

CANADA / JUDGMENT

Gutierrez v. Del Fierro

2020 BCSC 679

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Supreme Court of British Columbia

DECIDED

30 April 2020

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2020 BCSC 679 Gutierrez v. Del Fierro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gutierrez v. Del Fierro,

2020 BCSC 679

Date: 20200430

Docket: E055006

Registry: New Westminster

Between:

Evelyn Gutierrez also known as Evelyn C. Gutierrez

Claimant

And

Francisco M. Del Fierro also known as Francisco M. Del Fierro II

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Claimant:

A. Shee

The Respondent appearing in person:

F.M. Del Fierro

Place and Dates of Trial:

New Westminster, B.C.

June 11, 12, 2019

October 16, 17, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 30, 2020

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Introduction

- [1] The parties in this proceeding were married October 15, 2004 and separated in May 2016 and wish to be divorced from the other. The principal issues in this trial concerned division of family property and responsibility for family debt.
- [2] The respondent seeks an unequal division of the property in his favour; the claimant wants an equal division of property but seeks return of personal items left in the family home at separation. She also seeks a set-off of the respondent's entitlement to her Municipal Pension Plan/Health Shared Services BC Pension ("the Pension") against family property owned by the respondent in the Philippines.

Background

- [3] The claimant and respondent married in the Philippines in October 2004. At the time, the claimant had been a resident of Canada for 20 years and the respondent lived in the Philippines.
- [4] The parties met in September 2004 through a texting relationship and later that year met in the Philippines and were married. After marriage, the respondent remained in the Philippines and the claimant returned to Canada after which she began the process to sponsor the respondent to become a permanent resident in Canada based on their marriage relationship.
- [5] The claimant has been employed by Fraser Health Authority in British Columbia since 2002.
- [6] The respondent has been qualified to practice law in the Philippines since 2003. The claimant said there were disagreements about whether the parties should reside in Canada or the Philippines after marriage. Eventually, the claimant made the application to sponsor the respondent and he immigrated to Canada in 2006. His law practice was fully equipped with supplies and furniture. Although he began winding up his law practice it appears he continued to provide legal services until at least 2008. He returned to the Philippines in 2007 to do some hearings and attend to business issues. Those business premises remain in place in a building owned by the respondent.
- [7] In addition to practising law in the Philippines, the respondent was involved in family businesses including grocery store construction, a business supplies company, a 24 acre cattle farm, a mango production and export business, and a gasoline service station. He owned two offices and several properties around the Philippines, including a private beach resort. He also owns a condominium in Manila.
- [8] By the time the parties separated, the respondent had inherited substantial property holdings and business interests from his parents.

- [9] It is significant that the respondent did not disclose any of his property holdings in the Philippines nor any revenue generated by his law practice or other properties. Several documents were produced with some indications as to values, but the evidence concerning the values of those properties was entirely inadequate.
- [10] The respondent eventually arrived in Canada on April 2, 2006. On arrival, the respondent became a beneficiary of the claimant's employment health benefits plans and Pension program.
- [11] At the time of their marriage, the claimant had been a purchasing assistant with the Fraser Health Authority for four years and was earning approximately \$38,000 per year with full benefits. She began contributing to the Pension Plan on February 13, 2004 and by the end of 2018 had total contributions and interests of \$46,320 in the plan.
- [12] Throughout their relationship, the claimant managed the parties' bank accounts and managed their joint finances. She was able to perform these management functions using both parties' online banking facilities; the respondent was incapable of dealing with online banking and deferred to the claimant in managing their finances.
- [13] Shortly after his arrival in Canada the respondent obtained building maintenance work in the complex in which the parties' lived.
- [14] He worked for approximately one to two hours per week. In 2007, the respondent obtained employment at the Superstore at Metrotown in Burnaby where he earned \$9.00 per hour. While working for Superstore, he continued performing maintenance work at the condominium.
- [15] In 2008, the respondent obtained employment at the Canadian Tire store on 102nd Avenue in Surrey where he worked full time for 2.5 years to 2011. He was earning \$10.00 per hour. He continued doing maintenance work at the condo tower while he worked for Canadian Tire.
- [16] In 2007, the respondent enrolled in a course at UBC in immigration policy and practice. He finished that program in 2008 and shortly after obtained work at All Points Immigration Services. He remained working at All Points until 2011. In 2009, the respondent began his own immigration business, Canada Royal Immigration Services. In 2009, his janitorial contract at the condominium was terminated.
- [17] Shortly after, he began his own janitorial business Westgate Maintenance and Contracting; he worked four hours per day in this unincorporated business. Thus, by 2009 the respondent was working at two immigration jobs and in building maintenance.
- [18] In mid 2012, the respondent took seasonal employment with Best Buy in Langley; at that same time, he stopped doing business as Westgate Maintenance. At Best Buy, he was earning \$13.25 per hour and worked from September to the end of the Christmas period.

