
CANADA / JUDGMENT

Mann v. Mann,

2007 BCSC 980

COURT

Supreme Court of British Columbia

DECIDED

5 July 2007

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2007 BCSC 980 Mann v. Mann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mann v. Mann,,

2007 BCSC 980

Date: 20070705

Docket: E46304

Registry: Nanaimo

Between:

Susan Mann

Plaintiff

And

Robert Mann

Defendant

Before: The Honourable Mr. Justice Halfyard

Reasons for Judgment

Counsel for Plaintiff

R. Long

Counsel for the Defendant

T. Huntsman

Date and Place of Trial/Hearing:

May 14, 15, 16, 17,

18 and 24, 2007

Nanaimo, B.C.

The Claims

[1] In this family law trial, the plaintiff Susan Mann claims the following relief:

- (a) A divorce;
- (b) Joint custody and guardianship of Lisa Mann, born August 6, 1990 (the youngest of the two daughters of the parties) and primary residence of Lisa Mann;
- (c) Child support for Lisa Mann, both future and retroactive;
- (d) Retroactive child support for Michelle Mann, born September 1, 1987;
- (e) Division of family assets; and
- (f) Spousal support, both future and retroactive.

The Defence

[2] The position of the defendant Robert Mann with respect to each of the claims of the plaintiff is this:

- (a) He does not oppose the claim for divorce.
- (b) He agrees that there should be joint custody and guardianship of Lisa, but he opposes the claim for primary residence of Lisa.
- (c) He agrees that he should be required to pay child support in the future for Lisa, but pleads s. 9 of the Federal Child Support Guidelines and says that child support should be set at an amount less than would otherwise be required by the Guidelines. He opposes the claim for retroactive support for Lisa on several grounds, including s. 9 of the Guidelines. In the alternative, he says that any order for retroactive child support should not go beyond the date when this action was commenced, namely, March 15, 2006.
- (d) He opposes the claim for retroactive child support for Michelle, on the same grounds he raises in opposition to the same claim in respect of Lisa.
- (e) He opposes the claim for division of family assets, on the ground that they have already been divided between the parties pursuant to an oral agreement made in or about October 2001.
- (f) He opposes the claim for spousal support, on the ground that the defendant expressly waived her right to claim spousal support, as part of the same oral agreement.

Reply Position of the Plaintiff

- [3] The plaintiff denies that she and the defendant made an agreement which settled the division of family assets. In the alternative, she says that, if the court finds that such an agreement was concluded, then it should be either set aside on the ground that it is unconscionable, or varied on the ground that it is unfair. The plaintiff denies that she gave up her right to claim spousal support.

Divorce

- [4] At the end of final argument on May 24, 2007, I made an order for divorce, and reserved decision on all other issues.

Background Facts

- [5] The plaintiff is now 43 years of age, and the defendant is 48. They were married on October 11, 1986 at Nanaimo, but had lived together for about two years before that. They had lived together for a short time in Victoria, but since October 1984, they have always lived in Nanaimo, except for one year from April 1987 to April 1988, when they lived in Prince Rupert.
- [6] When the parties met, the defendant was managing a restaurant in Victoria, and the plaintiff began working there as a hostess (after she graduated from high school at Nanaimo). The situation at work became awkward, and so they resigned their jobs and moved to Nanaimo in October 1984. The plaintiff then worked for Hudson's Bay Company, typing data into the computer system. The defendant was out of work and on Employment Insurance for a number of months, and then obtained employment as manager of a Petro Can bulk fuel plant in the spring of 1985. That job lasted until November 1986, when the plant was bought out by Gulf and the defendant was laid-off. The plaintiff continued to work at Hudson's Bay Company.
- [7] In April 1987, the defendant got a job managing the restaurant and lounge at the Highliner Inn hotel in Prince Rupert. The parties moved to Prince Rupert. The defendant worked full-time at the hotel, and the plaintiff worked part-time, helping the accountant for the hotel. Michelle was born at Prince Rupert on September 1, 1987. The parties agreed that the plaintiff should stay home to care for Michelle. The Highliner was sold and the defendant's employment ran out in April 1988. The family then returned to Nanaimo.
- [8] The parties had purchased a house at 2199 Bay Street in Nanaimo in 1985, for \$60,000. They sold this property before Lisa was born (on August 6, 1990), and purchased a house in Lantzville for \$85,000. When the parties returned to Nanaimo from Prince Rupert, the defendant was out of work for a time. The plaintiff worked at several jobs at minimum wage, until shortly before Lisa was born. In about November 1988, the defendant obtained work as a driver with AlSCO Linen. The plaintiff did part-time work from home, in property management, and earned about \$500 per month (following the birth of Lisa). The defendant

was earning about \$18 per hour.

- [9] The family lived at the home in Lantzville until 1992. They then sold their home for \$100,000, and purchased a house on Rosstown Road in Nanaimo in late May 1992. There is a dispute as to whether the purchase price was \$135,000 or \$145,000. They obtained \$20,000 from the sale of their Lantzville home, to contribute to this purchase.
- [10] In or about 1994, the defendant obtained a supervisory position with Alsco Linen, as driver supervisor, and eventually advanced to the position of general manager. The plaintiff was not working at all, and she was of course, doing most of the child raising and housekeeping work.
- [11] The relationship between the parties deteriorated. In July 1999, the plaintiff moved out of the family home. She stayed away until returning to the home in September 1999. However, she was only at home for about six weeks when she moved out for the second time in October 1999. At that time, she went to live with Hector Mobillard, a friend of the family who lived nearby. The plaintiff continued to go to the family home when the defendant was at work, to get the girls ready for school, make their breakfast and lunch, and take them to school. She usually picked them up after school and sometimes made their supper as well.
- [12] In October 1999, the plaintiff obtained part-time work with Clarica, a life insurance and investment company. She started out answering phones and doing filing, and worked about three hours per day at \$8 per hour. She later advanced to a better position, managed to get full-time work, and Clarica increased her salary. She lost her employment with Clarica for about five months, but then obtained work with Edward Jones, although her earnings were less. She presently works as a claims advisor on a contract basis for Clarica. Her work is full-time, but she does not have the security she would have if she was an employee of Clarica. This may or may not occur in the future.
- [13] The plaintiff's earnings from employment since 1999 have been as follows:
- | |
|-----------|
| 1999 |
| 2,436.16 |
| 2000 |
| 8,570.02 |
| 2001 |
| 15,951.98 |
| 2002 |
| 16,411.00 |
| 2003 |

18,664.70

2004

37,614.00

2005

40,093.00

2006

28,989.00

[14] In her latest financial statement sworn April 11, 2007, the plaintiff reports her current annual income from employment to be \$37,128, and claims annual expenses of about \$44,000.

