

CANADA / JUDGMENT

# Muraca v. Dunsmore

2022 BCSC 279

## COURT

Supreme Court of British Columbia

## DECIDED

23 February 2022

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2022 BCSC 279 Muraca v. Dunsmore IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Muraca v. Dunsmore, 2022 BCSC 279 Date: 20220223 Docket: E56495 Registry: Kamloops Between: Franca Muraca Claimant And Alexander John Dunsmore Respondent Before: The Honourable Justice Giaschi Reasons for Judgment The Claimant, appearing in person: F. Muraca The Respondent, appearing in person: A.J. Dunsmore Place and Date of Trial: Kamloops, B.C. January 31, February 1, 2, and 3, 2022 Place and Date of Judgment: Kamloops, B.C. February 23, 2022 Table of Contents Introduction. 3 Facts. 3 Family Property. 5 Real properties. 5 Grasslands. 5 Sun Valley. 6 Raven Drive. 7 Bank Accounts. 9 Investments. 10 Vehicles. 11 Family Debts. 12 Pensions. 13 Issues. 13 Legal Principles. 13 Analysis. 17 What Properties are excluded?. 17 What Valuation Date to Use?. 19 What is the family property?. 20 What is the family debt?. 20 What is the result if Family Property and Debt are divided equally?. 21 Should there be an unequal division of family property?. 21 Duration of the relationship. 21 Agreements Between the Spouses. 22 Any other Factor 23 Calculation of Compensation Payment 24 Claim for not Sharing Rent 25 Orders. 26

## Introduction

- [1] The parties commenced cohabiting in a marriage like relationship in August 2014. The date of separation as disclosed by the pleadings was on July 1, 2018. There are no children of the marriage, although the claimant has two children, ages 8 and 7, from a previous relationship. The issues in dispute relate to what is family property and to the division of family property and debt. Of particular interest is how to treat a property purchased by the claimant towards the end of the relationship in anticipation of the parties' separation. The value of this property, in which the claimant and her children reside, has increased substantially since the date of purchase.
- [2] Before addressing the facts and issues, it will be noted that I qualified the date of separation as being "disclosed by the pleadings". I have done this because, during the claimant's opening, it became apparent that the parties may have, in fact, separated prior to July 1, 2018. Specifically, the claimant stated in her opening, and later gave evidence, that the parties were living separate and apart within the family home from approximately October 2017. Upon hearing this, I queried the claimant as to whether she intended to apply for leave to amend her notice of family claim to plead a different separation date. The claimant did

seek leave to amend but the respondent opposed any such amendment. After hearing argument, I was prepared to allow the claimant leave to amend her pleading but, on condition that the trial be adjourned to avoid any possible prejudice to the respondent. As she did not wish to adjourn the trial, the claimant withdrew her application to amend. Hence, I proceed on the basis that the separation date is July 1, 2018, as per the pleadings of both parties.

## Facts

- [3] As indicated, the parties commenced cohabiting in a marriage like relationship in August 2014 and separated on July 1, 2018.
- [4] Both of the parties owned real properties prior to the relationship. The respondent owned a house on Grasslands Boulevard in Kamloops (the "Grasslands property"), into which the claimant and her children moved upon the commencement of the relationship and which became the family home. The claimant also owned a house prior to the relationship, which she later sold during the relationship. She used part of the proceeds from that sale, to purchase an investment property at Sun Valley (the "Sun Valley property") which she rented out. She also used part of the proceeds to purchase a 2016 BMW. Towards the end of the relationship, the claimant also purchased a property on Raven Drive in Kamloops (the "Raven Drive property"). I will address these various real properties in more detail below.
- [5] The relationship between the parties was not a traditional one, in the sense that one party was the breadwinner and the other took care of the family home. Rather, at the commencement of the relationship, both parties were employed as teachers. The claimant initially earned slightly more income than the respondent as she had obtained a Masters degree in 2002. This disparity was eliminated when the respondent obtained his Masters degree during the course of the relationship. The parties continued to be employed during the relationship as teachers until 2019. In the latter part of 2017, the claimant took a partial stress leave from her teaching position and reduced her working hours to half time. In June of 2019, the claimant quit teaching completely and opened a practice as a notary public.
- [6] The non-traditional nature of the relationship extended beyond both parties being employed and having relatively equal incomes. With one exception, they also kept their properties, finances, investments, credit cards and debts separate during the course of the relationship. The exception was a single joint bank account into which they both periodically deposited funds. This account was used to pay for the family expenses including the mortgage, taxes and utilities for the Grasslands property. There may also have been a joint credit card that was used for Costco purchases but this is not relevant to any of the issues before me.
- [7] It is also noteworthy that the funds deposited in the joint account initially included a monthly deposit of \$825 from the rental of a suite located in the Grasslands property. However, commencing in September 2016, this monthly rent deposit was diverted by the respondent into his personal bank account. He did this because the claimant had by then

purchased the Sun Valley property, was receiving monthly rental income from that property and kept that rental income for her own uses. The respondent thought it was unfair that the rental income from Grasslands should be deposited into the joint account and shared when the claimant's Sun Valley rental income was not shared. Family Property

