

CANADA / JUDGMENT

# Mohtadi v. Mohtadi

2000 BCSC 604

## COURT

Supreme Court of British Columbia

## DECIDED

10 April 2000

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2000 BCSC 604

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2000 BCSC 604 Docket No.:

F960447

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SIRUS MOHTADI

PLAINTIFF

AND:

MINOO VESSALI MOHTADI

DEFENDANT

## REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE PARIS

Counsel for the Plaintiff Myra R. Elson

Counsel for the Defendant E.Lui

And T. Yu

Date and Place of Hearing/Trial: January 31 - February 10, 2000

Vancouver, BC

[1] This is an action pursuant to the Family Relations Act for a division of family assets.

[2] The parties were married in Iran in 1961. The plaintiff husband is 71 years old and the defendant wife is 58. They immigrated to Canada in 1979. They have three adult children. A declaration of irreconcilability was made by the Court on August 6, 1996. At present the

plaintiff continues to work full time as a security guard. The defendant has a health food and vitamin business which she started in 1995. However it has not been successful and she will be closing it down soon. She intends to operate a wholesale business in the same line of products.

## BACKGROUND

- [3] After the parties' marriage in 1961 they went to Germany where the plaintiff had previously been a student. He completed a doctorate in soils chemistry. In 1963 they returned to Iran where the plaintiff worked for the National Oil Company of Iran, mainly in Abadan. In 1976 they moved to Teheran. The defendant pursued a course in English literature at the University in Teheran. With the help of his mother the plaintiff had previously built what was apparently a fine house in the Teheran area and it eventually became the matrimonial home. The parties also had a summer cottage on the Caspian Sea.
- [4] In the late 1970s the plaintiff came into two other parcels of property in Iran, one in Shahroud through inheritance from a half-brother whom he barely knew, and the other - three shops and a house in Teheran - was given to him by his mother. The wife testified that it was her mother-in-law's clear intention that the Teheran property was ultimately to be for the benefit of their family. I shall discuss these properties more fully later in these reasons for judgment.
- [5] When the parties immigrated to Canada in the summer of 1979 they came to Vancouver. The plaintiff did not find work immediately and he took English language courses. The wife returned to Teheran almost immediately with two of the children and completed her English language degree at the university. She received financial assistance from her mother, both for herself and her husband and one child who had remained in Canada. The total amount of the assistance is in dispute but it is acknowledged that approximately \$30,000 was sent to Canada.
- [6] The defendant returned to Canada in 1980 and the family moved to Victoria. The husband became involved in a small construction business but it was unsuccessful. He subsequently took a job in a doughnut shop. He had purchased a lot in White Rock in 1979 and it was sold in 1980. The parties used the profit realised to buy a house in Victoria. A house that the husband had purchased in Tsawwassen, B.C. was lost in foreclosure.
- [7] By 1983 the parties were in difficult financial circumstances and the wife returned to Iran where she sold the cottage. She and her mother testified that the latter advanced another \$50,000 which the defendant brought back to Canada "by the black market". The plaintiff testified that he knew of no such transaction and there are no documents which substantiate it.

- [8] In 1985 the parties moved to Vancouver where the husband obtained a job with a research company but it went bankrupt within six months. He then set up a coffee shop business with the assistance of \$15,000 advanced from his mother-in-law. Within a few months he was out of that business and after working on a mushroom farm for two months he took a job as a security guard, which occupation he has been pursuing ever since.
- [9] In 1987 a house on Beechwood Street in Vancouver was purchased which the family moved into. By this time the wife's mother was living with them. Again, I shall discuss the circumstances relating to this house in greater detail later.
- [10] In the meantime the wife had been attempting to upgrade her qualifications and find employment. She took a business course at Camosun College in Victoria and, later, an accounting course in Vancouver. She had a few jobs, which lasted brief periods. In 1989 she was hired by Revenue Canada where she worked, part-time at first and then full time, until 1995.
- [11] In about the end of 1989 or early 1990 the husband moved out of the Beechwood house and the parties never cohabited as husband and wife thereafter. He came back occasionally on weekends and slept in the basement. In 1994 when he had no place to stay he moved back for approximately one and a half years.
- [12] In 1991 the husband went to Iran to arrange the sale of the former matrimonial home there. He gave a power of attorney with respect to it to a certain Mr. Akhavan. The parties agreed on a division of the proceeds and the house was sold in 1992 for U.S. \$486,000. Evidently, not all of the proceeds have yet been forwarded by Mr. Akhavan. However, with part of the proceeds forwarded the wife bought a house on West 49th Avenue in Vancouver and the husband bought a lot in Maple Ridge. As mentioned, in 1995 the wife started a health food business in the Kerrisdale area of Vancouver. The husband commenced this action on July 22, 1996.