[15] The defendant's earnings from employment since 1999 have been as follows:

1999

54,879

2000

75,860

2001

98,584

2002

93,342

2003

92,111

2004

144,180

2005

102,741

2006

111,688.

[16] As to expenses, the defendant claims that they are equal to, or more than, his gross income.

- [17] In or about May 2000, while the plaintiff was living with Hector Mobillard, she consulted a lawyer concerning her marital rights. Her lawyer wrote a letter to the defendant dated May 30, 2000, in which she outlined the facts, gave a general statement of the rights of the plaintiff, and said that the plaintiff wanted to negotiate a settlement of her claims. The lawyer (Sandra Dick) stated, in effect, that the plaintiff had the right to make claims for child support, division of family assets and spousal support. The letter also stated that the plaintiff believed that the defendant's salary would increase to \$100,000 within a few months.
- [18] It appears that the defendant sought legal advice after receiving the letter from Ms. Dick. He and the plaintiff did discuss these issues between themselves, but no resolution was reached in 2000.
- [19] At or about the time that the plaintiff consulted Ms. Dick, she had been told by Mr. Mobillard that she would have to move out of his place. In July 2000, when the defendant, Michelle and Lisa were on a trip to Disneyland, the plaintiff telephoned the defendant and told him that she needed a place to stay. She asked if she could move back into the family home, and the defendant agreed that she could do so. When he and the girls returned from Disneyland, the plaintiff had moved back into the home. The plaintiff says that she still held out some hope that she and the defendant might reconcile. The defendant testified that, when the plaintiff moved out of the family home for the second time (which I find was in October 1999), there was no longer any prospect for reconciliation.
- [20] The parties lived separate lives while the plaintiff lived at the family home. She continued to get the girls ready for school, make them breakfast and lunch, and (often) drive them to and from school.
- [21] The parties did not reconcile, and they made no attempt to reconcile. In or about October 2001, the defendant asked the plaintiff to move out of the family home. She told him that she would need money before she could afford to move out. They made an agreement, the terms of which are in dispute. The defendant alleges that he and the plaintiff reached a final settlement of the issues of the division of family assets, child support and spousal support. The plaintiff states that no final agreement was reached with respect to the division of the family home and denies that any agreement was reached with respect to spousal support.
- [22] It is common ground that some things were agreed to at that time. It was agreed that the defendant would pay the plaintiff \$1,000 per month in child support. They agreed that the defendant would obtain money by refinancing the mortgage against the house, that he would pay off the existing mortgage and all of the other family debts, that he would pay the plaintiff \$16,000 and that she would have the family car. The plaintiff agreed to transfer her interest in the family home to the defendant. That was done; the defendant obtained the money, paid off the debts, and paid the plaintiff about \$16,000. The plaintiff took the family car. The plaintiff knew the approximate amount of the mortgage debt (\$76,273.61) and the family debts (about \$10,000). But she did not know how much money the defendant had borrowed to carry out the transaction. The defendant obtained about \$36,800 from the

refinancing.

- [23] The plaintiff moved out of the family home at or about the end of October 2001, and rented a residence nearby on Rosstown Road. The children continued to live with the defendant at the family home, but spent considerable time with the plaintiff. The defendant paid the plaintiff \$1,000 per month, as agreed.
- [24] In or about February 2002, at the request of the defendant, the parties entered into a written agreement which had as its purpose the reduction of the income tax that the defendant would have to pay. The agreement had been prepared by the defendant's lawyer, and was said to have become effective on October 1, 2001. According to its terms, the parties agreed that the defendant would pay to the plaintiff the sum of \$1,000 per month as spousal support for an indefinite period of time. This agreement enabled the defendant to claim the child support payments he was making to the plaintiff, as a deduction from his income, for the purposes of income tax. The effect of his doing so was to increase the income tax payable by the plaintiff, but the defendant paid the extra income tax assessed against her. For several years thereafter, the defendant continued to claim a deduction from his income for tax purposes, based on this agreement, with the consent of the plaintiff. Eventually, the plaintiff objected to this procedure. There is a dispute about when the defendant was supposed to stop reporting the child support as spousal support on his income tax return, and about when he was supposed to stop claiming Michelle as a dependant child.
- [25] At or about the end of 2003, Michelle moved out of the defendant's home, and began living at her mother's place. At a later point in time which is uncertain (likely in July of 2005), Michelle moved out of the plaintiff's home to live with a friend. Both the plaintiff and the defendant continued to help Michelle financially. When Michelle turned 18 years of age on September 1, 2005, the defendant reduced his child support payments to the plaintiff to \$500 per month. The plaintiff complained about this reduction, and the defendant reminded her that they had agreed in 2001 that he would only pay child support for the girls, until they reached the age of 18. The plaintiff seemed to acknowledge such an agreement (or at least the defendant's belief in such agreement), but would not accept it.
- [26] During the dispute about the defendant's reduction of child support, the plaintiff also raised the issue of her interest in the former family home, and claimed that she had not yet been paid out in full. The defendant insisted that they had settled that issue when she moved out in the fall of 2001.
- [27] In or about late February or early March 2006, the defendant put the family home up for sale. The plaintiff saw the "For Sale" sign on the property, and commenced this action on March 15, 2006.
- [28] The plaintiff had filed a certificate of pending litigation against the defendant's property, which complicated its sale. The parties worked out the terms of a consent order, which enabled the sale to go through. The purchase price was \$265,000 (the mortgage debt was about \$100,000). Under the consent order, the plaintiff was authorized to file the certificate

of pending litigation against the new property that was purchased by the defendant and Deirdre Cootes, his new partner, for about \$365,000. Just over \$57,000 was paid into trust and held pending the outcome of this action, under the order. At the time of trial, the amount in the lawyer's trust account was \$58,439.15. Also on May 25, 2006, the court made a declaration under s. 57 of the Family Relations Act.

