

CANADA / JUDGMENT

Kelly v. Kelly

2014 BCSC 2033

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2033 Kelly v. Kelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kelly v. Kelly,

2014 BCSC 2033

Date: 20141029

Docket: E040923

Registry: New Westminster

Between:

Patrick John Kelly

Claimant

And

Marcelina Banua Kelly

Respondent

Corrected Judgment: The text of the Judgment was corrected at paragraph 116 on March 18, 2015; and was amended at paras. 84 to 102 by Supplementary Reasons issued on August 18, 2015 and indexed as 2015 BCSC 1451. The amendments do not appear in the text of these reasons.

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Claimant:

N. Hunter

A. Burns

Counsel for Respondent:

F.C. Lowther

Place and Date of Trial:

New Westminster, B.C.

October 28 - 31, 2013

February 14, 2014

Place and Date of Judgment:

New Westminster, B.C.

October 29, 2014

I. Introduction

[1] On April 25, 2012 Mr. Patrick Kelly commenced a family law case pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. Mr. Kelly seeks:

1. a divorce;
2. an order pursuant to s. 57 of the FRA that the marriage has no reasonable prospect of reconciliation;
3. an order for equal division of family assets excluding the home located at 1344 - 128 Street (the "Second Home") that he pleaded was the subject of a separate agreement dated September 20, 2004; and
4. an order for possession of the Second Home.

[2] In reply, Ms. Marcelina Kelly also seeks a divorce and a declaration pursuant to s. 57 of the FRA. In addition, Ms. Kelly seeks to set aside the abovementioned agreement and have it declared invalid. She also seeks a spousal support order and a division of Mr. Kelly's pension.

II. Issues

[3] This case has five issues:

1. Should the Court grant the parties a divorce and an order pursuant to s. 57?
2. Is the agreement regarding the Second Home unfair?
3. What amount of spousal support, if any, should be ordered?

4. How should Mr. Kelly's pension be divided?
5. Is April Kelly presently a child of the marriage?

III. Factual Background

- [4] Mr. Kelly began a career as a postal worker for Canada Post in 1975, where he worked continuously for 37 years until he retired in 2012. Before meeting Ms. Kelly, Mr. Kelly owned a home (the "First Home") that was encumbered by a mortgage.
- [5] Ms. Kelly was born in the Philippines. She worked hard to be allowed to attend high school. Following graduation, she moved to Hong Kong, where she worked as a nanny. In anticipation of the transfer of Hong Kong's administration from Great Britain to China, Ms. Kelly immigrated to Canada. Within a few years, she arranged for her sister, Ms. Esther Dungalen, to immigrate to Canada.
- [6] In 1988, Mr. Kelly and Ms. Kelly began living in a marriage-like relationship. They married on August 13, 1989. On April 27, 1990, the parties' only "child of the marriage", April Kelly ("April"), was born.
- [7] Ms. Kelly stayed at home with April for a couple of years after her birth. Ms. Kelly then took training and became qualified to work as a care aide. In 1997, she began working at Cherington Place as a unionized care aid worker. As a union member, Ms. Kelly was entitled to join a pension plan to secure a pension during her retirement years. The pension plan was paid, in part, by deductions from employee pay cheques, with the employer responsible for the remaining balance. Ms. Kelly declined to join the pension plan.
- [8] In addition to working at Cherington Place, Ms. Kelly worked for a commercial business that delivered newspapers to a significant number of subscribers.
- [9] Mr. Kelly brought significant assets into the marriage, including his equity in the First Home and a Canada Post pension purchased with contributions made over 14 years of continuous employment prior to the marriage.
- [10] In 1989, the parties purchased the Second Home for \$200,000. They financed the purchase with \$130,000 cash from the proceeds of selling the First Home, and a new mortgage of approximately \$70,000. Ms. Kelly made no financial contributions to the equity in the First Home before it was sold. The Second Home was registered in both parties' names as joint tenants. Mr. Kelly made all mortgage, property tax and insurance premium payments on the Second Home. By 2003, Mr. Kelly had reduced the mortgage principal from \$70,000 to \$8,058.97. Ms. Kelly made no financial contributions to the Second Home's expenses.
- [11] In 2003, the parties borrowed money to renovate the Second Home and purchase a new washer and dryer. In addition to the money borrowed for renovations, Ms. Kelly requested that Mr. Kelly borrow an additional sum to pay her \$20,000 line of credit to allow her to pay off additional credit card and other debts she had incurred previously; for example, a CIBC

Visa account (Exhibit 1, Tab 8, page 2). None of Ms. Kelly's debts were incurred for any purpose associated with the marriage or the Second Home. Mr. Kelly testified - and his evidence was not challenged or contradicted - that he was unaware how Ms. Kelly spent the money that gave rise to these debts.

- [12] Ms. Kelly testified that she used the \$20,000 to purchase or build a home in the Philippines for her parents. Mr. Kelly testified he did not know that Ms. Kelly was building a home in the Philippines, and that he was unaware how Ms. Kelly spent the borrowed money.

