
CANADA / JUDGMENT

Nguyen v. Nguyen

2013 BCSC 812

COURT

Supreme Court of British Columbia

DECIDED

8 May 2013

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2013 BCSC 812 Nguyen v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nguyen v. Nguyen,

2013 BCSC 812

Date: 20130508

Docket: E30541

Registry: New Westminster

Between:

Mary Phang Nguyen also known as

Naree Lengsawat

Claimant

And

Dong-Quoc Nguyen, also known as Dung-Quoc Ngyuen and

Mediterranean Bakery Inc.

Respondents

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Claimant:

R. Tretiak, Q.C.

Counsel for the Respondents:

J.C. Fiddes

Place and Date of Trial:

New Westminster, B.C.

February 27 - 29, 2012

March 1 - 2, 2012

November 8 - 9, 2012

Place and Date of Judgment:

New Westminster, B.C.

May 8, 2013

- [1] Issues abound in this unfortunate family dispute and are largely the result of a family living beyond its means. The disputed issues are the division of family assets, how to appropriately determine income to establish the quantum of child and spousal support, residency of the children of the marriage, and the fairness of a "Marriage Agreement" entered into prior to the final separation before the ultimate breakdown of the marriage. I will firstly review the history of this dispute before proceeding with the analysis of the issues.
- [2] Counsel prepared and agreed upon a comprehensive statement of facts which was filed as an exhibit and has been very helpful in reviewing the issues.
- [3] Mediterranean Bakery Inc. ("the Bakery") has been joined in this matter given that the company is owned by Mr. Nguyen, has been the sole source of income for the family for several years, employs some of the children, and because the financial affairs of the Bakery are significantly intertwined with the finances of both Mr. and Ms. Nguyen.

Factual Background

- [4] Mr. and Ms. Nguyen immigrated to Canada from Southeast Asia in 1983. There is a discrepancy in the evidence in that the Marriage Agreement states that the couple married in December 1984, while the agreed statement of facts states that they married in December 1988 while living in Winnipeg. However, nothing turns on this. The parties first separated in 1991 when Ms. Nguyen moved to Montreal. They later reconciled and moved to the Vancouver area in 1993 and have since continued to reside in Vancouver.

- [5] Ms. Nguyen studied to be a nurse's aide in Manitoba in the mid 1980s and worked as a nurse's aide in Winnipeg until 1991 with some time off for maternity leave in late 1988 and 1989 when the couple's first son, Daniel, was born. She also worked briefly as a nurse's assistant while in Montreal in 1991. Since 1993 Ms. Nguyen has been primarily occupied with raising the couple's children, save for a period during 2002 and 2003 when she worked at the Bakery.
- [6] Mr. Nguyen was trained as an electrician in South Vietnam but, upon moving to Canada, began working as a baker and eventually took a position as a bakery supervisor with Safeway in Winnipeg in 1989. Upon moving to Vancouver in 1993, Mr. Nguyen worked briefly for one bakery before accepting a position at the Mediterranean Bakery in 1994. At that time, the Mediterranean Bakery was a business owned by a person referred to only as "Marco" in these proceedings.
- [7] In 2001 Mr. Nguyen purchased the business from Marco and incorporated Mediterranean Bakery Inc., ie. "the Bakery" and has owned and operated the business since that time. Although Ms. Nguyen was stated to be a director and officer on some company documentation in 2005, the corporate records indicate that Mr. Nguyen has been the sole shareholder, officer and director since incorporation of the business in 2001.
- [8] The marriage produced four children: Daniel, born October 27, 1988 (now 24 years old), Johnny, born January 9, 1994 (now 19 years), Edward, born April 20, 1995 (now 18 years) and Diane, born April 7, 1996 (now 17 years).
- [9] Ms. Nguyen is also the mother of Scott Nguyen, a child of a previous marriage. Scott is now 30 years of age and lives with Ms. Nguyen's brother. During the trial, there was evidence of Ms. Nguyen saving, over many years, the support payments made to her for Scott by Scott's biological father. The parties have now agreed that these funds were held for Scott's future; however, there is an outstanding issue as to the amount due to Scott directly.
- [10] Upon moving to Vancouver in 1993 the parties rented several homes until they purchased the current family home located at E. 48th Ave, Vancouver in 2001. In evidence is an appraisal of the family home which assigned a value of \$1,260,000 to the home, against which there is one registered mortgage with \$181,330.10 owing as of the start of the trial in March 2012.
- [11] With some minor exceptions, Ms. Nguyen has continued to live in the family home since the parties separated on January 2, 2006. At the time of trial, Daniel, Johnny and Edward were residing in the family home with their mother. Pursuant to an order of Mr. Justice Leask of July 2, 2010 the parties were to live in the family home on alternating weeks with the other spouse occupying, during his or her "off" week from the family home, a basement apartment previously rented by Mr. Nguyen. That order has not been strictly followed by the parties; however, it provides the explanation for any periods since 2006 where Ms. Nguyen has resided outside the family home.

- [12] One matter I am being asked to decide is the primary residence of both Johnny and Edward. In that regard and to avoid those children having to make a decision as to with whom they would live, the parties agreed to have a "Views of the Child Report" prepared. That report, prepared by Mr. Bob Finlay, has been filed as an exhibit in this trial.
- [13] Diane has, for the most part, been living in the apartment with her father. The claimant is content with that arrangement continuing so long as Diane wishes.
- [14] Each of the parties has at their disposal a late model Mercedes-Benz. The vehicle driven by Mr. Nguyen is a 2010 Mercedes-Benz ML 350 which is valued at \$44,000 to \$45,000 and against which a loan is registered with a balance of just over \$16,000. The vehicle driven by Ms. Nguyen is a 2010 Mercedes-Benz SLK 350 which was purchased by the Bakery but is now registered in her name. The latter vehicle is appraised at between \$37,000 and \$38,000 and there is a charge registered against the same in the amount of slightly less than \$29,000. It is agreed that both of these vehicles are family assets.
- [15] One of the primary issues in this case is the valuation of the Bakery. Although there was no admission that the Bakery is a family asset, both counsel have approached this matter as if the Bakery were a family asset, and in my view, rightly so, as it is clearly established on the evidence.
- [16] There is an appraisal in evidence which I will refer to later in these reasons. Complicating the valuation of the Bakery are many payments which have been made by the Bakery over several years for the personal benefit of the parties and their children. These payments also have the potential to affect the income to be imputed to both Mr. and Mrs. Nguyen. As well, the Bakery has engaged in many cash transactions, in terms of both revenue and expenses, which have not been recorded and which further complicate any efforts to accurately value the Bakery.
- [17] Also in connection with the operations of the Bakery, the evidence revealed that some receipts received for the sale of bakery goods were deposited directly to Mr. and Ms. Nguyen's joint bank account. Exactly how much money was diverted in this manner is unknown.
- [18] The Bakery's Visa card was also used by Mr. Nguyen to pay some of his legal fees (amounting to over \$36,000 as of the start of the trial). Those funds have not been returned to the Bakery.
- [19] It is anticipated that the Bakery has accrued a significant liability for taxes due to the Canada Revenue Agency (the "CRA"), the amount of which is not currently known. There may also be a liability to the CRA for penalties and interest which are similarly unquantifiable at this time.
- [20] Each of the children has been on the payroll of the Bakery from time-to-time. Currently only Edward and Johnny work at the Bakery. At times, cheques written by the Bakery were made out to the children, but the children did not receive the funds from those cheques because the cash received on payment was used to pay overtime wages to employees who would not

work overtime if the amounts to be paid were included in their income. Mr. Nguyen implemented that process which continued for several years. For example, in 2010 Mr. Nguyen wrote cheques to the children amounting to \$49,515; how much of that sum was actually received by the children is unknown.