- [29] In February 2007, Michelle moved back into her mother's place and was still living with the plaintiff at the time of trial. She may be pursuing a job training program at Malaspina College in the coming year. Lisa, who is now 16, continues to share her time between the homes of her father and mother. She will be completing grade 11 at the end of June 2007.
- [30] For a year from November 1, 2005 to November 1, 2006, the plaintiff again lived at the home of Hector Mobillard pursuant to a contractual arrangement that she had with him. They continue to see each other socially, but the plaintiff says that she does not consider it to be a long-term relationship. She said that Mr. Mobillard is considerably older than she is.
- [31] Pursuant to an interlocutory order made on November 1, 2006, the defendant has resumed making monthly payments of \$1,000 to the plaintiff, since that date. The defendant did not pay any child support for Michelle, during the 12 month period from September 2005 through August 2006 (i.e., for the year before Michelle turned 19 years of age).
- [32] The written agreement relating to spousal support (for tax purposes) created some confusion in the pleadings and in the interlocutory proceedings. The plaintiff sought to rely on the agreement as evidence of her entitlement to spousal support, and the defendant alleged that the \$1,000 per month was paid to cover both child support and spousal support. By the time of trial, the parties had recognized that the agreement was illegal, and would not be enforced by the court.
- [33] For an uncertain period of time after the defendant began making payments of \$1,000 per month to the plaintiff, he also supplied her with a credit card which she could use to purchase gas up to \$150 per month (according to the plaintiff) or \$200 per month (according to the defendant). I find that the main reason the defendant terminated this benefit was because he believed Mr. Mobillard was benefiting too much from it. Neither party seemed able to give a confident estimate of the date of termination of the plaintiff's use of the gas credit card. In all of the circumstances, I will fix that date as being December 31, 2002.
- [34] The defendant testified that, from time to time, he gave extra money to the plaintiff when she requested it, and also gave some money directly to their two daughters or purchased things for them that he considered "necessary". None of this evidence was contradicted by the plaintiff, and I accept it. I cannot estimate the amount with any accuracy, but I find that the total of the "extra" amounts paid by the defendant, was \$100 per month, and I find that the duration of these extra amounts was from November 1, 2001 to September 1, 2005. The defendant has continued to give some financial assistance to his daughters, but it is impossible to estimate, and I find it is not a significant amount.

The Issue of Credibility

- [35] There are major conflicts in the evidence. The plaintiff says that her agreement with the defendant in October 2001 concerning the family assets was only temporary, not final. She says that the \$16,000 she received was only a part payment of her interest in the former family home and its contents, and that they agreed the defendant would pay her more money at a later date, when the house was sold. According to the plaintiff, she only agreed to transfer her interest in the property, because the defendant said that was the only way he would be able get enough money, to pay off the family debts, and also give her some money. She says she just accepted and went along with whatever the defendant said.
- [36] The defendant alleges that he and the plaintiff made an agreement which effected a final settlement of the issue of the division of family assets, and the issue of spousal support. As mentioned, the plaintiff contends that the agreement did not finalize the division of family assets. She also denies that she ever agreed to give up her right to claim spousal support.
- [37] If the defendant can prove the alleged agreement, then little would remain of the plaintiff's claim for division of family assets, and her claim for spousal support would have to be dismissed. Accordingly, the credibility of the parties is a crucial issue.
- [38] The onus of proof is on the defendant to prove the agreement that he alleges. He also bears the burden of proof on the issue of credibility. In order to succeed, the defendant must persuade the court that the plaintiff's key evidence should be rejected, and that his disputed evidence should be accepted.

The Credibility of the Plaintiff

- [39] In assessing the credibility of the plaintiff, I must examine her evidence by itself, and in the context of the evidence as a whole. In my opinion, the following matters have the potential to adversely affect the plaintiff's credibility.
- [40] It was not until the fall of 2005 that the plaintiff first claimed that the division of the family assets had not been finally settled. That was about four years after the terms of the October 2001 agreement had been carried out, and I find this conduct to be inconsistent with the truth of her trial testimony. The plaintiff's explanation for the delay appeared to be that there was no necessity to raise the issue, until the house was to be sold. In my opinion, that explanation is inadequate.
- [41] The plaintiff testified that there was to be a re-assessment of the value of her interest in the property in 2003. However, she failed to raise the issue at that time, and her conduct in this regard is inconsistent with her trial testimony on this point. I do not recall the plaintiff giving any explanation for her failure to broach this subject with the defendant in 2003.

- [42] In her email to the defendant on May 7, 2006, the plaintiff's statement: "We said we would re-assess in 2003 ...", seems inconsistent with her assertion at trial that they had agreed the house would not be sold until Lisa finished high school. Even about four years after 2003, at the time of trial, Lisa still has one year of high school to complete.
- [43] During her cross-examination, the plaintiff changed the testimony she had given on direct, on a significant point. In direct examination, she had testified to the effect that the defendant did not tell her what value he was placing on their Rosstown Road property. I think she added that the defendant might have told her that the property had a value of \$120,000. But in cross-examination, the plaintiff said that the defendant had told her he was using the value of \$131,800. No explanation was given for that change in her testimony. Moreover, I note that the Form A transfer that she signed, states that her interest in the property is valued at \$65,900, which is exactly half of \$131,800.
- [44] The plaintiff made a number of statements before trial, which are inconsistent with her trial testimony. Those previous inconsistent statements are as follows:
- (a) She testified that she and the defendant did not separate until October 1999 (i.e., after a six week attempt at reconciliation had failed). But it appears from her lawyer's letter to the defendant dated May 30, 2000, that she fixed the date of the separation as being July 28, 1999 (which would have been the date when she first moved out of the family home).
 - (b) She testified at trial that she did not return to the family home in July 2000 for financial reasons, but did so in the hope that she could reconcile with the defendant. But in her affidavit sworn August 31, 2006, she deposed (at para. 28) that she had returned to the home "for financial reasons". Under cross-examination, the plaintiff adopted her affidavit as being true, but testified that "financial reasons" were only part of the reason she moved back into the home. She was unable to give any sensible explanation for failing to state in her affidavit that reconciliation with the defendant was the reason (or one of the reasons) why she moved back to the home. At para. 22 of her same affidavit, the plaintiff stated: "I returned ... for one month August 1999 in an attempt to reconcile This did not work out." It seems strange that the plaintiff would make no mention whatever about reconciliation, in relation to her 15-month stay at the house from July 2000 to October 2001, if reconciliation was one of her reasons for returning.
 - (c) The plaintiff testified at trial that, after the parties separated at the end of October 2001, their daughters spent most of the time with her. But in her email to the defendant on October 4, 2005, she wrote: "They may have stayed half-time with you for the most part." When this statement was pointed out to her, when she was being cross-examined, the plaintiff appeared to reject her email statement, and stick to her trial testimony.