IV. Drafting of the Agreement

- [13] In 2004, Ms. Kelly asked Mr. Kelly to give her \$100,000. She did not tell Mr. Kelly her reason for asking for this money. Mr. Kelly did not have \$100,000 available. He would have had to obtain an additional mortgage on the Second Home to raise that money.
- [14] Ms. Kelly approached a lawyer, Mr. Scott, and asked him to prepare an agreement between her and Mr. Kelly (the "Agreement"). The principal terms of the Agreement were that Mr. Kelly would pay Ms. Kelly \$100,000, and, in return, Ms. Kelly would give her joint interest in the Second Home to Mr. Kelly.
- [15] Mr. Kelly retained Ms. McClugan, a lawyer, to review the Agreement that Mr. Scott prepared. She drew an error in the draft to Mr. Scott's attention.
- [16] Ms. Kelly testified that Mr. Scott acted on Mr. Kelly's instructions. Mr. Kelly denied that he was involved with or gave instructions to Mr. Scott. Mr. Scott was not called as a witness.
- [17] Although Ms. McClugan was not called as a witness, her correspondence and attached billing, which was exhibited in the trial, demonstrate that Ms. McClugan did not draft the Agreement. Her account for 1.5 hours of legal time is only consistent with her having reviewed the Agreement and provided Mr. Kelly with independent legal advice.
- [18] I reject any suggestion that Mr. Kelly instructed Mr. Scott to draft the Agreement. Ms. Kelly's testimony that Mr. Scott drafted the Agreement pursuant to Mr. Kelly's instructions is simply not a credible assertion, and it is wholly inconsistent with the bill rendered by Ms. McClugan. I find that Ms. Kelly sought out Mr. Scott and instructed him to draft the Agreement.
- [19] On that basis, I find as a fact that Mr. Scott prepared the Agreement, and that he acted solely on Ms. Kelly's instructions. I find that Ms. Kelly was eager to create the Agreement, as she wanted to receive the money from Mr. Kelly. I accept that Mr. Kelly was reluctant to give Ms. Kelly \$100,000 and thereby increase his debt by that amount.
- [20] The Agreement was dated September 20, 2004. The Agreement was in writing, signed by both Mr. Kelly and Ms. Kelly, and witnessed by their respective lawyers, who provided independent legal advice.

- [21] Pursuant to the Agreement, Mr. Kelly was responsible for making all mortgage payments and other expenses related to the Second Home, such as property taxes. Following the advance of the \$100,000, Ms. Kelly was no longer a party to the mortgage and had no liability thereunder (claimant's documents, Tab 8, Page 6). Mr. Kelly has since fully honoured his obligations under the mortgage and has paid all expenses for the Second Home, without any contribution from Ms. Kelly.
- [22] The Agreement states the value of the Second Home in 2004 was \$475,000. The Agreement states the Second Home was subject to a \$150,000 mortgage. However, the balance due on the Second Home's mortgage in 2004 was actually \$154,000. Thus, after adding an additional \$100,000 to the mortgage principal to finance the payment to Ms. Kelly under the Agreement, the principal amount of the mortgage loan to be repaid by Mr. Kelly was \$254,000.

V. Relationship issues

- [23] Later in 2004, Mr. Kelly was told by April that Ms. Kelly was romantically involved with the son of her employer in the newspaper delivery business. April had learned of this supposed relationship in 2004 after she had loaned Ms. Kelly her cell phone. When Ms. Kelly returned the cell phone to April, it contained text messages evidencing a romantic relationship between Ms. Kelly and her employer's son. April thought this relationship was inappropriate and told her father about the messages. This revelation seriously damaged April's relationship with her mother.
- [24] Mr. Kelly testified that he confronted Ms. Kelly with these revelations of an affair, which she admitted was true. He also confronted the parents of the other party to the affair to put an end to it. Mr. Kelly testified that the parents agreed to end the affair. His evidence on this point was not challenged during cross-examination.
- [25] Ms. Dungalen also testified that she was aware of this affair. When Ms. Kelly learned that Ms. Dungalen was intending to give evidence in this trial, she telephoned Ms. Dungalen and asked her not to attend the trial to give evidence. That phone call was not appropriate, and verged on obstruction of justice.
- [26] Ms. Kelly denied having had a relationship with her employer's son. While the weight of the evidence is against Ms. Kelly on this point, this Court does not need to make a finding in this regard to decide the issues in this case.
- [27] The parties continued to live in the Second Home after the text message revelations, although they were apparently estranged.

- [28] Thereafter, Mr. Kelly lost trust in Ms. Kelly in relation to financial matters and took to wearing a money belt after he concluded she had taken cash he earned driving a taxi. His fears were not unwarranted. Indeed, I find Ms. Kelly signed a cheque with Mr. Kelly's signature without his consent or approval. She also gave him cheques to pay other debts that she had incurred which were ultimately dishonoured.
- [29] It was not only in relation to financial matters that Ms. Kelly demonstrated a complete disregard for Mr. Kelly's interests, as she drove his car despite having lost her driver's licence, exposing him to potentially ruinous liability.

