

CANADA / JUDGMENT

Oleksiewicz v. Oleksiesicz

2017 BCSC 228

COURT

Supreme Court of British Columbia

DECIDED

10 February 2017

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2017 BCSC 228 Oleksiewicz v. Oleksiewicz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Oleksiewicz v. Oleksiewicz,

2017 BCSC 228

Date: 20170210

Docket: E102816

Registry: Kelowna

Between:

Daniel James Oleksiewicz aka

Dan James Oleksiewicz aka Daniel James Oleksewich

Claimant

And

Tracy Lee Oleksiewicz aka

Tracy Lee Oleksewich

Respondent

Corrected Judgment: The text of the judgment was corrected at paras. 2, 5, 6, 7, 10, 11, 16, 24, 31, 41, 45, 117, 118, 119, 120, 123, 124, 125, 126, 127, 131, 144, 145, 175, 183 and 195 where changes were made on March 7, 2017;

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

The Claimant appearing in person:

D.J. Oleksiewicz

The Respondent appearing in person:

T.L. Oleksiewicz

Place and Dates of Trial/Hearing:

Kelowna, B.C.

April 18-22, 2016

July 18-20, 2016

Place and Date of Judgment:

Kelowna, B.C.

February 10, 2017

Introduction

- [1] After a 25 year marriage, the parties separated. They had two children one of whom remains in need of financial assistance. This family law case concerns the parties divorce, child support, and division of family property and debt.

Background

- [2] The claimant, Daniel James Oleksiewicz, is a 56 year old automobile upholsterer by trade. He is self-employed and operates two businesses: Dan's Place Custom Interiors ("Dan's Place"), which is a sole proprietorship and Smart Parts Ltd. ("Smart Parts"), a business in which he and the respondent own half of the shares.
- [3] The respondent, Tracy Lee Oleksiewicz, is a 52 year old office manager at the Kelowna Sleep Clinic.
- [4] The parties married on June 27, 1987 and separated on January 21, 2012.
- [5] There are two children of the marriage: Kirsten Marie Oleksiewicz ("Kirsten"), who was born on June 25, 1989, and Lauren Lee Oleksiewicz ("Lauren"), who was born on February 22, 1994. Kirsten is independent, but Lauren remains dependant on the claimant and is currently enrolled as a full-time student in university.
- [6] Initially, the parties lived in Prince George, BC. They moved to Kelowna, BC. in July 1995, where they purchased the family home located at 2146 Shannon Woods Way ("the Home") as joint tenants.

- [7] On January 21, 2012, when the parties separated, the respondent moved out of the Home. A few days later, with the claimant's agreement, she moved back into the Home with Kirsten and Lauren. The claimant moved into a friend's house. As part of the parties' living arrangements, when the respondent moved back into the Home, they each kept their respective vehicles. The claimant was driving the parties' 1998 GMC and the respondent was driving a leased Toyota RAV 4.
- [8] Shortly after the claimant left the Home, the respondent began a relationship with Bernard Peters, a man whom the respondent had known for 35 years. Mr. Peters moved from Salt Spring Island to the Home in February 2014, where he and his two teenage boys resided as tenants. Mr. Peters was partially disabled at the time but paid rent of \$500 per month.
- [9] Mr. Peters performed yard work at the Home and other repairs including painting and appliance repair, he assisted the respondent when she moved out of the house.
- [10] On March 1, 2014, Lauren and Kirsten left the Home. Kirsten moved into her own apartment, while Lauren moved to the claimant's residence.
- [11] In November 2014 the Home was sold by the claimant pursuant to a court order. Since payment of judgments against the claimant's interest in the property, the proceeds of sale have been held in trust by a solicitor.
- [12] The issues in this case focus on division of family property, exclusion of property from the division, responsibility for family debt, and responsibility for payments made to family debt and for maintenance of family property.
- [13] The following is a list of property owned by the parties at the time of separation:
- a) A 1933 Ford Victoria automobile (the Vicky) ;
 - b) The Home (now net proceeds from the sale of the Home);
 - c) the business of Dan's Place;
 - d) shares in Smart Parts;
 - e) 1948 Hillman automobile;
 - f) 1998 GMC pickup;
 - g) 1979 Suzuki motorcycle;
 - h) 1980 GMC pick-up truck;
 - i) 1991 GMC pick-up truck acquired after separation
 - j) the vehicle trailer for moving the Vicky; and
 - k) contents of the family home.

[14] Similarly, at the date of separation the parties had significant debts some of which will be taken into account in the division of assets. These debts were:

1. debt secured by mortgage against the Home;
2. A Medical Services Plan debt of \$6,322 arising from unpaid insurance premiums for the family;
3. RBC joint line of credit with a current balance of \$9,504.25;
4. Canadian tire MasterCard with an outstanding balance of \$4,377.76 that the claimant has paid \$100 per month on this account since July 25, 2014 for a total of \$2,400 and \$401.28 paid in July 2014;
5. The respondent's credit cards RBC Visa of the balance of \$3,977.97 and CIBC Visa with \$6,996.71 outstanding;
6. The claimant's BMO MasterCard with the current balance of \$8,110;
7. Canada Revenue debt paid out at the time the family residence was sold of \$116,000;
8. personal loan from the respondent's mother of \$9,006.27; and
9. personal loan from the claimant's brother David of \$8450.

Divorce

[15] The parties have lived separate and apart for more than one year. On this basis, they are entitled to a decree of divorce, effective 30 days from the date of this judgment.

[16] I grant the respondent's application to change her name under s. 5 of the Name Act, R.S.B.C. 1996, c. 328. Her name will be Tracy Lee Ponuick.

Litigation History

[17] This proceeding started in April 2014. Since then, the parties have made multiple chambers applications dealing with the sale of the house, disclosure and child support. The most significant orders include:

- (a) May 27, 2014 - the parties were granted permission to apply for sale of the family residence prior to a Judicial Case Conference. They were to exchange document lists by June 26, 2014;
- (b) June 30, 2014 - the family residence was to be listed for sale; the respondent was to keep the family residence clean and in good and reasonable repair, the parties were prohibited from disposing of, transferring or dealing with family property; the respondent was ordered to return the claimant's correspondence and documents dealing with Canada Revenue, the claimant personally and his businesses, Dan's Place and Smart Parts; and the respondent was to pay the claimant's lump-sum costs;

- (c) September 30, 2014 - the claimant was granted sole conduct of the sale of the family residence and exclusive possession; the claimant was ordered to produce notices of assessment within seven days;
- (d) January 22, 2015 - the claimant is ordered to pay the respondent \$3,000 for retroactive child support; the respondent was ordered to pay the claimant reduced child support of \$222 per month while the respondent paid off a loan incurred for the purchase of the child's car;
- (e) June 16, 2015 - Skolrood J. adjourned the trial scheduled for July 2015 and required the claimant to provide certified true copies of Lauren's post-secondary documents from September 2014 to date, after which the respondent was to pay \$724.50 for her share of the child's spring tuition;
- (f) September 30, 2015 - both parties were ordered to file new F8 financial statements by October 1, 2015; the claimant was to attach to his F8 financial statement three years of financial statements with:
 - i. supporting documents for Dan's Place and Smart Parts;
 - ii. three years of income tax returns of each company;
 - iii. three years monthly bank statements for each and every bank account held by Dan's Place, Dan's Place Custom Interiors and Smart Parts;
 - iv. three years of monthly credit card statements held in the name of Dan's Place, Dan's Place Custom Interiors and Smart Parts; and
 - v. all receipts related to Lauren's post-secondary education.
- (g) October 8, 2015 - the claimant was ordered to file a F8 financial statement by October 13, 2015 and to provide the respondent with a copy of that statement with all supporting documents as per the September 30, 2015 order;
- (h) November 9, 2015 - the claimant was ordered to contact the accountants for himself, Dan's Place and Smart Parts and direct them to provide the respondent's advisers all information requested;
- (i) November 16, 2015 - the parties exchanged a list of orders that have not been complied with by November 25, 2015;
- (j) December 21, 2015 - the parties were ordered to exchange indices by December 31, 2015; and
- (k) March 14, 2016 - the parties were ordered to provide each other with lists of documents they intended to use as exhibits at the trial.