- (d) The plaintiff testified at trial that she and the defendant did not agree that child support would end when each of the girls turned 18. But in her email to the defendant on September 24, 2005, she wrote: "... yes she is 18 and that is what we said" Under cross-examination on this subject, the plaintiff accepted that the defendant honestly believed that they had agreed that child support would end when each of the girls turned 18. Yet she was reluctant to clearly admit they had agreed on this point.
- [45] To my mind, there are improbabilities in the plaintiff's version of events relating to the agreement about division of the former family home. She testified that she trusted the defendant to accurately estimate the fair market value of the property in October 2001, and she said (in effect) that this was the reason why she did not get an appraisal done, or ask for an appraisal. Yet she claimed that they had paid \$145,000 to purchase the property, and her lawyer's letter to the defendant dated May 30, 2000 indicated that the value of the house was about \$140,000. In addition to this, the plaintiff stated in cross-examination that the defendant told her that the amount he was paying her was based on one-half of the equity they had in the house, and she testified that she trusted the defendant. Yet she testified that she was badly in need of money at that point, and wanted all that she could get. In these circumstances, it seems improbable that the plaintiff would simply accept the defendant's estimate of the market value of the property, without seeing any documentary evidence to that effect, and without making inquiry of any kind. This creates suspicion that the plaintiff made her own estimate of the property value.
- [46] I see another improbability in the plaintiff's denial that there was any final settlement with respect to the former family home. Although she seemed reluctant to admit it, it was clear that the plaintiff had agreed with the defendant that all of the family debts would be paid in full, out of the money that the defendant would raise by refinancing the mortgage on the property. If (as she claims) there was to be a full accounting at a later date when the property was sold, why would she agree that all of the debts would be paid at that time? Since she was in need of money, it seems more likely that she would have insisted that her requirement to pay half of the debts should be postponed until the house was sold.

The Credibility of the Defendant

- [47] There also appear to be problems with the defendant's evidence, which are capable of affecting his credibility. To my mind, these problems include the following.
- [48] The defendant seemed to accept the plaintiff's assertion that there was to be a "re-assessment" of the value of the family home at a later date. But he says the agreement was that there would only be such re-assessment, in the event that he sold the property by the end of 2003, and that the sale price was more than \$131,800. It seems improbable that the plaintiff would agree to such a term, because all the defendant would have to do is wait, and his obligation to re-assess would simply expire at the end of 2003.

- [49] It was the defendant who orchestrated the written agreement, and got the plaintiff to sign it. This was a scheme designed to deceive the government, and was obviously illegal. In addition to that, it shows that the defendant was prepared to be dishonest, to further his own financial interest. While there is a tendency in our society to expect and forgive dishonesty in income tax matters more easily than dishonesty in other contexts, such conduct must be taken into account in assessing credibility.
- [50] The defendant did not inform the plaintiff of the increases in his annual income from employment, from the time of the agreement in October 2001, until after this lawsuit was commenced on March 15, 2006. Counsel for the plaintiff argued that the evidence justified the conclusion that the defendant knowingly misrepresented his income to the plaintiff, so as to induce her to believe that he was paying child support in accordance with the Guidelines. I do not agree, and I am not prepared to make such a finding. But his failure to disclose the changes in his income creates suspicion on this issue. No court order for child support was in existence, and so the Guidelines did not impose a legal duty on the defendant to disclose the increases in his income. But from a moral viewpoint, I think he should have done so. On the other hand, \$1,000 per month would have been the Guideline amount of child support for two children, on an annual income of \$78,000, and the defendant had earned only \$75,860 in the year 2000. But by the spring of 2002, the defendant would have known that he earned \$98,584 in 2001, and he should have disclosed this to the plaintiff. His earnings in 2002 and 2003 were somewhat below his 2001 earnings, but still far above \$78,000. In 2004, his income soared to \$144,180, and it was \$102,741 for 2005.
- [51] It is apparent from her emails to the defendant that, by September 2005, the plaintiff was well versed in the amounts of child support that had to be paid under the Guidelines. She testified that she trusted the defendant when he told her that \$1,000 per month (coupled with the additional benefits he provided) was the approximate amount of child support that the law required him to pay. She says she did not question this amount, or make any inquiries at all, up until the defendant cut off child support for Michelle in September 2005. This evidence tends to support the conclusion that there was no positive misrepresentation of his income by the defendant up to at least the fall of 2005.
- [52] On being questioned about his email to the plaintiff in October 2005, the defendant was asked what he meant when he said, in effect, that he had received a pay cut of \$500 per month. He explained that he must have been referring to his drop in bonuses from 2004. This explanation was unsatisfactory. The defendant's statement could have conveyed the idea to the plaintiff that he was not then earning \$95,000 per year, which was the figure she was using in her hypothetical calculation of child support for one child. It was true that the defendant was earning far less in 2005 than he had in 2004, but his earnings for 2005 turned out to be \$102,741. The defendant did not give the plaintiff a reasonable estimate of his current income.

