
CANADA / JUDGMENT

McCarthy v. McCarthy

2018 BCSC 1210

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1210 McCarthy v. McCarthy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCarthy v. McCarthy,

2018 BCSC 1210

Date: 20180719

Docket: E163075

Registry: Vancouver

Between:

Timothy George McCarthy

Claimant

And

Candice McCarthy aka Candance Wong aka Candice Markham

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

Counsel for Claimant:

P.A. Fleming

Counsel for Respondent:

N.L. Mills

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 15-19, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 19, 2018

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OVERVIEW

- [1] This is a relationship of relatively short duration. The parties began cohabitation on May 14, 2011. They were married on July 5, 2014. They were separated on September 1, 2016. There are no children of the marriage.
- [2] The key issues at trial relate to division of family assets and debt. At the heart of the dispute are certain family assets which the claimant says are his inheritance or gifts from his mother, and therefore excluded property under s. 85 of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). The family debts at issue relate to dental and orthodontic expenses which have either not yet been incurred or were incurred post separation.

ISSUES

- [3] The parties and their counsel are to be commended for resolving several contentious issues before trial. They were also able to resolve further issues at the close of trial. Their cooperation has been of great assistance to this Court.
- [4] The following matters were resolved by way of Consent Orders which were entered prior to the trial:
 - a) A Consent Order entered on November 23, 2016, resolved the issue of past and prospective spousal support with the claimant making a \$30,000 lump sum payment to the respondent.
 - b) The November 23, 2016 Consent Order also settled the issue of the respondent's interest in the matrimonial home for a lump sum payment of \$39,685 paid by the claimant to the respondent.
 - c) A Consent Order dated March 7, 2017, provided for transfer of \$24,572.80 from the claimant's RRSPs to the benefit of the respondent by way of a spousal rollover under section 146(16)(b) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).
- [5] The following matters were resolved between the parties at the conclusion of the trial:
 - a) The claimant withdrew his claim seeking equalization of the respondent's GICs.
 - b) The claimant agreed to transfer his $\frac{1}{2}$ interest in a grave plot to the respondent for a \$6,000 compensatory payment. The respondent on her part, has accepted the claimant's valuation of the grave plot. The grave plot is located at Forest Lawn Memorial Park in Burnaby, BC, and was purchased by the parties during their marriage. It holds sentimental value to the respondent.
 - c) The claimant agreed to share one-half of the increase of the respondent's Crown debt from the time period of May 2011 to July 2017 (i.e. from \$9,823.84 to \$13,785). The claimant's share of this debt is \$1,980.58.

- d) The parties agreed to value the 2014 Toyota FJ Cruiser truck at \$37,000, and the 2011 Campion boat at \$25,000.
- [6] The respondent has sought a name change under s. 5 of the Name Act, R.S.B.C. 1996, c. 328, from Candice McCarthy to Candice Markham. The claimant does not oppose the granting of this order. I will refer to the respondent as Ms. Markham in these Reasons.
- [7] As a divorce order was pronounced by me on January 19, 2017, the issues remaining for my determination are as follows:
1. whether the Johnson's Landing property, which the claimant says is his inheritance, is a family asset, and if so, whether and in what proportion, it should be divided between the parties;
 2. whether the 2014 Toyota FJ Cruiser truck and the 2011 Campion boat, which the claimant says were purchased with excluded family property, are a family asset, and if so, whether and in what proportion, they should be divided between the parties;
 3. whether the respondent is required to return two bird prints or their equivalent in value to the claimant, which the claimant says were gifted to him by this mother and allegedly are in the possession of the respondent;
 4. whether the claimant is required to share one-half of the dental and orthodontic expenses of the respondent which were incurred after the parties separated but the respondent claims are a family debt; and
 5. costs.

STATUTORY SCHEME

- [8] Under the FLA, property owned by the spouses at the time of separation is categorized as either "family property" or "excluded property". All real or personal property owned by either spouse at the date of separation is broadly defined as family property (s. 84(1)).
- [9] Section 83(4) defines "property", which "includes a beneficial interest in property unless a contrary intention appears".
- [10] Pursuant to s. 81 of the FLA, each spouse is presumptively entitled to an undivided half interest in all family property as a tenant in common, and equally responsible for family debt. These rights and responsibilities accord to the parties regardless of their respective use or contribution. The date on which property rights vest is the date of separation: *Cole v. Cole*, 2016 BCSC 716 at para. 22.
- [11] "Excluded property" is property which presumptively remains with the owning spouse, and is not subject to division.
- [12] Section 85(1) of the FLA lists the categories of property that are excluded:

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) inheritances to a spouse;
- (b.1) gifts to a spouse from a third party;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

[13] Section 85(2) places the onus on the spouse claiming the exclusion, to prove that the property qualifies as excluded property.

[14] Family debts are defined under s. 86(a) of the FLA as all financial obligations incurred by a spouse during the period beginning when the relationship between the spouses began, and ending on their separation. Thus, any debt acquired during the relationship, regardless of whether it was for a family purpose, is a family debt: Cole at para. 25.

[15] Section 95(1) of the FLA allows the Court to order an unequal division of family property or family debt if it would be significantly unfair to equally divide such property or debt. Section 95(2) enumerates factors the court may consider in weighing an unequal division. These factors are set out below:

95 (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;

- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1);
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[16] Section 96 stipulates that the Court must not order a division of excluded property unless one of the following sets of circumstances exists:

96 The Supreme Court must not order a division of excluded property unless

- (a) family property or family debt located outside British Columbia cannot practically be divided, or
- (b) it would be significantly unfair not to divide excluded property on consideration of
 - (i) the duration of the relationship between the spouses, and
 - (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

[17] The implications of categorizing property as either family property or excluded property, and the impact of the significant unfairness test on such categorizations, was noted by our Court of Appeal in *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para.10:

[10] The consequence of the categorization of property as either family property or excluded property is that on separation, each spouse is generally entitled under s. 81 to an undivided half interest in family property as a tenant in common. The court may divide it unequally only if equal division would be "significantly unfair" having regard to all the factors listed in

ss. 95(2) and (3). Excluded property in contrast must not be divided unless it would be significantly unfair not to divide it having regard to only two factors - the duration of the parties' relationship and any direct contribution by a spouse to the preservation or maintenance of the property (s. 96(b)). Obviously, the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the 'unfairness' test in the FRA: see *Family Law Explained*, supra, at s. 95; *L.G. v. R.G.* 2013 BCSC 983 at para. 71; *Jaszczewska v. Kostanski* 2015 BCSC 727 at para. 166-9. As observed by Mr. Justice Savage (as he then was) in *Slavenova v. Rangelov* 2015 BCSC 79:

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

[Emphasis in original.]

