2019, the parties reached an agreement about those of Mr. Hawkins' chattels that remained on the Cypress Boulevard property. It was agreed that Mr. Hawkins' uncle would park a flat bed truck and dump trailer on the property, to be loaded by Ms. Gaiga. Video footage of the items and the loading process was to be taken by Ms. Gaiga. When the items were loaded, Ms. Gaiga was to call Mr. Hawkins to pick up the loads. Ms. Gaiga testified that this last move of Mr. Hawkins' property was carried out in September 2019, but she did not take video footage.
- [57] In his evidence, Mr. Hawkins ran down an even longer list of alleged missing items than was delivered via his counsel in February 2019. To each item he attached a value based on his recollection of its condition and its purchase price, or his research into the cost of replacement. For her part, Ms. Gaiga testified that the only property she disposed of were the items she specifically acknowledged selling, or disposing of as scrap. She points to the fact that much property was moved: in the days following the 13 November 2018 order by Mr. Hawkins' father and sons; by the moving company on 22 November 2018; and in the last move in September 2019. She testified that some of the items Mr. Hawkins claimed had gone missing had in fact been returned to him.
- [58] Mr. Hawkins supposes that Mr. Moyen and others might have a good deal more of his property in their hands than Ms. Gaiga's evidence reveals. He points to Mr. Clydesdale's evidence. Mr. Clydesdale is a mechanic that Ms. Gaiga testified she received advice from about the value or lack of value of some of the material. Mr. Clydesdale testified that he was shown through the shop by Ms. Gaiga, and that it was his impression that she was interested in selling some of the items.

- [59] While I am suspicious that Ms. Gaiga may have sold or disposed of more of the items than she acknowledges, I am not satisfied on the balance of probabilities that this is so. To succeed, Mr. Hawkins must prove that these chattels existed, that they are not in his possession, and that they were disposed of by Ms. Gaiga. The body of evidence supporting these propositions cannot be described as clear, convincing and cogent. I would have to accept Mr. Hawkins' assertions that each of these items existed and these items have not been in his possession since he left the Cypress Boulevard property. The problems with Mr. Hawkins' evidence run deep. He participated in a scheme to arrange a construction loan by putting forward a false estimate, and he reported to the RCMP that his firearms were stolen when I find that he knew that in all likelihood the firearms were on his property at Cypress Boulevard right where he had left them. Moreover, Mr. Hawkins was at times evasive during cross-examination. Mr. Hawkins' unsupported assertions as to the existence of the chattels on his list and, especially, his unsupported assertions that these chattels are not in his possession do not amount to clear, convincing and cogent evidence. He has not discharged his burden of proving sale or disposition of items beyond the admissions made by Ms. Gaiga.
- [60] Ms. Gaiga acknowledges the wrongful sale of the hoists, the two large containers, and the oil tank, and admits wrongfully disposing of the material she identified as amounting to scrap. Mr. Hawkins puts a higher value on these items than the \$8000 Ms. Gaiga says she received. Mr. Hawkins testified that he spoke to Kelly Moyen. Mr. Hawkins alleges that Mr. Moyen told him he paid more than \$8000. This hearsay evidence is not admissible for its truth. Neither party called Mr. Moyen as a witness, or explained why this seemingly important witness did not give evidence. Further, Mr. Hawkins' opinions about the condition and value of the items sold or disposed of by Ms. Gaiga, including those disposed of as scrap, do not convince me on a standard of probabilities that the remedy called for is anything more than an adjustment of the compensation order by \$8000 in his favour.
- [61] I make two further ancillary orders to give effect to the division of property. First, I order that any culverts not in use on the Cypress Boulevard property be made available for pickup by a person instructed to do so by Mr. Hawkins. Ms. Gaiga testified that she has no interest in this material, but it remains on the property. This material shall be removed within 30 days. Second, the mower and wheelbarrow that Mr. Hawkins owned prior to the beginning of the relationship, which are currently in Ms. Gaiga's possession, shall also be made available for pickup by a person instructed to do so by Mr. Hawkins within 30 days. I am not persuaded that Ms. Gaiga's rationale for keeping Mr. Hawkins' mower and wheelbarrow -- i.e., that during the course of the relationship he damaged her wheelbarrows and ruined her mower by leaving it out in the elements -- defeats his *prima facie* right to possession of these chattels.