VI. Ms. Kelly's financial circumstances

- [30] Much of the evidence tendered at trial related to attempts to reveal Ms. Kelly's actual financial circumstances. I will now summarize this evidence.
- [31] Ms. Kelly's employment at Cherington Place was continuous from 1997 until 2012, a period of 15 years. According to her income tax returns, she earned more than several hundred thousand dollars during that 15 year period. She also received significant sums of money from Mr. Kelly, in excess of \$122,000, which has been outlined above. I find that she contributed none of that money either to family assets, such as mortgage payments, property tax payments, or costs associated with housing maintenance, furniture, or household accessories, or to family expenses, such as groceries.
- [32] Ms. Kelly attempted to explain where she spent her money, but I found her explanations did not account for significant amounts of money she earned or received from Mr. Kelly. Her explanations were otherwise wanting in documentary support and were wholly unsatisfactory.
- [33] One proffered explanation was that Ms. Kelly sent half of her monthly income to her brother in the Philippines on a monthly basis. However, in her examination for discovery, reviewed in the evidence at trial, she denied that she ever made any regular monthly payments to her brother, and said she only sent her brother the equivalent of \$500 per year.
- [34] Ms. Kelly also testified that she spent money on her mother's funeral, but she was unable to tell the Court how much money she spent for funeral purposes, and produced no documents evidencing funeral expenses which she paid.
- [35] When Ms. Kelly was asked on cross-examination whether she had documents evidencing that she had sent money to anyone in the Philippines, she testified that she had no documents; rather, she stated that her friends would carry quantities of cash to the Philippines on her behalf. Ms. Kelly agreed at her examination for discovery to produce a list of persons whom she alleged carried money to the Philippines for her, and she agreed to provide contact information for those persons. She did not provide any list. In cross-examination, she refused to provide the names or contact information of any such persons. Ms. Kelly's unwillingness to provide this information leads me to give her testimony that she

sent money to the Philipines with "friends" no evidentiary weight.

- [36] Ms. Kelly further testified that she contracted to pay approximately 100,000 Philippine pesos for architectural or engineering fees in relation to construction activity in the Philippines in 2004. She testified that one Canadian dollar equals 40 Philippine pesos, and that she still owed approximately 71,000 Philippine pesos (\$1,725) on that debt in 2012.
- [37] Based on her evidence, Ms. Kelly only paid the equivalent of \$825 in Canadian funds between 2004 and 2012, and the balance of fees owing remained outstanding.
- [38] Ms. Kelly became quite emotional in court when her counsel suggested to her that she did not own real property in the Philippines. That question arose in relation to a draft agreement Ms. Kelly had a lawyer prepare in 2011 that proposed the parties set aside the Agreement and sell the Second Home, dividing the sale proceeds equally between the parties while preserving the Philippine property that Ms. Kelly owned for her own exclusive use. Mr. Kelly did not agree to the proposed agreement.
- [39] Ms. Dungalen was familiar with the costs of constructing a home in the Philippines, as she and her husband had built a home similar to the homes occupied by her other family members in the Philippines. She testified that her home cost approximately \$16,000 in Canadian funds to build. This evidence was unchallenged and is accepted by the Court.
- [40] The sums Ms. Kelly allegedly spent, assuming those sums were spent on some aspect of construction or real estate development in the Philippines, ought to have allowed for the creation of significant and demonstrable real assets in the Philippines. However, other than the reference in the draft agreement to a property in the Philippines, Ms. Kelly presented no evidence at trial of any real assets in the Philippines which she owned or held any legal interest. Further, she testified she had no interest in any real property in the Philippines.
- [41] In sum, I find that I cannot give Ms. Kelly's evidence as to her finances any weight, as her explanations about how she expended the money she earned or was given simply find no support in any proven facts. Ms. Kelly has not demonstrated how she spent the funds she received from Mr. Kelly or earned through her employment at Cherington Place or the newspaper delivery business. Moreover, no evidence was called demonstrating that she had any savings or other investments. The large sums of money earned or given to Ms. Kelly between 1989 and 2012 seem to have simply disappeared. The Court has no basis to determine what happened to the hundreds of thousands of dollars Ms. Kelly possessed over the years of her relationship with Mr. Kelly.
- [42] For the aforesaid reasons, I find Ms. Kelly was not an honest, credible or forthright witness. I give her uncorroborated evidence no evidentiary weight. In addition to her inability to demonstrate her financial circumstances, Ms. Kelly was also shown to have been deliberately untruthful. Before trial, Ms. Kelly filed two Form 8 Financial Statements. Ms. Kelly swore that these statements were true. The first such statement did not disclose the income she actually earned. The second of these statements declared that Ms. Kelly was

physically disabled and unable to work, and stated her income was \$600 per month. However, when Ms. Kelly was confronted during cross-examination with her own bank statements, she admitted that she had been working as a care giver for children and had received an additional \$3,600 per month for that work including in the month before the second Form 8 Financial Statement was sworn. She thus did not tell the truth about her monthly income, which was actually \$4,200 per month.

VII. Discussion

1. Should the court grant the parties a divorce and an order pursuant to s. 57?

[43] I am satisfied that the parties have been living separate and apart for at least one year at the commencement of this action and that there is no reasonable prospect of reconciliation. The divorce sought by the parties is granted and will take effect 31 days from the date of this judgment. I make this finding notwithstanding that the parties were living in the same residence. The parties had for some years occupied different bedrooms, and did not have a marriage-like relationship during those years.

2. Is the agreement regarding the Second Home unfair?

[44] The most significant issue in this case is whether the Agreement is unfair, having regard to the factors listed in s. 65(1) of the FRA.