- [19] In November 2012, the respondent took employment with Starline Windows and he has continued with Starline Windows to the present. He has also maintained his immigration consulting business through Canada Royal Immigration.
- [20] In July 2013, the respondent earned a significant commission on a transaction involving Desjardins Financial whereby he received \$62,352. He placed \$50,000 into a GIC. The respondent was required to pay income tax on the sum of \$16,727 sometime after the fact. He used some of these funds for daily expenses but eventually transferred the balance into a TFSA in 2017.
- [21] In 2015, the parties decided to purchase a strata property at 13383-108 Avenue, Surrey (the family home) for \$280,000 financed with a \$274,379 mortgage. The deposit and closing costs of \$15,241 were paid from the respondent's account. Although the parties applied jointly for the RBC mortgage, title to the property was eventually registered in the respondent's name; the respondent said there was an impediment to the claimant being a covenant on the mortgage.
- [22] Before moving into the family home, the parties carried out some renovations to the home costing \$8,000.
- [23] The claimant contended that the respondent arrived in Canada to begin life with her with a duffle bag of clothes and \$100 US in his pocket and no other assets or job prospects. The claimant testified that she was frustrated because her earnings seemed to be paying all of the parties' ongoing living expenses and she was struggling to financially maintain their day-to-day lives with little support from the respondent. As things moved on, she paid approximately \$4,000 to cover his tuition and books at the UBC immigration course. While he was in school, she said she paid most of their living expenses.
- [24] When he set up his own immigration business, Canada Royal Immigration, the claimant contends she purchased three computers to support his new business. She obtained financing from Dell Canada in or around 2007 and purchased a laptop and two desktop computers.
- [25] In 2008, the parties leased a Honda Civic automobile in their joint names; after the lease expired they paid out approximately \$7,455 in December 2013. The respondent estimates that vehicle is now worth \$4,000; the claimant guesses the value at \$8,000. The original cost of this car was \$24,000.
- [26] Each of the computers she purchased were paid for over time and the last computer was fully paid for shortly after the parties separated.

- [27] After separation, the respondent contends he has been unable to make all of his necessary payments; he said the monthly mortgage was \$1,200 and strata fees were \$500 each month; he receives \$2,000 per month from his earnings. Thus he said he has borrowed \$6,000 to \$12,000 from friends and \$5,000 from family to help him through the financial stress pending settlement of this claim.
- [28] The respondent's line 150 incomes were: \$13,372 in 2007; \$18,212 in 2008; \$16,569 in 2009; \$9744 in 2010; \$-3148 in 2011, \$5642 in 2012, \$77,435 in 2013; \$31,864 in 2014; \$32,858 in 2015; \$36,229 in 2016; and \$40,529 in 2017.
- [29] The claimant contended that the respondent received substantial cash payments for his immigration work. There was no indication that these amounts were not recorded as income but he did not provide copies of filed income tax returns from before or after the separation.
- [30] The claimant testified that at the time of marriage she was earning approximately \$38,000 per year. Her line 150 income in 2016 was \$43,565. There was no evidence concerning the claimant's income in other years except for a 2019 pay statement which reflects an annual income of approximately \$48,000 per year.

Evidence

Assets and Liabilities

- [31] The documentary evidence concerning the parties' assets come from bank statements and their F-8 Financial statements. The listed assets and liabilities included the following:
- a. Family home (registered in the respondent's name)
\$472,000
 - b. 2008 Honda Civic (registered in the respondent's name)
\$4,000 to \$7,000
 - c. Commercial building Philippines
\$50,000
 - d. Respondent's RBC RRSP
\$1,697
 - e. Respondent's RBC chequing account
\$1,000 to \$2,842
 - f. Respondent's RBC savings account
\$1,401

g. Respondent's RBC GIC

\$5,908

h. Respondent's RBC TFSA

\$3,110

i. Claimant's RBC account

\$249

j. Household furnishings and contents

Unknown

TOTALS

\$539,365 to \$544,207

[32] In addition to these assets, the respondent disclosed during the trial that he owned interests in various properties and businesses in the Philippines not disclosed in any of this information or in his F-8 Financial Statement. He was somewhat vague and unclear concerning these properties and assets. He gave no financial statements, corporate information, income information or other disclosure that would have assisted the court in assessing the claimant's potential entitlement to an interest in those assets.

[33] In 2013 the respondent earned a \$65,000 commission from Desjardins Financial for services he provided. After tax paid on this amount the respondent opened a \$50,000 guaranteed investment certificate. In 2017 he moved those funds to a tax-free savings account. The respondent did not disclose the amount in the GIC at the time of transfer to his TFSA nor did he account for the reduction in his TFSA to \$3110.

[34] He confirmed he had maintained a TFSA at the RBC that was not listed on his statement. He said he had used his GIC funds to cover expenses. He was asked by claimant's counsel for an accounting of the history of those funds but did not provide same. This leaves open the possibility that he used those funds after the parties separated or may have retained funds that were not disclosed.

[35] Both parties own property in the Philippines and the nature and extent of those properties and any fair market value of them was not disclosed.

[36] The respondent's banking records show that in May 2016, after separation he transferred \$2,300 from one Royal Bank account to his day-to-day Royal Bank account #2184. He did not provide any documents or information from the Royal Bank account where these funds originated. From his account #2184 the respondent was also transferring \$125 per month to a mutual fund investment.

- [37] The claimant has a defined-benefit pension plan through the Pension. The total contributions plus interest to this plan as at December 31, 2017 were \$41,457.77. No additional information was provided about that plan.
- [38] At the high-end of the parties' valuation of the assets, the total held at separation is at least assets of \$544,207 before taking debts into account. I conclude that these assets together with the assets located in the Philippines constitute family property to be divided in this trial.
- [39] The debts at separation disclosed in the evidence and the parties F-8 Financial Statements at the date of separation were estimated at:
- a. Mortgage registered against family home
\$238,005
 - b. Claimant's Coast Capital Savings Line of Credit
\$3,927
 - c. Respondent's Coast Capital Savings Line of Credit
\$1,692
 - d. Claimant's Capital One MasterCard
\$3,933
 - e. Claimant's Canadian Tire MasterCard
\$12,465
 - f. Dell Canada (Claimant)
\$1,219
- TOTALS
\$261,241
- [40] Taking into account all of the debts referred to by both parties, \$261,241 represents family debt.
- [41] Representing a shortfall between the Shaw cable charges and amounts paid by the respondent. This account is in the claimant's name and must be paid.
- [42] The parties provided no reliable evaluation for the matrimonial home or the Honda vehicle. I was provided a BC assessment authority evaluation of the family home at \$472,000. The debts claimed by the respondent to be outstanding at the date of separation were not accurate; those amounts represented the maximum available credit and not the outstanding balances.