[18] I turn now to the matters in dispute.

JOHNSON'S LANDING PROPERTY

[19] The largest asset owned by the parties at the date of separation, is the Johnson's Landing ("JL") property. The parties agree that by virtue of a joint appraisal completed of the property on June 30, 2017, the value of the property for the purposes of trial, is \$650,000.

[20] The parties have each advanced several arguments affecting the categorization and division of the JL property. The claimant first says that the whole of the JL property is his inheritance, and as such falls within s. 85(1)(b) of the FLA, thereby making it excluded property that is not subject to division. Alternatively, if only his interest in the JL property is found to be an inheritance, but the respondent's interest is found to be a gift from a third party under s. 85(1)(b.1), then the respondent's interest should be divided under s. 96 as it would be significantly unfair not to do so. In the further alternative, if the JL property is found to be family property, the claimant says that it should be divided in his favour pursuant to s. 95(1)(a), on the grounds that it would be significantly unfair to divide it equally. The end result is that the claimant wishes to be awarded most if not all of the interest in the JL property regardless of how it is categorized.

[21] The respondent argues that the JL property was a gift to both spouses as joint tenants. As such it is family property and therefore subject to equal division. In the alternative, if the JL property is found to be excluded property in the hands of each of the parties, then she claims half of the JL property as her gift from a third party, and thus excluded property under s. 85(1)(b.1). In the further alternative, if all of the JL property is found to be excluded property, then it would be significantly unfair not to divide it having regard to s. 96(b)(ii). In the end, the respondent seeks in her counterclaim a one-half share in the JL property

regardless of whether it is categorized as excluded property or family property.

- [22] Many of the facts relied on by the parties in support of their respective positions, are not in dispute. They were either uncontested or the subject of an Agreed Statement of Facts which was filed into evidence.
- [23] Where disputes in the evidence do occur, they centre primarily around the stated intentions of the parties.

Parties' Connection to the JL Property

- [24] The claimant, Timothy McCarthy, is 62 years old. He is a senior policy advisor with Worksafe BC. He is also a registered forester. This is his second marriage. Mr. McCarthy has two adult children from his first marriage.
- [25] The respondent, Candice Markham, is 55 years old. This is her first marriage. She does not have any children. At the time the parties met in 2009, Ms. Markham was working as a temporary executive assistant for the Teamsters Union.
- [26] The parties are registered as joint tenants on property located at Johnson's Landing, on the northeast end of Kootenay Lake, B.C. The relatively remote property consists of 110.6 acres, some of which is lakefront. There is an older rustic cabin located on the property, which was built by the claimant.
- [27] Patrick McCarthy and Patricia McCarthy purchased the JL property in 1969. They are the claimant's parents. After Patrick McCarthy passed away in 2010, Patricia McCarthy remained on title as the joint survivor of the JL property.
- [28] The claimant has built a strong connection to the JL property, which has been in his family for 49 years. Over the course of those years he:
- built a log cabin on the property for his parents in 1981;
 - uncovered property boundary pins in 1983;
 - located a small house trailer on the property in 1984;
 - thinned the cedar trees on a ¼ hectare area to improve the quality of the forest;
 - prepared a Forest Management Plan on behalf of his parents in the 1990's for property tax reductions;
 - embarked on a ten-year legal battle in 1998 to facilitate the planned harvest operation;
 - lived and worked on the land for nine continuous months in 2000, in order to execute the harvest operation and silvicultural regeneration plan;
 - attended at the property in order to extinguish a fire in the late fall of 2001 which broke out on the land extending over several hectares;

- built a timber access road and bridge to the upper reaches of the property and a boat and log barge access ramp on the lake;
- performed maintenance of the waterline, propane supply system, and waterfront (rock removal);
- reconstructed rotten deck beams; and
- built a trail to the house trailer.

[29] In contrast, the respondent's connection to the JL property is more recent and brief. It is centered on vacations taken on the property with the claimant.

[30] Ms. Markham first attended at the JL property in 2011, shortly after the parties started living together. She did not attend at the JL property in 2012 as there was a landslide. In 2013, Ms. Markham had surgery to her shoulder, and the parties went to Banff instead for their summer vacation. It was not until 2014, a few weeks after the parties were married, that Ms. Markham next went back to the JL property. In the years 2014, 2015, and 2016, she vacationed at the property with Mr. McCarthy, for approximately one month each summer. While she was there, she would perform domestic chores (much as she did at the family home) such as cleaning the cabin and cooking meals.

[31] There was dispute as to the amount and type of work Ms. Markham performed on the JL property during her vacations. Although Ms. Markham testified that she moved heavy logs and boulders on the beach, this was not plausible given her shoulder injury. However, I accept that in addition to cooking and cleaning, she did perform some light activities on the property such as clearing debris and branches. I also accept that she painted some cabinets and doors inside the cabin in 2016. However, I do not find that these activities were substantial or out of the ordinary.

[32] There was also some dispute as to the amount of time Ms. Markham spent on the property during each visit. I find that in total, Ms. Markham spent no more than approximately 20 weeks at the JL property over the course of the 4 years that she attended there.