[45] Ms. Kelly seeks a determination that the terms and division of assets under the Agreement are unfair and that she is entitled to share in the equity in the Second Home. She submits that the Agreement was not fair when it was made or at the time of the distribution, when her property interest in the Second Home was transferred to Mr. Kelly. She seeks a reapportionment of family assets referred to in the Agreement.

[46] Mr. Kelly asserts the Agreement is not unfair. He argues that Ms. Kelly promoted the Agreement to him after being advised by her legal counsel, and that he has fully honoured his obligations under the Agreement by paying Ms. Kelly the \$100,000 stipulated in the Agreement and making all mortgage payments, both principal and interest, without any contribution from Ms. Kelly.

[47] Ms. Kelly's application is governed by the FRA. The Agreement dealt with the parties' ownership of a family asset, was in writing, was signed by both parties, and was witnessed. It was thus a marriage agreement pursuant to s. 61 of the FRA. Section 65 of the FRA allows the court to reapportion entitlement to property dealt with in a marriage agreement where the agreement is unfair. Section 65 provides:

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

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,

- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[48] The fundamental question is thus whether the Court should reapportion the parties' entitlement to the equity in the Second Home on the basis that the Agreement is unfair. As the party seeking this reapportionment, Ms. Kelly bears the onus of proving that the Agreement is unfair.

[49] The leading case on the fairness of marriage agreements is *Hartshorne v. Hartshorne*, 2004 SCC 22. In *Hartshorne* at para. 43, Bastarache J., for the majority, stated that, in assessing the fairness of a marriage agreement, the court must determine whether the agreement is substantively fair when the application for reapportionment is made. Bastarache J. then set out the essence of this inquiry:

- 1. whether the circumstances of the parties at the time of separation were within their reasonable contemplation when the agreement was formed;
- 2. whether the parties made adequate arrangements in response to these anticipated circumstances when the agreement was formed.

[50] At para. 44, Bastarache J. noted the following considerations as central to any analysis under s. 65(1) of the FRA:

- 1. how accurately the parties predicted, at the time of contract formation, their actual circumstances at the time of distribution;
- 2. whether the parties considered the impact of their decision; and

3. whether the parties adjusted the agreement during the marriage to deal with different situations than expected either because the circumstances were different or simply because implications were inadequately addressed or proved to be unrealistic.

[51] At para. 47, Bastarache J. set out a two-stage analysis that the court must follow:

1. First, the court must apply the marriage agreement. In applying the agreement, the court assesses the parties' financial entitlements under the Agreement and other financial entitlements from all other sources, including spousal and child support.
2. Second, the court must consider the factors in s. 65(1) of the FRA to determine whether the agreement operated unfairly. At this stage, the court considers the parties' personal and financial circumstances and how these circumstances evolved over time. Where the parties contemplated the current circumstances when forming the agreement and the agreement reflected a response to these circumstances, the burden to prove unfairness is a heavy one. Indeed, the court can only vary the agreement if, in considering the s. 65 factors, it determines that the economic consequences of marriage breakdown were not equitably shared.

[52] Bastarache J. further stated at para. 47 that this approach accords with the underlying principle of the FRA, as it strikes a balance between deference to the parties' intentions and the assurance of an equitable result.

[53] At para. 67, Bastarache J. made the following concluding remarks that are particularly apposite to the case at bar:

67 Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the FRA permits a court, upon application, to find that an agreement or the statutory regime is unfair and to reapportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s. 65 factors, that a different apportionment should be made. [Emphasis added.]

[54] From the foregoing, it is clear that courts should respect the decisions people in marital relationships make and give those decisions due deference.

- [55] In applying the first step of the Hartshorne analysis, the Court must apply the Agreement. Using the values set out in the Agreement, Ms. Kelly was to receive \$100,000. In return, Mr. Kelly was to receive an asset worth \$475,000. However, this property was encumbered by a mortgage of \$254,000. Moreover, Mr. Kelly was to be responsible for all house-related expenses, such as the mortgage principal, interest, and property taxes. In summary, using the figures in the Agreement, Ms. Kelly was to receive \$100,000 and Mr. Kelly was to receive an asset with a net value of approximately \$221,000 (minus house expenses).
- [56] However, I am not satisfied that the market value of the Second Home was \$475,000 in 2004. While the parties' agreed on that value, the court is entitled to conclude that an asset had a different value than that agreed upon in a reapportionment application brought under s. 65 of the FRA: see *S.L.C. v. C.J.R.C.*, 2014 BCSC 1814 at paras. 444-458.
- [57] Counsel for Ms. Kelly, in defending the value cited in the Agreement, claimed that "a realtor was consulted then as to the value" of the Second Home. However, the identity of this realtor was not put into evidence. Moreover, no expert appraisal witness was called to explain the value cited in the Agreement. In filed written submissions, Ms. Kelly stated that "the bank would do an appraisal prior to a re-mortgage". However, no evidence of such a re-appraisal was led before the Court.
- [58] Ms. Kelly also did not call Mr. Scott to explain how the \$475,000 figure was reached. As Mr. Scott prepared the Agreement, he would have been in a unique position to provide evidence about how the market value in the Agreement was calculated. Thus, in the absence of opinion appraisal evidence, the evidence in support of the \$475,000 valuation is hearsay without a known or identifiable source.
- [59] Mr. Kelly testified he did not know how the value of \$475,000 was determined. Mr. Kelly submitted, at Tab 7 of his Book of Documents, annual property assessments conducted by the BC Assessment Authority. The BC Assessment Authority is mandated by the Assessment Authority Act, R.S.B.C. 1996, c. 21, and the Assessment Act, R.S.B.C. 1996, c. 20, to produce independent and uniform property assessments on an annual basis for all BC property owners.
- [60] In 2004, the BC Assessment Authority valued the Second Home at \$363,100.
- [61] Counsel for Ms. Kelly submitted that the Court should take judicial notice that property assessments are notoriously undervalued.
- [62] As counsel made that submission unsupported by any authorities, I have considered two seminal cases regarding judicial notice.
- [63] First, in *R. v Find*, 2001 SCC 32 at para. 48, McLachlin, C.J. said:

Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy[.]

[64] Second, in *R. v. Spence*, 2005 SCC 71 at para. 65, Binnie J. said:

When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.

[Emphasis in original.]

[65] The submission that the Court should take judicial notice that property assessments are notoriously undervalued will not be given effect because the assertion does not meet either of these tests.

[66] In considering the value of the Second Home, I have noted that the Agreement incorrectly states the mortgage balance. The Agreement states that the balance due on the mortgage as of September 2004 was \$150,000. However, a mortgage statement dated October 12, 2004 exhibited at Tab 8, page 6 of Mr. Kelly's Book of Documents states that the mortgage principal due after the payment of \$100,000 to Ms. Kelly was \$254,000. In other words, the balance due on the mortgage before Mr. Kelly borrowed additional funds to pay Ms. Kelly was \$154,000. The drafter of the agreement thus did not accurately state the mortgage balance. It is therefore questionable whether a greater degree of care was taken to establish the market value of the Second Home.

[67] In the circumstances, I am satisfied that the 2004 BC Assessment Authority appraisal is the best evidence of the value of the Second Home in 2004. I thus consider the value of the Second Home to have been \$363,100 at the time the parties effected the Agreement. This left Mr. Kelly an asset with a net value of \$109,100 (minus house expenses).

[68] As discussed above, the net effect of the Agreement was that Ms. Kelly received \$100,000 and Mr. Kelly received full title to an asset with a net value of approximately \$109,100. Ms. Kelly thus received approximately 48% of the equity in the Second Home in 2004. I have also noted that she received \$20,000 and the retirement of certain debts from the earlier refinancing of the home in 2003, and that the Agreement in no way precluded Ms. Kelly from seeking spousal support or a division of Mr. Kelly's pension in the event of marriage

breakdown.

[69] The factors in s. 65 of the FRA can be summarized as follows:

- (a) the parties were married for 25 years;
- (b) there is insufficient evidence to determine how long the parties have lived separate and apart, although they have lived separate and apart for at least one year;
- (c) the Second Home was acquired during the marriage;
- (d) the Second Home was not acquired by either party through inheritance or gift;
- (e) at the time the Agreement was signed, and at the time this application was made, both parties had independent sources of income. Moreover, Mr. Kelly has given Ms. Kelly ample assistance in becoming more financially independent as she kept all of her income from two jobs throughout the marriage and was also given at least \$120,000.00; and
- (f) as set out above, Mr. Kelly has been responsible for all household and family expenses throughout the parties' ownership of the Second Home. Moreover, Mr. Kelly has routinely borrowed money to allow her to pay off her debts.

[70] The thrust of Ms. Kelly's argument for reapportionment was that the value of the Second Home increased substantially between 2004 and 2012. As a point of reference, the 2012 BC Assessment Authority appraisal values the Second Home at \$611,900. After considering the factors set out in s. 65 of the FRA, I find that the Agreement is substantively fair, for the following reasons.

[71] Firstly, I find that the parties' current circumstances were within the reasonable contemplation of the parties. Indeed, I have found that it was Ms. Kelly who was intent on creating the Agreement and retained Mr. Scott to draft the Agreement. The Agreement provided that if the relationship ended she would not have a claim against the Second Home. It would have been within Ms. Kelly's reasonable contemplation that the value of the Second Home would likely increase after 2004.

[72] Secondly, I find that the parties made adequate arrangements for their anticipated circumstances. The Agreement provided that Mr. Kelly would be solely responsible for all mortgage payments and other household expenses. Mr. Kelly has fulfilled this obligation over the last 10 years, during which time Ms. Kelly has lived in the Second Home for free. Ms. Kelly received \$100,000 for which she had the opportunity to invest in real assets. If she failed to do so, that is not a circumstance justifying a judicial reapportionment.