- [8] The properties and debts in issue are not really disputed by the parties, although they do dispute whether some are family property and debts. Real properties
- [9] There are three real properties owned by one or the other of the parties on the date of separation, namely, the Grasslands property, the Sun Valley property and the Raven property. Grasslands
- [10] The Grasslands property was owned by the respondent prior to and at the commencement of the relationship, and became the family home. As indicated, during the course of the relationship, both parties contributed to the mortgage payments, taxes, insurance and utilities on the Grasslands property through the joint account into which they both deposited funds.
- [11] The value of the Grasslands property, indeed of all of the real properties, was sought to be established by BC Assessments, and various appraisals. The BC Assessments assessed the value of Grasslands at \$415,000 on July 1, 2014, \$528,000 on July 1, 2018 and \$733,00 on July 1, 2021. Appraisals conducted by Frilan Appraisals LLP ("Frilan") valued it at \$430,000 as of August 1, 2014, and at \$570,000 as of May 29, 2019. The assessed values and the appraised values are not significantly different. However, I prefer to base my findings as to the value of Grasslands on the BC Assessments which are closer in time to the respective dates of commencement and separation. Additionally, the assessment on July 1, 2021 is more current than the last Frilan appraisal. I find that the value of Grasslands was:
- a) \$415,000 on the date of the commencement of the relationship;
  - b) \$528,000 on the date of separation; and
  - c) \$733,000 as of today.
- [12] The Grasslands property was and has been mortgaged throughout the period under consideration. The evidence before me is that the mortgage balance was: \$355,040 as of January 1, 2014; \$345,646 as of December 31, 2014; \$341,549 as of December 31, 2017; and \$295,216 as of December 4, 2021. Based on this evidence, I find that the amount of the mortgage as of the date of the commencement relationship was \$350,000 and is currently approximately \$295,000.

- [13] It is to be noted that the balance on the mortgage increased in 2016, something which neither party was initially able to explain. However, during the course of submissions, a document was introduced into evidence by agreement. The document indicates that, in August 2016, the respondent consolidated the mortgage with a line of credit debt in the amount of \$17,000 and a credit card debt in the amount of \$7,984. Hence, the amount owing on the mortgage increased in 2016. Sun Valley
- [14] The Sun Valley property is in the sole name of the claimant. She testified that she purchased the Sun Valley property in August 2016 for \$379,650. The total amount paid to acquire the property was \$387,331. She testified that the funds to purchase this property came from the sale of the property she owned before she and the respondent began cohabiting. The claimant was cross-examined as to whether she had documents that could prove she used funds from the sale of her previously owned property to purchase the Sun Valley property and the BMW. She replied that she did not have the documents on her but could get them.
- [15] I pause to note that the parties did not conduct any examinations for discovery and that production of documents appears to have been incomplete, on the part of both parties.
- [16] I accept the plaintiff's evidence that she used the proceeds from the sale of her previous home to purchase Sun Valley and financed the rest.
- [17] The BC Assessments on the Sun Valley property assessed the property at \$424,000 on July 1, 2018 and \$631,000 on July 1, 2021. The property was appraised at \$380,000 on June 5, 2016 and \$490,000 on May 29, 2019. Based on the purchase price and the assessments and appraisals, I find the value of Sun Valley was \$380,000 in August 2016, \$424,000 on the date of separation, and is currently \$631,000.
- [18] The mortgage on the Sun Valley property was at \$337,817 when purchased, \$320,768 as of May 19, 2018, and is currently \$286,108. Raven Drive
- [19] The Raven Drive property was purchased in May of 2018 by the claimant. The owners on the title to the property are the claimant, as to a 90% interest, and her brother, Sebastiano Muraca, as to a 10% interest.
- [20] The claimant currently resides in the Raven Drive property with her two children.
- [21] The claimant testified to the circumstances that led to her purchasing Raven Drive. She testified that there was a breakdown in the relationship between the parties that occurred in October 2017. She said that the respondent then commenced living primarily on the first floor of the family home and that she and her two children occupied the second floor. She said the respondent only came to the second floor to cook food and access the kitchen. She said the respondent ceased speaking to her and her children. She testified that she purchased the Raven Drive property because she knew they were going to separate and she needed a place where she and her children could live. She testified that although she took possession of the Raven Property on May 3, 2018, the respondent agreed that she and her daughters could remain living in the family home until the end of the school year. She also

testified that she began moving her belongings out of the family home prior to May 3, 2018. She said she moved some belongings into her mother's home and later moved more belongings from the family home into the Raven Drive property.