- [53] It is true that, in his first financial statement sworn May 3, 2006, the defendant deposed that his income was \$86,040, whereas in his 2005 tax return he reported income of \$102,741. However, that error was corrected in his financial statement sworn July 26, 2006, after the defendant had retained new counsel. I accept the defendant's explanation that he had given financial information to his former counsel, which included information as to salary, bonuses and allowances, and that the amount of \$86,040 was estimated by him and his lawyer. The litigation was underway at this point, and it would have been impossible for the defendant to conceal his true income. I find that there was no deliberate attempt to falsify his income in his financial statement sworn May 3, 2006 (nor in his financial statement of November 10, 2006).
- [54] The defendant testified at the trial that he himself had calculated all the items that were to be deducted from the \$131,800 notional selling price of the property, before dividing the remainder by two, to arrive at the value of the plaintiff's interest. But on examination for discovery, he said that he had given the documents and bills to his lawyer, and the lawyer figured out the amount to be deducted. His explanation at trial for this inconsistency was that he meant to say, on discovery, that he had calculated some of the items, but that his lawyer had obtained the mortgage payout figure. This was not an adequate explanation, in my view.
- [55] The defendant was questioned by plaintiff's counsel as to why his claimed expenses in his financial statement of November 10, 2006 was about \$20,000 higher than in his financial statement of July 26, 2006. He explained that some of the amounts used in the July statement were too low, and had been corrected in the November statement. That explanation was only partially satisfactory, because the defendant acknowledged he had failed to disclose that Deirdre Cootes was paying half the mortgage cost, and half of several other living expenses. The mortgage contribution of Ms. Cootes was not disclosed until the financial statement sworn April 4, 2007.
- [56] It was suggested to the defendant in cross-examination that he had given evidence on examination for discovery on September 27, 2006 that was inconsistent with his trial testimony, concerning the dates when the plaintiff had moved out and moved back into the former family home, and as to when the last attempt at reconciliation had been made. The defendant explained, in effect, that he was unsure whether the final separation had occurred in late 1999 or early 2000. But he remained firm that, when the plaintiff moved out after the failed six week attempt at reconciliation, their relationship was over. I accept the defendant's explanation for these apparent inconsistencies on this point, and I am satisfied that they have no adverse effect on his credibility.
- [57] The defendant acknowledged in cross-examination that he had claimed Michelle as a dependent child on his income tax return for the year 2005, when Michelle had not lived with him at all during that year. It was suggested that the plaintiff had told him he should not claim Michelle for 2005, but the defendant denied this. I note that the defendant did pay child support for Michelle up to September 1, 2005. While it is arguable he should not have

claimed Michelle as a dependent child for the whole of 2005, in my opinion this is an income tax matter which does not reflect on the defendant's credibility.

[58] In cross-examination, counsel suggested to the defendant that, when they were discussing his wife's interest in the family home in October 2001, he told his wife that he could not give her any money, unless she transferred her interest to him so that he could refinance the property. The defendant testified that he could not recall whether he said this to the plaintiff or not. This answer impressed me as being truthful. There was nothing to contradict the defendant if he had denied counsel's suggestion, except the testimony of the plaintiff. There were already numerous conflicts between them on critical matters, and one more conflict would have mattered little.

Conclusions as to Credibility

[59] I have identified weaknesses in the credibility of both the plaintiff and the defendant. As I see it, this is not a case in which the evidence of one party can be generally accepted wherever it conflicts with the evidence of the other party. I intend to treat the evidence of the parties on the points of conflict with some caution, and in the context of what I consider to be the probabilities of the case. The main points of conflict are whether the agreement relating to the former family home was a final one, and whether the plaintiff expressly waived her right to claim spousal support. In my opinion, the issue of child support does not turn on the question of credibility.

[60] The contest as to whether the final separation of the parties occurred in October 1999 or in October 2001 is not a direct point of conflict. The plaintiff says she held out some hope for reconciliation when she came back to the home in July 2000, and thought the defendant shared such hope. The defendant denied this. I find that there was no attempt by either party to reconcile, after October 1999. Accordingly, I conclude that the final separation was when the plaintiff left the family home for the second time, in October 1999.

Did the Parties Make a Binding Agreement for Final Settlement of the Division of the Family Home and its Contents?

[61] I find, on the balance of probabilities, that the parties did make an agreement that was intended to finally settle the division of their equity in the former family home. I find that the terms of that agreement were as follows:

- (a) The plaintiff would transfer her interest in the property to the defendant;
- (b) The defendant would obtain a new mortgage in an amount sufficient to enable him to:
 - (i) pay out the existing mortgage (which was about \$76,000);
 - (ii) pay the family debts of about \$10,000, consisting of amounts owed on credit cards with Zellers, The Bay, Sears and CIBC;

(iii) pay to the plaintiff one-half of the equity of the parties in the property, the equity to be calculated by subtracting the mortgage debt and the other family debts from the fair market value of the property.

[62] The defendant told the plaintiff that the fair market value of the property was \$131,800. He was using the value stated on the property assessment notice issued by the government. The plaintiff agreed with this value, in the mistaken belief that the fair market value of the property was \$131,800. In fact, as shown by the opinion evidence of the appraiser, William Ethier, the fair market value was \$137,000.

[63] The defendant has failed to persuade me that the plaintiff agreed that one-half the costs of a notional real estate commission (\$7,954) and one-half the cost for special insurance (\$2,445) would be deducted from her share of the equity. Nor am I satisfied that she agreed to pay one-half the cost of the legal fees and disbursements charged to carry out the transaction (\$675).

[64] I am unable to say whether the defendant mistakenly believed that the plaintiff had agreed to these deductions, or whether he simply considered that it was fair to make these deductions. But in any event, I reject the submission of plaintiff's counsel that the defendant deliberately tricked or deceived the plaintiff into giving up her interest in the property for far less than its actual value.

[65] While I accept that there was some discussion about a potential re-assessment of the situation in 2003, I am not satisfied that there was any binding agreement reached on that subject. At best, it could not have amounted to more than an agreement to make an agreement.