Transfer of Title of JL Property

[33] On October 24, 2015, Patricia McCarthy executed a Form A Freehold Transfer ("Form A"), transferring her entire interest in the JL property to the claimant and respondent as joint tenants, for the consideration of \$1.00 "with natural love". The Form A indicates a market value for the property of \$438,800. The Form A was filed at the Land Title Office on October 30, 2015. The Land Title Registry completed the transfer on November 3, 2015. Although the Agreed Statement of Facts indicates that the transfer occurred on October 10, 2015, this is incorrect having regard to the documentary evidence.

- [34] It is Mr. McCarthy's contention that his mother did not intend to gift the JL property to Ms. Markham. Rather, Patricia McCarthy intended that Ms. Markham hold her undivided half interest in the JL property in trust for Mr. McCarthy.
- [35] Ms. Markham says that the transfer of title jointly into hers and the claimant's names was intentional. Her counsel submits that the transfer of interest in the JL property constitutes a perfected inter vivos gift made by Patricia McCarthy to the claimant and the respondent together, and cannot be revoked.

Intention of the Transfer

- [36] Three witnesses testified in the trial: the claimant, the respondent, and the claimant's mother, Jeanne Patricia McCarthy ("Patricia McCarthy").

Claimant's Evidence

- [37] Mr. McCarthy testified that he expected the JL property would be his inheritance. He spoke about his lengthy connection with the JL property and the gratuitous work that he performed on the land for over three decades while the property was still owned by his parents.
- [38] According to Mr. McCarthy, in March 2014, he and his mother had a lengthy conversation about the JL property. A 2012 landslide had caused the property value to drop dramatically. As such, they discussed two options: either selling the property, or trying to reinvest in the property and keep it in the family to pass it on to the next generation. He stated that his mother preferred the second option.
- [39] Mr. McCarthy testified that around 2015, his mother told him that she wished to transfer the JL property to him. However, rather than placing the property solely in his name, he asked his mother to place Ms. Markham jointly on title with him, saying simply that he thought they could "save legal fees" of the "second legal transfer to her" by doing it once together. He added that he "trusted her".
- [40] Aside from this vague explanation that he wanted to "save legal fees", Mr. McCarthy was not asked, nor did he provide, any further reasons for his request to have Ms. Markham placed jointly on title with him.

Transferor's Evidence

- [41] Patricia McCarthy resides in Ontario. She testified at the trial via video conference. At the time of trial, she was 91 years old. In the words of counsel for the respondent, she presented as "a remarkably articulate and intelligent person regardless of age."
- [42] Patricia McCarthy stated that she and her husband had intended for many years that the JL property would be Mr. McCarthy's inheritance. She corroborated the claimant's evidence about his extensive involvement with the JL property, adding that he had acted as her and

her husband's consultant in regards to the management of the entire harvest operation in 2000. When the logging was completed, she testified that the claimant turned over the net proceeds of approximately \$300,000 to his parents. Though he recovered his expenses, he was not remunerated at his professional rate for the harvest operation.

[43] Patricia McCarthy also corroborated the claimant's evidence about her reason for placing Ms. Markham jointly on title. She provided the following testimony in her evidence in chief:

Q. What were your intentions, uh, with the property in later years?

A. My husband and I had intended, for years before, from years before that Tim should have the Kootenay property as part of his inheritance.

Q. To whom did you transfer the property in 2015?

A. I discussed it with Tim, felt that it was about time that something that I should actually take effect on our purpose from years before. So he knew that it was coming to him. But in fact by that time, I think he was married to Candice and he phoned and asked me if I would please make Candice a tenant, a joint tenant with him. That would make something easier from the financial standpoint.

Q. Alright, and did you sign the paper in that capacity?

A. Yes, I did.

Q. Did you, did you have Candice in mind when you gave the property to both of them?

A. It was only at my son's request that I added Candice to that, to the transfer. It wasn't because I had her in mind from the beginning at all, no. It was just that he had asked me to do so.

[44] In cross-examination, Patricia McCarthy confirmed her evidence that the transfer of the JL property was the claimant's inheritance, and that she transferred it jointly into his and Ms. Markham's names "at Tim's specific request only". She stated that the transfer had nothing to do with Ms. Markham.

[45] Patricia McCarthy described her relationship with Ms. Markham as being "amicable". Though they got along well, they were not particularly close.

Respondent's Evidence

[46] Ms. Markham testified that she and Patricia McCarthy had a very good relationship "until the time we got married" and that "it changed three weeks after" the parties' marriage. Not long after their relationship turned sour, Ms. Markham says that she overheard a phone conversation between the claimant and his mother about Patricia McCarthy's desire to transfer the JL property to both of them, adding that "she was very angry and did not trust her daughter". She stated also that Patricia McCarthy wanted to give the JL property to her and Mr. McCarthy because "it will be income for the rest of our lives".

- [47] Counsel for the claimant objected to Ms. Markham's evidence of a poor relationship between Patricia McCarthy and her daughter, or that this was the motivation for the transfer, on the grounds that the statements were not put to either Mr. McCarthy or Patricia McCarthy in their cross-examination. In so doing, claimant's counsel invoked the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.) which holds at 70-71 that, "if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him."
- [48] As noted in the recent decision of *North America Construction (1993) Ltd. v. Yukon Energy Corporation*, 2018 YKCA 6 at para. 62, the failure of a party to put certain testimony to a witness in cross-examination may engage the rule in *Browne v. Dunn*. When the rule is engaged, the trial judge has broad discretion to determine the appropriate remedy, but may not use the rule to exclude evidence. The trial judge may rely on the breach of the rule as part of her evaluation of the reliability and credibility of the contradictory evidence.
- [49] In this instance, I do not need to resort to the rule in *Browne v. Dunn* as I have found the respondent's testimony on this point to be unreliable for reasons set out elsewhere. As such, I place very little weight on it.