- [18] During the trial, the respondent complained that the claimant had failed to provide sufficient disclosure of his business interests to permit her to perform a valuation of his businesses.

The Issues

On-going Child Support

- [19] Before separation and during the children's high school and university years, the respondent provided extraordinary assistance to her children in their educational and personal endeavours. Those efforts ended when the children moved out of the respondent's home and stopped communicating with the respondent.
- [20] January 2013 Lauren lived with the respondent who was committed to ensuring she had adequate transportation to facilitate her schooling. The respondent purchased a Mazda car for Lauren to drive for \$13,315; as a result of an accident the respondent was advised to register the Mazda in Lauren's name and since then she has retained the car. The respondent has made all of the \$300 per month payments on the car loan and the insurance premiums of \$2432 per year.
- [21] This routine was established on January 22, 2015, when Hyslop J. ordered the respondent to pay child support of \$522 per month but was directed to pay \$300 per month toward the Mazda car loan and the balance to the claimant. She has continued to pay \$222 in child support per month to the claimant.
- [22] As a result of another interim order, the respondent was obliged to pay one-third of Lauren's tuition fees, \$300 per month toward a loan obtained to buy Lauren's car, and \$222 per month to the claimant.
- [23] The claimant seeks continuing child support for Lauren and one-third of Lauren's tuition fees, of \$1,744 for 2015, and for 2016 and 2017. He also seeks to continue the loan payment and payment of the \$222.
- [24] He also seeks to vary Skolrood J.'s order by removing his obligation to provide proof of Lauren's enrolment in university. The claimant makes no request for support with respect to Kirsten, who has been living independently since March 2014.
- [25] However, the respondent contends that Lauren forfeited her right to child support by her actions in terminating any relationship with the respondent thereby ceasing to be a "child of the marriage".
- [26] Section 2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [DA] defines a "child of the marriage" as follows:
2. (1) child of the marriage means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (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

[27] Lauren is clearly over the age of majority; however, the claimant argues, she remains a child of the marriage under s. 2(b) of the DA due to an "other cause"; He contends she is financially dependent on him. Groberman J.A. described how pursuing post-secondary education can result in a child continuing to be a child of the marriage in *Nordeen v. Nordeen*, 2013 BCCA 178:

[15] It is clear that pursuit of post-secondary education can result in a child continuing to be a child of the marriage. In *W.P.N. v. B.J.N.*, 2005 BCCA 7, the general proposition was summarized by Levine J.A.:

[18] The pursuit of education necessary to equip a child with a career qualifies as "other cause" for continuing dependence of a child of or over the age of majority: *Martin v. Martin* (1988), 26 B.C.L.R. (2d) 390 at 393 (C.A.). In determining whether a child pursuing an education is unable to withdraw from her parents' charge or obtain the necessities of life a court must consider the surrounding circumstances; mere attendance at an educational institution is not sufficient: *Ciardullo v. Ciardullo* (1995), 15 R.F.L. (4th) 121 at para. 17 (B.C.S.C.).

[16] In determining whether pursuit of education is a valid reason for continued dependence, a court must consider two questions. The first is whether, considering all of the child's circumstances, the child's educational pursuits are reasonable. If they are, the court must also consider whether it is appropriate that the pursuits be financed by the parents. These questions can be complex and value-laden. In *Farden v. Farden*, (1993), 48 R.F.L. (3d) 60 at 64-5, Master Joyce (as he then was) set out a list of eight factors that may assist a court in making the determinations:

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;
- (5) the age of the child;
- (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;

- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [17] This Court has found the Farden factors to be useful indicators in deciding whether child support should continue to be paid in respect of a child over the age of majority who is attending a post-secondary institution (see, for example, *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406; *W.P.N. v. B.J.N.*, 2005 BCCA 7 and *De Beck v. De Beck*, 2012 BCCA 465). It must be emphasized, however, that the Farden factors are neither a checklist nor a set of statutorily-mandated criteria. Rather, they are considerations for the court in assessing whether the child's situation is consistent with the definition of "child of the marriage" in the Divorce Act.
- [28] There is no evidence that Lauren's educational plan is not realistic, achievable or in accord with economic reality. Lauren is attending a four year undergraduate program in Psychology at the University of British Columbia in the Okanagan. She is on track to graduate in May 2017.
- [29] While attending university, Lauren has found employment, both at UBC-Okanagan and at a restaurant. While she claims she earns \$9.47 per hour plus tips at the restaurant, she provided no tax returns or proof of income or employment when she testified. She could not remember how much she worked or how much she earned.
- [30] She has not applied for student loans, grants or financial assistance.
- [31] The respondent has made attempts to assist her children by researching and pursuing scholarship and bursary opportunities for them. She secured employment for them at the clinic where she is employed full-time. Kirsten was able to work at the clinic while she attended the University of Victoria. She earned an income which helped her support herself.
- [32] With respect to the last factor set out in *Farden v. Farden*, (1993), 48 R.F.L. (3d) 60 - a child's unilateral termination of the relationship with the parent from whom support is sought can be a basis for denying child support to an adult child.
- [33] The respondent has attempted to communicate with Lauren by sending her cards and gifts. These attempts have been unreciprocated. Since Lauren moved out in March 2014, they have not spoken or seen each other, save for Lauren's attendance at court.
- [34] Lauren now refers to her mother as "Tracy" and shows antipathy towards her. Since moving into her father's home, Lauren has refused to communicate any details concerning her education, marks, plans or future with her mother. As a result of a court order, Lauren was required to furnish copies of her tuition invoices, marks and enrolment records to inform her mother of the progress she was making at school.

- [35] If a child unilaterally terminates a relationship with a parent, the court will consider whether there was an "apparent good reason" for the vanquished parent to continue to provide maintenance for that child: *Kaleniuk v. Kaleniuk* (1998), 82 A.C.W.S. (3d) 959 (B.C.S.C.) at para. 15. Quoting from *Jalil v. Jalil*, 2015 BCSC 567, this is because:

A parent and child relationship is not just an economic dependency. If a child expects to receive support, it is reasonable the child should have a relationship with the parent who is being asked to pay that support in the absence of conduct by that parent justifying a child's neglect of the child's duties towards his or her parent.