- [22] Importantly, the claimant was not cross-examined on her evidence regarding the deterioration of the relationship in October 2017, the reasons for purchasing the Raven Drive property, or the agreement that she and her children could remain in the Grasslands property until the end of the school year.
- [23] I accept and find as a fact that the Raven Drive property was purchased in anticipation of separation. I further accept and find as a fact that the respondent agreed she and her daughters could remain in the Grasslands property until the end of the school year.
- [24] The purchase price of Raven Drive was \$435,000. In addition to the purchase price, the claimant was required to pay the property transfer tax and mortgage insurance. The total amount required to complete the purchase was \$444,916. The claimant testified that she borrowed \$47,924.59 from her brother to purchase the property. She explained that Sebastiano is on title to secure the repayment of this loan. The balance of the funds to complete the purchase of Raven Drive came mostly from a mortgage. The total amount of that mortgage, including a mortgage insurance premium, was \$403,636.
- [25] The claimant testified that the respondent made no contributions to the purchase of Raven Drive, something which the respondent did not dispute.
- [26] The claimant's evidence as to the source of the funds to purchase Raven Drive is corroborated by contemporary documents including the statement of adjustments, mortgage documents and statements.
- [27] The claimant's evidence is also corroborated by her brother. By agreement, he gave evidence at the trial by way of an affidavit sworn November 10, 2021. In this affidavit, the brother deposes that he lent the claimant \$47,924.59 to purchase Raven Drive. He further deposes that the yearly interest payment on the loan is \$2,318.04. He deposes that the claimant has made four interest payments on the loan in the amount of \$193.17 and that the total amount owing as of April 26, 2021 was \$52,090.82.
- [28] Although the claimant is registered on title as owning only 90% of the Raven property, based on her evidence and that of her brother, it is apparent that the brother is on title merely to secure the repayment of the loan to the claimant. I find that, in fact, the claimant beneficially owns 100% of the Raven property and the brother's interest is simply as a secured lender.
- [29] Various BC Assessments and appraisals were provided in respect of the Raven Drive property. The BC assessments assessed the value of the property at \$443,000 on July 1, 2018, and at \$618,000 on July 1, 2021. An appraisal done by Frilan appraised the property at \$490,000 as of May 29, 2019.

- [30] Based on the purchase price and the assessments and appraisals, I find that the value of Raven Drive was \$435,000 on May 3, 2018, \$443,000 on the date of separation and is \$618,000 currently.
- [31] The current amount owing on the Raven mortgage is \$367,000. In addition to this amount, the claimant still owes her brother in excess of \$50,000 for his loan to purchase the property.
- Bank Accounts
- [32] Both of the parties had various bank accounts. The claimant did not lead evidence as to the balances in those accounts. The respondent included various documents from the different accounts in his book of documents. The included documents all purported to provide the balances in the accounts on various dates in May 2018, more than one month prior to when the parties separated. I do not propose to address in detail all of the various accounts. Suffice it to say that the claimant had accounts totalling \$16,788 and the respondent had accounts totalling \$16,378. Given that the amounts are very similar and that such accounts can vary significantly over the course of a month, there is no need to divide the bank account balances or to further consider them.
- Investments
- [33] The respondent testified that he had no investments, other than his pension.
- [34] The claimant does have investments but the evidence of those investments is limited and incomplete. In August of 2014, the claimant had RRSP and TFSA accounts with Investment Planning Counsel which then totalled \$4,791. By July 2018 the total amount of those investments had increased to \$11,194. The claimant did not have more recent account statements but testified that the amount now stood at less than \$2,000, as she had to use these funds to pay school fees and the property transfer tax upon the purchase of the Raven Drive property. I accept her evidence of this.
- [35] As of June 2018, the claimant also had an RRSP with Fidelity Investments that had a balance of \$8,576, and investment and TFSA accounts with RBC in the amount of \$10,433 and \$510, respectively.
- [36] Doing the best I can on the limited evidence before me, I find that the value of the claimant's investments were: \$4,800 as of the date of cohabitation; \$30,700 as of the date of separation; and, are currently at approximately \$22,000. The increase in value from the date of cohabitation to now is \$17,200.
- [37] I note that the claimant also holds an RESP with a small balance. The parties are agreed that this amount is not to be considered family property and I will not consider it further.
- Vehicles
- [38] There are three vehicles that were owned by the parties as of the date of separation.