The Will and Power of Attorney

- [50] Sometime before the parties separated, Patricia McCarthy drafted a will in which she named the respondent as a beneficiary (the "Earlier Will"). The Earlier Will was destroyed by Patricia McCarthy after the parties separated in 2016, and replaced with a new will removing Ms. Markham as a beneficiary (the "New Will"). There are no remaining copies of the Earlier Will. There was some suggestion that Patricia McCarthy may still be in possession of a draft of the Earlier Will (the "Draft Will"). However, the Draft Will was not put into evidence.
- [51] Very few details emerged in the evidence about the Earlier Will. No date was provided for the Earlier Will; nor is there an indication of when it was drawn. The uncontroverted evidence of the claimant was that Ms. Markham was a secondary beneficiary, and only stood to inherit Patricia McCarthy's estate in the event that Mr. McCarthy and Patricia McCarthy passed away. In addition, Mr. McCarthy testified that one of the terms of the Earlier Will passed the JL property to the claimant and the respondent, as joint tenants upon Patricia McCarthy's death. Though Patricia McCarthy has a daughter residing in Ontario, there was no evidence of whether she was also a beneficiary in the Earlier Will.
- [52] Patricia McCarthy testified that she only put Ms. Markham in her Earlier Will at her son's request. When the parties separated, she destroyed her Earlier Will, and executed a new one in which Ms. Markham was removed as a beneficiary. She stated that the Draft Will contained a handwritten note made by her in pencil, indicating that the claimant had "requested that I should give the Kootenay property to Tim and Candice as joint tenants."

- [53] It seems that around the time that the Earlier Will was drafted, Patricia McCarthy also had a power of attorney drafted in which the respondent was named as Patricia McCarthy's alternate attorney. However, the power of attorney was revoked after the parties separated in 2016. Patricia McCarthy testified that naming Ms. Markham as her alternate attorney, was done at the behest of the claimant. The document was not put into evidence, nor was the revocation. There was no evidence as to when the power of attorney was drafted.

Analysis

- [54] Because equity presumes bargains, not gifts, there is a general presumption in the law that when one person gratuitously transfers property to another adult person, the recipient holds the property in trust for the donor: *Hu v. Li*, 2016 BCSC 2131 at para. 36. This creates a rebuttable presumption of a resulting trust. Once the presumption is raised, the onus falls upon the recipient on a balance of probabilities to show that the transferor intended to make a gift.
- [55] Thus, in this case, both the claimant and the respondent must show on a balance of probabilities that Patricia McCarthy intended to make a gift to each of them when she transferred title of the JL property to them jointly.
- [56] As noted by the court in *Beaverstock v. Beaverstock*, 2011 BCCA 413 at para 9, the actual intention of the transferor is a question of fact, and must be determined by having regard to all of the evidence.
- [57] Evidence arising subsequent to the transfer should be considered with some caution, to guard against self-serving testimony. In addressing the weight to be given to evidence of post-transfer events, the Court in *Bergen v. Bergen*, 2013 BCCA 492 said at para. 6:

The Court in *Pecore* also discussed the kinds of evidence that may be considered in determining the transferor's intent, stating that evidence arising subsequent to the transfer should not "automatically" be excluded, as some earlier authorities had suggested. (Para. 59.) Overall, Rothstein J. said, a trial judge should determine what weight should be given to such conduct, "guarding against evidence that is self-serving or that tends to reflect a change in intention." (Para. 59.)

- [58] In this case, the evidence going to intent consists entirely of the viva voce testimony of the parties and the donor. In assessing and weighing each witness's version of events, I have considered whether the evidence is credible and reliable.
- [59] The claimant was generally a credible witness. He did not overstate his position, and made admissions that were not always in his self-interest. Mr. McCarthy did not appear to exaggerate, and was balanced in his testimony about Ms. Markham. His testimony with respect to the circumstances around the transfer of interest in the JL property, though vague, was corroborated by Patricia McCarthy's evidence.

- [60] Patricia McCarthy was a diligent and forthright witness. She was cogent and clear when giving her evidence, and had good recall of the events in question. Her testimony with respect to her intentions when she transferred her interest jointly into the parties' names, was internally consistent and also consistent with the other evidence in the case.
- [61] Ms. Markham's testimony on this issue, and her evidence regarding many other matters, lacked credibility. Her negative view of Mr. McCarthy appeared to colour much of her testimony. Her evidence was sometimes internally inconsistent and often self-serving. She was vague in her recollection of events, appeared to exaggerate some of her evidence, and at times, the events described by her were just not plausible. For example, Ms. Markham's testimony about a falling out between her and Patricia McCarthy a few weeks after the parties were married, is inconsistent with her contention that Patricia McCarthy intended to gift her the JL property only a year later. There was no evidence that they had mended their relationship such that Patricia McCarthy was inclined to make such a substantial gift to her daughter-in-law with whom she had at best, a cordial relationship.
- [62] Ms. Markham's evidence that Patricia McCarthy intended that the JL property could be used to provide income to her and the claimant for the rest of their lives, is also not credible. Mr. McCarthy testified that the tree harvesting operation, completed in 2000, required that new trees be planted in order to renew the forest. That new growth of trees would take 100 years to mature before another harvest operation could be conducted on the land, by which time both of the parties would have long passed.
- [63] After having regard to all of the evidence, I find that Ms. Markham has failed to prove on a balance of probability that Patricia McCarthy intended to gift the JL property to her. In coming to this conclusion, I have taken into consideration the Earlier Will and power of attorney executed by Patricia McCarthy. However, I do not find those acts, taken together with the whole of the evidence, are sufficient to establish an intention to gift the JL property to Ms. Markham.
- [64] Patricia McCarthy's act of making Ms. Markham a backup attorney in her power of attorney, is no more than an indication that at some point, she trusted Ms. Markham to assist her with her affairs. The evidence about the contents of Patricia McCarthy's Earlier Will, while potentially significant, is so vague as to be of minimal assistance in determining Patricia McCarthy's intentions. On the evidence before me, I am unable to draw the inference that respondent's counsel has urged me to draw, i.e. that the Earlier Will is contemporaneous evidence establishing Patricia McCarthy's intention to gift the JL property to Ms. Markham. For it to be considered a contemporaneous act, at the minimum there must be evidence that it was drawn up at or around the same time as the transfer was made. No such evidence was elicited.
- [65] As noted by the Court in Bergen at para. 41, in cases where the property was provided by the transferor, "the transferee must still prove that a gift was intended - i.e., he or she must rebut the presumption of resulting trust." The respondent has failed to do so.