- [36] Although Lauren testified at the trial, she gave no explanation for her continuing antipathy and rejection of a relationship with the respondent. She has refused to acknowledge any communication with or gifts from the respondent were substantially unexplained. It may be that Lauren simply decided she was able to support herself without the respondent's assistance, despite the respondent's efforts to help her children attain their educational goals and to secure remunerative employment while attending school.
- [37] The only evidence concerning Lauren's decision to move out from the respondent's home was the fact that her mother had formed a new relationship with Mr. Peters who she invited into their home. The respondent explained to her children that she had been experiencing financial difficulties and that the rent Mr. Peters would pay her while living with them would be of assistance. Her daughters felt uncomfortable with this suggestion and argued with her. However, neither this nor the minor disagreements Lauren had with her mother, including one concerning a lost passport, explain Lauren's decision to unilaterally terminate her relationship with her mother which has continued for almost three years.
- [38] I conclude that Lauren's unilateral decision to completely exclude her mother from her life is not explained or justified. I find that she is no longer a "child of the marriage", and that consequently, the respondent is no longer obliged to pay support or to contribute to s. 7 expenses.
- [39] Lauren's regrettable estrangement from the respondent began in March 2014 when Lauren went to live with her father. Since then there have been interim orders requiring the respondent to contribute to Lauren's support. However, interim orders are not based on a fulsome exploration of the facts and issues that occur during a trial and are thus subject to reconsideration after a trial. See: *Tedham v. Tedham*, 2003 BCCA 600 at para. 59.
- [40] Although this may be an unusual case, I am satisfied that the courts granting the interim orders concerning support were not informed with sufficient evidence to assess all of the factors touching on the claimant's entitlement. I have had the opportunity to assess the evidence of the respondent, the claimant and their two children. The previous interim orders are not determinative of the respondents support obligations; the final determination of the support issue and must be considered in light of all of the relevant circumstances revealed at the trial.

[41] I am satisfied that Lauren's rejection of her mother has festered over many years. Although it is difficult to mark a date from which the respondent's support obligation should be terminated, I consider that August 31, 2015 will mark the end of the respondent's support obligation. That date marks the beginning of Lauren's third-year of university education and, in my view marks the end of her entitlement to support. All monies paid by the respondent since that date will be repaid to the respondent.

Retroactive Child Support to the Respondent

- [42] The January 22, 2015 order also required the claimant to pay the respondent \$3,000 in retroactive child support. The claimant failed to pay the respondent that amount until February 2015; when he obtained this sum from the net proceeds of sale the family Home.
- [43] For clarification I find that the respondent's receipt of \$3,000 from the sale proceeds held in trust will be deducted from the claimant's share of the family property after the property is divided between the parties.

Apportionment and Division of Assets Family Property

Proceeds of sale

- [44] Section 81 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides that on separation, each spouse has a right to an undivided one-half interest in all family property. In this case, there is a dispute concerning the exclusion of property purchased in part, with the respondent's injury settlement money.

Excluded Property

- [45] The first property to be considered under this heading is the Home at 2146 Shannon Woods Way purchased in May 1998 and sold in November 2014.
- [46] Property derived from property or the disposition of property excluded under s. 85 from consideration as family property will not generally be divided. Section 85 sets out the exclusionary rule:

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

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) inheritances to a spouse;
- (b.1) gifts to a spouse from a third party;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
- (i) loss to both spouses, or

- (ii) lost income of a spouse;
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[47] In May 1998, the parties purchased the Home at 2146 Shannon Woods Way. It was sold in October 2014 and at the time of sale there were judgments against the claimant in the sum of \$140,095.34 paid directly from the solicitors to the Crown in Right of Canada. At that time, the balance held to the credit of the parties was \$99,099.21.

[48] The respondent claims she made contributions to purchase the Home that qualify as excluded property under s. 85 of the FLA. The respondent testified that she used \$22,598 from her personal injury settlement towards the purchase of the Home. She argues that this contribution is specifically addressed in s. 85(1)(c) and 85(2) of the FLA and constitutes excluded property.

[49] The claimant testified that he contributed \$20,000 from an inheritance from his mother towards the purchase of the parties' first two properties in Prince George prior to their move to Kelowna. He did not argue that this sum constituted excluded property under s. 85(a) of the FLA; there was not any evidence that he made any contribution to the Home purchase from the proceeds of sale of either of the Prince George properties. I will address the claimant's mention of his contributions to the Prince George properties to ensure fairness in the analysis constitutes excluded property under s.85(c) of the FLA.

[50] Under the FLA one spouse's initial investment may fall under the excluded property if the party claiming the exclusion establishes, on a balance of probabilities, the basis for and extent of the exclusion with precision: see *Shih v. Shih*, 2015 BCSC 2108 at paras. 64 and 103-107, *aff'd* 2017 BCCA 37 [Shih], *Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143 at paras. 93-94.

- [51] In Shih, Warren J. described this process as follows:
- [64] Where it is asserted that excluded property has changed character, each link in the chain required to trace the property into a currently owned asset must also be established. Depending on the nature of the claim in question, this may mean, in practical terms, that it is impossible for a party to meet the onus without documentary evidence. For example, where the claim in question is a bank account that one party says pre-existed the relationship the court may conclude that a party's viva voce testimony of the balance in the account at a particular point in time several years earlier is unreliable, and therefore insufficient to meet the onus, if not corroborated by a bank statement. On the other hand, where the claim in question is founded upon an unusually memorable event, such as an inheritance, the court may conclude that a party's viva voce testimony as to the value of the inheritance is reliable without corroborating documents. In other words, in determining whether the onus has been met, the court will assess the credibility and reliability of the whole of the evidence tendered in the context of the specific case, but having regard for the precision mandated by the more formulaic approach of the FLA.
- [52] In A.A.P. v. G.T.F., 2015 BCSC 662, Ehrcke J. made it clear that the onus is on the spouse seeking to exclude settlement funds arising from a motor vehicle accident to demonstrate that the portion of the funds is attributable to injury or loss to the spouse and constitutes excluded property: see para. 69. If the party seeking the exclusion is unable to meet the burden of showing the settlement or award does not relate to lost income, then no part of settlement is excluded property.
- [53] In this case, the respondent provided compelling documentary evidence that her 1996 settlement was used to pay the balance necessary to complete the purchase of the Home; the funds came from an account in which held her 1998 personal injury settlement.
- [54] The respondent's personal injury settlement was for \$55,000 non-pecuniary damages plus special damages and court ordered interest. The evidence proved clearly that these funds were from her non-pecuniary damages and not lost wages. Shortly after receiving these funds she deposited a portion of the Home purchase price to the lawyers trust account.
- [55] The respondent had kept her damages settlement in a separate bank account until the parties purchased the Home in May 1998. The statement of adjustments from the Home purchase in May 1998 demonstrates that the parties paid \$180,000 for the Home. The purchase funds were paid from a Royal Bank mortgage of \$159,965 and the respondent's \$22,598.06 paid directly to their solicitor.
- [56] I am satisfied that under s. 85(1) of the FLA, the funds advanced at the time of purchase were excluded property and that the Home is property derived from those funds because of the respondent's personal injury settlement. Thus, \$22,598 of the sale proceeds are excluded property subject to further considerations noted below.

- [57] Conversely, I find that the claimant's viva voce testimony as to the value of the inheritance he received from his mother was not helpful to any suggestion that he contributed to the purchase of the Home by using excluded assets. The bank records and closing documents related to the purchase do not reflect any contribution to the price other than the respondent's infusion of her personal injury settlement money to the transaction. In the result, I do not consider the claimant's \$20,000 inheritance to be excluded from the sale proceeds of the Home.
- [58] Before reaching a final conclusion concerning the exclusion of property in this case, it is necessary to address the question of the impact of the parties' decision to hold title to the Home in joint tenancy on the result.
- [59] No presumption of advancement arises when one spouse's investment is put into a property that is jointly owned by that person: see *Hu v. Li*, 2016 BCSC 2131. In that case, MacIntosh J. set out the correct approach to the presumption of advancement analysis when property from one spouse is transferred from one spouse to another. He said:
- [39] The analytical framework was expressed as follows in *Wu v. Sun*, 2010 BCCA 455 (CanLII) at para. 18:

The Supreme Court of Canada has made it clear in cases such as *Pecore v. Pecore*, 2007 SCC 17 (CanLII), [2007] 1 S.C.R. 795, that it is a question of fact as to what is the intention of a party transferring property to a third party for no consideration. In some circumstances, it may be appropriate to infer a resulting trust or a constructive trust, but the conclusion to be inferred in the individual case will depend on a consideration by the trier of fact of all the circumstances of the case. The trial judge in the present case concluded on his consideration of all the evidence that the mother, at the time of the transfer of the Drummond property from her to her son in 1999, intended to divest herself of ownership of the property and transfer that ownership to her son. In a recent case in this Court, *Fuller v. Harper*, 2010 BCCA 421 (CanLII), the Court, after referring to the comments of Mr. Justice Rothstein in *Pecore*, noted that the effect of any presumption of resulting trust only will be requisite after all the evidence and the surrounding circumstances in which the transfer was made has been weighed and considered by the trial judge. It is only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer that it may become necessary to apply such presumption to possibly tip the scales in favour of the transferor of property or the donor of funds. ...