- [73] Thirdly, the parties' clearly considered the impact of their decision as they both received independent legal advice. I find this to be a very significant factor in this case, as not only did Ms. Kelly receive independent legal advice but it was pursuant to her instructions that the Agreement was drafted in the first place. Ms. Kelly did not complain about the Agreement Mr. Scott prepared, and signed it. Ms. Kelly has received the benefits of this Agreement, and she is accordingly bound by its terms.
- [74] Pursuant to Hartshorne, I can only vary the agreement if the economic consequences of marriage breakdown were not equitably shared. After considering all of the circumstances, I have concluded that the consequences of marriage breakdown were equitably shared and that Ms. Kelly has not discharged her heavy burden of proving that the Agreement was unfair. Mr. Kelly shall receive the benefit of any increase in the value of the Second Home since 2004. He has fulfilled all of his obligations pursuant to the Agreement. He is entitled to rely on Ms. Kelly's covenants that the parties reasonably contemplated when Ms. Kelly had the Agreement drafted in 2004.
- [75] For all of the above reasons, my conclusion that the Agreement is fair would not have changed had there been objective evidence that the Second Home was properly valued at \$475,000.
- [76] The parties' Agreement is fair and deserving of due deference. Accordingly, Ms. Kelly's application for reapportionment of the Second Home is denied.
3. What amount of spousal support, if any, should be ordered?
- [77] Ms. Kelly is applying for a spousal support order. However, due to the sparsity of the evidence of Ms. Kelly's financial circumstances, I cannot decide at this time what spousal support might be appropriate to order. Nonetheless, I will still canvass the issue for the purposes of the judgment and the record.
- [78] Section 15.2 of the DA outlines the legislative framework for spousal support. Section 15.2(4) directs the court to consider the conditions, means, needs, and other circumstances of each spouse in determining entitlement to support, including: (a) the length of time the spouses cohabited; (b) the functions performed by each spouse during cohabitation; and (c) any order, agreement or arrangement relating to support of either spouse.
- [79] Section 15.2(6) sets out the objectives of a spousal support order. Under s. 15.2(6), an order for spousal support should:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[80] All four of these statutory objectives must be taken into account and none of them takes precedence over any other: see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at 440; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 852.

[81] Section 15.2(5) prohibits the court from taking into consideration any misconduct of a spouse in relation to the marriage.

[82] In *M.S.G. v. S.K.R.*, 2014 BCSC 1344, Madam Justice Ballance helpfully summarized some of the legal principles related to spousal support:

[210] The Supreme Court of Canada has formulated three conceptual models for determining entitlement to spousal support: non-compensatory (needs-based); compensatory; and contractual: *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge], 99 D.L.R. (4th) 456; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577 [Bracklow]. These bases are not mutually exclusive and there is no single basis of support or single statutory objective that overtakes another. The basis of entitlement for spousal support, being contractual, compensatory or needs-based, or a combination, will influence the quantum and duration of the award.

[211] The fundamental underpinning for an order of spousal support is the doctrine of equitable sharing between the parties of the economic advantages and disadvantages of marriage and marriage breakdown: *Chutter v. Chutter*, 2008 BCCA 507 at para. 49 [Chutter].

[212] It is settled that financial need alone of one spouse may be enough to establish entitlement to support: *Chutter*. It does not inevitably follow, however, that the quantum or duration of spousal support must fully address those needs: *Bracklow*; *T.N.P. v. R.P.*, 2004 BCSC 1627. In evaluating need, if the financial means are available, then the appropriate standard of living to look at is a reasonable standard, bearing in mind the standard of living enjoyed during the marriage. The notion of "need" is a relative concept that extends beyond the basic necessities of life, and will vary according to the circumstances of the parties: *Chutter*, at para. 55

[213] In *Moge*, at para. 84, the Court spoke to the importance of the marital standard of living in lengthy marriages:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement [citations omitted]. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer

the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution [citations omitted].

[215] In contrast to child support, there is no presumptive entitlement to spousal support. Mr. G. was under no legal obligation to look out for Ms. R.'s interests upon separation.

[83] Due to the insufficiency of the evidence Ms. Kelly has presented, I cannot decide at this time what spousal support might be appropriate to order. That issue will have to be decided at a future hearing where reliable evidence of Ms. Kelly's financial situation is presented to the Court.

4. How should Mr. Kelly's pension be divided?

[84] Ms. Kelly seeks a division of Mr. Kelly's Canada Post pension. Mr. Kelly's pension began accruing in 1975 when he commenced his employment at Canada Post, and it ceased accruing in 2012 when he retired. As this family law action was commenced before the Family Law Act, S.B.C. 2011, c. 25 [FLA] came into force, unless the parties agree otherwise the division of Mr. Kelly's pension is to be effected pursuant to the FRA: FLA s. 252.

[85] Part 6 of the FRA governs the division of a spouse's pension. Section 70 of the FRA defines both a "local" pension plan and an "extraprovincial" pension plan. Section 77 provides for the division of an extraprovincial plan:

77 (1) If a pension to be divided is in an extraprovincial plan, a spouse is entitled to receive from the plan a proportionate share of benefits paid under the pension until

- (a) the death of the spouse, or
- (b) the termination of the pension,

whichever occurs first, and the member is a trustee of the proportionate share of benefits for the spouse.

- (2) Despite subsection (1), if no other spouse is entitled to receive a proportionate share of benefits paid under the pension, the spouse who is the designated beneficiary of a postretirement survivor benefit under the pension is entitled to the whole of the postretirement survivor benefit.
- (3) Subject to subsection (4), subsection (1) does not apply if the plan, or legislation establishing or regulating the plan, provides an alternative method of satisfying the interest of the spouse in the pension.
- (4) If, having regard to the principles that apply to pension division under this Part, the alternative method under subsection (3) would operate unfairly, the Supreme Court may order the spouse's share in the pension be satisfied under subsection (1).