## THE ASSETS

- [13] The assets in issue are as follows:

1. The house on West 49th Avenue in Vancouver.

- [14] The wife resides in it with one son, who is 25, and her mother, who is 85. As mentioned, it was purchased in 1993 by the wife with part of the proceeds of the matrimonial home in Iran. It is valued at approximately \$465,000 with a mortgage against it at present of approximately \$150,000. The husband is guarantor on the mortgage.

2. The lot in Maple Ridge.

- [15] It is valued at approximately \$150,000 and has a mortgage against it of approximately \$70,000. The husband testified that before buying it he had taken his wife to see it and that he had originally hoped that they "might reconcile and move there".

3. The balance of the proceeds of the matrimonial home in Iran.

[16] The correct amount is somewhat in dispute. The husband has provided an accounting of the proceeds (Exhibit 5-10) showing just over U.S.\$74,000 to be distributed. The wife has received just over U.S.\$200,000. For some reason that is not at all clear from the evidence, Mr. Akhavan is said to be having some difficulty distributing the balance owing. Counsel for the wife disputes the accounting, arguing that there should be some U.S.\$116,000 left to be distributed. However the wife herself testified that she believes she has approximately U.S. \$37,000 coming to her.

4. Vital Nutrition Centre Ltd.

[17] When the wife started this business in 1995 she financed it with a line of credit secured by the houses on Beechwood Street and 49th Avenue and, according to the wife, loans from various relatives. As mentioned, she is attempting to sell the business without any success, and for purposes of reapportionment under the Act (assuming it is a family asset), I can attribute no value to it.

5. The wife's jewellery.

[18] She received this from her mother. She testified that it had been kept in a safety deposit box with a trust company since 1985 but had disappeared when the box was opened in 1996 after a long period unopened. There is ongoing litigation against the trust company. On the evidence it is impossible to attribute an accurate value to the jewellery.

6. Certain carpets and furniture in storage in Iran.

[19] The carpets are worth approximately \$10,000 and the furniture \$5,000 (although they were originally attributed, apparently due to a mistake in conversion from Iranian to Canadian currency, an enormously greater value).

7. The Shahroud properties

[20] As mentioned, in 1978 the husband inherited three properties and a small share of a fourth property in Shahroud from his half-brother. The nature of the properties and their present status is somewhat vague on the evidence. The husband has never received any revenue from them and did nothing about them until 1991. He then gave a power of attorney to one Mr. Davoudi in Iran to dispose of them. He testified that he had not been close to his half-brother, that he did not know for a long time that he had inherited the properties and that it had always been his intention to dedicate them to some benevolent purpose in Shahroud. He testified that they have now been sold and with the agreement of the other beneficiaries to the one shared property, the proceeds have been used to help fund an emergency department in the local hospital. An appraisal of the properties of \$585,000 was tendered by the wife (Exhibit 22-16). However, it consists of a brief note under the letterhead of a Vancouver firm, Teheran Express Ltd., and signed by a Mr. Elahe. The document simply identifies the properties and states a value for each of them with no description of the

properties or of how the valuation was arrived at, nor is there is any statement of the qualifications of Mr. Elahe.

8. Three shops and a house in Teheran.

[21] The husband received these properties from his mother in 1979. Again the husband has done virtually nothing with respect to these properties. A certain Dr. Vesali (the wife's brother) has a power of attorney to receive the rents but the plaintiff testified that apart from a few months rent which his wife received in 1979 when she was in Iran, he has received nothing from the properties over the years. The value of the properties is in dispute. A value of \$320,000 has been given to them by Mr. Elahi (Exhibit 22-15E) whereas a letter from Mr. Akhavan asserts that the property has no value because, presumably by operation of Iranian law, the tenants have been in possession for so long that their "goodwill" interest in the property, which would have to be reimbursed to them on eviction, is greater than the value of the property. That principle of law is disputed in a document addressed to the wife dated March 28, 1998 from a "S.H. Banitaba". There is no statement on the document as to the qualifications of Mr. (or Ms.) Banitaba.

9. Pensions.

[22] The husband worked for the National Oil Company of Iran for fifteen years before coming to Canada. He apparently has some pension rights but he testified that when he went to Iran in 1991 he was told by the manager of the pension department of the Company that nothing could be done for him "when he saw that I was Ba'Hai". He receives Old Age Security and Canada Pension Plan pensions.