- [21] Suffice it to say that the parties' complacency with maintaining loose financial records coupled with Mr. Nguyen's disregard for maintaining separation between his business and family finances has caused undue complexity in resolving the matters currently before the Court.
- [22] Throughout the marriage, Ms. Nguyen had a penchant for travel. To pay for the travel costs, she would make purchases on her credit card and the balances would be paid off by Mr. Nguyen and/or the Bakery. On one occasion, Ms. Nguyen travelled to Europe with all costs paid by Mr. Nguyen and the Bakery. On that trip, luxury goods with a total value of approximately \$30,000 were purchased by Ms. Nguyen, and as a result of her non-disclosure of these purchases upon returning to Canada she incurred significant penalties, duties and other expenses; all of which were eventually paid off by funds supplied by Mr. Nguyen and the Bakery.
- [23] In December 2009, Mr. Nguyen withdrew \$30,000 from the joint bank account of the parties; that withdrawal remains unaccounted for. There have been other exceptional transactions which I will refer to as necessary during these reasons.
- [24] As mentioned, the parties separated on January 2, 2006 but both continued to reside in the family home. When reconciling during the summer of 2006, the parties entered into a "Marriage Agreement". That agreement, signed in July 2006, primarily dealt with the division of family assets should the parties separate once again in the future.
- [25] The parties separated for the last time on November 29, 2010.
- [26] One of the most significant issues in this case is the enforceability of the Marriage Agreement, or rather, whether the circumstances warrant a reapportionment of assets pursuant to section 65 of the Family Relations Act, R.S.B.C. 1996 c. 128 (FRA) on the basis that the apportionment of assets under the Marriage Agreement would be unfair. While the FRA was recently repealed and replaced by the Family Law Act, S.B.C. 2011, c. 25, section 252(2) of the new Act provides that, absent an agreement between the parties, proceedings relating property division already before the courts are to be determined pursuant to the now repealed FRA.
- [27] While the case law is clear that the division of assets is the first issue to be determined, in a case where reapportionment is sought, it is sometimes necessary to first address the issues which will factor into the analysis which must be considered pursuant to the framework set out in the 2004 Supreme Court of Canada decision of *Hartshorne v. Hartshorne*, 2004 SCC 22.

[28] The parties disagree as to the value of the Bakery and the income of Mr. Nguyen. The primary residency of the two younger boys and whether Daniel remains a child of the marriage are also at issue, as are the funds retained from previous support payments received in relation to Scott. I will address these issues before determining the division of property and any entitlements to support.

Valuation of the Bakery

[29] The principal evidence regarding the value of the Bakery is that of Ronald Tidball, who was qualified as an expert business evaluator. Mr. Tidball has been qualified as a business evaluator on many occasions by members of this Court and has extensive experience in business evaluations for companies in many different industries or trades.

[30] Mr. Tidball prepared two reports which were admitted into evidence. In both reports, he explained that he was providing a "calculation report" as opposed to a valuation or comprehensive report. A calculation report is the type of report that involves the least detailed review and does not involve an independent verification of the accuracy of the financial statements. I refer to the type of report due to some of the evidence received at trial including: payments to the company being deposited to the joint account of the parties, cash payments received by the company which were used for purchases of various items (and not recorded) and other dubious practices such as issuing cheques to the children and then using the cashed cheques to pay employees of the Bakery. Mr. Nguyen testified that some employees would not work overtime if they were paid by a conventional pay cheque with the usual remittances and so they were paid cash from the cheques cashed by the children. All of these unusual occurrences result in a situation where it is virtually impossible to compile comprehensive and accurate financial statements with respect to the Bakery.

[31] The first report, dated June 27, 2011 concludes that the fair market value of the Bakery was \$350,000 which included the value of the strata unit where the Bakery carries on business. The appraised value of that unit was \$180,000 as of June 2, 2011. This report was based on the financial statements for the Bakery for the year ending December 31, 2010.

[32] The second report by Mr. Tidball is dated February 16, 2012 and states Mr. Tidball's conclusion that the fair market value of the shares of the company amounted to \$285,000. The 2012 Tidball report was based on the 2011 financial statements for the Bakery and the financial information relied upon in the 2011 Tidball report including the appraisal of June 2, 2011.

[33] Mr. Tidball applied the "valuation approach" as a generally accepted method for determining the fair market value of the business by valuing the net assets at fair market value and the capitalization of maintainable earnings or cash flows. Mr. Tidball estimated the adjusted pre-tax earnings of the Bakery of approximately \$53,000 for 2011 after adjustments for Mr. Nguyen's wages, fair market value for the rental of the bakery premises

and adding to the income the amount paid on account of legal fees for these divorce proceedings incurred by Mr. Nguyen. He then came to a determination of after-tax earnings for 2011 of approximately \$45,000.