[Emphasis added.]

- [40] That passage underscores the test in *Pecore*, at para. 55, that the trial judge must "weigh all the evidence relating to the actual intention of the transferor." That is a factual inquiry. This Court's primary task therefore is to examine all of the evidence in order to determine what Thomas and Anita intended in 1996 and 2004.

- [60] There was no evidence given by either party concerning the respondent's intention in contributing the non-mortgage related funds to the purchase price. The claimant did not address this question at all during his testimony.
- [61] There is some evidence in the steps taken by the respondent when the Vicky was purchased and owned separately by her to the exclusion of the claimant up to separation. I conclude that this decision reflects the respondent's clear intention when she used her personal injury settlement to firstly to buy the Vicky. At the time the house was purchased the respondent again used her accident settlement and I accept it is more likely than not that she intended to keep her interest in the deposit money separate from the claimant. I conclude that insofar as she did not intend to make a gift of the Vicky to the claimant, it is reasonable to infer that she also intended to retain her interest deriving from the settlement funds in the Home notwithstanding that it was registered in joint tenancy. The parties had purchased the house together; I presume both owners were required by their lender to be covenantors on the mortgage and joint tenants. I cannot infer that the respondent's infusion of all of the cash used to purchase the house and registration of title as joint tenants was any indication of her intention to make a gift to him. It is most likely that title to the Home was registered in joint tenancy as a convenient means to reflect their shared use and ownership of the property and shared obligation under the mortgage but without any intention on the respondent's part to abandon her interest in the property and make a gift of her settlement funds to him.
- [62] Thus, I conclude that the respondent's contribution of \$22,598.06 to the purchase of the Home is excluded property. The proceeds of sale of the Home are family property and will be divided after taking into account the other issues concerning debt, unequal division and the other others.

Unequal division of remaining proceeds

- [63] Each of the parties claim that the proceeds of sale of the Home should be divided unequally under s. 95 of the FLA because it would be "significantly unfair" to divide it equally. The relevant portions of s. 95 read as follows:

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (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.
- [64] The respondent argues that it would be significantly unfair to divide the proceeds of sale from the Home equally for three reasons:
- (a) The respondent claims that the house was worth more than its final sale price and that the claimant failed to optimize the Home's ultimate sale price, entitling the court to order unequal division of family property pursuant to s. 95(2)(g)(i);
 - (b) The respondent claims she was deprived of the right to negotiate with Canada Revenue to try to reduce the claimant's debts. The claimant paid his personal debt to Canada Revenue in the amount of \$145,000 from the proceeds of sale from the Home. While the respondent was aware that the claimant was indebted for taxes, she was unaware of the magnitude of the claim and only became aware of it after the claimant had paid it without her consent. Because she was left in the dark, she believes she is entitled to a larger interest in the proceeds of sale under s. 95(2)(h).
 - (c) She paid the mortgage payments and other maintenance expenses on the Home after separation and until sale in 2014.

- [65] The claimant seeks an unequal division because he expended \$2442.07 purchasing cleaning supplies and repairing the residence prior to sale. He contends he should be compensated for the labour he provided in preparing the house for sale. He estimated this to be \$1432 (99.5 hours at \$15 per hour).
- [66] He argued that the respondent removed the appliances when she vacated the Home and this resulted in a loss of \$3500.
- [67] He also contends that he should be compensated for the "unnecessary hardship and stress as a result of the respondent's repeated applications and false accusations".
- [68] I will address the respondent's first and second concerns at this point and will discuss her third concern and the claimant's position later in these reasons
- [69] Firstly, s. 86 the FLA defines family debt as all obligations incurred by a spouse from beginning to end of the relationship.
- [70] I am satisfied that the claimant's tax debt accrued from the period between 2004 and 2010; this time is well within the time the parties were together. Presumably, the debt resulted from the claimant's failure to report income or pay taxes related to his business. Had he attended to timely payment of this debt to Canada Revenue, however, those funds would have come from the family finances and would have reduced the family's standard of living. The evidence does not suggest that the claimant's tax debt increased after separation beyond the accrual of interest and penalties. There was nothing in the respondent's evidence or submissions suggesting that the CRA debt was incurred, otherwise than in the normal course of the parties relationship or that he in any way reduced the value of family property. Consequently, the respondent has not demonstrated that it would be significantly unfair to divide the CRA debt equally having regard to ss. 95(2) of the FLA. I will not order unequal division of the proceeds of sale on this ground.
- [71] In making this decision, I have taken each spouse's financial means and capacities into account including the fact the claimant waived his claim to spousal support before any consideration of family property where the burden of family debt. I am satisfied that s. 95(3) does not support the respondent's claims.

Apportionment and Division of Assets - Vehicles

The 1933 Ford Victoria

- [72] The respondent purchased the Vicky in April 1996 with the non-pecuniary damages funds she received from the settlement of an automobile accident injury claim discussed above. She paid \$16,000 for the car. It was registered solely in the respondent's name.

- [73] Before 1992 and before the claimant purchased the Vicky, the claimant had been hired by the previous owner to complete restoration work on the car to bring it up to show-worthy condition. He had been allowed by the owner to use the Vicky to promote his businesses before the respondent purchased it.
- [74] During the relationship, the claimant also used the Vicky at car shows to promote his businesses, namely Dan's Place and Smart Parts. He testified that on one occasion in 2009, he drove the Vicky to a car show and when returning, the vehicle broke down and has not been driven since. He testified that the engine had overheated and needed to be repaired but he had not done this work.
- [75] There was evidence that parts of the Vicky had been disassembled and before it could be made roadworthy and saleable at an optimum price, it would be necessary to complete work on the vehicle.
- [76] Since 1996, the car has been insured for driving sporadically; it has been insured for driving for three years and eight months cumulatively.
- [77] In or about April 2013, the claimant unilaterally removed the Vicky from the Home and placed it in storage in a friend's garage. He testified that the respondent agreed that he should take control of the Vicky; I do not accept his evidence on this point. She was the registered owner of the vehicle and it is inconceivable that she would have allowed him to take the vehicle in the midst of this dispute. Furthermore, she made some repeated requests for him to disclose the new location of the Vicky; he repeatedly refused to disclose this information. He did not disclose the Vicky's new location to the respondent. This frustrated the respondent.

Excluded Property

- [78] The parties disagree about whether the Vicky is excluded property and how to value and divide the asset. The respondent claims that the Vicky is excluded property and that she should retain ownership without any obligation to compensate the claimant for his interest in it. She alleges that the claimant mishandled the Vicky by removing it from the Home and leaving it in disrepair, removing its engine and otherwise disassembling the vehicle in the summer of 2013. She asserts that this has resulted in a diminution of the car's value.
- [79] The claimant contends that although the Vicky has been registered in the respondent's name since 1996, it was an important feature in business and constitutes family property to be divided equally. He said that the Vicky had been registered in the respondent's name for "tax purposes".