[66] Rather, I find that the evidence establishes that Patricia McCarthy's intention at the time of the transfer, was to gift the entirety of the JL property to the claimant as part of his inheritance. This intention did not change despite the fact that Patricia McCarthy transferred her interest in the property into the joint names of the parties. I accept the claimant's and Patricia McCarthy's evidence that the joint transfer was done at the request of the claimant, and that it was Patricia McCarthy's intention that Ms. Markham hold her interest in trust for the claimant.

[67] As I am able to reach a conclusion on the evidence about Patricia McCarthy's actual intention at the time of the transfer, it is not necessary for me to resort to the presumption of a resulting trust to determine the result. As noted by the court in *Wu v. Sun*, 2010 BCCA 455 at para. 18 (referring to *Pecore v. Pecore*, 2007 SCC 17 at para. 44):

It is only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer that it may become necessary to apply such presumption to possibly tip the scales in favour of the transferor of property or the donor of funds.

[68] I find the claimant's one half interest in the JL property is excluded property as per s. 85 of the FLA, and is therefore not subject to division. I further find that the respondent's one-half interest in the JL property is held in trust for the claimant, and as such, in the hands of the claimant, is also excluded property.

Significant Unfairness

[69] I turn now to the question of whether it would be significantly unfair not to divide the excluded property pursuant to s. 96(b) of the FLA.

[70] The court noted in *V.J.F.* at para. 10, that s. 96(b) permits a trial judge to consider only two factors in determining whether it would be significantly unfair not to divide excluded property: the duration of the parties' relationship and any direct contribution by a spouse to the preservation and maintenance of the property. The court went on to say that:

Obviously, the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the 'unfairness' test in the [Family Relations Act]

[71] Counsel for the respondent argues that Ms. Markham made a direct contribution to the preservation, maintenance, improvement, operation or management of the JL property, in the 20 odd weeks that she spent on the property over the course of four years. He says that her contribution was such that it would be significantly unfair not to divide the JL property.

[72] I am not persuaded by the evidence that the significant unfairness test has been met. During 20 weeks that Ms. Markham spent at the JL property on her vacations, most of her activities consisted of performing domestic chores. While I accept that she cleared some debris, and also painted kitchen cabinets and some doors inside the cabin, these activities are not substantial enough to meet the high bar set out for the significant unfairness test stipulated in section 96 of the FLA.

Quantum Meruit and Other Claims

[73] In her counterclaim the respondent seeks an interest in the JL property on the following alternative grounds:

- detriment suffered by her premised on requests made by the claimant that she leave the workforce so that she could devote all her time to working at the "tree farm" at Johnson's Landing;
- detriment suffered by her premised on requests made by the claimant that she leave the workforce and devote all her time and efforts to housekeeping duties, which permitted the claimant to devote his efforts to his career and the acquisition, maintenance or improvement of the JL property;
- detriment suffered from misrepresentations made by the claimant that she will earn an income from the tree farm if she continued to devote her time and efforts to working at the tree farm;
- a claim for quantum meruit due to her contributions to the tree farm for which she received no remuneration; and
- proprietary estoppel and promissory estoppel based on assurances allegedly made by the claimant and representations that she was to have an equal share in the entire equity of all real and personal family property and would receive an income from the tree farm for her contribution of time and labour.

[74] No submissions were made on these claims though evidence was led on these various issues. Having regard to all the evidence, I find that there is no merit to any of these claims. As indicated elsewhere, the evidence does not support a finding that the respondent performed any significant work at the Johnson's Landing property, creating entitlement on a quantum meruit basis, or causing her detriment. In addition, the evidence does not establish that the respondent left the workforce because of requests or representations made by the claimant.

[75] I also do not find the respondent's evidence credible that Mr. McCarthy made representations to her that she would receive an income from the tree farm for her contribution of time and labour.

[76] As such, the respondent's claims for an interest in the JL property are dismissed.

Increase in Fair Market Value

- [77] The JL property was transferred on November 3, 2015, to the claimant, and to the respondent in trust for the claimant. The parties separated approximately 10 months later, on September 1, 2016, and the trial of this action was held in January 2018. Pursuant to ss. 84(2)(g) and 87 of the FLA, the respondent is entitled to a one-half interest in the increase in the fair market value of the excluded property from the date of acquisition to the date of trial.
- [78] While the parties agree to a fair market value for the JL property of \$650,000 at trial, they were silent with respect to their views on its fair market value as at the date of acquisition. In her counterclaim, the respondent sought a one-half interest in the increased value of the excluded property. There was no evidence and no arguments made on behalf of Ms. Markham with respect to this point.
- [79] The Form A transfer indicates a value of \$438,800 in 2015, which, according to Mr. McCarthy, was likely taken from the 2015 Property Assessment Notice, as the two figures are identical. While there appears on the surface to be a significant difference between the 2015 Property Assessment Notice amount and the 2017 appraisal amount, these numbers cannot be compared fairly, as there is a substantial difference between what is considered a fair market value, and the property assessment notice amount used for taxation purposes. This is evident even from a cursory review of the documents.
- [80] The appraisal report relied on by the parties was prepared in June 2017. It indicates a fair market value of \$650,000.
- [81] The 2018 Property Assessment Notice represents the property value as of July 1, 2017. It indicates an assessed value of \$493,100, which is 31.8% lower than the \$650,000 fair market value for the same time period.
- [82] The 2018 Property Assessment Notice also provides an assessment history for the years 2014 to 2018 (read 2013 to 2017). The notation next to the assessment applicable for the 2013 year, indicates that it is 25% lower than in the previous year. The dramatic drop between the assessed values for the 2012 and the 2013 years, is consistent with Mr. McCarthy's evidence that the JL property dropped substantially in value as a result of a landslide that occurred in 2012.
- [83] As a result, the following assessed values are indicated:
- 2017 - \$493,100
- 2016 - \$390,200
- 2015 - \$436,100
- 2014 - \$438,800