- [39] The first vehicle is a 2006 Ford Escape owned by the respondent. I was provided with documentation purporting to establish its value. However, during the course of the hearing it became apparent that this vehicle was owned by the respondent prior to the commencement of the relationship and there was no evidence of an increase in value during the relationship. Hence, this vehicle is not family property and I will not consider it further.
- [40] The second vehicle is a 2016 BMW purchased by the claimant on September 9, 2017 for \$49,545. She paid cash of \$20,000 and the balance was financed. She testified that the source of the cash was the proceeds from the sale of her previous home. As of July 1, 2018, the amount owing on the BMW was \$27,035. There is no evidence as to the amount currently owing.
- [41] The claimant was cross-examined as to whether she had documents that could prove she used funds from the sale of her previously owned property to purchase the BMW. She replied that she did not have the documents with her but could get them. Other than this, the claimant was not challenged on her statement that she used funds from the sale of her previous home to purchase the BMW.
- [42] I accept the claimant's evidence that she purchased the BMW using \$20,000 of the proceeds from the sale of her previous home.
- [43] The respondent introduced a printout from an internet search showing that the average asking price for a 2016 BMW similar to the claimant's vehicle was \$29,385. Again, this is far from the best evidence of value but it is all that I have.
- [44] I find the value of the BMW is approximately \$29,000.
- [45] The final vehicle is a 2008 Yamaha XT250 motorcycle owned by the respondent. The respondent again provides an internet search indicating the average asking price for such a vehicle is \$1,825. I have no other evidence as to the value of this motorcycle. I find the value of the Yamaha is \$1,800. Family Debts
- [46] I have addressed the mortgage debts above. Other debts or financial obligations, of the parties as of the date of the separation, excluding amounts of less than \$100, are:
- a) A Scotia Bank line of credit in the name of the respondent in the amount of \$24,863 as of May 25, 2018;
  - b) A BMO Mastercard in the name of the respondent in the amount of \$2,890 as of May 17, 2018;
  - c) An RBC Visa credit card in the name of the claimant in the amount of \$1,435 as of May 20, 2018;
  - d) The collateral mortgage on the BMW owed by the claimant in the amount of \$27,035 as of June 30, 2018; and

- e) The loan from the claimant's brother owed by the claimant in the amount of approximately \$50,000.
- [47] In addition to the above, the respondent submits that in August 2016 he refinanced the mortgage on Grasslands and consolidated two debts with the mortgage. Those debts were a Scotiabank line of credit in the amount of \$17,000 and credit card debt of \$7,984. He submits that the amount of \$24,984 is family debt. Regrettably, there is very limited evidence of exactly what transpired in August 2016. The evidence consists of a single document by a solicitor relating to the payout of funds. I infer that the line of credit then paid off was the same line of credit that had a balance of \$24,863 as of May 25, 2018. However, I do not know what the balance was on that line of credit as of the date the parties began cohabiting or whether any balance had been paid off. The same can be said of the credit card. I infer that it is the same RBC visa card that had a balance of \$1,435 as of May 20, 2018, but I do not know what the balance was on that card at the commencement of the relationship or whether any balance had been paid off. In my view, the respondent has failed to prove that these are family debts.
- [48] I note that the respondent concedes the mortgage debt on Grasslands is not family debt.
- Pensions
- [49] Both parties had teacher's pensions at the commencement of the relationship. These pensions increased in value during the relationship and the parties initially sought an order for the division of the pensions. However, by the end of the trial, it was apparent that the pensions had increased by approximately the same amount and there was no utility in an order dividing them. The parties agreed that the requests for pension division were withdrawn. Accordingly, I will not address pensions further.

## Issues

- [50] The issues are:
- a) What is the family property and family debt?
    - i. Is the Sun Valley property excluded? ii. Is the Raven property excluded? iii. Is the BMW excluded?
  - b) Should there be an unequal division of family property and debt? Legal Principles
- [51] Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] addresses "Property Division". Under s. 81 of the FLA, each spouse is entitled to a presumptive one-half undivided interest in each family asset as a tenant in common upon separation, regardless of their respective use or contribution. However, the presumptive one-half undivided interest under s. 81(b) is "subject to an agreement or order that provides otherwise".