[66] It is clear that the parties agreed that the plaintiff would acquire ownership of the former family vehicle. But I am unable to say whether they agreed that it had a value of \$2,500, or whether they agreed that the value of the plaintiff's half interest in the car would be deducted from her share of the house equity.

[67] I have found that the agreement relating to the former family home was final, on the whole of the evidence. I find that this conclusion is also consistent with the probabilities of the case. The defendant made significant renovations to the house, purchased a new heating system and new appliances, and continued to make all mortgage and property tax payments, without seeking any assurance from the plaintiff that his expenditures would be credited to him at the time of a later sale. I find this conduct to be consistent with his evidence at trial as to finality of the agreement. His conduct in listing the property for sale, without even notifying the plaintiff, is also conduct consistent with his version of the agreement. Also, the plaintiff's conduct in failing to seek any re-assessment in 2003, and failing to claim any further interest in the property until the fall of 2005, is conduct inconsistent with her allegation that the agreement was only an interim measure.

- [68] Another reason which supports the conclusion that the agreement relating to the family home was final is that, when the plaintiff moved out of the home at the end of October 2001, both parties knew that their relationship was ended.
- [69] The defendant having established that the agreement relating to the former family home was final, the onus shifts onto the plaintiff to show that the agreement was unconscionable, or was unfair. Counsel referred me to a number of cases on these issues, including the leading case of *Miglin v. Miglin* [2003] 1 S.C.R. 303. The plaintiff has failed to persuade me that the agreement was either unconscionable or unfair.
- [70] However, the evidence shows that both parties mistakenly believed that the fair market value of the property as at November 1, 2001, was \$131,800. That was a mutual mistake, and in that regard the agreement did not reflect the true intentions of both parties. The agreement will be varied to accord with the true intentions of the parties, so that the fair market value of \$137,000 is incorporated. And as I have said, only the mortgage debt and the four credit card debts were agreed to be deducted from that value, in calculating the 50 percent share to be paid to the plaintiff. This is simple arithmetic, and I leave it to counsel to make the necessary calculation of the value of the plaintiff's interest. Of course, the amount of approximately \$16,000 already paid to the plaintiff will have to be deducted from her half share, in order to arrive at a net figure which remains payable. It appears that the net amount will be in the range of \$9,000 to \$10,000.
- [71] Before considering the division of family assets in a comprehensive manner, I intend to first consider the issues relating to the children.

Custody, Guardianship and Primary Residence Issues

- [72] The parties agree that there should be joint custody and guardianship of Lisa. But the plaintiff seeks primary residence, and this is opposed by the defendant. In my opinion, no useful or necessary purpose would be served by making such an order, and I decline to do so. There will be an order for joint custody and guardianship of Lisa.
- [73] There was a dispute as to whether a declaration should be granted that Michelle is no longer a child of the marriage. It seems to me that, at the present time she is not a child of the marriage within the meaning of the statutes. But the defendant failed to claim declaratory relief and I decline to make such an order.

Child Support

- [74] The defendant rightly concedes that the plaintiff's claim for child support is not barred by her agreement to accept \$1,000 per month from the defendant. Nor does he clearly allege that Michelle ceased to be a "child of the marriage" as of her 18th birthday on September 1, 2005. but he does allege that her status as a child of the marriage ended when she turned 19 on September 1, 2006. The defendant also asserts that, upon a proper application of s. 9 of the Guidelines, he paid a fair amount of child support up to at least September 1, 2005. The

defendant seems to concede the possibility that he could be liable for some retroactive child support for Michelle, for the period from October 1, 2005, until September 1, 2006. But his position appears to be that, because he has resumed paying \$1,000 per month as of November 1, 2006 (and therefore has made seven or eight unwarranted payments up to the time of trial), those payments should be deemed to satisfy any claim for retroactive child support for Michelle. The defendant takes the position that he should not be held liable for any retroactive child support for Lisa. In the alternative, he says that, if retroactive support for Lisa is payable, it should not extend back beyond March 15, 2006.

[75] Much argument was directed to the issue of how s. 9 of the Guidelines should be applied to this case. That statute provides as follows:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[76] Counsel brought several cases to my attention on this issue, the leading case being *Contino v. Contino* [2005] 3 S.C.R. 217. I find that the shared custody practiced by the parties resulted in the defendant having custody of the two girls "for not less than 40 percent of the time" from November 1, 2001 until December 31, 2003. Thereafter, when Michelle left the defendant's home, he had custody of Lisa for not less than 40 percent of the time, which is the situation that continues to the present. Michelle left her mother's home in about July 2005, and never lived with either of her parents again, until after she had turned 19.

Future Child Support for Lisa

[77] The defendant's Guideline income is \$111,688. The Guidelines require that \$835.40 child support must be paid for one child, by a parent having that Guideline income. It is my opinion that s. 9 of the Guidelines should not be applied so as to reduce future child support. Accordingly, I order that the defendant shall pay to the plaintiff the amount of \$835.40 per month as child support for Lisa, commencing on July 1, 2007, and continuing on the first day of each month thereafter.