- [34] Mr. Tidball used a 40% capitalization rate (ie. an earnings multiplier of 2.5) with an after-tax income of \$45,000 to come up with a value of the Bakery of \$113,000. These figures took into consideration factors listed by Mr. Tidball of the comparative ease of entry into the bakery business, the business risks of the reliance and dependence on the skills and contacts of Mr. Nguyen and the reliance in the report of only two years of historical earnings. Taking the value of the bakery of \$113,000 and the other assets and liabilities as reviewed by Mr. Tidball, in the more recent report he estimated the shares of the company to have a value summary of \$285,000.
- [35] Significant items arising from the evidence of the finances of the Bakery and the two Tidball reports and Mr. Tidball's evidence at trial include:
- a) Mr. Nguyen works in the Bakery for 10 to 14 hours per day, 7 days a week. He is clearly the one and only driving force behind the company which, I believe, derives its value almost solely as a result of the efforts and skills of Mr. Nguyen. Mr. Tidball determined a fair annual wage to Mr. Nguyen in 2011 of \$80,000 based in part upon his hours worked at an hourly rate of \$20 which is the rate the Bakery was paying to other bakers. Mr. Nguyen's actual wage from the Bakery in 2011 was \$108,000 and as a result, the difference between the actual wage (\$108,000) and the fair annual wage as determined by Mr. Tidball (\$80,000), ie. \$28,000, should be added to the value of the Bakery. I agree with that calculation.
 - b) In 2010 Mrs. Nguyen did not work for the Bakery but did receive employment income from the company of \$13,490 and spousal support payments of \$12,000. Mr. Nguyen testified that the support payments were made by the Bakery to Mrs. Nguyen but that he has repaid those funds to the company. At trial, Mrs. Nguyen had not filed a 2011 income tax return however it was estimated her income would be \$24,000 all of which would be from spousal support. It was not clear in the evidence whether that amount was paid by the Bakery and if so, whether the Bakery has been reimbursed.
 - c) According to the financial statements prepared by the accountants for the Bakery, in 2010 the Bakery earned a net income of \$99,877 before taxes and \$86,393 after taxes. In 2011 the Bakery incurred a net loss of \$8,286 before taxes and \$7,051 after taxes. Previously, in 2009, the net income of the Bakery before taxes was \$29,401 and \$34,082 after tax.
 - d) In 2011 the Bakery's revenue was \$630,400, a decrease from the 2010 fiscal year of approximately \$40,000 which was attributed to the loss of a one of the Bakery's customers. Mr. Nguyen testified that due to the increased cost of ingredients and other costs, he expected Bakery profits to decrease.

- e) In 2011 the Bakery paid legal fees for Mr. Nguyen for the costs of these family proceedings and for the Bakery, which is also a party to this family proceeding. To the extent that the Bakery paid legal fees incurred by Mr. Nguyen, the amount of those payments are to be added to the income of the Bakery. To the extent that the payments were made on account of obligations for fees of the Bakery, the amount of those payments are legitimate expenses of the Bakery. The total amount paid was \$44,000 which was included in the value of the Bakery, according to Mr. Tidball. Mr. Tidball, on being advised that the full amount of these legal fees were for the divorce proceedings, was not aware that the company was a party to this proceeding. I find that some portion of those legal expenses would be incurred by the Bakery, in particular as the costs relate to a valuation of the company for the purposes of this proceeding, but I am of the opinion that no more than 20% or \$8,800 could be expensed by the Bakery. Therefore, as Mr. Tidball had already attributed the full amount for legal fees to Mr. Nguyen personally, by adding that amount to the income of the Bakery, there must now be a deduction of \$8,800 adjusted by a multiplier of 2.5 (ie. \$22,000) based upon my reallocation of a portion of legal fees as a legitimate expenditure of the Bakery.
- f) In the introductory section of these reasons I stated that Mr. Nguyen was the owner of a 2010 Mercedes-Benz ML 350 vehicle. The monthly payments due under the financing agreement for that vehicle during 2011 amounted to a year total of \$15,109.20 and the company claimed the full amount as a business expense. Counsel for Ms. Nguyen argues that the entire amount of those payments should be added to the value of the Bakery together with a multiplier of 2.5 based on a 40% capitalization rate. I agree that to the extent that this vehicle was operated for personal use, the amount attributable should be added to the value of the Bakery. Mr. Nguyen testified that approximately 60% of the use of the vehicle would have been related to the business use for the purposes of operating the Bakery and I accept that estimate. Accordingly, only 40% of the payments on account of the financing of the vehicle should be added to the value of the Bakery which by my calculation amounts to \$6,043.68. Taking into account the earnings multiplier of 2.5 used by Mr. Tidball, which I agree represents an appropriate capitalization rate of 40%, this amounts to a total increase in the value of the Bakery of \$15,109.20.
- g) Ms. Nguyen alleges that in 2011 \$17,500 from the Bakery funds was used to purchase a vehicle for their son, Johnny. Counsel for Ms. Nguyen submitted this payment is not shown by the Bakery's accountant to be assigned to the shareholder loan account of Mr. Nguyen, however, the General Ledger for the Bakery reveals an entry in an amount of \$17,500 dated December 31, 2011 in favour of Edward Nguyen and records this payment with a notation that it was for Edward to purchase a vehicle. Both counsel agree that the vehicle purchased for the above price was for Johnny Nguyen and not Edward Nguyen and so the General Ledger entry is presumably in error insofar as it refers to Edward. The description further shows the transaction recorded under salary and sub-contracts and is included in the amount "due from shareholder" which totals \$92,996.55 in the General Ledger, ie. from my understanding of the General Ledger, the \$17,500 amount was in fact recorded as part of the shareholder's loan. As the company has recorded this amount as part of the shareholder's

loan there is no requirement to adjust upwards the value of the company as a result of this transaction. Before leaving this point, Mr. Nguyen testified that he had purchased the vehicle on his personal Visa card. From the General Ledger, it appears as though the Bakery must have made a payment for the vehicle or there would be no need for the entry referenced above. In any event, as stated above, the use of Bakery funds to purchase the vehicle appears to have been properly recorded by the company's accountant and included in the shareholder's loan and therefore, the value of the Bakery shares need not be adjusted.

h) Mr. Tidball stated, at page 3 of his report of February 16, 2012 that:

Our valuation excludes the amount due to the Company from shareholder of \$92,997 (rounded), which we assumed represents funds removed from the Company by Mr. Nguyen which must be reversed by the reporting of a wage expense or dividend to Mr. Nguyen in the reporting of his personal income for income tax purposes in 2012. Related personal income taxes will apply depending upon assumptions regarding other personal income and expenses. Accordingly, a related personal income tax liability should properly be included in a current personal net worth statement of Mr. Nguyen.

[36] Basing the valuation on only the statements for the company for the year of 2011 is realistic in that 2010 the profits were far and away the highest the company had ever earned, the company has since lost one of its largest customers, ie. Meinhardt Foods, and Mr. Nguyen testified about the significant increase in the cost of materials and supplies. Accordingly, I find that the more modest profits of 2011 represent a more realistic estimate for the future of the company.

[37] Therefore, in accepting Mr. Tidball's valuation of the company of \$285,000, with an adjustment for the personal use of the Mercedes-Benz by Mr. Nguyen of 40%, an apportionment of the legal fees to take into consideration the portion of fees that would be incurred by the company as a party to this proceeding, and finally, considering the increase in the shareholder loan during 2011 in an amount of \$38,000, I find the value of the shares of the company are as follows:

- \$285,000 as valued by Mr. Tidball;
- Add \$15,109 to reflect the personal use of the Mercedes-Benz by Mr. Nguyen;
- Subtract \$8,800 for the portion of the legal fees allocated to the company as a party to this proceeding, which must be adjusted by the multiplier of 2.5 for a total reduction of \$22,000 from the share value; and
- Add \$38,000 to the value for the increase in the shareholder loan during 2011 which represents payments by the Bakery for personal items not chargeable to the company.

[38] I find the summary of the value of the shares of the company, as a result of calculating the above items, is \$316,109.