10. The Beechwood Street house in Vancouver.

[23] This house was sold in foreclosure proceedings in December 1999. However the disposition of the proceeds is of considerable significance on the issue of the reapportionment of the existing family assets. It was purchased in 1987 for \$195,000 and registered in the name of the wife and her cousin, the latter being a necessary party because of the parties' difficulty in obtaining a mortgage. The exact source of the down payment is somewhat in dispute but it is essentially academic. The parties had salvaged some funds from the failed business venture of the husband and had also realized approximately \$41,000 from the house in Victoria, although that was used in good measure to meet other obligations. The wife claimed to have been advanced \$10,000 by her mother to assist in the down payment but the husband testified that that suggestion at trial came as a complete surprise to him. The house served as the matrimonial home until the husband moved out in 1990. By mid-1989 the husband was earning relatively minimal income as a security guard and he ceased making any significant financial contribution to the maintenance of the house. However, he personally made renovations to the basement before he left, almost completing a suite that was used as a "mortgage helper". During the period in 1994 when he moved back in he made Hydro and Cablevision payments for several months when they were about to be cut off for non-payment.

[24] As mentioned, the house was sold under foreclosure in December 1999 for \$465,000. According to the wife's testimony and a letter from the mortgagee's solicitors (Exhibit 22-52) the proceeds were disbursed approximately as follows:

\$130,000

The first mortgage

\$200,000

The line of credit of the wife secured by the Beechwood and 49th Avenue properties which she had used to finance her business, although to meet some ordinary living expenses as well.

\$50,000

To pay out the second mortgage on the 49th Avenue house.

\$35,000

Towards the principal on the 49th Avenue house.

Balance

Towards other debts of the wife.

## **PAYMENTS AND LOANS FROM THE WIFE'S FAMILY**

[25] Over the years since the parties moved from Iran the wife's mother has made various payments to her daughter. The issue is whether they were gifts or rather loans which the defendant is obligated to repay to her mother and to which repayment the plaintiff should be obliged to contribute by an appropriate reapportionment of the family assets. The defendant and her mother testified that they were loans and that there is approximately \$100,000 outstanding.

[26] There is no dispute that there have been certain payments made but the husband does dispute the amounts of such payments. For example, he acknowledges that \$30,000 was advanced in 1979 to help the parties when they came to Canada and a further amount of \$10,000-\$15,000 in 1985 to help him set up a coffee shop business, but he disputes that the other payments suggested by the wife were in fact made. In any event, according to him those that were made were not loans.

[27] Unfortunately for the position of the wife there was no documentation evidencing the alleged loans as the payments were made from time to time. There is a promissory note in favour of the mother for \$72,500 dated May 11, 1995. According to the wife that was for funds received in 1979 and 1983. There was also a mortgage in the same amount witnessed by the same notary public who witnessed the note dated and registered on the Beechwood property on July 29, 1996. However, I note that the registration occurred after this action was started and a few days before the decree of irreconcilability. There appears to be a pattern of creation after the fact of supposed security instruments in that in 1983 a mortgage in favour

of the mother was created and registered against the property which the parties then owned in Victoria. The husband testified, and on balance I think it is the likely explanation, that that was done in an attempt to avoid the effect of a guarantee he had had to give a bank to finance a business he was involved in at the time.

- [28] Next I note that the defendant's explanation with regard to a supposed loan of approximately \$22,000 made by her mother in 1993 to help her buy the 49th Avenue house which she attempted to relate, for some reason, to a term deposit note in her own name, was contradictory and quite unsatisfactory.
- [29] I think it is significant also that when the parties agreed to a division of the proceeds of the matrimonial home in Iran there was apparently no demand for or allowance made for the repayment of any monies to the defendant's mother.
- [30] Finally, I note that in her first property and financial statement filed in these proceedings dated September 24, 1996 the defendant listed as debts owing to her mother only \$30,000, said to have been advanced during the 1979 to 1980 period, although that was then changed in her property and financial statement of September 4, 1997 to more than \$100,000 for the period from 1979 to 1994. I find it unlikely that if there had been as much advanced from the mother as suggested and they were true loans that they would not have been mentioned in the first property and financial statement.
- [31] In sum, although the wife has received financial assistance from the mother over the years and the husband has received the benefit of these advances to some extent, I must conclude from the circumstances that the usual presumption with respect to advances from parent to child applies in this case, that is, that they were essentially gifts not loans.
- [32] There have also been advances to the wife from her children, that is, from her daughter Susan and in a far lesser amount, from her two sons. Again there is a pattern of executing promissory notes somewhat after the fact. The majority of the advances, from Susan in particular who has advanced approximately \$80,000, were made after the final separation of the parties. Their purpose was clearly to help the defendant "with living expenses and to survive" to use Susan's words. She is a pharmacist with a young family and involved, with her husband, in a struggling new business of their own. She testified that from her conversations with her father it is clear that he is motivated in this law suit to a good degree by resentment against his wife's family - "he wants to make them suffer" and "he has said he intends to destroy them".
- [33] It is clear from the circumstances that the bulk of these advances, in particular those made by Susan after 1996, were intended to be loans not gifts. However, since they were made after the separation and declaration of irreconcilability, I cannot consider them as "family debts" as that expression seems to be used in these kinds of cases and as argued by the defendant, that is, debts incurred during the spousal relationship, the benefit of the consideration received having been shared by the parties and sometimes even referable to specific family assets. Nevertheless, I believe can consider them in a general way when

reapportioning the family assets, especially with respect to the proceeds of the Beechwood property, pursuant to s. 65(1)(e) and (f) of the Family Relations Act, that is, "the needs of each spouse to become or remain economically independent and self sufficient" and the "circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse".