- [43] Overall, the respondent's credibility and reliability were seriously undermined during cross-examination. He did not accurately or honestly report his financial holdings and disposition of assets when swearing his F-8 financial statement. There were multiple examples of claimant's counsel seeking disclosure of documents and information that went unanswered by the respondent. He testified that his income after separation was \$2,000 per month and he had difficulty meeting his monthly expenses based on that income.
- [44] The respondent provided notices of assessment from Canada Revenue Agency concerning his taxes but did not provide financial statements for his business or evidence of his employment income. His tax information demonstrated that from 2015 to 2017 his net income was in the order of \$2500-\$3400 per month.
- [45] When the parties separated, the respondent placed the claimant's goods in a storage facility; he said he did not keep a list of the things moved and could remember details of all the items he removed.
- [46] The respondent testified that he has an RRSP and contributes money regularly to this plan; he did not list this asset in his F-8 financial statement nor could he remember how much was in the account. Under cross-examination the respondent feigned an inability to obtain documents from his bank online notwithstanding that he had been using online banking for two years.
- [47] The respondent's contention that \$10,000 was owed on credit cards for debt extant at the time of separation (and not incurred to preserve or maintain family property) was not proved. He testified that the totals of these accounts represented the maximum debt that could be incurred but could not say how much, if any, of this debt was outstanding at the date of separation. Thus, I am satisfied that family debt totalled \$262,826.

Management of Family Funds and Debt

- [48] The claimant maintained three separate credit facilities during the marriage. She had a MBNA MasterCard with a balance of \$1,149 at the date of separation. She stopped using that credit card at the date of separation and is paying only the minimum of \$50 per month until this proceeding is resolved. She used this credit card to pay for some of the respondent's immigration business costs and expenses.
- [49] Her second credit card is a Capital One MasterCard which she obtained after separation. There is currently \$3,933 owing on that credit card.
- [50] The claimant also maintained a line of credit/credit facility with Dell Computers. At separation, there was a modest amount owing on this account.
- [51] The claimant also had a Coast Capital bank account that had a line of credit with \$5,000 owing as of March 29, 2018. At separation, she also had a Canadian Tire MasterCard with a balance owing of \$13,146 in March of 2018. In total, the claimant's current debt is \$24,823.55.

- [52] The respondent said he has a line of credit with Coast Capital Savings with a current balance of \$5,000. He also listed a line of credit with the Royal Bank which he said was \$2,500 and a Capital One credit card with a balance owing of \$2,500.
- [53] In fact, when the respondent testified it was clear that based on the statements of account, the balance owing at May 8, 2018 was only \$1,692. He said he indicated the balances on the three accounts at \$10,000 because those were the maximum amounts available.

The Break-Up

- [54] There was considerable acrimony between the parties during their marriage due in part to the claimant's allegation that the respondent had been unfaithful. This culminated in a violent exchange on the date of separation resulting charges of assault against the claimant. Her bail conditions prohibited her from attending at the family home but the charges were eventually stayed.
- [55] On the issues in this trial, nothing turned on the parties' disagreements throughout the marriage or the events that ended their relationship.

Positions of the Parties

Claimant

- [56] The claimant seeks an equal division of family property and opposes any unequal division in the respondent's favour. She highlights the Family Law Act, S.B.C. 2011, c. 25 [FLA] requirement that significant unfairness be proved before an unequal division of family property can be ordered.
- [57] The claimant contends she was ousted from the family home and the respondent's continued exclusive occupancy militates against an unequal division particularly in light of her claim for occupational rent. Since separation, she has paid rent between \$400 and \$600 per month in addition to \$210 per month for 21 months to store her personal belongings.
- [58] The claimant stresses that she funded the bulk of the parties living expenses in the early years before the respondent obtained full-time employment. Further, she managed the family finances and used her earnings to fund many of the business expenses of the respondent's business needs. In particular, she purchased all of the computers used in his enterprise.
- [59] She contends that, taking into account all of the FLA s. 95 factors, there is no basis to divide family property unequally.
- [60] She contends that the valuation of family property should be set at the date of trial. She would like the family home sold and proceeds divided and shared equally.

[61] Finally, she argues that the extra provincial assets owned by the parties be dealt with under ss. 106 and 109 of the FLA. Both parties resided in the province of British Columbia now and at the date of separation. The claimant argues the respondent's failure to disclose the extent and values of his extra provincial properties warrants making an order for compensation to be paid and that this compensation should be set-off against the claimant's Pension. Thus, although each party is entitled to an equal share in the other's family property, her pension should be set-off against the increase in value of his property in the Philippines since marriage.