2013 - \$438,200

2012 - \$547,750

- [84] Doing the best that I can in the absence of an appraisal, I have taken the assessed value for the JL property for the 2015 year (the year the property was acquired), and increased it by 31.8% to arrive at an approximation of its fair market value for the same year, i.e. \$574,780. Comparing this to the \$650,000 fair market value at trial, yields a difference of \$75,220.
- [85] While relying on the property assessments is not ideal, as noted by Groberman J.A. in *Dosanjh v. Liang*, 2015 BCCA 18, the court is often faced with a dearth of evidence when it comes to property value in family law cases. In such situations, property assessments have frequently been relied upon. He writes at paras. 60-61:
- [60] While trial courts have, with some frequency, admitted property assessments as evidence of property value in family law cases, they have generally done so either with the agreement of the parties, or, alternatively, where no other evidence of value has been tendered (e.g. *Chung v. La*, 2011 BCSC 1547). Where proper expert evidence of value has been tendered, the courts have been reluctant to consider property assessments as evidence (see, for example, *Hall v. Mougán*, 2009 BCSC 645).
- [61] In family law cases, a court is often faced with having to assess the value of real property in a situation where neither side is clearly subject to any burden of proof. Rather, the court is simply required to estimate the value of property for the purpose of dividing a family asset. It is not surprising, in such situations, that a court may "grasp at straws" in an attempt to reach a just result. It is simply a matter of doing the best job possible with limited evidence.
- [86] I am faced with that situation here. Pursuant to s. 84(1)(g) and s. 87 of the FLA, I find the respondent is entitled to \$37,610 representing her share in the increase in the fair market value of the JL property.

2011 CAMPION BOAT

- [87] The parties purchased a 2011 Campion Boat (the "Boat") on May 8, 2014 for \$42,840. Although the Agreed Statement of Facts indicates a purchase price of \$42,480 this appears to be a typographical error as the Purchase Agreement indicates a price of \$42,840.
- [88] The Boat is registered solely in the claimant's name. The parties have agreed on a trial valuation of the Boat at \$25,000.
- [89] The parties disagree as to whether the Boat is family property. Under s. 85(2) of the FLA, the onus lies with the party claiming the exclusion, to prove that the property fits within s. 85(1).
- [90] After payment of \$500, a \$5,000 deposit for the Boat was charged to Mr. McCarthy's Visa card. The balance of \$37,340 was paid from an RBC account held at the time solely in Mr. McCarthy's name, with funds drawn from a line of credit held also in Mr. McCarthy's name.

- [91] Payments on the line of credit were made through Mr. McCarthy's RBC bank account. By November 2014, the amount owing on the line of credit was \$20,800.
- [92] On November 19, 2014, Patricia McCarthy obtained a bank draft in the amount of \$20,000 made payable to the claimant. Patricia McCarthy testified that this money was intended solely for the benefit of the claimant and was not intended as a gift to Ms. Markham. The money was deposited into Mr. McCarthy's account, and used directly to pay off the remaining line of credit for the Boat.
- [93] Ms. Markham was not added onto Mr. McCarthy's RBC account until December 2014, after the Boat had been paid off.
- [94] There was some discrepancy raised in the evidence about Patricia McCarthy's and Mr. McCarthy's testimony regarding the timing and amount of money that was given by Patricia McCarthy towards the purchase of the Boat.
- [95] In an affidavit filed in these proceedings on December 22, 2016, Patricia McCarthy deposed that she transferred \$30,000 to the claimant on April 11, 2014 for the purchase of a boat. In support, she attached a diary entry for the same date. She testified that the notes were made contemporaneously. The handwritten diary entry makes a reference to Patricia McCarthy having some communication with her bankers about obtaining \$30,000 for Mr. McCarthy for a boat. At trial, Patricia McCarthy testified that she was mistaken in her interpretation of the notes from her diary. Though she was contemplating sending Mr. McCarthy \$30,000 for the purchase of the Boat on April 11, 2014, in fact, she did not send money to him until November 2014, at which time she transferred \$20,000.
- [96] The banking records verify that on November 20, 2014, \$20,000 was paid towards the line of credit. This money can directly be traced to funds provided by Patricia McCarthy.
- [97] I am satisfied with Patricia McCarthy's explanation and do not find that the error in her affidavit detracts from her credibility.
- [98] Patricia McCarthy's error in saying that she paid \$30,000 in April 2014 towards the purchase of the Boat, was repeated in Mr. McCarthy's affidavit, and also corrected by him at trial. I am satisfied upon hearing Mr. McCarthy's explanation for the error that it was not intentional on his part. As such, it has not impacted my overall finding of Mr. McCarthy's credibility.
- [99] Patricia McCarthy's reasons for assisting in the purchase of the Boat, were linked to the JL property of which she was the sole owner.
- [100] According to Patricia McCarthy's and Mr. McCarthy's testimony, a functioning boat was necessary to act as an emergency transport in case they were cut off during a landslide or needed to evacuate the property because of forest fire. Both of these events had occurred on the JL property. In addition, Mr. McCarthy testified that if any work was being done on the property, the Worker's Compensation Board required a marine ambulance. Thus, though the Boat could be used for fishing, its primary purpose was non-recreational.