- [80] The respondent contends that the Vicky's fair market value when it was purchased was \$75,000. The claimant suggests the Vicky is worth \$30,000. At trial there was evidence that its present fair market value is \$20,000. They included an appraisal to support these contentions; unfortunately, it was inadmissible and was ultimately unhelpful in assessing the vehicle's value.
- [81] The claimant submits that the Vicky should be valued at \$30,000 and that he would pay the respondent \$15,000 for her interest. He argues that he used the vehicle to promote Dan's Place and Smart Parts. He also contends that the Vicky was registered in the respondent's name for "tax purposes" and that it forms part of the "family property" to be divided equally. He contends that because it is an important feature of his business, title should be transferred to him in exchange for giving the respondent \$15,000.
- [82] Dealing first with the claimant's claims, I find that the claimant's contention that the Vicky was registered in the respondent's name for tax purposes makes no sense; putting the vehicle in the respondent's name served no tax purpose. However, I accept his contention that he used the car to promote his businesses.
- [83] In considering the respondent's claim, I am satisfied that the Vicky is excluded property since it was purchased by the respondent with \$16,000 of her non-pecuniary damages award. It is excluded property because it "derived from" the respondent's injury settlement. However, that is not the end of the inquiry. Under s. 96(b) of the FLA, I must also consider whether:
- (b) it would be significantly unfair not to divide excluded property on consideration of
 - (i) the duration of the relationship between the spouses, and
 - (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.
- [84] I accept that the claimant used the Vicky to advertise his businesses and that it represented an example of his workmanship. I note, however, that his restoration work was primarily performed before the respondent purchased the vehicle. He did not say whether he expended any efforts to repair or improve the car either before or after separation. The more compelling evidence is that he disassembled the Vicky and this resulted in a diminution in its value.
- [85] He testified that he removed the Vicky from the home with the agreement of the respondent; she steadfastly denied that assertion.
- [86] The claimant did not specifically argue that it would be unfair to exclude the Vicky from family property due to unfairness as described in s. 96(b) of the FLA. In *Szablewska v. Staehli*, 2015 BCSC 1558, Brown J. summarized the approach to this issue. She said:

- [63] Under s. 96(b), the court must not order the division of excluded property unless it would be significantly unfair not to do so in consideration of the duration of the relationship and the spouse's direct contribution to the property.
- [64] In *V.J.F. v. S.K.W.*, 2015 BCSC 593 (CanLII) at para. 79, Mr. Justice Walker found the comments of the court on s. 95 of the Family Law Act in *Remmem v. Remmem*, 2014 BCSC 1552 (CanLII), instructive for the approach to be taken for s. 96. In *Remmem* at para. 44, Mr. Justice Butler provided;
- [44] Significantly is understood to mean more than a regular impact -- something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful[.]
- [65] In *V.F.J.*, Walker J. went on to find:
- [83] The FLA has not set the bar so high that finding significant unfairness is next to impossible. For example, in *Cabezas v. Maxim*, 2014 BCSC 767 (CanLII), the Court found that significant unfairness would result from the unequal division of the claimant's purported excluded property given the respondent's contributions to the maintenance of the property, her decision to undertake liability on the mortgage, her greater contribution towards expenses, and the length of their cohabitation of 6.5 years[.]
- [87] The standard "significantly unfair" creates a high threshold for a party to establish that significant unfairness would result from a refusal to divide excluded property.
- [88] In the circumstances of this case, the parties have emerged from a lengthy relationship during which the respondent retained ownership of the Vicky. This factor alone might favour a division of the Vicky.
- [89] I accept the claimant's testimony that he had restored the Vicky before it was purchased by the parties. I also accept that he used the Vicky as an advertising feature for his business. There was no evidence of his contribution to the preservation, maintenance or improvement of the vehicle. It might be a convenient assumption to conclude that the claimant continued to maintain, improve, preserve operate and manage Vicky, but there was a little direct evidence on this point. Rather the evidence suggests that while the vehicle has been in his possession it broke and has deteriorated in condition and value and over many years he has not repaired the vehicle.
- [90] The claimant has not established that he made any post acquisition financial contributions to the vehicle. Although he has a business interest in retaining a one-half interest in the Vicky, there is nothing in the evidence to persuade the court that it would be "significantly unfair not to do so".

[91] I therefore find that it would not be significantly unfair not to divide the excluded property represented by the Vicky. He is entitled to share in the appreciated value but the respondent is entitled to the first \$16,000 of the Vicky.

Equal Division of the Vicky

[92] There is also the question of how to treat the difference between the Vicky's purchase price and its present fair market value.

[93] Section 84(1) defines "family property" as "all real property and personal property". Section 84(2)(g) states that family property includes:

- (g) the amount by which the value of excluded property has increased since the later of the date
- (i) the relationship between the spouses began, or
- (ii) the excluded property was acquired.

[94] In the result, I find that any difference between the current fair market value of the Vicky and \$16,000 is family property that will be shared equally by the parties.

[95] Section 97 of the FLA provides direction on how the court affects a division of family property and debt. The Vicky is currently in a state of disrepair and in part, disassembly. The respondent believes the Vicky is worth substantially more than \$30,000; this obviously assumes that the vehicle has been put back together and made roadworthy. The vehicle stopped working before the parties separated but remained at the home until it was removed by the claimant after separation.

[96] The respondent presented a passionate argument that she should retain ownership of the Vicky. In her written argument she said "I grew up with vehicles such as this, and I am entitled to have it returned to me in the condition it was prior to separating. I will not be able to afford another opportunity such as this, and I request that this asset of mine alone be return to me in proper order". She does not want the vehicle sold or auctioned.

[97] There was nothing in the evidence to suggest that an equal division of the appreciated value of the Vicky should not be divided equally. The same standard set out in s. 96 applies to s. 95 mandating an equal division of family property unless such a division would be substantially unfair. The respondent did not meet the high threshold to engage s. 95(1).

[98] In the absence of any other reliable evidence, I accept the claimant's assertion that he believes the Vicky is currently worth \$30,000. However, the respondent believes the Vicky is worth substantially more. There was an attempt to prove the value of the vehicle with an opinion based on the disassembled state of the car.

- [99] Section 87(b) requires the value of family property to be determined as at the trial date. Sections 97(1)(a) and (2)(a) provide authority for the court to determine any question respecting ownership, right of possession or division of family property and to declare which party will have ownership or possession of the property. The court is also authorized to divide family property unequally where, after separation, one spouse caused a significant decrease in the value of the property.
- [100] I find that if the parties cannot agree that the Vicky is worth \$30,000 or some other amount, or which spouse should retain possession of the Vicky; thus there will be a mechanism for determining the value and retention.
- [101] Each party will submit a sealed bid to the court indicating the value that person is prepared to pay to become the owner of the Vicky. The party presenting the highest bid for the Vicky in its current state will become the owner on payment of the price bid.
- [102] If the claimant is the successful bidder, the claimant must pay the respondent \$16,000 plus one-half of the difference between his price offered and \$16,000 within ten days of the payment of the proceeds of the Home sale.
- [103] If the respondent is the successful bidder, she will pay to the claimant one-half of her bid price less \$16,000 less the cost to re-assemble the Vicky. If the parties are unable to agree on the costs necessary to reassemble the Vicky, then the question of the amount necessary to achieve reassembly will be referred to the registrar of the court who will determine the cost necessary to restore the vehicle to its pre-separation condition.
- [104] Whether the parties agree that the Vicky is worth \$30,000 or rely on the registrar's valuation of the car, the respondent will receive the first \$16,000 of that asset. The parties will share the remaining appreciation of the car, subject to my comments concerning the claimant's financial obligation to restore the vehicle to its pre-separation condition.