- [52] Section 84 of the FLA provides that family property is all real and personal property owned by one or both spouses at the date of separation. Family property also includes property acquired after separation but only if the post separation property is derived from family property owned at the time of separation.
- [53] Certain property is excluded from family property pursuant to s. 85 of the FLA. The excluded property is:
- (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).
- [54] It is to be noted that if an excluded property increases in value during the relationship, the increase in value is family property pursuant to s. 84(2)(g) of the FLA.
- [55] Family debt is defined in s. 86 of the FLA as including all financial obligations incurred by a spouse during the period from the commencement of the relationship to the date of separation, and also includes financial obligations incurred after the date of separation, if incurred for the purpose of maintaining family property.
- [56] Pursuant to s. 87 of the FLA, unless there is an agreement or it is otherwise ordered, all family property is to be valued according to its fair market value at the date of the hearing. This means that the parties presumptively share in any post-separation increases in the value of family property: *Jean Louis v. Jean Louis*, 2020 BCCA 220, at paras. 33-34 [*Jean Louis*]. Section 87 recognizes a discretion to order a valuation date different than the date of the hearing. However, setting the valuation date at another date is effectively a reapportionment or unequal division of property and should only be done where there is compelling evidence of significant unfairness: *Rudyak v. Bekturova*, 2018 BCCA 414, at para.

35; Jean Louis, at para. 36; Kumagai v. Campbell Estate, 2018 BCCA 24 at para. 76.

- [57] Pursuant to s. 95 of the FLA, the court may order an unequal division of family property or debt but only if an equal division would be "significantly unfair". The factors to consider in determining whether family property should be divided unequally are set out in s. 95(2) and (3).
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
  - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
  - (c) a spouse's contribution to the career or career potential of the other spouse;
  - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
  - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
  - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
  - (g) the fact that a spouse, other than a spouse acting in good faith,
    - (i) substantially reduced the value of family property, or
    - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
  - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
  - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [58] The objective of s. 95 is to restrain judicial discretion: Jean Louis, at para.44.

- [59] The meaning of "significantly unfair" was addressed in *Singh v. Singh*, 2020 BCCA 21, at paras. 128-134 [Singh]. Justice Garson wrote that the threshold is high. There must be persuasive reasons, i.e. something objectively unjust, unreasonable or unfair in an important or substantial sense, before property will be divided unequally.
- [134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczevska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.
- [60] The scope of s. 95, in particular s. 95(2)(i), was also addressed in *Singh*. Although s. 95(2)(i) is worded broadly, Garson J. held that the meaning of the phrase "any other factor" was constrained by the *ejusdem generis* rule of statutory construction and allowed only a consideration of factors relating to the economic characteristics of a spousal relationship.
- [138] Applying these requirements to the provision at issue, if the rule applies, the class cannot be any factor "that may lead to significant unfairness" as this would violate the second requirement as set out by Sullivan. The other factors enumerated in s. 95(2) suggest consideration of aspects of the relationship between the spouses, including its duration, the terms of any agreement, as well as the characteristics of family assets and debt and how the spouses have influenced their value. One of the considerations in s. 95(2)(g) includes an analysis of a spouse's good faith or motive. These factors are broad. Nevertheless, in my view, they all relate to a limited class, namely, the economic characteristics of a spousal relationship.
- [61] In *Cook v. Cook*, 2021 BCCA 19, Justice Wilcock held that a financial disparity because of an inheritance, or other excluded property, does not give rise to unfairness justifying an unequal division of family property. He also confirmed that a financial advantage unrelated to the economic characteristics of a spousal relationship is not a relevant consideration.
- [48] The principle that animated the judgment of this Court in *Pasch* is still valid. We ought not to find unfairness in the outcome contemplated by the legislation and that is, therefore, presumptively fair. Under the current Family Law Act regime, "[t]he starting point in the division of property analysis already applies significant exclusions": V.J.F. at para. 10, citing *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 60. An unequal starting point suggests that an unequal end point is similarly contemplated by the statutory regime.

- [50] In my opinion, the trial judge erred in law in finding that it would be significantly unfair to equally divide family property because of a disparity arising from events unrelated to the parties' marriage. Financial advantage alone, unrelated to the economic characteristics of a spousal relationship, does not justify a departure from the usual rule. Unless necessary to give effect to an order for compensatory support, neither the unequal division of family property, nor the division of excluded assets, was called for by the Act.
- [62] Unequal contribution after separation can be a relevant consideration in reapportionment: *Jaszczewska v. Kostanski*, 2016 BCCA 286, at paras. 51-52.
- [63] With these principles in mind, I now address the issues in dispute.