[Emphasis added.]

[86] The Division of Pensions Regulation, B.C. Reg. 77/95 (the "Regulation") elaborates on the division of a pension under Part 6 of the FRA. Section 6 of the Regulation outlines how to calculate the division of a pension. Section 6(1)(c) of the Regulation provides that the section applies to the division of an extra-provincial plan. Section 6(2) provides:

- (2) Subject to subsections (3) and (4), the proportionate share must be determined in accordance with the following formula:

$$\text{proportionate share} = 1/2 (A \div B)$$

where

A = the pensionable service accumulated by the member from the date of marriage to the entitlement date for the spouse, excluding any pensionable service for that period purchased by and credited to the member after that entitlement date;

B = the total pensionable service accumulated by the member to the date that

- (a) the spouse's share is transferred from the plan,
- (b) the spouse begins to receive a separate pension, or
- (c) the spouse begins to receive a payment of benefits from the member or the plan.

[87] The effect of this formula is that the non-member spouse receives a proportionate share of pension benefits acquired between the date of marriage and the entitlement date, which is defined in s. 1 of the Regulation as the earliest of a separation agreement, a declaratory judgment under s. 57 of the FRA, an order for dissolution of marriage or judicial separation, or an order declaring the marriage null and void.

[88] While the abovementioned formula dictates how pensions are to be divided pursuant to the FRA, s. 77(3) of the FRA excludes an extra-provincial plan from this method of division where the legislation establishing or regulating the extra-provincial plan contains an alternative method of dividing the pension: see *C. (H.E.D.) v. C. (R. M.)*, 2003 BCCA 420 at para. 44. Section 77(4) of the FRA permits the court to apply the method of division outlined in s. 6(2) of the Regulation if the alternative method operates unfairly.

[89] The federal Pension Benefits Division Act, S.C. 1992, c. 46 [PBDA] applies to pension plans provided by federal statutes, including the Public Service Superannuation Act, R.S.C. 1985, c. P-36 [PSSA]. Section 8 of the PBDA provides for the division of pension benefits as follows:

8(1) A division of pension benefits shall be effected by

- (a) subject to subsection (4), transferring an amount representing fifty per cent of the value of the pension benefits that have accrued to the member of the pension plan during the period subject to division, as determined in accordance with the regulations, to the spouse, former spouse or former common-law partner

- (2) For the purposes of subsection (1) but subject to subsection (3), the period subject to division is
 - (a) the period specified by the court order or agreement as the period during which the member of the pension plan and the spouse, former spouse, or former common-law partner cohabited; or
 - (b) where the court order or agreement does not specify a period as described in paragraph (a), such period as may be determined by the Minister, on the basis of evidence submitted by either of the interested parties or by both, as being the period during which the member of the pension plan and the spouse, former spouse or former common-law partner cohabited.
- (3) For the purposes of subsection (1), where the application is based on a court order and the order provides that pension benefits that have accrued to the member of the pension plan during a period specified in the order are to be divided, the period specified in the order is the period subject to division.
- (4) If the court order or agreement provides, or the interested parties agree, that the terms of the court order or agreement shall be satisfied by the payment of a lump sum amount and that lump sum amount, together with such interest as may be required by the regulations, is less than the amount that would otherwise be transferred in accordance with paragraph (1) (a), that lump sum amount, together with that interest, shall be transferred in accordance with that paragraph in lieu of the greater amount.

[Emphasis added.]

- [90] Section 8 of the PBDA thus establishes that the recipient is to receive 50 percent of the benefits accrued during the period of cohabitation between the spouses, former spouses, or former common-law partners.
- [91] The Canada Post Pension Plan is established pursuant to the PSSA. Mr. Kelly's pension is thus subject to s. 8 of the PBDA by virtue of s. 77(3) of the FRA: see C. (H.E.D.) at para. 43. Section 8 dictates that Ms. Kelly is entitled to 50 percent of the pension benefits that accrued to Mr. Kelly during the parties' period of cohabitation. If either party establishes that this method operates unfairly, s. 77(4) of the FRA permits the court to apply the method of division established by s. 6(2) of the Regulation.
- [92] From the foregoing it is clear that the Court must determine the parties' period of cohabitation.
- [93] In *Campbell v. Campbell*, 2011 BCSC 1491, rev'd on other grounds, 2013 BCCA 109, at para. 87, Mr. Justice Groves held that the focus of the inquiry of whether parties were "cohabiting" is whether the parties were in a "marriage-like" relationship.
- [94] In *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 at 268 (C.A.), Lambert J.A. stated some objective indicators of when a couple were living together as husband and wife:

Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependent on the other, in accordance with a mutual arrangement.

[95] These considerations were held to be equally relevant in the determination of whether a couple was living in a marriage-like relationship in *Eisener v. Baker*, 2007 BCSC 83.