Retroactive Child Support for Lisa

- [78] Counsel for the defendant argued that the application of s. 9 of the Guidelines should result in the dismissal of the claim for retroactive child support. I disagree. I think the issue (aside from amount) is whether payments should be retroactive to some point earlier than the date this action was commenced, i.e. March 15, 2006.
- [79] Mr. Long referred me to all of the leading cases on the issue of retroactivity, and in particular, *L.S. v. E.P.* 1999 B.C.C.A. 393. The relevant factors were defined by the court at paras. 66 and 67. Counsel argued that several of the factors favour an earlier retroactive order in this case. Among other things, he submitted that the defendant's failure to disclose his income amounted to blameworthy conduct, and that the plaintiff had a reasonable excuse for her delay in making the claim (i.e., because she did not know of the increases in the defendant's income). It was also argued that she had given notice of her intent to seek child support based on the Guidelines through her lawyer's letter to the defendant dated May 30, 2000.
- [80] I am unable to fully accept the suggested explanation for the plaintiff's delay. At the time of her lawyer's letter to the defendant on May 30, 2000, the plaintiff apparently believed that the defendant would soon be earning \$100,000 per year. In September 2005, she was operating on the assumption that he was earning \$95,000 per year. The evidence does not persuade me that the defendant somehow convinced the plaintiff that, as at October 2001, he was earning far less than that.
- [81] As to the plaintiff having given notice to the defendant in May 2000 through her lawyer, it was after the plaintiff had received legal advice that she made the agreement with the defendant concerning child support. Having received legal advice as to her rights, I infer that she knew of her right to seek child support based on the defendant's Guideline income. But she also knew that she and defendant were sharing custody of the children. With this knowledge, she agreed to accept \$1,000 per month in child support. She also received benefits by way of the defendant's gas card, and the additional amounts that he would pay her from time to time. In my opinion, the plaintiff acted reasonably in making the agreement for child support. The amount of child support paid by the defendant (direct and indirect), and a consideration of the factors in s.9 of the Guidelines and those relevant to retroactivity lead me to conclude that child support should not be ordered for any period before this action was commenced.
- [82] In my view, to the limited extent that the defendant's failure to disclose his increasing income to the plaintiff can be considered blameworthy conduct, it justifies an order that he should pay retroactive child support commencing March 15, 2006. He has been paying \$500 per month for Lisa, but the Guideline amount is \$835.40. In my opinion, s.9 of the Guidelines should not further operate in the defendant's favour. The difference is \$335.40 per month. The order will be that he shall pay \$335.40 for the 15½ months from March 15, 2006 to June 30, 2007. That amount is \$5,198.70.

Child Support for Michelle

- [83] The defendant paid \$500 per month child support for Michelle up to the end of August 2005. Michelle turned 18 on September 1, 2005, and the defendant stopped child support payments for her, in reliance on an agreement with the plaintiff that child support would end when each of the girls turned 18. I find that the plaintiff did make that agreement with the defendant, but that in the circumstances existing here, the agreement should not be enforced. No other reasonable arrangement was made, as contemplated by s. 15.1(5) of the Divorce Act.
- [84] Accordingly, I order that the defendant pay to the plaintiff retroactive child support for Michelle, for the 12 months from September 2005 through August 2006, in the amount of \$500 per month. The total amount is \$6,000. I have chosen not to increase the amount payable from March 15, 2006 to August 31, 2006, based on all of the circumstances.
- [85] The defendant has been required to pay an additional \$500 per month to the plaintiff, under the interlocutory order of November 1, 2006. By July 1, the defendant will have made nine monthly payments of \$500, making a total of \$4,500. This amount will be credited towards the child support that he is required to pay for Michelle under the order I have just made, which leaves a balance of \$1,500.
- [86] In making this order, I am mindful that Michelle moved out of the plaintiff's home in July 2005. I find that the plaintiff continued to provide financial assistance to Michelle after that time, and that Michelle sought and received help from both her parents, particularly her mother. I also note that the defendant bought Michelle a car for \$3,000 (from the plaintiff).
- [87] In my opinion, the evidence does not support any further retroactive award of child support for Lisa or Michelle.

Division of Family Assets

- [88] I have already dealt with the division of the former family home. I find that there never was any true division of the household contents by agreement of the parties. The evidence is unsatisfactory as to the value of the household contents. But I accept the plaintiff's evidence that she had to use \$3,500 of the money paid to her by the defendant in order to equip her new residence. Doing the best I can, I value the household contents at \$7,000, and this means that the defendant owes the plaintiff \$3,500 for her share.
- [89] There was a dispute as to whether the family vehicle was worth the \$2,500 placed on it by the defendant. I fix the value of the vehicle at \$2,500. The plaintiff received that vehicle, and so she owes the defendant \$1,250 for his share. Setting off the car against the household contents leaves a net amount of \$2,250 payable by the defendant.
- [90] Since the parties have separated, the defendant has accumulated a pension through his employment which has a present value of about \$96,000. He began contributions toward that pension, on January 1, 2000. The defendant also began contributing to an RRSP plan in

2003, and it has a present value of about \$47,000. Since these assets were not covered by the separation agreement, there was no triggering event until the s. 57 declaration on May 25, 2006, and so these assets of the defendant fall within the definition of family assets.

However, the relationship of the parties had permanently ended as of October 1999.

Moreover, the plaintiff did not make any contributions, direct or indirect, to these assets. In these circumstances, and having regard to the factors in s. 65(1) of the Family Relations Act, I would reapportion this pension and this RRSP 100% in favour of the defendant.

- [91] If the plaintiff has accumulated any pension benefit through her employment, or RRSPs, since 1999, they will be reapportioned 100 percent in her favour. The parties seemed to agree that they should each retain their own Canada Pension Plan benefits and that will be the order, unless I have misinterpreted the positions of the parties.
- [92] The defendant owns a pension to which he contributed during his years as a union worker for his present employer. He believed, in October 2001, that when he retired, the pension would pay him \$375 per month. The parties agree that they discussed this pension. I find that the defendant offered to give this pension to the plaintiff, but that no final agreement was reached on the subject. The defendant testified at trial that it now appears that his pension may be worth nothing, because of financial problems with the administration of the pension fund. It seems to me that this union pension should be divided in accordance with Part 6 of the Family Relations Act. That will be the order, unless the parties otherwise agree, or one of the parties makes further application for some different division of the union pension plan.
- [93] To the extent that such an order is applicable to the items of property in this case, each party shall have sole ownership of the items properly described as family assets, in his or her possession.

Spousal Support

- [94] Plaintiff's counsel argued forcefully that the plaintiff should be awarded spousal support on a permanent basis, and in an amount based on a liberal interpretation of the Spousal Support Advisory Guidelines. A retroactive award was also sought. Counsel for the defendant did not seriously contend that, absent waiver by the plaintiff, she would not be entitled to payment of some amount of spousal support. But it was argued that, on the whole of the evidence, the defendant had proved on the balance of probability that the plaintiff had freely relinquished her right to make any claim for spousal support.
- [95] In summary, the plaintiff testified that, when she and the defendant were discussing settlement in October 2001, she asked him for spousal support, but he refused on the ground that he could not afford to pay it. She testified to the effect that she did not pursue the issue and essentially let it slide, in order to avoid conflict with the defendant. In essence, she said that she simply postponed any claim for spousal support.