The Other Vehicles

- [105] The claimant seeks orders that:
1. The 1948 Hillman remain the respondent's property so long as she compensates him in the amount of \$500;
 2. The 1979 Suzuki GS 750E motorcycle remain the claimant's property so long as he compensates her in the amount of \$1,500;
 3. The 1980 GMC pickup truck be deemed excluded property under s. 85(1)(a) since it was purchased by him in 1980 and owned exclusively by him after that date;
 4. The 1991 GMC pickup truck be deemed personal property under s.84(1)(a) since he purchased this vehicle after separation;

5. The 1996 GMC pickup truck be deemed excluded property under s. 85(1)(b.1) since he was given the truck as a gift from his brother.

[106] I find that the 1991 GMC truck is personal property and the 1980 and 1996 GMC trucks are excluded property.

[107] I also find that the 1958 Hillman, the 1979 Suzuki, the 1998 Travel Mate camper were purchased by the claimant during the marriage and are family property.

[108] The 1998 GMC pickup truck was obtained by the respondent as a leased vehicle. In 2001 she financed the payout of the lease and acquired ownership of that vehicle. It is registered in her name.

[109] In March 2014, the claimant had possession of this vehicle; the respondent took the vehicle amid some controversy. Apparently the complainant had received the keys to the respondent's car and refused to return those keys unless she sign over the 1998 GMC to the claimant. Nothing turns on the controversy concerning possession of the vehicle saved and except that there was an issue concerning the rims and tires which will be addressed later in these reasons.

[110] He contends that the GMC should remain in the respondent's possession and that, for the purposes of dividing family property, should be valued at \$4000.

[111] There was no admissible evidence concerning the value of these items. While I could order a public auction of these items, I am satisfied that an equal division can be achieved if the respondent retains the 1998 GMC, and the claimant the 1948 Hillman and the 1979 Suzuki.

[112] If the 1998 GMC is not returned to the respondent in its condition at separation, the claimant will pay to the respondent the costs of restoring that vehicle to its pre-separation condition. If there is any disagreement concerning the cost to return the vehicle to that condition, then the matter will be referred to the registrar of the court to determine the costs necessary to restore its condition.

Apportionment and Division of Family Businesses and Business Assets

Overview

Dan's Place

[113] The claimant first learned how to upholster automobiles when he was 17. At 19, he began upholstering/specially manufacturing custom interiors for hot rod vehicles. He opened a business that provided these services named Dan's Place in 1985.

[114] The business proved to be less than robust throughout the marriage. The respondent suggested the claimant performed work which was paid for in cash and was not recorded as income to the business. She produced one document that appeared to reflect a cash payment; the evidence fell short of proving that Dan's Place received much unreported income.

[115] The claimant produced year-end financial statements for Dan's Place in December 2012 and 2014 only. Its gross income and the claimant's line 150 incomes have been reported as follows:

Year

Dan's Place's Gross income

Claimant's Line 150 income

2010

\$61,333

\$37,565

2011

\$45,576

\$28,123

2012

\$34,179

\$10,195

2013

\$30,753

\$9,875

2014

\$54,254

\$17,232

[116] It is difficult to accept that his net income from business in these five years was less than the Canada Revenue debt he amassed over the same period. I do not accept the claimant's assertions concerning his income.

Smart Parts

[117] In 2000, the claimant started a business named "Smart Parts" which, like Dan's Place, specializes in manufacturing custom interior Parts for hot rod vehicles. The business involves cleaning, packaging and selling Parts. In 2006, Rick McGillivray, one of the claimant's friends, acquired 50% of the shares in Smart Parts. The claimant owns one-third of the shares and the respondent one-sixth.

[118] The claimant is the director and president of Smart Parts; Mr. McGillivray is the other director. The claimant does design work and develops new Parts while Mr. McGillivray handles the finances. Both of them help clean and ship the products.

[119] The claimant works at Smart Parts approximately ten hours each week but draws no salary. He claims Smart Parts buys him and Mr. McGillivray lunches and pays for trips to tradeshowes but that there is little income leftover to distribute to them.

Financial Records of the Businesses

[120] Mr. McGillivray testified that he purchased one-half of Smart Parts' shares for \$50,000. He advanced \$25,000 in cash and purchased \$25,000 worth of inventory. He claims that Smart Parts still owes him money for advances he has made on its behalf.

[121] The claimant produced year-end financial statements for Smart Parts for May 2011-2015. He did not produce any financial records for Smart Parts in 2016.

[122] Smart Parts' gross and net incomes have been reported as follows:

Year

Gross income

Net income

2011

\$109,196

\$30,377

2012

\$90,518

\$(3,105)

2013

\$93,912

\$(5,281)

2014

\$100,386

\$4,121

2015

\$92,970

\$(2,004)

[123] Both Smart Parts and Dan's Place's financial records contained anomalies. For instance, in 2014, Smart Parts reported paying rent of \$11,250. Mr. McGillivray, Smart Parts' landlord, could not explain this where this amount came from.

[124] Dan's Place also rents space from Mr. McGillivray. In 2014 Dan's Place paid \$6,612 for rent and \$2,136 for property taxes. There was no evidence that Dan's Place owned any property and the claimant testified that Dan's Place paid \$550 per month rent; he said Dan's Place pays for the utilities for the building rather than paying the actual rent. Nonetheless, the claimant's profit and loss statement indicates he pays \$4326 for utilities and telephone in addition to the rent and property taxes. The rent component of the financial statements is entirely inconsistent with the claimant's evidence and underscores the unreliability of his evidence and the financial statements.

[125] Smart Parts' 2015 financial statement shows expenses of \$8,519 for bank charges and interest and \$4,317 for telephone expenses. Mr. McGillivray could not explain these fees either. Similar explanations for charges were listed in the company's 2014 financial statements.

[126] Mr. McGillivray testified that Smart Parts owes him \$49,000, has credit card debt in the amount of \$24,000 and has a term loan of \$10,000. It also owes \$4,200 to its suppliers. On Mr. McGillivray's evidence, the company owes \$98,400. In its May 2015 financial statement, however, Smart Parts disclosed liabilities of \$24,161 of which \$17,779 was allegedly owed to Mr. McGillivray and the claimant as shareholder's loans.

[127] In my view, the discrepancies between Mr. McGillivray's evidence, the claimant's evidence and the financial statements are so great that I cannot rely on them. Further I have no confidence that the financial statements and records (insofar as they were produced) fully, fairly or accurately describe the financial status of either enterprise.

Apportioning business assets in the absence of reliable financial records

[128] The claimant argues that he has earned a very modest income from either Dan's Place or Smart Parts. The parties agree that Dan's Place and the shares in Smart Parts are family property. The respondent performed some services for Dan's Place and was a shareholder in Smart Parts.