Respondent

[62] The respondent argued it would be unfair and grossly unjust to divide the parties' property equally. He contends that 80% of the value of the strata unit should be allocated to him because:

- a) the respondent has lived in the property for approximately five years and the claimant vacated the property 10 months after it was purchased;
- b) the claimant abandoned the financial obligations associated with the property and those costs were paid by him. He argued that those expenses including deposit, down payment, closing costs, lien charges, strata fees, property taxes, renovation expenses and furniture and appliances total \$113,163. He contends that if these expenses are paid from the net equity in the family home; there is a balance of family property of \$118,830.
- c) He contends the respondent should receive \$23,766 from the net equity in the home.
- d) the respondent managed the purchase of the property including securing funding and drafting the purchase agreement; the respondent performed labour and expended funds for materials for repairs and maintenance;
- e) the respondent improved the property by installing new appliances, new furniture and storage units that increase the value of the property;
- f) the claimant removed a substantial amount of personal property and chattels when she left the property;
- g) the respondent's business, Canada Royal Immigration, occupies and uses one third of the area of the residence for his immigration consulting business;
- h) the respondent paid the property purchase down payment together with mortgage payments and strata fees, closing costs and taxes from 2015 to present; and
- i) the respondent contends the value of the property at the date of separation was only \$299,600 and there has been a substantial appreciation in the market value of the property since separation.

- [63] The respondent argued that the claimant's income was substantially more than his income and she had greater financial resources to pay a larger share of the debt. He contends that the debts alleged to be family debt by the claimant were exclusively her debt and not incurred for the benefit or enjoyment of the family. Lastly, he contends the claimant was entrusted with management of the family finances and bank accounts and her immature and irresponsible behaviour in not paying debts or not paying the debts in a timely way further justifies an unequal division of family property.
- [64] The respondent contends that he owns a two thirds interest in the 2008 Honda Civic and a one-half interest in the claimant's RBC account, Pension and Coast Capital savings account. He argued that the claimant should be responsible for 80% of the family debt.
- [65] The respondent would also like to buy the claimant's interest in the family home and the Honda motor vehicle. He concedes the claimant should receive one-half of \$4,000 for her interest in the Honda; this was his estimate of the value of the vehicle.
- [66] The respondent argued that he improved the family home by purchasing new furniture and appliances and working on renovations. He believes he should be credited with \$6,000 towards his labour for these improvements.
- [67] He seeks to keep 80% of his investments including an RRSP, GIC, and TFSA.
- [68] In addition, the respondent claims a one-half interest in the claimant's bank accounts in the Philippines and their property also in the Philippines. He did not mention any division of the property (or the post marriage increased valued in property) he owned in the Philippines.
- [69] He claims a one-half interest in the claimant's Municipal Pension Plan/Health Shared Services BC Pension. He recognizes that one-half of his RRSP is to be divided equally along with Coast Capital accounts and RBC accounts.
- [70] In summary, the respondent contends that he provided all funds used to acquire and improve the value of the family home and that, after separation, he paid all post-separation mortgage payments thereby increasing the parties' equity in the family home. He felt abandoned and unfairly burdened by the ongoing financial demands necessary to maintain the family home. He paid all of the taxes, improvement costs, insurance and upgrades after separation. He claims the claimant failed to prove that her debt was "family debt" and absent such proof he should not be responsible for any of her debt.
- [71] Finally, he contends the division of family assets ought to reflect the fact that he worked at Starline Windows for minimum wage employment at a time when the claimant earned twice the income he generated.

Analysis

The FLA

[72] The relevant provisions of the FLA are as follows:

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
 - (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.
- (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.

Family debt

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

Valuing family property and family debt

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or
 - (ii) of the hearing before the court respecting the division of property and family debt.

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
- (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

Giving effect to property division

97 (1) For the purposes of giving effect to a division of property or family debt under this Part or Part 6 [Pension Division], the Supreme Court may

- (a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and

- (b) despite sections 94 (2) [orders respecting property division] and 215 (2) [changing, suspending or terminating orders generally], and subject to subsection (3) of this section, make any order that is necessary, reasonable or ancillary to give effect to the division.
- (2) Without limiting subsection (1), the Supreme Court may make an order to do one or more of the following:

Determining whether to act under this Part

106 (1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

- (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
 - (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
 - (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
 - (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
 - (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.
- (3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:
 - (a) property that is the subject of the proceeding is located in British Columbia;
 - (b) the most recent common habitual residence of the spouses was in British Columbia;
 - (c) a notice of family claim with respect to the spouses has been issued under the Divorce Act (Canada) in British Columbia.
- (4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.
- (5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:
 - (a) [Repealed 2014-9-15.]
 - (b) the relative convenience and expense for the spouses and their witnesses;
 - (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;

- (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
 - (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
 - (f) the fair and efficient working of the Canadian legal system as a whole;
 - (g) any other circumstances the court considers relevant.
- (6) A determination of authority under subsection (2) or of whether to decline jurisdiction under subsection (4) is to be made solely by reference to this section.

Extraprovincial property

109 (1) If the Supreme Court has authority under this Division to make an order respecting extraprovincial property, the Supreme Court may make an order respecting the ownership and division of the extraprovincial property.

- (2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:
- (a) instead of dividing the extraprovincial property,
 - (i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or
 - (ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;
 - (b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,
 - (i) preserve the extraprovincial property,
 - (ii) provide for the possession of the extraprovincial property,
 - (iii) require a spouse who has legal title to the extraprovincial property to transfer all or part of the spouse's interest in the extraprovincial property to the other spouse, or
 - (iv) provide for any other matter in connection with the extraprovincial property;
 - (c) if the court is satisfied that it would be enforceable in the jurisdiction in which the extraprovincial property is located, provide for non-monetary relief

Family Debt

- [73] For the reasons that follow, I am satisfied that the family debt at the date of separation was \$24,387.90 comprising the debt owing by the respondent of \$1692.96 and \$22,694.94 owed by the claimant. I am also satisfied that family debt should be shared equally (\$12,193.95 each) and the parties will receive their portion of the \$22,694.94 debt from the family property before it is divided.