- [96] The defendant testified that the plaintiff told him that she did not want spousal support, and that she wanted to be independent from him. I do not think that he specifically denied that the plaintiff ever asked him for spousal support, but it was at least implicit in his testimony that he did not want to pay spousal support to the plaintiff, and that he made this known to her.
- [97] I find it highly improbable that the plaintiff would agree to give up her right to claim spousal support, having regard to her needy economic circumstances in October 2001. She acquiesced in the defendant's resistance to the idea of spousal support, and this may have led the defendant to believe that she was giving up her right. But on the whole of the evidence I am not satisfied that the plaintiff agreed to give up her right to claim spousal support.

Entitlement

- [98] This case is unusual, in that the plaintiff has delayed at least four and a half years before making a claim for spousal maintenance. Had she made her claim at the time of separation (either in October 1999 or in October 2001), I think she could easily have established entitlement, on the basis of compensation and need, under the principles established in *Moge v. Moge* [1992] 3 S.C.R. 813. In that case, the Supreme Court gave guidance for the interpretation and application of the rules set out in s. 15.2 of the Divorce Act. Further clarification was given in *Bracklow v. Bracklow* [1999] 1 S.C.R. 420. Had the plaintiff made her claim in a timely way, I think the issues would only have been as to amount and duration.
- [99] In my opinion, the plaintiff's long delay in making her claim should preclude any retroactive award which reaches back before the action was commenced on March 15, 2006.
- [100] Even if it is assumed that the plaintiff harboured some faint hope of reconciliation up to October 2001, her professed desire to avoid conflict could only explain the delay in making a claim up to that point in time. She offered no adequate explanation for failing to make any claim for the following 4.5 years. In saying that she put off making a claim so as to avoid conflict, the plaintiff is effectively saying that she did not accept the defendant's assertion that he could not afford to pay spousal support.
- [101] The assessment of the claim for spousal support remains somewhat complex. I say that because, on the facts of this case, I have doubts whether a court would have awarded indefinite spousal support in 1999 or in 2001, and I do not think that a permanent order is justified at this time. On the other hand, the plaintiff had a valid claim for spousal support, and it was never satisfied. Even if any spousal support order that could have been made would have expired by the time of trial, I do not think that this should be a bar to her claim. But I consider the circumstances to be unusual. I should add that I do not find much assistance on the issue of amount, from the Spousal Support Advisory Guidelines, although I am grateful to counsel (particularly plaintiff's counsel) for their extensive submissions on

this subject.

- [102] The plaintiff was only 35 years of age when the parties separated permanently in October 1999. She was in good health, and had some office and computer skills. During the marriage, the plaintiff did substantially more of the child raising and housekeeping work than did the defendant. That situation prevailed for 12 years from the time that Michelle was born on September 1, 1987, until the plaintiff left the home the first time in July 1999. During that time, the plaintiff's efforts were concentrated mainly on the children and the home. She did work part-time for several years during that period, but never worked full-time (although the defendant wanted her to do so when Lisa started school). Even after the final separation in October 1999, the plaintiff continued to do considerable work at the former family home in child raising and housekeeping (but not at the defendant's request), until she finally left the home at the end of October 2001. Her child raising responsibilities will continue for Lisa for another few years, but the defendant has assumed (and will continue to assume) about equal responsibility in this regard.
- [103] To the plaintiff's credit, after two difficult years in 2002 and 2003, she has increased her income-earning ability to the point where she is essentially self-sufficient. Economic self-sufficiency should be measured against the standard of living enjoyed during the marriage, where the marriage has been lengthy. See *Tedham v. Tedham* 2005 B.C.C.A. 502. That principle does not assist the plaintiff in this case. In the year 1999, the defendant earned about \$55,000. The relationship of the parties ended in October 1999. Consequently, the plaintiff never became accustomed to a standard of living commensurate with the defendant's later earnings of \$100,000 a year and more.
- [104] It is true that, during the marriage, the defendant increased his income-earning capacity up to the point where he was earning \$55,000 per year at the time of separation in October 1999. It is difficult to measure how much of this increase should be attributed to the child raising and housekeeping work of the plaintiff. I would not characterize the plaintiff's contribution in this respect as being substantial, but I think it was significant.
- [105] The plaintiff did give up the opportunity to pursue a career for herself when she took on the greater share of the child raising and housekeeping responsibilities for at least 12 years of the marriage. But at her young age, and with the work experience she acquired both before and during the marriage, it cannot be said that the plaintiff thereby lost an opportunity to increase her income-earning capacity, which was no longer open to her at the time of separation. She has made reasonable efforts to achieve economic self-sufficiency, and has substantially succeeded in achieving that goal. Consequently, it is my opinion that the economic disadvantages to the plaintiff arising from the marriage and its breakdown are not permanent.
- [106] Yet the plaintiff has previously suffered economic hardship arising from the breakdown of the marriage, and one of the objectives of spousal support is to relieve such economic hardship. After applying the rules and principles set out in s. 15.2 of the Divorce Act and in

the case authorities, to the facts of this case, it is my opinion that justice will be served by an order in these terms. The defendant shall pay to the plaintiff the sum of \$25,000 for spousal support, in full satisfaction of this claim. In a general way, I have estimated this amount on the assumption that, if the plaintiff had applied for spousal support in a timely way, a court would have awarded her about \$700 per month for a period of three years.

Costs

- [107] I consider that success has been divided between the parties by the end of this trial. Accordingly, I am inclined to make an order that each party will bear his and her own costs. I do think that the parties should equally share the trial disbursements for hearing fees. Unless one of the parties promptly files an application (or at least makes a request to the trial coordinator) to speak to a different order, the order I have described will go.
- [108] I will expect counsel to work out the net amount payable by the defendant to the plaintiff as a result of the orders I have made. There will be an order that this amount will be paid out of Mr. Long's trust account to the plaintiff, and that any balance remaining will be paid to the defendant (or to Mr. Huntsman in trust for the defendant).

The Honourable Mr. Justice Halfyard

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