- [129] The respondent claims that the claimant's disclosure of the businesses' financial information was so lacking that she could not value the businesses. To illustrate this point, she noted that the claimant had failed to provide lists of his businesses' inventory and equipment. She also pointed to evidence that Dan's Place receives cash payments for services in an effort to avoid taxes.
- [130] She contends that he failed to meet his obligation to make full disclosure of his business interests in response to her demands and court orders. The claimant replied by saying that he had produced everything he had been ordered to produce.
- [131] Under cross-examination, the claimant acknowledged that on September 30, 2015 he was ordered to produce ledger of payments to Mr. McGillivray from January 2012 to April 2016 including the amounts paid and the reasons for such payments. He admitted that he had not produced these documents.
- [132] He confirmed that he had not provided two to three years bank statements as ordered by the court in November 2015. He acknowledged that there were 23 bank statements not produced; his only explanation was he misunderstood his obligation; he believed he needed to produce only three years of bank statements and was not obliged to produce more. He had been asked for a shareholders loan account for Smart Parts; this was not produced.
- [133] He did not produce a financial statement for the year ending May 31, 2016 or any related documents for that year.
- [134] I am satisfied that Dan's Place and the parties' shares in Smart Parts are family property under s. 84(2)(b) of the FLA and despite the poor disclosure of information and records, I must attempt to value the businesses to permit the parties finality in this dispute.

Dan's Place

- [135] There was a paucity of evidence to inform me about the value of Dan's Place. The claimant testified that this business purchased a type of storage facility described as railway container that cost \$3,000 in 2001 or 2002. The container is used to store parts for his business and some furniture. It is 8' x 40' and could accommodate two motor vehicles. He did not include this item in his 2015 F8 Financial Statement nor did he attribute any value to Dan's Place in that document.
- [136] The respondent concedes that the claimant should retain ownership of the unit. Although there is no reliable value attached to the storage unit, it would not be practical or economical to require a registrars hearing concerning that item. I conclude that the value of the railway container is likely \$1000.

- [137] The respondent asked that I impute a value to Dan's Place based on his failure to provide documents and information about the business. He did not disclose the current inventory, did not give an equipment list nor did he provide any detail about the acquisition of the storage unit among other shortcomings in his disclosure referred to above.
- [138] Although the assets of Dan's Place, including the equipment and inventory, likely have some value, it is impossible to evaluate the assets or the business as a whole largely due to the claimant's non-disclosure; thus the respondent has been denied the possibility of proving the extent or value of her claim.
- [139] The respondent quite understandably did not request any further adjournment of the trial. She contends the claimant simply failed to abide by court orders to produce all relevant documents including bank statements. Yet by the start of the trial he had not produced the information and documents referred to above.
- [140] I accept that the claimant was dilatory in producing some information and simply failed to produce other items requested. I will address the claimant's shortcomings in the context of the respondent's request for a fine under s. 213 of the FLA.
- [141] In view of the meagre income disclosed in the records he has produced it including anything that identifies the assets of the business other than the railway storage facility)(I cannot fairly or reasonably conclude that there is significant value in Dan's Place to warrant a finding that he must pay the respondent for her interest in the enterprise. It may very well have value but I am not able to come to any conclusion to assist the respondent.
- [142] I have also taken into account the claimant's decision to waive any entitlement to spousal support as a factor that engages a consideration of the fairness of an equal division if such had been ordered. This would have been a consideration under ss. 95 (2)(i) and (3).

Smart Parts

- [143] To assist my valuation of Smart Parts, I rely, in part, on the claimant's submission that he agreed to pay the respondent \$5,000 to buy her one-sixth of Smart Parts' shares. I use that offer as recognition of the claimant's view that the parties' interest in their 50% of Smart Parts' shares are worth at least \$15,000.
- [144] Relying on Mr. McGillivray's testimony that he paid \$50,000 for half of the Smart Parts shares and extrapolating from the claimant's offer to pay the respondent \$5,000 to buy her one-sixth of the company, the company is worth between \$30,000 and \$100,000 in total.
- [145] The challenges to the claimant's credibility and reliability and Mr. McGillivray's reliability are significant. These concerns with the evidence tendered by the claimant coupled with his failure to disclose documents and produce information generally necessary to perform an analysis of the value of the businesses, I will address the question of valuing the respondent's interest in Smart Parts in a "rough and ready" manner.

[146] I find that the value of the half of Smart Parts shares that the claimant and respondent own between themselves is \$25,000. The claimant's two-thirds of shares are worth \$16,667 while the respondent's one-third of shares are worth \$8,333; however both parties' shares are family property to be divided equally between them. I order that the respondent transfer her one-third of shares to the claimant, and that the claimant pay the respondent \$12,500 to compensate her for the equal division of half of the company's shares, which are family property and he will retain their entire interest in Smart Parts.

The Custom Built Trailer

[147] In 1998, the claimant built a custom trailer to transport the Vicky to shows. He painted it to match the upholstery used in the car. The description of the trailer indicates it is well-suited to transporting the Vicky and is decorated with some sophistication.

[148] Because the trailer was created during the marriage, I find that the trailer is family property. The value of the trailer will be divided equally between the parties.

[149] The trailer will be retained by the party successfully bidding for the purchase of the Vicky. That party will pay the other one-half of the fair market value of the trailer. Although it may be more appropriate to refer the valuation of the trailer to the registrar, I am of the view that the cost and expense of such a review is impractical. The parties will be at liberty to provide the court with further opinion evidence concerning the value of the trailer and a decision concerning that value will be made based on that evidence.

Apportionment and Division of Debts

[150] Section 81 of the FLA provides that on separation, each spouse is equally responsible for all "family debt". Since there is no agreement that provides otherwise, according to s. 87 of the FLA, the date for valuing the family debt is the hearing date.

[151] Family debt is defined under s. 86 of the FLA as follows:

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

[152] The claimant contends that all of the debts outstanding for Medical Services Plan premiums, the RBC joint line of credit and the Canada Revenue debt ought to be shared equally by the parties. He seeks compensation for one-half of the \$100 per month payment he has made on the Canadian Tire MasterCard account since July 25, 2014 and for one-half of the principal he paid on that account in July 2014: \$401.28.

- [153] He argues that the respondent should be responsible for the personal loan made by her mother, Judy Clark, of approximately \$9,000 as well as for her RBC Visa, CIBC Visa, BMO MasterCard and HBC credit card, totalling \$19,482.54.
- [154] He concedes that the loan from his brother, David Oleksiewicz, of \$8,450, as well as personal loans and debts currently in his name, should remain his responsibility.
- [155] The respondent seeks an order that the claimant be responsible for the repayment of the RBC line of credit, the claimant's Canadian Tire MasterCard and the claimant's BMO MasterCard.
- [156] She also seeks an order that the claimant be held solely responsible for the Canada Revenue debt.
- [157] She also seeks an order that the claimant assume responsibility for the entirety of debts owing to Georgina Ewanchuk, David Oleksiewicz, Alan Oleksiewicz, Helen Oleksiewicz and Jim Peck.
- [158] Finally, she seeks an order that the respondent reimburse her for \$31,131.04, representing one-half of the property taxes, utilities, mortgage and home insurance payments made by her for the Home between 2012 and 2014.

CRA Debt

- [159] The claimant owed family debt to Canada Revenue at the time when the debt was incurred. However, when the Home was sold pursuant to a court order, the CRA debt was discharged as a necessary function of the transaction. As such, pursuant to s. 87 of the FLA, there was no debt on the date that the family debt was valued i.e. on the date of the hearing.
- [160] Considering the factors under s. 95(2) of the FLA respecting unequal division of family debt, I note that:
- a) The parties were married for 24.5 years;
 - b) The parties maintained separate careers during their marriage;
 - c) The CRA debt, excluding interest and penalties, accrued between 2004 and 2010. The claimant provided no satisfactory explanation about why he allowed this debt to accumulate. He testified that he was not aware of the debt until 2012 because the respondent "did his books" and he thought she was taking care of it. Nevertheless, nothing in the evidence indicates that the claimant caused an increase in the family debt despite the fact that the respondent complains that the claimant could have been more aggressive in challenging the CRA assessments; and
 - d) The respondent has demonstrated a stronger financial base and earning capacity than the claimant. The claimant has also chosen not to seek spousal support.