What is Mr. Nguyen's Income for the purposes of Spousal Support?

- [39] Previously in these reasons I discussed Mr. Nguyen's long standing practice of intermingling the finances of the Bakery with those of the family. As some transactions had not been entered in the company records and the company has made payments on account of personal items for Mr. and Ms. Nguyen which should be added to their personal incomes, it will not be possible to calculate their respective incomes with any degree of precision. Finally, in imputing income to Mr. Nguyen, I have also considered that the debt accumulated by Mr. Nguyen has benefited not just Mr. Nguyen, but has been accumulated by making purchases for the benefit of all family members.
- [40] The debts referred to include the requirement of Mr. Nguyen to re-pay to the Bakery his debt on the shareholder loan by the end of 2013. The amount of that debt as of the end of 2012 was \$96,997 and based upon my review of this family's finances, the funds to repay the loan would have to come from the proceeds of sale of the family residence or a loan to be arranged by Mr. Nguyen.
- [41] In 2011, Mr. Nguyen's wages paid by the Bakery were \$108,000 and he also earned a dividend of \$1,250 for a total line 150 income of \$109,250. Mr. Tidball testified that a fair annual wage for Mr. Nguyen was \$80,000 and calculated that amount by taking the hourly rate for the other experienced baker employed at the Bakery multiplied by the number of hours Mr. Nguyen worked during the year. Therefore, Mr. Tidball determined that Mr. Nguyen had been overpaid in an amount of \$28,000. As an officer of the company Mr. Nguyen is in a position to determine what his income may be from time to time subject to accepted accounting principles and the success of the company. I am of the opinion that a fair estimate of Mr. Nguyen's base income for Guideline purposes is the amount that he paid to himself in 2011, ie. \$108,000.
- [42] At this time, the possibility of any dividends being paid to Mr. Nguyen appears to be small and I will not add any amount for dividends to his imputed income.
- [43] Counsel for Ms. Nguyen submits the value of personal legal expenses paid by the company for Mr. Nguyen amounting to \$44,000, the amount paid by the company on account of Mr. Nguyen's purchase of his Mercedes-Benz and the increase in the amount of his shareholder's loan due to the company (which is comprised in part of funds spent for personal and family items) should be added to Mr. Nguyen's line 150 income which would result in an income for Guidelines purposes of \$205,217.20.
- [44] Considering the totality of the evidence surrounding Mr. Nguyen's finances, I am of the opinion that a lesser amount of income should be imputed to Mr. Nguyen for the following reasons:
- a) The legal fees being paid by Mr. Nguyen are extraordinary and the amount of those fees could not and should not be considered part of his disposable income. I appreciate that both Mr. and Ms. Nguyen are incurring substantial legal fees which could not realistically be paid

from the income generated by the Bakery. This trial was conducted in 2012 and it is apparent that substantially more legal fees have been incurred by both parties in addition to the legal fees of Mr. Nguyen which incurred in 2010 and 2011 which have been referred to in the evidence. At this point, I do not know if the fees incurred in 2012 have been paid and if so, whether or not they have been paid by the Bakery. For these parties, the legal fees are amounting to a very large debt and to add the amount of the same to the income in order to impute additional income to Mr. Nguyen would not be appropriate/

- b) Only the portion of the payments for the Mercedes-Benz attributable to his personal use of the vehicle should be added to Mr. Nguyen's line 150 income. Previously in these reasons I found that 60% of the use of the Mercedes-Benz was for business purposes. The remainder of the payments made for the vehicle should therefore be added to Mr. Nguyen's income for Guideline purposes and that amount is \$6,043.68/
- c) Regarding the increase in the shareholder's loan during 2012, I find that a significant amount of the funds spent by the company were for family purposes and as a result need not be added to the income to be imputed to Mr. Nguyen for Guideline purposes.

[45] Having regard to these considerations I impute income to Mr. Nguyen in the amount of \$114,043.

[46] As for Ms. Nguyen, I am satisfied on the whole of the evidence that it would be inappropriate to impute any income to her at this time. Her income tax returns between the years 2007 and 2010 disclose a line 150 income ranging from a low of 13,500 (2008) to a high of \$43,125 (2009). Any income she has earned in the past number of years came from the Bakery and will not be available to her in the future. While it is quite possible that she has been capable of earning some income since the time of separation, on the evidence before me it would be inappropriate to impute an income for Ms. Nguyen based on purely hypothetical guess work. As I will discuss in further detail on the issue of spousal support, Ms. Nguyen will be expected to take steps to seek employment on a go-forward basis.

[47] I recognize that in making these findings I have had to make calculations based upon imperfect evidence. Moving forward, I anticipate that it will be necessary for the parties to share income information candidly; Mr. Nguyen will have to be more transparent in disclosing his business records and income lest the Court be required to undertake further inquiries into his imputed income. I also recognize the likelihood of significant changes in the financial positions of both Mr. and Mrs. Nguyen in the wake of the resolution of these proceedings; I refer here to the parties' unsustainable spending habits and their reliance on loans and credit to maintain an unrealistic standard of living. As a result, and keeping in mind that I have made findings on an imperfect record, I order that spousal support be reviewed annually and I order that the parties exchange copies of their income tax returns and assessments by no later than July 1 of each forthcoming year.

Is Daniel a Child of the Marriage?

[48] The next issue is whether or not Daniel, born October 27, 1988 and now 24 years old, is a "child of the marriage" as defined by s. 2(1) of the Divorce Act which states:

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

...

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.

[49] Daniel graduated from secondary school at the age of 18 and since that time it is unclear how he has occupied his time. On occasion he has worked in the Bakery but that work did not continue, apparently because Daniel and his father had conflicts. In early 2012 he began attending Langara College to update his English skills with the intention of entering into a "Justice Program", also at Langara. Ms. Nguyen has testified that Daniel had previously wanted to attend post-secondary institutions but there was no money available from the family to allow him to do so. I note that an RESP account taken out by the parents several years ago listed only Diane, Johnny and Edward as beneficiaries, and not Daniel.

[50] Daniel commenced living with his mother in the former family home in early 2012. Near the conclusion of the trial in November 2012, Mr. Nguyen testified that they were waiting for Daniel to go to school but he was not certain what Daniel was going to do.

[51] There have been several decisions of Courts in this province wherein adult children in attendance at post-secondary institutions have been held to be "children of the marriage" for the purposes of the Divorce Act. The leading case in British Columbia on whether an adult child's educational pursuits justify that child retaining the status of a "child of the marriage" is *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (Master Joyce, as he then was), adopted in *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 (BCCA). In *Farden*, Master Joyce listed eight factors to be considered in such applications including whether the child is studying on a part-time or full-time basis, whether the child has applied for or is eligible for student loans, the reasonableness of the child's career plans, the child's age and past academic performance and any plans made by the parent's concerning post-secondary education in the pre-separation period.