Expenses Incurred by Respondent After Separation

- [74] I find that, subject to a few exceptions discussed below, the claimant is not responsible for costs and expenses incurred after separation. The value of property and debt is to be determined as of the date of trial and can be divided unequally only where significant unfairness would result from an equal division. Equal divisions are the presumptive treatment of property and debt.
- [75] Unequal contributions to preservation or maintenance of property during the relationship do not warrant unequal division of assets on separation. In any event, for all but one year, the claimant earned significantly more income in all years after marriage.
- [76] Unequal divisions of property and debt based on a consideration of unequal contributions is not abolished under the FLA, it can be considered under s. 95(2)(i); however the discretion to do so is "much constrained": *Jaszczewska v. Kostanski*, 2016 BCCA 286 [Jaszczewska] at paras. 43 to 44.
- [77] In *Storey v. Terry*, 2020 BCCA 30 [Storey], the Court approved the approach of taking into account expenses relating to a parties' home incurred by a spouse remaining in occupation of that residence. On the issue of whether it would be "just and equitable" under s. 95 of the FLA, Butler J.A. explained that a spouse out of occupation ought not to be obliged to reimburse the other spouse for costs incurred to maintain the property without having any benefit from the property (para. 28).

Unequal Division of Family Property

- [78] Unequal division is governed by s. 95 of the FLA. Section 81 of the FLA provides for presumptive equal sharing of family property and family debt on separation. Family debt is defined by s. 86 of the FLA.
- [79] Valuing of family debt and family property are addressed in ss. 86 and 87.
- [80] Sections 95(1) and (2) set guidelines to ensure fairness in dividing responsibility for debt paid or payable after separation. In this case, I do not find that any additional family debt was incurred by the parties after separation except for the debt servicing payments set out in the parties' submissions.

- [81] The law concerning unequal division of property and debt focuses on evidence of "significant unfairness" stemming from equal division. The principles were summarized by Madam Justice Newbury in *V.J.F. v. S.K.W.*, 2016 BCCA 186:
- [10] The consequence of the categorization of property as either family property or excluded property is that on separation, each spouse is generally entitled under s. 81 to an undivided half interest in family property as a tenant in common. The court may divide it unequally only if equal division would be "significantly unfair" having regard to all the factors listed in ss. 95(2) and (3). Excluded property in contrast must not be divided unless it would be significantly unfair not to divide it having regard to only two factors - the duration of the parties' relationship and any direct contribution by a spouse to the preservation or maintenance of the property (s. 96(b)). Obviously, the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the 'unfairness' test in the FRA: see *Family Law Explained*, supra, at s. 95; *L.G. v. R.G.* 2013 BCSC 983 at para. 71; *Jaszczewska v. Kostanski* 2015 BCSC 727 at para. 166-9. As observed by Mr. Justice Savage (as he then was) in *Slavenova v. Rangelov* 2015 BCSC 79:

The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions. [At para. 60.]

[Emphasis in original.]

- [82] The presumptive date for valuing family property is the date of trial; using any other date for valuation can result in an unequal division of family property that must be considered only under s. 95: see *Kumagai v. Campbell Estate*, 2018 BCCA 24 [Kumagai] at para. 76.
- [83] In *Kumagai*, the Court of Appeal also said:
- [84] In my respectful view, the judge's decision in this case to value the property as of the date of separation is an error. His decision was based on his finding that it would be "unfair" for Ms. Kumagai to share in the increase in the market value of the Campbell Lands after separation because she did not contribute to that increase. "Unfair" does not rise to the standard of "significantly unfair" under s. 95, and, more significantly, contribution is not a requirement for an equal division of family property under s. 81 of the FLA. Furthermore, as discussed above, by valuing the family property as of the date of separation, the judge effectively granted Ms. Kumagai an unequal division of the net family property in favour of the Estate, contrary to the judge's expressed intention to divide the net family property equally.

- [84] In Jaszczewska, Harris J.A. articulated the point that entitlement to an equal interest in family property exists independent of contribution or use of the property. He also concluded that "significantly unfair" requires evidence that "something objectively unjust, unreasonable or unfair in some important or substantial sense" has happened: see para. 42.
- [85] Overall, a party claiming that equal division is "significantly unfair" must meet a higher threshold before judicial discretion to reapportion will be engaged: see *Venables v. Venables*, 2019 BCCA 281 at para. 91.
- [86] The principles applicable were summarized by Madam Justice Iyer in *Wakefield v. Owen*, 2018 BCSC 1160: para.8:
- [8] If equal division of family property is objectively unjust, unreasonable or unfair in a substantial sense, or in other words, will cause "significant unfairness", s. 95 grants the court a discretion to order an unequal division: *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 83. Section 95 lists a number of factors that may be considered in this assessment. As the Court of Appeal noted in *Kumagai*, "significantly unfair" establishes a higher threshold for the person seeking unequal division than simply "unfair": para. 84; see also *Jaszczewska v. Kostanski*, 2015 BCSC 727 at paras. 162-163, 2016 BCCA 286 at paras. 3536.