## Analysis

### What Properties are excluded?

- [64] In the circumstances of this case, the question of what is family property depends, in part, on what properties are excluded and on the appropriate valuation date for the real properties. I will address these issues first.
- [65] It is undisputed that Grasslands was owned by the respondent prior to the relationship. The value of Grasslands as of the date of the commencement of the relationship is therefore excluded property pursuant to s.85(1)(a) of the FLA. The excluded amount is \$415,000.
- [66] The increase in the value of Grasslands since the date of cohabitation is family property pursuant to s. 84(2)(g) of the FLA.
- [67] The Sun Valley property was purchased during the relationship and is, therefore, *prima facie*, family property under s. 84(1) of the FLA. However, the funds used to purchase it came, in part, from the sale of the claimant's previous home which she owned prior to the commencement of the relationship. That home was excluded property pursuant to s. 85(1)(a) of the FLA and, pursuant to the provisions of s. 85(1)(g), the proceeds from that sale used to purchase Sun Valley remain excluded property. The amount of the excluded property is \$49,514, being the difference between the total amount paid to acquire the property (\$387,331) and the amount financed (\$337,817).
- [68] Funds from the sale of the claimant's previous home were also used to purchase the 2016 BMW. I have found these to be in the amount of \$20,000. The value of the BMW is approximately \$29,000. \$20,000 of this amount, is excluded property.
- [69] Finally, the balance in the claimant's RRSP and TFSA accounts of \$4,791 at the commencement of cohabitation are excluded funds pursuant to s. 85(1)(a) of the FLA.

- [70] The claimant also submits that the Raven property is excluded but her submissions did not address how it came within any of the classes of excluded property in s. 85. I find that the Raven property is not excluded but I will address it further in relation to whether there should be an unequal division of family property. What Valuation Date to Use?
- [71] I now address what valuation date to use. As I have indicated, pursuant to s. 87 of the FLA, family property is ordinarily valued as of the date of the hearing. However, a different valuation date can be chosen if there is compelling evidence of significant unfairness.
- [72] The claimant submits that I should value the real properties as of the date of separation. I note that the claimant appears to be of the view that the calculations will work out to her benefit if the real properties are valued as of the date of separation. I believe she is mistaken in this.
- [73] The respondent submits that there is no basis for adopting a valuation date other than the date of the hearing.
- [74] The claimant primarily relies on the fact that real properties have increased in value since the date of separation because of market forces. She says that the increase has nothing to do with anything done by the parties and that it would be unfair to equally divide the increases when she contributed to the mortgage and maintenance of Grasslands whereas the respondent did not contribute in any way to Sun Valley and Raven.
- [75] I do not agree with the claimant's submissions. It is no doubt true that property values have increased since the date of separation due to market forces. But they also increased in value during the period of the relationship because of market forces. Additionally, both parties have benefited from these increases in value as both own real property. There is no unfairness arising from the increases in value due to market forces that justify selecting a valuation date different from the date of the hearing. This may, however, be a relevant consideration in relation to a reapportionment under s. 95, which I address below.
- [76] The second part of the claimant's submission is that she contributed to Grasslands whereas the respondent did not contribute, in any way, to either the Raven Drive or Sun Valley. I accept that this is true to the extent that the respondent did not directly contribute to Raven Drive and Sun Valley but this is again a factor better considered in relation to reapportionment under s. 95. It is not relevant to the choice of a valuation date.
- [77] In the circumstances of this matter, I am simply not satisfied that there is compelling evidence of significant unfairness that justifies choosing a valuation date other than that prescribed by the FLA. Hence, the valuation date is the date of the hearing. What is the family property?
- [78] The family property consists of the three real properties, the claimant's investments, the 2016 BMW and the Yamaha XT50. The table below summarizes the family property, identifies the excluded portion and allocates the non-excluded property to the party that is the legal owner. Property Value Excluded Portion Claimant Respondent Grasslands \$733,000

\$415,000 \$318,000 Sun Valley \$631,000 \$49,514 \$581,486 Raven \$618,000 \$618,000 Claimant's Investments \$22,000 \$4,791 \$17,209 2016 BMW \$29,000 \$20,000 \$9,000 Yamaha \$1,800 Totals \$1,225,695 \$319,800 What is the family debt?