[52] Based on the evidence before me, it is clear that several of the applicable factors have not been satisfied so as to enable me to determine that Daniel is presently a "child of the marriage". The lack of evidence as to Daniel's career plans, if any exist, prevents me from being able to determine if those career plans are reasonable. He is 24 years old, and yet there is no evidence of any educational pursuit of his own volition since high school graduation nor is there any evidence to show that he has applied for or is ineligible for student loans. I am also unable to assess his past academic record, as it is not in evidence.

[53] Although it is possible for a child to take a break from post-secondary education and then return to full-time education and regain his or her status as a "child of the marriage" (See *Paterson v. Paterson*, [1997] B.C.J. No. 2293 (S.C.), additional reasons (1997), 34 R.F.L. (4th) 28

(S.C.), it would not be reasonable for Daniel to regain such status in this case, at this time. Regaining status as a "child of the marriage" so as to substantiate an award for child support would require significant compliance with all or most of the Farden factors, especially in cases, such as this one, where the child has not pursued any significant educational goals for approximately four years since leaving secondary school.

Residency of Johnny and Edward

[54] Since Johnny is now 19 years of age I find that the question of his primary residence is now moot; he may determine on his own with whom he wishes to reside. Edward has recently turned 18 and on the evidence before me he has been primarily residing with his mother. Because of his age and the fact that there does not seem to be much contention on this issue, I find that Edward may also determine for himself his primary residency. In the resolution of these proceedings, I will operate under the assumption that Edward has chosen to remain living with his mother. If these circumstances change while Edward remains a child of the marriage, then Mr. Nguyen is at liberty to apply to the Court for a variation of his child support obligations with respect to Edward.

Disputed Savings from Child Support Related to Scott

[55] Mrs. Nguyen received monthly child support payments on account of Scott from his biological father for several years. The parties have not been able to agree on the amount which was retained in a bank account, or accounts, to provide for Scott's future. What is clear is that the funds were originally maintained by Mrs. Nguyen in a bank account in Winnipeg, but were eventually transferred to a bank account in Vancouver and deposited into a joint account held in the names of Scott and Mr. Nguyen.

[56] The parties' agreed "Statement of Facts" states, at para. 6:

The claimant has one child from a previous marriage, her son Scott Nguyen ("Scott") who was born August 11, 1982.

- a) Scott's biological father began paying child support in the amount of \$300 per month by way of an Order of the Manitoba Supreme Court from the time Scott was 1 until he was 19 years of age.
- b) The parties agreed that this child support money would be held for Scott's future

[57] Scott continued to live with his mother and Mr. Nguyen for many years and now lives in a home with his uncle, Ms. Nguyen's brother, in the Vancouver area. Mr. Nguyen considered Scott as part of his family and based on all of the evidence, the relationship between Scott and the other family members appears to be very positive.

- [58] The funds accumulated from the support payments for Scott were deposited in a joint account at the Royal Bank of Canada at Joyce Road and Kingsway. Funds were withdrawn from that account and became part of the down payment on the family home on E. 48th Avenue. There is conflicting evidence between Mr. and Mrs. Nguyen as to the amount contributed to the purchase price of the home but the parties evidence is that the amount was between \$10,000 and \$20,000.
- [59] There was evidence from Ms. Nguyen that the payments received on account of Scott were in the amount of \$300 per month when Scott was between the ages of 1 and 19. If that were the case, I calculate that the amount that was being set aside for Scott would be \$64,800 not including any interest on the funds. If interest were calculated from the dates of receipt of the monthly payments, I expect the amount would likely exceed \$100,000. I also recognize that the cost to Mr. and Mrs. Nguyen of raising Scott for many years would have been substantial and the support payments from Scott's father were intended to contribute to those costs for Scott's benefit.
- [60] Both counsel agree that Scott should receive funds "off the top" from the distribution of assets, including the likely sale of the family residence. Counsel for Ms. Nguyen submits the amount that should be paid to Scott should be in the range of \$50,000 whereas counsel for Mr. Nguyen submits that amount should be in the range of \$20,000.
- [61] Considering all factors on this issue, I find that a fair and reasonable amount that should be paid to Scott from realization on the family assets is \$50,000.

The Marriage Agreement

- [62] It is undisputed that the agreement executed in July 2006 is a "marriage agreement" as defined under the provisions of the Family Relations Act, R.S.B.C. 1996, c.128 and as a result, the agreement is subject to judicial scrutiny and possible reapportionment on the basis of fairness, under the provisions of s. 65 of the Family Relations Act. The contentious issue is whether re-apportionment should occur.
- [63] The provisions of the Marriage Agreement most relevant to this issue are:

Recitals

- B. The parties separated on or about January 2, 2006, although they both remained residing in the family residence, and now intend to reconcile and resume living together.
- D. The Wife's gross annual income is presently \$30,000 and is received from her employment with the bakery business owned by the parties known as Mediterranean Bakery Inc.
- E. The Husband's gross annual income is presently \$30,000 and is received from [his] employment with the bakery business owned by the parties known as Mediterranean Bakery Inc.

G. The Husband and the Wife own the family residence [...] as joint tenants and purchased the Family Residence in 2001. The parties anticipate that they will continue to reside in the Family Residence, but the parties may purchase a new residence together in the future. . . .

H. The Wife owns the property and has the liabilities listed in Schedule "A" attached to this Agreement.

I. The Husband owns the property and has the liabilities listed in Schedule "B" to this Agreement.

J. The parties have the joint property and joint liabilities listed in Schedule "C" to this Agreement.

K. The parties are entering into this Agreement to:

- (a) determine ownership, management, and division of all property either or both of them own or may acquire
- (i) during the time they live together, and
- (ii) if the parties' relationship ends, and
- (b) avoid acrimony and litigation in the unlikely event that their relationship ends.

L. The parties are aware that the law provides for judicial intervention in some circumstances if this Agreement is found to be unfair now or in the future and the parties wish to confirm that

- (a) each of them relies on this Agreement to be enforced according to its terms,
- (b) each of them have considered the provisions of the Divorce Act, the Family Relations Act, the Wills Act, the Estate Administration Act,
- (c) neither of them would have entered into this Agreement, had it been anticipated that the other would ever apply to vary the Agreement, and
- (d) either of them may choose not to pursue economic opportunities because of their relationship but each party recognizes that certain sacrifices will be made within, and because of, the relationship, and the consequences of those choices will not be used to avoid the terms of this Agreement.

M. The parties acknowledge that each of them is prepared to abide by the terms of this Agreement because each recognizes that:

- (a) the importance to each of them of being able to rely on the Agreement far outweighs the risk that it may operate unfairly at some future date, and
- (b) the impossibility of returning the parties to the positions they occupied before they entered this Agreement would make any variation, however fair viewed solely in the changed circumstances, unfair on the whole because all dealings with their property during the course of their relationship will have been based on the binding nature of this Agreement.

N. In negotiating this Agreement, the parties have:

...