Responsibility for Family Debt and Payments Made After Separation

- [87] In *Ostere v. Harding*, 2017 BCCA 157 at para. 22 the Court of Appeal addressed the issue of expenses paid by one spouse after separation and concluded the remedy was an accounting for payments made by that spouse. I conclude that family debt reduction can be adjusted between the parties as an accounting between them.
- [88] I will approach the respondent's claims regarding expenditures made before and after separation as additions to family debt incurred after separation to maintain family.
- [89] At the outset, it must be clear that family debt is only debt extant at the time of separation unless incurred for the purpose of maintaining family property after that date. Thus, if a loan existing at the date of separation is increased by one party after separation, the increase in debt is not family debt unless incurred to maintain family property.
- [90] The respondent also submits the circumstances in this case warrant an unequal division of family property (80/20) in his favour because, over the course of the relationship, he has been the only spouse with sufficient financial resources and income sufficient to pay their ongoing expenses before and after separation and he alone brought substantial property to the marriage: see *Jaszczewska* at para. 44; *Blair v. Johnson*, 2015 BCSC 761 at paras. 82-83; *E.H.H. v. C.L.M.*, 2017 BCSC 1299 [E.H.H.]; and *Nanara v. Nanara*, 2017 BCSC 1447 at para. 83.

- [91] I have considered the respondent's argument that his post-separation payments preserved, improved, and maintained the property and these efforts should be recognized when considering his claim to unequal division.
- [92] He claims reapportionment based on amounts paid for:
- a) \$41,994.31 in mortgage payments after separation and strata fees of \$14,101 after separation;
 - b) post separation property taxes for 2016 to 2019 of \$5498 and pre-separation taxes of \$1,495.
 - c) \$30,000 for renovation expenses, furniture and appliances; and
 - d) \$16,446 for deposit, down payment closing costs and lien charges incurred in 2015.
- [93] The issues regarding mortgage payments, taxes and insurance were addressed by Blok J. in *Rudyak v. Bekturova*, 2017 BCSC 2223, aff'd 2018 BCCA 414. In that decision, the Court declined to divide family property unequally based on one party's payment of mortgage payments and resources spent on home improvements post-separation. The Court, however, said it would be "significantly unfair" for the non-occupying spouse to benefit from the appreciation in the value of the home without contributing to tax and insurance costs necessary to preserve the property. Mr. Justice Blok ordered an unequal division based on the respondent's obligation to contribute to the tax and insurance expenses but expressly denied unequal division based on the mortgage payments made.
- [94] The claimant argues that there should be no reapportionment in the respondent's favour because of his efforts at maintaining and preserving the property, including payment of mortgage costs, taxes and insurance because that claim is notionally offset by her claim in the nature of occupational rent and his efforts do not warrant an unequal division of property in his favour.
- [95] This position was consistent with the principle that post-separation mortgage contributions alone are not enough to justify unequal division: *E.H.H.* at paras. 228-230.
- [96] The respondent contends he should receive an unequal division of family property including the family home because the appreciation in market value of the land was achieved largely through his efforts at continuing the mortgage payments, tax and insurance payments.
- [97] The claimant responded to the respondent's argument in favour of an unequal distribution of family property in his favour. She contends she was excluded from the home and compelled to obtain alternate accommodation during her absence from the property. I was told that she expended between \$400 and \$600 per month for rent in addition to bearing the cost of a storage unit rented by the respondent to hold the claimant's personal belongings left when she vacated.
- [98] The claimant's rental expenses were in the order of \$17,900 plus \$410 for storage rental costs she paid over the last 21 months.

[99] During the time post-separation, the claimant remained responsible for servicing the parties' Dell computer debt and Shaw cable expenses.

[100] I will deal with the respondent's claims in the context of s. 95 where the court is given directions for permitting unequal divisions of family property.

[101] Absent compelling evidence, the fact that one party remains in possession of the family home and pays mortgage costs is not sufficient evidence to depart from the practice of valuing family property at the date of trial.

[102] The guidance in section 95(2) of the FLA directs the court to consider:

- Subsection (2)(a) - duration of the relationship: This relationship was in the midrange of 11.5 years. During this relationship the claimant provided a substantially disproportionate share of family income to family purposes including the respondent's business in the earlier years. The respondent earned one large commission fee which provided the parties with the down payment to purchase their current home but otherwise more of their expenses were paid by the claimant. I am satisfied that unequal contributions to the acquisition of family property during a midrange marriage would not, in the absence of some extremely unusual circumstance, justify an unequal division: see *Jaszczywska* at para. 43.

Here, the claimant's contribution to maintaining the respondent and supporting his businesses' financial needs were significant and nothing in the roles of the parties supports a finding that an equal division of family property would be significantly unfair. In *Yousefian v. Jafarmadar*, 2018 BCSC 855, Choi J. concluded that a medium length marriage is a neutral factor under ss. (2)(a): see para. 99.

- Subsection (2)(b) - terms of any agreements: There were no agreements between the parties concerning ownership of family property or funding expenses such as mortgages, taxes and insurance. Although the respondent was able to fund the initial down payment of the family home, those funds were earned by him during the marriage. There was agreement that the claimant would manage the family finances in addition to her full time work. To a large extent, she supported and maintained their family unit during the early years of their marriage and the respondent made more substantial contributions later in time.

- Subsection (2)(c) - one spouse's contribution to the career or potential of the other spouse: In this case, the claimant made significant financial contributions to support the respondent's immigration business including funding of client disbursements and purchasing computers required for his business. She earned income exceeding the respondent's income in all but one year following marriage. Thus she contributed more than one-half of their total incomes in those years. She also managed the family finances and nothing relating to the respondent's contributions to the claimant's career could be considered significantly unfair.