## CHARACTERIZATION OF ASSETS

- [34] Of the above assets it is clear that the Beechwood house and its proceeds were family assets, as well as the proceeds of the matrimonial home in Iran. So are the 49th Avenue house and the lot in Maple Ridge. Whether or not the wife's business is a family asset is essentially academic because it clearly has virtually no value at present. However, I must note that some of the proceeds of the matrimonial home in Iran were likely put into the business. The carpets and furniture still in storage in Iran are family assets, as are the husband's pensions. Conversely, given that the wife's jewellery was inherited from her mother and was intended to be passed on to her daughter (if it had not been lost), I cannot find that it was used or intended to be used for a family purpose. Therefore it (or whatever proceeds, if any, result from the litigation concerning it) is not a family asset.
- [35] As to the properties in Iran, I must first make this general observation. The evidence, perhaps unavoidably, was vague as to their exact nature and present status. However, I must do the best that I can with the evidence I have.
- [36] As to the Shahroud property (if the husband retains any interest in it which is not at all certain on the evidence one way or the other) although the wife and the daughter Susan claim to have tried to persuade the husband to use it for a family purpose, it was never so used and it seems clear that the husband, for whatever reason, never did intend it to be so used. I therefore cannot find it to be (or to have been) a family asset.
- [37] The situation with respect to the property in Teheran is different. The husband received it from his mother and it seems believable that she would intend it to be used for the benefit of her son's family, and that that was in the contemplation of all. It is clear that at the very least for a short period around 1979 to 1980 they received the benefit of some rent from it. In general, it seems to be much more closely connected to the family and I find it to be a family asset.

## DISPOSITION

- [38] It seems that the principal difference in concrete terms between the parties now is whether there should be some compensation awarded to the plaintiff for the proceeds of the Beechwood house since a large part of it was applied towards the defendant's line of credit. The plaintiff has taken what in my mind is a curious position, that the Court should award to the defendant the properties in Iran which are not only out of the geographical jurisdiction of the Court (although, of course, the Court may make in personam orders) but they are

registered in his name. He then asks the Court for an award of compensation of \$200,000 cash "or such sums as this Court considers reasonable" from the defendant which he proposes that she raise by way of a mortgage on the 49th Avenue property. How he expects that she would be able to service such a mortgage, given her present circumstances, completely escapes me.

[39] Furthermore, it must be borne in mind that the line of credit was used by the defendant, directly and indirectly, quite literally to survive. It is clear that since about 1989 the plaintiff was determined not to assist the defendant (although, granted, he had limited means).

[40] Given those things, given the defendant's far greater contributions to the Beechwood house over the years and given what seems to me to be the most sensible course to follow with respect to the properties in Iran, I believe a much better solution than what the plaintiff suggests presents itself.

[41] My order is as follows:

1. The defendant will retain her entire interest in the 49th Avenue property. However, she will make her best efforts to obtain a new mortgage without the plaintiff's guarantee. Failing that it is the order of the Court that she will indemnify the plaintiff for any liability on the present guarantee in the unlikely event that any should arise.
2. The plaintiff will retain the Maple Ridge property.
3. The defendant will retain all her interest in the Vital Nutrition Centre Ltd. business.
4. There will be no order as to the Shahroud properties.
5. The plaintiff will retain his entire interest in the Teheran property (the three lots and house).
6. The defendant will receive \$35,000 Can. from the balance of the proceeds of the matrimonial home in Iran and the plaintiff will receive the remainder. That is something less than half of the balance left to be distributed but I have taken into account the benefit received by the defendant by my reapportionment of the 49th Avenue house.
7. The rugs and furniture in Iran will be divided equally or as the parties agree. If the parties cannot agree on the appropriate division, then I order that they will be sold and the proceeds divided evenly.
8. The defendant will retain her jewellery or the proceeds, if any, of the litigation respecting it.
9. The plaintiff will retain his pensions in their entirety.
10. Each party will retain any other chattel presently in their possession.

[42] Neither party asked for maintenance at trial and there will be no order in that regard.

## COSTS

[43] There was divided success in this matter. Each side will bear their own costs.

"R.M.P. Paris, J."

The Honourable Mr. Justice R.M.P. Paris

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