(iv) a party providing care, assistance or financial support to the other party;

...

Terms

1.4 The parties will regularly review the terms of this Agreement to determine whether it continues to operate satisfactorily and meet their expectations in the existing circumstances then foreseeable at the following times:

- (a) every five years following the date of the making of this Agreement;
- (b) whenever there is a material change of circumstances with respect to:
 - (i) any of the issues or categories of issues listed in recital N that were taken into account when this Agreement was made;
 - (ii) any other matter affecting either of the parties or their relationship;
- (c) if the parties do not review this Agreement as provided under sub clauses (a) and (b) above, or review this Agreement and do not amend or revise it, both parties are deemed to consider that the terms of this Agreement continue to operate fairly in the existing circumstances, or the circumstances then foreseeable.

2.1 While the relationship continues, each party will share all income with the other.

4.1 In the event that the parties separate, the Husband will, within 30 days of the parties' relationship having ended, transfer to the Wife all of his right, title and interest in and to the Family Residence upon the Wife making satisfactory arrangements to have the Husband released from any financial obligations and liabilities under the Mortgage.

4.2 Upon the transfer of the Husband's interest in the Family Residence to the Wife, the Wife will be responsible for the property taxes, utilities, and all expenses required to maintain the Family Residence, and the Husband shall pay to the Wife the amount required in respect of the mortgage payments until the mortgage has been repaid in full.

5.1 Immediately upon the signing of this Agreement, the parties will make the necessary arrangements to have the Business transferred into joint names so that each holds an equal share in the Business.

5.2 In the event that the parties separate, they will do one of the following within 30 days following their separation:

- (a) sell the Business and divide the net sale proceeds equally; or
- (b) the parties would each have an option to purchase the other's interest in the Business as follows:

- (i) unless the parties otherwise agree, the value of the Business for the purposes of the option to purchase will be the average of values determined by two certified business valuers, one valuation to be obtained by and paid for by the Husband and the other valuation to be obtained by and paid for by the Wife;
 - (ii) a party who wishes to exercise the option must give the other notice in writing;
 - (iii) the completion date for the purchase must be within 30 days after the delivery of the notice;
 - (iv) a party is not required to transfer his or her interest in the Business until satisfied with the arrangements for released the party from all obligations and liabilities under any charges registered against the Business;
 - (v) if both parties exercise the option, the person who gives notice first is entitled to priority.
- [64] With respect to Schedules "A" and "B" attached to the agreement, the only assets referred to on each schedule were the unknown amounts of the parties' Canada Pension Plan Credits. No liabilities were listed.
- [65] Regarding Schedule "C", the joint assets referred to were the Family Residence valued at the time at approximately \$750,000 and the Bakery, the value of which was not recorded, and was presumably unknown. The only joint liability listed was the first mortgage registered against the Family Residence with the Royal Bank, on which the amount owing was then estimated to be \$300,000.
- [66] The Marriage Agreement made no provisions for spousal support or child support.
- [67] At trial, there was considerable evidence led by both of the parties regarding the circumstances under which the parties executed the Marriage Agreement, including the independent legal advice received by each party, earlier drafts reviewed by the parties, and the negotiations leading up to the agreement which were primarily between the lawyers representing the parties at the time.
- [68] The evidence surrounding execution of the Marriage Agreement became relevant due to the position taken by Mr. Nguyen which was that it was never intended that the Marriage Agreement would be relied upon and that his counsel at the time never did explain the Marriage Agreement to him, or at least he did not understand the advice he received at the time he executed the Marriage Agreement. Mr. Nguyen also stated that "I had no choice", and expressed that "my wife would not do anything to harm me". He admits that he signed it because he wanted to keep his family. However, I note that Mr. Nguyen is not alleging unconscionability or undue influence related to the formation of the agreement.
- [69] The evidence of Mr. Nguyen regarding the execution of the Marriage Agreement was most unsatisfactory. He stated on several occasions that his then lawyer told him the Marriage Agreement was unfair but then later denied that his lawyer advised him not to sign the agreement.

- [70] The lawyer who was advising Mr. Nguyen at the time completed a "Solicitor's Certificate of Independent Legal Advice" after witnessing the signature of Mr. Nguyen and Mr. Nguyen confirmed in writing that he had read the Certificate and that the statements in the Certificate signed by his lawyer are true. That Certificate is in a standard form and generally states that the lawyer had advised his client on the contents and the nature and effect of the Marriage Agreement, that his client appeared to understand the Agreement and entered into the same of his own free will and accord and not under duress, undue influence or deception. The lawyer even went so far as to insert an interlineation which read, "He agreed to execute the Agreement notwithstanding advice from counsel".
- [71] The advice received by Mr. Nguyen was wise and he arguably should have followed that advice. The advice was wise since by entering into the Marriage Agreement the parties were "required to make the necessary arrangements to have the Business transferred into joint names so that each holds an equal share in the Business" (5.1), while providing that, should the parties separate again in the future, he would give up his share of the equity in the Family Residence, which is by far the most valuable family asset, but remain liable for the mortgage payments until the balance owing was paid in full (4.1 & 4.2). The Marriage Agreement also provided that in the event of a future separation, one of two situations would occur: the first would require that the Bakery be sold and the sale proceeds would be divided equally (5.2(a)); or alternatively, that either party could give notice in writing to exercise the option to purchase the other's interest in the Business (5.2(b)). The problem with the second option is that it is predicated on the parties having complied with clause 5.1, which was not done.
- [72] The leading case decided under s. 65 is the Supreme Court of Canada decision in *Hartshorne v. Hartshorne*, 2004 SCC 22. Several governing principles were determined by the court in *Hartshorne*, including:

8 The primary policy objective guiding the court's role in division of assets on marital breakdown in British Columbia is fairness; it is achieved by reviewing either the presumptive division provided for in the Act itself, or the parties' private agreement, in light of the factors set out in s. 65 of the FRA. To give effect to legislative intention, courts must encourage parties to enter into marriage agreements that are fair, and to respond to the changing circumstances of their marriage by reviewing and revising their own contracts for fairness when necessary.

...

43 ...The court must determine whether the marriage agreement is substantively fair when the application for reapportionment was made. The essence of this inquiry is whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed, and, if so, whether at the time the parties made adequate arrangements in response to these anticipated circumstances.

...

47 The ultimate point then is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus consideration of the factors listed in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on the one hand, and assurance of an equitable result, on the other.