- Subsection (2)(d) - whether family debt was incurred in the normal course of the relationship between spouses: The family debt extant when the parties separated was incurred in the normal course of the relationship between them. Acquisition of the family car, acquisition of computers

for the respondent's business, and funding of costs for the immigration business all occurred in the normal course of give-and-take between the spouses. There was no evidence adduced by the respondent indicating that debt incurred by the claimant prior to separation was not incurred for their family. To the contrary, I am satisfied that all of the expenses that she incurred up to the date of separation are "family debt", incurred in the normal course of the parties' relationship.

- Subsection (2)(e) - whether the amount of family debt exceeds the value of family property and the ability of parties to pay their share of family debt: In this case, the value of family assets clearly exceeds the value of family debt. There is no need to reconsider division of family debt due to differences in the values of debt versus assets.

- Subsection (2)(f) - whether, after separation, one spouse caused a significant decrease or increase in the value of family property or family debt beyond market trends: In this case the respondent continued making tax, insurance and mortgage payments after the claimant vacated the family home. To the extent that each mortgage payment resulted in a reduction in the principal outstanding on the mortgage, his payments caused an increase in the equity in the family property beyond market trends. This factor warrants further discussion.

[103] The claimant contends that consideration of occupational rent principles should impact the assessment of a claim for unequal division of family property. She contends that her rental expenses between the date of separation and trial total approximately \$22,310 and should be considered in the face of the respondent's claim for an unequal division based on his payment of taxes, strata fees, mortgage payments and other costs.

[104] In *J.D.G. v. J.J.V.*, 2016 BCSC 2389 [J.D.G.], Fleming J. addressed the question of occupation rent. She observed that absent ouster from a property, if the party in possession seeks to recover property expenses the court retains a discretion to set off occupation rent against that expense: see para. 226. Addressing the concept of occupation rent, the court noted that this type of an award could be made where it was just and equitable under the FLA.

[105] Referring to *Shen v. Tong*, 2013 BCCA 519, and *Kirton v. Mattie*, 2014 BCCA 513, in *J.D.G.*, Fleming J. reiterated concerns that when occupation rent claims are not pled, the court should avoid making orders that were not fully explored or argued. The courts in *Kirton* and *Shen* repeated the principle that, under the FRA, occupation rent was not a standalone claim but a factor to be weighed in the division of assets.

[106] Over the 52 months from the purchase of the strata to October 2019, the principal owing on the mortgage was reduced by \$36,374. On a prorated basis, the principal owing on the mortgage by October 2019 had been reduced after separation by \$28,290.

[107] Payment of the principal of outstanding mortgage debts stand on a different footing than all other expenses including interest. I am satisfied that it would be significantly unfair for the claimant to benefit from the increased equity in the family home brought about by the mortgage payments made by the respondent. Accordingly, in dividing family assets I am satisfied it would be significantly unfair for the claimant to receive one-half on the equity in

the property including that portion that resulted from the respondent's payment of the principal part of the monthly payments. Thus, the family property will be divided unequally to the extent of one-half of the reduction in mortgage principal paid by the respondent after separation; he will receive \$14,145 above his one-half interest.

- [108] The respondent claimed an unequal division of family property based on the fact the claimant abandoned the property and left him to pay all of the financial obligations and that his repairs, maintenance and improvements increased the value of the property. While there is little evidence concerning the latter point, he has pled his entitlement to an unequal division based on the expenses he incurred. In the response to the respondent's counterclaim, the claimant did not argue or raise the question of occupation rent.
- [109] Overall, I am satisfied that it would not be "significantly unfair" to deny the respondent's reapportionment claim to compensate him for property tax, insurance and strata fees he paid while the parties were separated (except for the mortgage principal he paid after separation): see Storey at para. 28.
- [110] This finding results, in part, from his exclusive use and occupancy of the property as his home and place of business. Presumably, the business revenues would be used to pay many of the house expenses but the respondent chose not to provide any information and detail concerning the business.
- [111] The respondent also contends that he purchased new appliances (\$10,000) for the unit after separation and made efforts to improve the unit (\$20,000).
- [112] There was no evidence that persuaded me that the respondent's expenditures after separation, including replacing serviceable appliances with new appliances or any improvements or repairs made by him increased the value of the family home and absent evidence on that point I make no adjustment to the division of the family property in his favour: see J.D.G.
- [113] Further, I do not accept that the respondent's efforts or the acquisitions he made after separation caused any significant increase in the value of the home beyond market trends. No unfairness results from these efforts without an unequal division.
- [114] The overall objective of the FLA on the question of occupation rent claims is to ensure that a division results in a "just and equitable" as between the parties. The respondent made some improvements to the home, paid taxes and insurance; during the entire post separation period he has lived in the unit and carried on his immigration consulting business without accounting to the claimant for any profits or use of the premises for his own benefit.
- [115] Taking into account the above cited cases, and the circumstances of the parties including to respondent's sole use of the premises for four years I find it would not be just and equitable to reapportion the division of assets to reflect the respondent's maintenance of the property.

[116] In the circumstances, I am not satisfied there are any other factors leading to significant unfairness in an equal division of the family property other than his reduction in the principal due under the mortgage after separation.

Property in the Philippines

[117] The challenges created by the respondent's failure to disclose details of property located in the Philippines make this case difficult to resolve. The claimant argued that this Court has jurisdiction to make orders concerning the respondent's property located outside of British Columbia: see ss. 106(2)(c) and (d) of the FLA.