[96] In *Eisener* at para. 36, Russell J. also noted that the case-law was clear that the point at which the parties ceased living in the same residence is not determinative of the date their marriage-like relationship terminated. Rather, the key issue is when the "marriage-like" quality of the relationship terminated. Russell J. outlined the following non-exhaustive factors in determining when a couple have ceased living in a marriage-like relationship: "the absence of sexual relations, a clear statement by one of the parties of his or her desire to terminate the relationship, physical separation of the parties into different rooms of the same house or different residences, or the couple no longer presenting themselves to the outside world as a couple."

[97] In this case, the parties were married on August 13, 1989. However, I am satisfied that they began living in a marriage-like relationship in 1988 and thus began cohabiting in that year. Therefore, the value of Mr. Kelly's pension benefits that accrued between 1975 and 1988 are not subject to division.

[98] As to when the parties ceased cohabiting, the Court is not currently in a position to make this determination due to insufficient evidence. I will now summarize the evidence that is before the Court.

[99] Ms. Kelly and Mr. Kelly resided in the Second Home throughout the entire period Mr. Kelly's pension was accruing. However, after 2004 Ms. Kelly gradually became estranged from Mr. Kelly and April. She withdrew to her own separate bedroom and interacted infrequently with her family. When she did interact with Mr. Kelly, their interactions were unhappy and featured loud and unpleasant arguments. The allegations that Ms. Kelly was having an affair were looming over the relationship.

[100] Mr. Kelly testified that he demanded Ms. Kelly leave the home in April of 2011, but she refused to leave.

[101] Neither party has provided an adequate evidentiary basis for the Court to determine when the parties ceased cohabiting for the purpose of establishing Ms. Kelly's entitlement to Mr. Kelly's pension benefits. Moreover, while April's uncontradicted evidence establishes that her parents' relationship changed significantly after 2004, her evidence is also not sufficiently detailed to allow the Court to make a final determination on this issue.

[102] The Court will require the parties to obtain a hearing date to present evidence and submissions on this issue. I ask that counsel structure their arguments pursuant to the legal principles I have outlined. I remain seized of this case for the purposes of deciding the division of Mr. Kelly's pension.

5. Is April Kelly presently a child of the marriage?

[103] Section 2(1) of the DA defines a "child of the marriage" as:

a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life

[104] Children that reach the age of majority but still attend a post-secondary institution are frequently considered children of the marriage under s. 2(1): see *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 (B.C.C.A.). The child does not need to reside with either parent to fall within s. 2(1)(b): see *Robertson v. Hibbs* (1997), 71 A.C.W.S. (3d) 1134 (B.C.S.C.).

[105] Both *Darlington* and *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.) refer to a number of non-exhaustive factors for a court to consider in determining whether a child is still a "child of the marriage":

- 1) whether the child is studying on a part-time or full time basis;
- 2) whether the child has applied for, or is eligible for, student loans or other financial assistance;
- 3) whether the child's career plans are reasonable and appropriate;
- 4) the child's ability to contribute to his or her own support through part-time employment;
- 5) the child's age;
- 6) the child's past academic performance and whether the child is demonstrating success in the chosen course of studies;
- 7) the parents plan for education of the children particularly whether those plans were made during cohabitation; and
- 8) in the case of a mature child who has reached the age of majority, whether the child has unilaterally terminated a relationship with the parent from whom support is sought.

[106] A child who has legitimate scholastic ambitions that cannot be realized without financial contribution from his or her parents is deserving of child support: see *Paterson v. Paterson* (1995), 52 A.C.W.S. (3d) 1080 (B.C.S.C.).

- [107] Notably, when a child does not continuously pursue post-secondary education but lives at home and works part-time, a payor parent may be relieved from a portion of the child support payment for that period. However, the child may regain "child of the marriage" status if his or her circumstances change: see *Hartshorne v. Hartshorne*, 2010 BCCA 327 at para. 77.
- [108] At the time of trial, April was a full time student attending a post-secondary institution. Her father, Mr. Kelly, has paid all of her expenses from the time she commenced post-secondary education.
- [109] Ms. Kelly takes the position that April is not a child of the marriage due to her age. She also stated that she did not receive timely disclosure of the university tuition and other expenses that might be claimed as child support on April's behalf.
- [110] As a result, I will adjourn the application for child support to be heard at a later date when the parties can provide more complete pleadings and documentation. I remain seized of this case for that issue.

VIII. Conclusions

- [111] The parties are granted a divorce, which will take effect 31 days from the date of this judgment.
- [112] Based on the evidence heard and my findings, I am satisfied that the Agreement was not unfair and is a valid and subsisting agreement.
- [113] Pursuant to the Agreement, Mr. Kelly holds indefeasible title to the Second Home and is thereby entitled to control who occupies that home. As a result, I order that Ms. Kelly vacate the Second Home within 30 days from the date of this judgment.
- [114] I further order that the issues of child support, spousal support and the division of Mr. Kelly's pension be adjourned to a date to be fixed for a hearing on those issues. I remain seized of this case for these three issues.
- [115] Before hearing these issues, Ms. Kelly must file a complete Form 8 with full supporting documentation disclosing any and all income from any source whatsoever and any and all assets or claims to assets wherever located which she may have. If any such documentation is in a language other than English, a translation of such documentation provided by a court certified translator shall be provided.
- [116] The issue of costs shall be spoken to at a later date. The parties are at liberty to arrange a hearing on the issue of costs with trial scheduling.

"Ball J."

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