[101] While Mr. McCarthy did own a boat previously, that boat was broken and required costly repairs before it could be operated. As such, he "donated" it to the Marina from where he purchased the Champion Boat.

[102] As noted by the Court of Appeal in *Shih v. Shih*, 2017 BCCA 37 at para. 43, clear and cogent evidence is required to establish excluded property:

[43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.

[103] After having considered all of the evidence, I am unable to find that Mr. McCarthy has met the onus of establishing that the Boat is excluded property pursuant to s. 85(1) of the FLA.

[104] However, having regard to the duration of the relationship between the spouses, the fact that the Boat was purchased using a line of credit for which Mr. McCarthy was solely liable, the use to which the boat was put, and the lack of contribution by Ms. McCarthy, I find that it would be significantly unfair pursuant to s. 95 of the FLA to divide the value of the Boat equally between the parties.

[105] As Mr. McCarthy is keeping the Boat which is currently valued at \$25,000, I find that Ms. Markham is entitled to a payment of \$5,000 representing her share of the interest in the Boat.

2014 TOYOTA TRUCK

[106] The parties are joint owners of a 2014 Toyota FJ Cruiser truck (the "Truck"). The Truck was purchased on May 7, 2014, for \$47,767.66. The parties agree on a trial valuation for the Truck at \$37,000.

[107] At issue is whether the Truck constitutes family property or whether some or all of its value is excluded property. Under s. 85(2) the onus lies with the party claiming the exclusion, to prove that the property fits within s. 85(1).

[108] The parties agree that to partially fund the purchase of the Truck, the claimant traded in his 2010 Kia vehicle, which he brought into the relationship. The trade in value for the Kia vehicle was \$10,000.

[109] Mr. McCarthy testified that another \$10,000 came from his TFSA, which he brought into the marriage. This is corroborated by the documentary evidence.

[110] According to both Mr. McCarthy and his mother, the final \$30,000 required for the purchase of the Truck, came as a gift to the claimant from Patricia McCarthy. Banking records show that on April 29, 2014, Patricia McCarthy provided \$30,000 by way of bank draft payable to Tim McCarthy. Those funds were deposited into the RBC account held at the time solely in Mr. McCarthy's name, and can be traced directly towards the purchase of the Truck.

- [111] Patricia McCarthy testified that she gave Mr. McCarthy money towards the purchase of the Truck because the Truck was needed to move the Boat. In addition, the four-wheel drive Truck provided better access to the rough terrain of the JL property. She stated that the money was a gift to her son, and was never intended for the benefit of the respondent. Regardless, Mr. McCarthy took the money given to him by his mother, and used that towards the purchase of an asset jointly held with the respondent.
- [112] Mr. McCarthy explains his decision to put the Truck into their joint names was made because Ms. Markham "insisted" that he do so when he was at the dealership.
- [113] Counsel for Ms. Markham argues that the Truck (along with the Boat) were purchased as wedding presents and are thus family property, which should be divided equally. The Truck was used by the parties as their primary mode of transportation. Ms. Markham did not have a driver's licence during the relationship, and as such Mr. McCarthy was the primary person that operated the vehicle. However, she did occasionally drive the Truck when they were vacationing at the JL property.
- [114] I find that Mr. McCarthy has met the burden of establishing that the Truck is an excluded asset. As per s. 85(1)(g) of the FLA, the Truck was derived from excluded property under s. 85(1)(a) and (b.1). The \$10,000 from the trade in of Mr. McCarthy's previous vehicle, together with \$10,000 from the his TFSA, are excluded by virtue of s. 85(1)(a) as they are property which was acquired before the parties relationship. In addition, the \$30,000 from Patricia McCarthy is excluded as it is a gift to a spouse from a third party.
- [115] Having regard to s. 96(b) I am unable to conclude that it would be significantly unfair not to divide the value of the Truck. The marriage was of relatively short duration, and there is insufficient evidence to show that Ms. McCarthy made any direct contribution to the preservation, maintenance, improvement, operation or management of the Truck.

BIRD PRINTS

- [116] The claimant alleges that the respondent removed two bird prints from the family home without his consent. He claims the bird prints as excluded property, and asks for their return. He says that the prints were gifted to him by his mother, and are worth approximately \$500.
- [117] The respondent denies taking the bird prints. She testified that following the parties' separation, she labelled all of Mr. McCarthy's belongings, and put them in a corner for the movers to take. She indicated that there was some mix-up with some of the items that were removed by the movers, such that she made a list of all of the items remaining and took photographs of the items belonging to Mr. McCarthy. Presumably, the prints were not a part of those items.
- [118] I accept Ms. Markham's evidence on this point. She was specific in her recollection of events and provided details that had the ring of truth.

- [119] The claimant has failed to establish on a balance of probability that Ms. Markham took the bird prints, and as such, his claim to have them returned or for a compensation order, is dismissed.

ORTHODONTIC EXPENSES

- [120] The respondent seeks an order that a January 4, 2018 dental clinic treatment estimate, for \$17,172.00 from Dr. Marshall, constitutes a family debt for which the claimant is equally liable. The expense relates to orthodontic care that has not been commenced, but which is allegedly required by the respondent to complete a program of care which was begun while the parties were together. She argues that the ongoing care required by her is a financial obligation incurred by a spouse during the relationship under section 86(a) of the FLA.
- [121] The respondent also seeks equal contribution from Mr. McCarthy for the balance owing to Dr. Douglas's office of \$3,480. This is in relation to dental care that she began after the parties separated. That expense has already been incurred and part of it has been paid off.
- [122] In support of her position that the post-separation dental treatment is a family debt, Ms. Markham relies on discussions that she says she had with Mr. McCarthy during the time that the parties were together. Ms. Markham also says that these treatments are necessary to complete the initial treatment that was commenced while the parties were still together, and with the claimant's consent.
- [123] Mr. McCarthy denies that he made any such commitments, and argues that any dental or orthodontic care received by the respondent following the parties' separation is not a family debt.
- [124] Although the claimant worked when the parties met in 2009, she was not working full-time, and had not done so since at least 1999. She testified that she preferred temporary office work, as it provided her with variety. As a temporary office assistant, Ms. Markham would have significant periods of unemployment during which she supported herself with EI or social assistance from the Ministry of Social Development and Social Innovation. Sometimes she was in receipt of social assistance when she did not have any entitlement, thus resulting in her owing money to the government and eventually, a Crown lien being registered on the JL property.
- [125] In 2011, Ms. Markham had a shoulder injury and was off work completely. As there was a long wait in the public system, the claimant paid for private surgery at the Cambie Surgical center. Following her surgery, Ms. Markham did not return to the workforce.