[118] Section 107 of the FLA establishes that the proper law concerning this relationship is British Columbia. Under s. 109, the court is empowered to make orders relating family property outside of British Columbia.

[119] The claimant contends that this Court has power to order payment of compensation to a spouse having legal title to property in another jurisdiction: see s. 109(2) and *Slavenova v. Ranguelov*, 2015 BCSC 79.

[120] The claimant contends the respondent's failure to disclose details of his Philippines property triggers the court's discretion to order compensation to be paid. She seeks to set-off that compensation entitlement to his property interests in the Philippines against her employment Pension.

[121] Further, there was a paucity of evidence from the respondent concerning the finances and earnings from his business.

[122] The consequences of non-disclosure of assets has received repeated comment. I reiterate Fraser J.'s comments in *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93, 51 A.C.W.S. (3d) 277 (S.C.):

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.

It is not enough to respond to non-disclosure by an award of costs. Nor is it enough, in a case like this one, to deal only with what is known. Either of these approaches, or both together, may still reward the non-disclosing litigant for his conduct, depending whether his concealment has been successful.

I conclude that where there has been concealment of assets, it ordinarily should be held that the concealment is ongoing, that there are assets still undisclosed, and that the division of assets should be affected accordingly. I am not sure whether it is of consequence whether this is characterized as an assumption, a rebuttable presumption or an inference of fact. The result is the same. Such a holding may be avoided if the trial judge is satisfied by the conclusion of the trial that full disclosure has by then been made.

[123] However, in the absence of any evidence concerning the value of family property in the Philippines I am unable to make the order setting off the claimant's Pension against those assets. This principle was settled in *Wu v. Sun*, 2011 BCCA 239 at para. 42.

[124] In my view, the claimant is entitled to the difference in values of the respondent's assets in the Philippines between the date of marriage and the date of separation. I will make an order referring the question of the differences in values between the respondent's assets (including but not limited to those assets described in paragraph 7 above) after marriage and at the date of separation, to the registrar and direct that they certify the result of those inquiries.

[125] The respondent will pay to the claimant an amount equal to one-half of the value differences, if any, proved in regard to the respondent's property in the Philippines.

[126] Both parties have equal shares in one Philippines property and the claimant believes no order is necessary to protect her one-half interest in that jointly owned property.

Divorce

[127] I am satisfied the parties have lived separate and apart for more than one year and met the conditions necessary to obtain a decree of divorce. The parties will be divorced 31 days from the date of this order.

Conclusion

[128] I conclude that the parties' assets will be divided equally, subject to the respondent's entitlement to an unequal division stemming from the post separation reduction in the mortgage debt (\$14,145) less than the respondent as noted above.

[129] Each party will receive from the family property the sums owing by them at the date of separation (family debt) as described above. The respondent will pay to the claimant one-half of the amounts in his TFSA, GIC, RBC savings account, RBC chequing account and his RBC RRSP at the date of separation. The RRSP transfer will ensure an equal sharing of any tax liability and the parties have liberty to make further submissions as to the terms in the order necessary to complete this division of property. If the parties cannot agree on the terms or conditions of these transfers, liberty is given to make submissions on this point.

- [130] The Pension is to be divided in accordance with Part 6 of the FLA for the period of the relationship which commenced on the date of marriage and ending May 1, 2016. No argument was made concerning the terms of the order necessary to effect a division of the claimant's pension and the parties have liberty to make further submissions on the necessary terms to be included in the final order. The parties are to complete any necessary documentation to effect the division of the pension.
- [131] The family home will be listed for sale jointly by the parties at a price to be agreed upon. Failing agreement as to price, the parties will obtain a jointly commissioned appraisal of the property within 14 days and listing will be at the appraised value.
- [132] However, if the respondent wishes to purchase the family home, he may do so before the property is listed for sale. The terms of his purchase will be at a price equal to one-half the appraised value [if no agreement is reached as to price] and payment and transfer must be within 30 days of receipt of an appraisal of the strata unit.
- [133] If the parties require further directions regarding sale of the strata unit, submissions can be made.
- [134] In the absence of better evidence, the respondent will be entitled to retain the 2008 Honda Civic upon payment to the claimant of \$2750 [being one-half of the average of values attributed to the vehicle by both parties].
- [135] The claimant argued there were many items of personal property left in the home at the date of separation including furniture and other personal property. She provided a list of items she believes remain in the respondent's possession and asks that her property be returned and some payment be made for her interest in items remaining in the house when she left.
- [136] The respondent said he moved all of her personal property into a storage locker and she has had access to that place since her things were removed from the home. The evidence was not persuasive concerning the location of her property or the value of other furnishings in the home when she left.
- [137] I will order that the respondent deliver to the claimant any personal property belonging to her that remains within the property in seven days. If the respondent fails to deliver this property to the claimant, either party will liberty to make further submissions about the enforcement of this order and compensation that may be ordered for property not returned to her.
- [138] If there is furniture and household contents that were in the home at separation, not including fixtures, then the parties must divide those items equally. If they can not agree on the division or value of any items, I direct that the registrar to conduct an inquiry and valuation of such items and report to the court the results of such inquiry; the parties may then make further argument concerning division of those items of family property.

[139] I decline to make an order offsetting the respondent's claim to one-half interest in the claimant's pension based on family property in his name in the Philippines until the Registrar certifies the result of the reference ordered.

[140] The parties also have liberty to make submissions concerning costs of this proceeding within 30 days absent which the claimant will have costs at Scale B.

"Armstrong J."

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Prepared on 25 October 2026 · Esheria