- [79] The family debt consists of the Sun Valley and Raven mortgages, the loan from the claimant's brother, the BMW chattel mortgage and the parties' credit cards and lines of credit. The table below summarizes the family debt and allocates the debt to the party that is legally responsible for it. Debt Claimant Respondent Sun Valley Mortgage \$286,108 Raven Mortgage \$367,000 Scotia L/C \$24,863 BMO Mastercard \$2,890 RBC Visa \$1,435 BMW finance loan \$27,035 Loan from Brother \$50,000 Totals \$731,578 \$27,753 What is the result if Family Property and Debt are divided equally?
- [80] If family property and debt are divided equally between the parties, the claimant would be required to make an equalization payment to the respondent in the amount of \$101,035, as illustrated by the below calculation. Claimant Respondent Assets \$1,225,695 \$319,800 Debts (\$731,578) (\$27,753) Net \$494,117 \$292,047 Equalization Payment (\$101,035) \$101,035 \$393,082 \$393,082 Should there be an unequal division of family property?
- [81] The claimant submits that the Sun Valley and Raven properties, should not be divided. In support of this submission she relies on the fact that the parties kept their assets separate and that the respondent did not contribute to the purchase or maintenance of either of these properties.
- [82] The respondent simply submits that all properties should be divided equally as is the presumption under the FLA.
- [83] The factors that I am allowed to consider in relation to whether an equal division of family property would be substantially unfair are set out in s. 95(2) of the FLA. Not surprisingly, given that both parties are self-represented, their respective submissions did not focus on these factors. Nevertheless, they are the factors that I must apply. In my view, the factors set out in ss. 95(2) (a), (b), (d) and (i) are particularly relevant. Duration of the relationship
- [84] Section 95(2)(b) of the FLA sets out that the duration of the relationship between the parties is a relevant factor. This is a particularly significant factor in the circumstances of this case. The relationship was not particularly long. It was slightly less than four years in duration.
- [85] In *Chapman v. Cuthbert*, 2021 BCSC 1, at para. 67, Justice Shergill noted that a relationship of approximately four years or less, has been a factor that has been given considerable weight in supporting judicial reapportionment.
- [86] It is also useful to compare the duration of the relationship with the time that has elapsed since separation. The period of cohabitation was approximately three years and eleven months and the time that has elapsed since separation is three years and seven months. The post separation period is approximately equal to the period of time the parties cohabited. Moreover, during this post-separation time period, the real properties have increased substantially in value. Grasslands increased in value by \$318,000. Sun Valley increased in

value by \$251,000. Raven Drive increased in value by approximately \$170,000. In comparison, the increases in value during the course of the relationship were relatively small.

- [87] In my view, the combination of the relatively short duration of the relationship, the fact that the post separation period is almost equal to the relationship period, and the large increases in real property values during the post separation period, militate in favour of an unequal division of property. *Agreements Between the Spouses*
- [88] Section 95(2)(b) of the FLA sets out that the terms of any agreement between the spouses is a relevant factor. Neither of the parties specifically addressed this factor and it is clear that there was no express agreement between the parties that there would be no co-mingling or sharing of assets and debts. However, it is apparent that the parties kept their properties, finances, investments and debts completely separate. With the exception of the family home, neither party contributed to the assets of the other or paid the debts of the other. This conduct does not establish an agreement between the parties but is nevertheless a relevant consideration under s. 95(2)(i).
- [89] More significantly, I find as a fact that there was an agreement between the spouses in relation to the Raven Drive property. The plaintiff testified to an agreement that she and her children could remain in the Grasslands property until the end of the school year. I accept her evidence of this and further find that, in the absence of such an agreement, she and her children would have moved out of the Grasslands when the Raven Drive property was purchased. This is a relevant consideration as, absent the agreement, the Raven Drive property would not have been family property. *Any other Factor*
- [90] Section 95(2)(i), permits the consideration of any other factor, other than the objectives of spousal support. Although broadly worded, s. 95(2)(i) allows only a consideration of factors relating to the economic characteristics of a spousal relationship.
- [91] In my view, a significant additional factor is the fact that the Raven property was purchased by the claimant in anticipation of separation and with the intent that she and her daughters would move into it at the end of the school year. Although technically family property, the claimant submits it would be significantly unfair to divide this property given the reason for its purchase and its current use.
- [92] A similar issue was addressed by Justice DeWitt-Van Oosten, as she then was, in *O.O. v. L.M.*, 2017 BCSC 1411. In that case, the respondent's claim to an interest in property that had been purchased by the claimant "in anticipation of separation" was dismissed. At paras. 200-202, DeWitt-Van Oosten J. wrote:

- [200] However, I am satisfied that to do anything other than award the claimant 100% of the value of the Surrey townhouse would be "significantly unfair": s. 95(1). This property was acquired only 13 days prior to separation. According to the claimant's evidence, she had already turned her mind to separating. The townhouse was purchased in anticipation of the claimant living there, likely without the respondent. Although the marriage-like relationship had not formally ended, it was moving in that direction.
- [201] The respondent acknowledges that he did not contribute any funds toward the townhouse. Nor were any "family" funds used to buy the property. I accept the claimant's evidence that the monies for this property arose out of the sale of 948 rue de la Rochelle in Boucherville, Quebec. I find as a fact that until lent to the claimant in January 2015, these proceeds belonged to the claimant's mother. Through her banking documentation, the claimant has shown a traceable nexus between the sale of the Boucherville home and the purchase of the Surrey townhouse. Since separation, 194A Street has been the exclusive residence of the claimant and K.M. The respondent does not assist with the costs; or contribute to its maintenance and preservation. The claimant is solely responsible for any debt associated with this property.
- [202] I dismiss the respondent's claim for a division of 37332-194A Street.
- [93] I am of the same view as DeWitt-Van Oosten J. To do anything other than award the claimant 100% of the Raven property would be significantly unfair. This property was purchased for the sole reason that the relationship had broken down and it was purchased so that the claimant and her daughters had a place to live once they moved out of Grasslands. Moreover, as in *O.O. v. L.M.*, the purchase was entirely financed by the claimant.
- [94] I am satisfied, based on the above factors and for the reasons expressed, that it would be significantly unfair to apportion the Raven property equally between the parties. It is to be re-apportioned 100% to the claimant.
- [95] Concerning the Sun Valley property, I am not satisfied that there should be a re-apportionment. The FLA contemplates that family property is to be equally divided between the parties, regardless of the respective contributions of the parties. Sun Valley was purchased as an investment during the course of the relationship and increased in value during the course of the relationship. There is nothing unjust in requiring that its value be shared between the parties. Calculation of Compensation Payment
- [96] When the value of the Raven property, and the related mortgage and loan are removed from the calculations, the claimant is required to make an equalization payment to the respondent in the amount of \$535, as indicated in the below calculation: Property/Debt Value Excluded Portion Claimant Respondent Grasslands \$733,000 \$415,000 \$318,000 Sun Valley \$631,000 \$49,514 \$581,486 Investments \$22,000 \$4,791 \$17,209 2016 BMW \$29,000 \$20,000 \$9,000 Yamaha \$1,800 Sun Valley Mortgage (\$286,108) Scotia L/C (\$24,863) BMO Mastercard (\$2,890) RBC Visa (\$1,435) BMW finance loan (\$27,035) Assets - Debts \$293,117 \$292,047 Equalization Payment (\$535) \$535 \$292,582 \$292,582

- [97] In my view, this is an appropriate and just result and in keeping with the principle of equal division under the FLA, except to prevent significant unfairness. Claim for not Sharing Rent
- [98] The claimant has additionally requested an order that the respondent pay her one-half of the rental payments that were made from September 2016 to July 2018 and were deposited into the respondent's account as opposed to the joint account. The amount would be \$9,075 (22 x \$825/2). I decline to make any such order. The only basis for such a claim could be that there was an agreement between the parties regarding the deposit of rent but the evidence fell far short of establishing any such agreement.
- [99] Additionally, this request is partly based on the assumption that the parties contributed unequally to the joint account. However, the evidence did not establish the relative contributions of the parties to the joint account. I am unable to determine that the respondent's contributions were less than the claimant's contributions or that the respondent's contributions did not make up for the missing rent.
- [100] Finally, if considered in the context of a s.95 re-apportionment, I am not satisfied that it was significantly unfair for the respondent to retain the rental income from the Grasslands' suite when the claimant did the same in respect of the rental income from Sun Valley.

## Orders

[101] I make the following orders:

- a) The claimant shall pay compensation in the amount of \$535, within 60 days, to the respondent for the purpose of dividing family property;
- b) The parties shall have sole and exclusive title to, and ownership of, the real properties and chattels in their respective names;
- c) The parties shall each be solely responsible for the debts in their respective names; and
- d) On consent, the pensions of the parties are not to be divided.

[102] The parties have leave to speak to me regarding an order as to costs, if necessary. Otherwise, success having been divided, each party is to bear their own costs. "Giaschi J."

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