VI

- [62] Ms. Gaiga obtained protection orders in November 2018 that restrain Mr. Hawkins from communicating with her or attending at or near or entering the Cypress Boulevard property. These orders were supplemented and extended by an order made on 7 November 2019. These orders expire on 7 November 2020, and Ms. Gaiga seeks an order varying them such as to make their terms of indefinite length, or in the alternative that they be varied to provide for expiry in five years' time. However, there is nothing in the evidence that supports varying the existing orders in the manner suggested. To the contrary, my impression is that the circumstances that gave rise to the orders are likely to abate with the conclusion of this litigation.

VII

- [63] As mentioned in the introduction to these reasons, I heard an application for leave to file a counterclaim after closing argument on the trial concluded. Mr. Hawkins' proposed counterclaim advances a s. 85 exclusion claim, and a claim for compensation arising out of the claimant's breach of the s. 91 order.
- [64] Ms. Gaiga properly concedes that Mr. Hawkins' trial brief filed in January 2020 made it clear that he intended to advance these arguments at trial. She resists this application on the narrow footing that if a limitation period has expired, it is too late to file a counterclaim.
- [65] Needless to say, the time provided for filing a counterclaim has long expired: SCFR 4-4(2). However, any period of time provided for in the Rules may be extended: R. 21-2(2). And, when applying R. 21-2(2), I keep in mind that the object of the Rules includes the determination of every case in a just fashion and on its merits: R. 1(1)(b).
- [66] The factors to be considered when determining whether it is just and convenient to exercise this discretion to extend time in relation to the filing of a counterclaim include the length of delay in making the application; the reasons for delay in making the application; whether the counterclaim would be time barred but for s. 22(1) of the Limitation Act; the connection between the proposed counterclaim and the claimant's claims; whether the respondent would be prevented from making full answer and defence to the claims brought against him if not permitted to file a counterclaim; and whether permitting the proposed counterclaim would give rise to prejudice to the claimant. See *Squamish Indian Band v. Canadian Pacific Ltd.*, [1998] B.C.J. No. 1726 at paras. 36-42; *Smith v. British Columbia*, 2010 BCSC 928 at paras. 18-19; *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2014 BCSC 1049 at paras. 23-24.
- [67] The delay in bringing this application for leave to file a counterclaim is manifest, and no good reason has been advanced for the delay. These factors are, however, overwhelmed by countervailing considerations. I doubt that Mr. Hawkins' claims would be time-barred but for s. 22(1) of the Limitation Act. His claim for compensation respecting the claimant's breach of the s. 91 order arose in February 2019. With respect to the respondent's claim for a s. 85 exclusion related to the Cypress Boulevard property, it is difficult to understand how

the claimant could be heard to advance a limitation argument when she herself first pleaded a s. 85 claim in relation to that property by amending her notice of family claim on 12 February 2020. The parties separated in 2017 -- if a s. 85 claim is capable of being time-barred, then any applicable limitation period in this case would catch both parties' claims or neither. The most important considerations in this case, however, are that the respondent suffers clear prejudice if the application is refused by way of restricting the arguments that he is at liberty to make on the evidence that was fully developed at trial, whereas there is no material prejudice to the claimant if the application is allowed.

[68] It is just and convenient to extend time to file a counterclaim in this case. The time for filing a counterclaim is extended until 30 October 2020; in deciding this case and preparing these reasons for judgment, I have proceeded on the basis that the pleadings include the proposed counterclaim.

VIII

[69] I will leave it to counsel to draw an order in accordance with these reasons. As to costs, my preliminary view is that each party ought to bear their own costs with the exception of the application for leave to file a counterclaim. By consent, the claimant is entitled to her costs of that application in any event of the cause. Liberty to apply.

"Thompson J."

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