- [73] The above excerpts set out the authoritative analytical framework to the assessment of marriage agreements. In short, at stage one, the Court must assess the entitlements of the parties as they would exist under the Marriage Agreement and consider entitlements from all other sources. The second stage requires a determination as to whether the contract operates unfairly. At the second stage of the assessment, the court must consider the s.65(1) factors and whether the current circumstances were within the parties' contemplation at the time of execution of the Marriage Agreement and whether the arrangements set out in the Agreement reflect a consideration of the current situation.
- [74] In this case, the Marriage Agreement was entered into in July of 2006 after 18 years of marriage, after the purchase of the Family Residence and the purchase of the Bakery. The Marriage Agreement was executed after a separation of approximately 6 months and, as indicated in the recitals, was intended to provide some certainty as to the distribution of family assets should the parties separate again, which finally occurred in November of 2010.
- [75] Mr. Nguyen received independent legal advice that he should not execute the Marriage Agreement, however, Mr. Nguyen went ahead to sign the Marriage Agreement. I am satisfied he had read the Agreement and received a comprehensive opinion from his counsel to the effect that the Marriage Agreement was "unfair" to him in all the circumstances.
- [76] Having had proper legal advice will not preserve an unfair agreement, but such advice makes it more difficult for a party to an agreement to later assert that they did not fully appreciate the legal consequences: see *Bradshaw v. Bradshaw*, 2011 BCSC 1103 at 49; *J.K.T. v. A.J.T.*, 2012 BCSC 491 at para 75.

Stage One Analysis

- [77] I now turn to first stage of the Hartshorne analysis. This requires that I set out the entitlements to each party by applying the Agreement. Pursuant to the Agreement the claimant would receive:
- a) Title to and 100% interest in the family residence having a value of approximately \$1,260,000;
 - b) Pursuant to clause 5.2(a) the Bakery would be sold with the claimant receiving one-half of the proceeds of the sale, i.e. approximately \$158,000;
 - c) Under clause 4.2 of the Agreement Ms. Nguyen would pay all household expenses save Mr. Nguyen's ongoing responsibility to pay to Ms. Nguyen the amount required in respect of the mortgage payments until the mortgage has been repaid in full. The mortgage payments are due bi-monthly in amounts of \$682.40 or \$1,364.80, the potential value of these payments would depend on the balance of the mortgage amortization period. However, considering the balance owing on the mortgage of approximately \$180,000 if the home was sold today, the Agreement under clause 4.2 essentially means that Ms. Nguyen receives the entire equity of the home including the balance due under the mortgage, i.e. \$180,000.
- [78] As mentioned, the Agreement was not comprehensive in that it did not address distribution of the parties' other assets or debts or the issue of spousal support. As a result, the other assets are presumptively subject to equal division and Ms. Nguyen retains the right to claim spousal support.
- [79] On the issue of support, Ms. Nguyen has claimed spousal support and child support. As I have found Daniel is no longer a "child of the marriage", and because Johnny has recently turned 19 years of age (and depending on his current situation may no longer be a "child of the marriage") I have calculated support obligations with only the two youngest children in mind. With Edward and Diane residing with Ms. Nguyen and Mr. Nguyen respectively, Mr. Nguyen's monthly liability is \$2,047 in spousal support (according to the low-range of the SAGGs) and \$1,037 in child support.
- [80] The total value of assets to which Mrs. Nguyen would be entitled would be in the range of \$1,338,000 plus support payments as set out above.
- [81] As other family assets are not listed in the Agreement and in any event are minimal, I have not included the value of these assets in this analysis. I have also not listed all exceptional expenditures of the parties, funds withdrawn from the joint account or other financial transactions, the compilation of which would likely balance.

- [82] Under the Agreement, Mr. Nguyen would receive only one-half of the value of the Bakery, i.e. \$158,000 and one half of the parties' other minimal assets. Presumably, however, Mr. Nguyen would still be required to satisfy the shareholder loan of \$97,000 which would leave him with a net value of assets of approximately \$60,000 compared to the assets which would be allocated to Mrs. Nguyen totalling approximately \$1,338,000.
- [83] Other considerations, should the Agreement be applied, would include the consequences of selling the Bakery. If the Bakery were sold, Mr. Nguyen would no longer have the income from the Bakery and would need to seek out employment. If he gained employment as a baker, the value of that employment, according to Mr. Tidball's report, would be \$80,000 per annum. However, whether such employment is available is pure speculation. It is noteworthy that Mr. Nguyen is 55 years old and ordering the sale of the Bakery at this stage of his career would detrimentally impact his income earning capacity for his remaining working years.

Stage Two Analysis

- [84] Applying the principles set out in Hartshorne, the question at this stage is not whether the agreement was fundamentally unfair as of the time it was executed in 2006 but whether the implementation of the terms of the Marriage Agreement at this point in time will operate in a manner that is substantively unfair: See Hartshorne at paras 43, 37 and 65.
- [85] Section 65 of the FRA provides:
- 65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
- the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.
- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.
- [86] Some of these factors will be more relevant than others in a given case: See Hartshorne at para 48. In this case, I find that the factors listed under (a), (e) and (f) to be most relevant.
- [87] The circumstances of the parties have not significantly changed in the over six years since the Marriage Agreement was executed, however, the parties' non-compliance with certain provisions of the agreement, even prior to their 2010 separation, calls into question the extent to which the parties intended to rely on the agreement and will factor into the assessment of whether adequate arrangements were made to reasonably contemplated future circumstances. Specifically, the parties did not take the required steps under clause 5.1 to have the Bakery transferred into joint ownership between the parties. Similarly, they did not comply with the requirement to have two separate business valuations conducted. There is also no evidence to show that either of them seriously pursued their contractual remedies under clauses 4.1 and 5.2 within the time frames provided in the contract.
- [88] Other considerations in determining whether applying the Agreement would be substantively unfair in addressing the party's current situations consist of the follow:
- a) the value of the Bakery was unknown at the time of the Agreement but has likely increased significantly since 2006;
 - b) the income generated from the Bakery for the benefit of the family has increased from \$60,000 (combined) at the time of the Agreement, to over \$114,000, based on Mr. Nguyen's current imputed income.
 - c) the Bakery has continued to provide income for at least two of the Nguyen children and there is nothing to show that this was anticipated at the time of the Agreement;
 - d) Although the Agreement called for the sale of the Bakery should the parties separate, the parties did not proceed to sell the Bakery, presumably since the Bakery was the foundation for all family income.
- [89] I conclude, based upon the parties failure to sell the Bakery upon separating in 2010, the need for Mr. Nguyen to seek employment should the Bakery have been sold, the improved earnings of the Bakery since 2006 and the unequal family asset distribution along with an obligation of Mr. Nguyen to pay spousal and child support plus the mortgage payments would result in unfairness to Mr. Nguyen and an unworkable situation for the entire family. The Agreement did not adequately anticipate the current circumstances of the parties and under the Agreement the economic consequences of the marriage breakdown would not be shared equitably in all of the circumstances.