- [126] Since 2011, the respondent has had extensive dental needs which were covered by the claimant either directly or through the claimant's extended health care plan. Though the respondent insisted that she paid for her own dental care through a plan provided to her by social services, this was contradicted by the documentary evidence which showed that the claimant's Pacific Blue Cross plan was covering some of the respondent's treatments, with the balance being paid for directly by Mr. McCarthy.
- [127] In August 2013, Ms. Markham was referred to a specialist by her dentist, Dr. Seebaran. She saw an orthodontic specialist, Dr. Metzner. There was some dispute as to whether she told Dr. Metzner that she wanted to follow a full course of treatment or a partial one. According to the claimant, the respondent chose not to have a full treatment from Dr. Metzner. The respondent says that whatever treatment plan she entered into she did so in consultation with the claimant.
- [128] In any event, Dr. Metzner recommended a partial course of treatment estimated at \$4,325 for repositioning her teeth. The treatment was successful and paid in full by Mr. McCarthy and his insurance.
- [129] Dr. Seebaran recommended some implants and Ms. Markham and Mr. McCarthy discussed whether or not she should get them. Mr. McCarthy testified that he agreed in their private discussion that she should get the implants, but did not sign any contract or agreement with Dr. Seebaran's office. The treatment was not commenced.
- [130] Ms. Markham became unhappy with Dr. Seebaran. Around 2015, she switched dentists and started seeing Dr. Marshall. As with Dr. Seebaran's treatments, Dr. Marshall's treatments were paid for by Mr. McCarthy and his dental plan.
- [131] In January 2016, Ms. Markham saw another orthodontist, Dr. Douglas. Although Ms. Markham testified that the treatment commenced in January 2016 while the parties were still together, the documentation from Dr. Douglas's office indicates otherwise. Dr. Douglas's treatment did not begin until 2017, after the parties had separated. Ms. Markham did not discuss Dr. Douglas's proposed treatment plan or the cost with Mr. McCarthy, though she testified that she expected him to pay for it.
- [132] Ms. Markham signed the Orthodontic Financial Agreement with Dr. Douglas's office in February 2017. The total cost for the treatment was \$7,960. Pacific Blue Cross covered the initial payment of \$1,990, leaving a remaining balance of \$5,970. Ms. Markham has paid for Dr. Douglas's treatments in monthly instalments of \$249. As at December 2017, statements from Dr. Douglas's office indicate that \$3,480 remains owing (contrary to the \$4,972 figure alleged by counsel for the respondent).
- [133] The respondent asks that the balance owing to Dr. Douglas's office be considered a family debt for which the claimant is equally liable.

- [134] On February 2, 2017, Ms. Markham also obtained an estimate from Dr. Marshall of \$14,377 for treatment which includes implants, bone grafts, and crowns. This treatment was never started and Dr. Marshall provided a further estimate in January 2018 for \$17,172, which is the figure relied on at trial.
- [135] Aside from her own viva voce evidence, Ms. Markham provided no admissible evidence substantiating the need for the treatments with Dr. Marshall and Dr. Douglas, connection of these treatments to the treatment that she was undergoing while the parties were married, and the reasonableness of the costs.
- [136] In addition, I note that the agreement for incurring the expense with Dr. Douglas, was entered into solely between Ms. Markham and Dr. Douglas's office. Ms. Markham did not discuss the proposed treatment with Mr. McCarthy, and did not get his consent before embarking on it. As such, Mr. McCarthy is not responsible for the payment of a debt incurred by Ms. Markham after the parties separated and without his consent.
- [137] I thus conclude that the debt to Dr. Douglas is not a family debt, and as such is the sole responsibility of the respondent.
- [138] I also am unable to find that the proposed course of treatment with Dr. Marshall is a family debt. In addition to the lack of evidence substantiating the necessity for this treatment, and connecting it to the treatments done while the parties were married, there is no reliable evidence even as to the cost of this treatment. There is a difference of over \$3,000 between the 2017 estimate and the 2018 estimate. As such, Ms. Markham's claim to have Mr. McCarthy share equally in the cost of Dr. Marshall's treatment, is dismissed.

ADDITIONAL ORDERS

[139] Pursuant to paragraph 5 above, the following Orders are made, by Consent:

- a) The claimant's claim for equalization of the respondent's GIC's is dismissed.
- b) The claimant shall transfer his $\frac{1}{2}$ interest in a grave plot located at Forest Lawn Memorial Park in Burnaby, BC, to the respondent for a \$6,000 compensatory payment.
- c) The claimant shall pay to the respondent the amount of \$1,980.58, representing his one-half share of the increase of the respondent's Crown debt.

[140] Pursuant to s. 5 of the Name Act, R.S.B.C. 1996, c. 328, the respondent's name is changed from Candice McCarthy to Candice Markham.

COSTS

[141] Ordinarily, costs follow the event. As Mr. McCarthy has had substantial success, he is entitled to his ordinary costs. However, if the parties wish to make submissions with respect to the question of costs, they should provide their submissions in writing within 30 days of these Reasons for Judgment.

"Shergill J."

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