- [90] This is not a case where one party has brought a disproportionate portion of the assets into a relationship and has contracted to protect those assets, but rather, this is an instance where the successes and shortcomings contributing to the family's financial situation has been the result of a joint effort and contribution, albeit that the marriage was traditional in the sense that Mr. Nguyen has been the primary breadwinner while Ms. Nguyen has contributed through her primary responsibilities as a homemaker and mother. The relationship spanned well over 20 years and the parties have four children together. If the Agreement were enforced, the only source of family income would disappear on the sale of the Bakery and yet Mr. Nguyen's obligations to pay support and mortgage payments would continue. In those circumstances, Mr. Nguyen could easily default on his obligations; such an occurrence would operate to the detriment of the entire Nguyen family.
- [91] In this case, the Marriage Agreement was unfair to Mr. Nguyen in 2006 and, having considered the Agreement through the lens of Hartshorne, it operates unfairly if followed today. While I have found that Mr. Nguyen received adequate legal advice prior to entering into the agreement, the analysis above demonstrates that the arrangements contemplated under the agreement were wholly inadequate, specifically in light of Mr. Nguyen's ultimately crucial role as the owner/operator of the Bakery.

Section 65 Reapportionment of Family Assets

- [92] My finding that the application of the Agreement results in an unfair result for Mr. Nguyen necessitates an assessment of adjustments that should be made to reapportion family assets under s. 65 of the FRA. In making a reapportionment of family assets I have considered the need for the parties to reduce their expenses by reducing debt so as to be in keeping with the income available to Mr. Nguyen to be able to support the family.
- [93] Firstly, the obligation under clauses 5.1 and 5.2 of the Agreement to transfer a one-half interest in the shares of the Bakery to Mrs. Nguyen and then sell the business and share the proceeds is not in the best interest of either party. The income generated from the Bakery has sustained the family for several years and to force a sale of the Bakery would take away a reliable source of income for the future. I also recognize that Mr. Nguyen will have an obligation to pay the shareholders loan back to the Bakery before the end of 2013.
- [94] Finally regarding the Bakery, it would not be wise in light of the history of the Nguyen's relationship, especially regarding them working together in the Bakery, that a one-half interest of the shares be transferred to Ms. Nguyen. Mr. Nguyen alone should have control of the Bakery operations and income. However, Ms. Nguyen should be entitled to receive financial statements of the Bakery as the parties move forward.
- [95] As a result I reapportion ownership of the shares of the Bakery so that Mr. Nguyen retains 90% of the issued shares and 10% of the issued shares be transferred to Ms. Nguyen. Mr. Nguyen should remain the sole officer, director and signing officer of the Bakery.

- [96] Reallocation of the shares will result in Mr. Nguyen's shares being valued at \$284,400 and Mrs. Nguyen's 10% being noted at \$31,600 based upon my valuation of the Bakery of \$316,000.
- [97] The E. 48th Avenue residence should be sold with the parties sharing joint conduct over the sale. The substantial equity in the family home can be used to pay family debt and hopefully allow each party to re-establish themselves in more modest residence. Especially since the children are getting older and becoming more independent, there is no need for a home the size of the E. 48th Avenue residence. From the sale of the E. 48th Avenue residence any remaining balance on the mortgage should be paid and discharged. Secondly, the debt due from shareholder to the Bakery should be paid in the amount of \$97,000 as all family members benefited to some degree from payments made by the Bakery for personal items up to the date of the trial.
- [98] After payment of the foregoing, the remaining proceeds should be reapportioned 70% to Ms. Nguyen and 30% to Mr. Nguyen. The funds due to Scott amounting to \$50,000 should be paid to Scott and charged equally to the interest of Mr. and Ms. Nguyen.
- [99] This reapportionment of family assets takes into consideration the Agreement but more appropriately reflects the current personal and financial circumstances of the parties. It leaves Ms. Nguyen with a significantly larger portion of the proceeds from the sale of the Family Residence which, in this case, is appropriate in light of Mr. Nguyen's 90% shareholder interest in the Bakery, being an income-producing asset, albeit of a significantly lower value.
- [100] The two Mercedes-Benz vehicles are the only other assets of significant value. As previously mentioned, the ML 350 has a value of between \$44,000 and \$45,000 with an outstanding loan of \$16,000. Using the lower figure of \$44,000, the equity in the vehicle is \$28,000. The SLK, driven by Ms. Nguyen, has a value of between \$37,000 and \$38,000 against which there is a charge of \$29,000. In other words, the equity in the SLK is only about \$8,000. The combined equity totals roughly \$36,000; although I understand that this figure may be less as of the date of these Reasons. Because of the significant amount owing on each of these vehicles, it was suggested by counsel that they should be sold, with the equity pooled and divided equally between the parties. This is a reasonable solution in the circumstances and so I make that order. Sale of the vehicles will eliminate the significant monthly payments on each vehicle and provide cash to each party.
- [101] The parties' mutual unadjusted Canada Pension Plan credits will be divided pursuant to the Canada Pension Plan legislation.
- [102] Each party will retain their personal possessions. Mrs. Nguyen will retain furnishings from the East 48th Avenue residence except any items that were purchased by Mr. Nguyen since separation, or as otherwise agreed.

[103] At trial the evidence disclosed little cash investment and therefore accounts in each party's name should be retained by them and the proceeds in the joint account should be divided equally and the joint account should then be closed.

Spousal Support

[104] Spousal support is determined pursuant to sec. 15.2 of the Divorce Act. The factors to be considered in making an order for support are found in subsection (4) and (6). Ms. Nguyen has not worked outside the home on a regular basis since 1993, save for her intermittent work at the Bakery, assisting with the deli counter and various other business related errands. This was a long marriage and was traditional in the sense that Ms. Nguyen left the workforce for a number of years in order to raise children and maintain the household. I find there is a basis for support on compensatory and non-compensatory grounds. However, Ms. Nguyen is healthy and does have some employable skills. With the children now in their late teenage years, there is no reason that she should not be able to re-enter the workforce in some capacity. She has made no efforts to determine what might be required in order to re-train or upgrade her skills as a nurse's aide or assistant, nor has she expressed any interest in pursuing any other line of work. While it is not realistic to expect Ms. Nguyen to be able to become completely economically self-sufficient, it is reasonable to expect that she make some efforts in that regard. Both parties will have to make adjustments to their standard of living in order to live within their more modest means post-divorce. In light of the reapportionment of property in her favour, I award spousal support on the low end of the SAGG range in the amount of \$2,047 for an indefinite period subject to review after one year from the date of these reasons. This order is to operate prospectively, as no claims were made for retro-active support.

Child Support

[105] As Edward is residing with Ms. Nguyen as a child of the marriage, Mr. Nguyen shall pay child support in the amount of \$1,040 per month according to the Child Support Guidelines. Johnny has recently reached the age of majority and because I do not have updated information as to his employment or educational pursuits, either party is at liberty to make further application to the Court to determine whether he remains a child of the marriage and to address any issue of child support in the event that he has maintained or regained that status.

Costs

[106] In light of the overall financial situation of the parties and the results of this litigation, there will be no order as to costs.

"Jenkins J."

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Prepared on 27 October 2026 · Esheria