[161] It is curious that the claimant claims to have been unaware of this mounting tax liability. Averaging the total debt over seven years, the annual tax payable exceeds the amount he claimed he earned in December 2015 in his F8 Financial Statement: \$17,232.

[162] I am satisfied, having considered all the circumstances, that the CRA debt should be divided equally and was properly paid from their joint interests in the net proceeds of the sale of the Home.

Other debts

[163] I am also satisfied that the following debts are family debts that shall be shared equally by the parties and paid for from the net proceeds of the sale of the Home:

1. Medical Services Plan debt of \$6,333;
2. RBC joint line of credit with an outstanding balance of \$9,504.25 and accrued interest of \$1,988.56;
3. Canadian Tire MasterCard debt with an outstanding balance of \$4,377.76;
4. Visa with an outstanding balance of \$3,977.97 and the July 2014 principal of \$401.28;
5. CIBC Visa with an outstanding balance of \$6,996.71;
6. BMO MasterCard with an outstanding balance of \$8,110; and
7. HBC credit card with an outstanding balance of \$387.86.

[164] None of the above debts or financial obligations was incurred by either spouse for personal reasons or after separation.

[165] Neither party seeks to share the burden of personal family loans made by Judy Clark to the respondent or from David Oleksiewicz to the claimant or by any other relatives or friends to the parties. On the basis of their mutual positions I will order that those debts not be shared.

[166] In any event, there was insufficient documentary evidence to show that monies were a) advanced, b) advanced as loans as opposed to gifts and c) confirmed by the debtor within six years of the loan having been advanced by the creditor(s). As such, it is likely that none of these loans remain payable by the parties to the lenders in any event.

Expenses related to maintenance and sale of the Home

- [167] The claimant contends that when the respondent vacated the Home before it was sold, she left it in disrepair and in an untidy state. She conceded that she removed three appliances and has only offered to return the appliances to the claimant at the conclusion of this matter. The claimant contends that the removal of the appliances and state of disrepair and cleanliness of the house impacted the eventual sale price and required that he incur significant cleaning and repair costs for which he seeks repayment.
- [168] In total, he estimates that he is owed compensation in the amount of \$2,442.07 for materials purchased to clean and repair the Home. He also contends that he and friends expended 99 hours in preparing the house for sale and he seeks \$1,432.50 for this labour. He estimates that the removal of the fridge, dishwasher, washer, dryer and other appliances represent a further \$3,500 diminution of value of the Home.
- [169] There was no evidence concerning the impact of the missing appliances on the eventual sale price. Common sense suggests that a prospective buyer viewing a house without appliances may consider the cost of replacing appliances in making an offer. The appliances may have been purchased when the house was purchased in 1998; the claimant provided no reliable evidence as to the cost of replacing those items.
- [170] The respondent acknowledges removing some of the appliances but disagrees that she left the house significantly unclean or in disrepair.
- [171] Without any reliable evidence concerning the value of these used appliances it has not been proven their absence devalued the Home. However the respondent must account to the claimant for one-half of the value as at the date of sale. The parties had owned the Home for 20 years. If they cannot agree on the value of the appliances, the question of value should be referred to the registrar. If I were to make an arbitrary finding as to value, I would have suggested the value was \$1,000; however that matter is left to the parties or the registrar.
- [172] With respect to the labour costs the claimant incurred in preparing the Home for sale, I conclude that the claimant is entitled to no reimbursement from the respondent. He requested, and was granted, an order for sale. Homeowners should expect to put some time and effort into preparing their houses for sale. They are not entitled to compensation for their labour in the absence of evidence of actual damage caused by the occupant.
- [173] During the three years following separation, the claimant occupied the family Home. She received rent from Mr. Peters during some of that time. She paid expenses to maintain the house including the monthly mortgage costs. She claims she paid \$62,262.07 in property taxes, utilities, insurance, cleaning and maintenance and interest on the parties' joint line of credit. She claims she received no property tax refunds when the Home was sold even though she should have received the pro rata balance of taxes to the year end.

- [174] The respondent testified that she made mortgage payments in the amount of \$453 biweekly in 2013 and \$488.75 biweekly in 2014. She provided no evidence of the actual mortgage payments she made in 2012, but I accept that she paid mortgage payments in the amount of \$453. In total, the payments she made on the mortgage between January 21, 2012 and October 2014 amount to \$32,878. She is entitled to be reimbursed \$32,878, from the claimant's share of the sale proceeds.
- [175] The respondent testified that she paid monthly interest on the parties' joint line of credit. On the same basis, she must be compensated for one-half of the interest that accumulated on the parties' joint line of credit since separation. The claimant must pay her \$994 from the claimant's share of the sale proceeds.
- [176] She claims the right of reimbursement for these expenditures.
- [177] The case law treats different types of post-separation expenses differently.
- [178] In *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895, Betton J. addressed the treatment of post-separation mortgage and other debt payments made by one party. He found:
- [155] Similarly, the good faith retirement of all or some of a family debt post-separation but before hearing cannot relieve the other spouse of their obligation to share in that family debt. The Act specifies that we start with the value at hearing date, but provides tools in ss. 87 and 95 to adapt to the peculiar circumstances that might arise to achieve the intent of the legislation.
- [156] Some examples may be useful. I will use a line of credit as the family debt throughout, for consistency. In these examples, I will assume that the starting debt meets the definition of family debt at the date of separation.
- If the principle debt remained static post-separation but interest accumulated, then the value should be the new balance including accumulated interest at the date of hearing.
- [179] As in this case, the mortgage debt is a family debt. The respondent's mortgage payments after separation would have included repayment of some principal and interest. I conclude that the respondent must be compensated for the monthly mortgage payments she made between separation from the respondent and sale of the Home. She is not entitled to credit for the property taxes and other household expense payments.
- [180] The other expenses claimed by the respondent include taxes, maintenance costs, operating costs and upkeep. In *Bilawchuk v. Bilawchuk*, 2014 BCSC 2067, Fenlon J. (as she then was) adopted Betton J.'s approach and concluded that the costs of operating a home including paying property taxes, but not mortgage costs, paid by the spouse who remains in the residence post-separation should not be shared by the other spouse. She concluded that those expenses represent a type of set-off akin to occupation rent.

- [181] In my view, the approaches taken by Betton and Fenlon JJ., lead to a conclusion that the valuation date for the assessment of the family debt ought to be the separation date and all of the mortgage payments, including principal and interest made by the respondent should be adjusted to ensure fairness between the parties.
- [182] The claimant seeks to be compensated for \$180 representing payments he made on the RBC line of credit over and above his pro rata share. Initially, he was paying \$120 per month and was reimbursed by the respondent \$60. Eventually, the respondent stopped giving the claimant \$60 per month and began paying \$60 directly to the bank. Thus, he believes he has overpaid his obligation. I accept that the claimant is entitled to compensation for this part of the family debt he has paid disproportionately. He will receive \$180 before the division of family property. The claimant is entitled, however, to half of the cleaning/repair costs he incurred. These were out of pocket expenses that he spent to repair the deck and clean the house and which were rendered necessary because the status of the Home would have likely decreased its value when it was offered for sale. I order that the claimant be reimbursed \$2,442 from the proceeds of sale of the Home.
- [183] The parties also claimed reimbursement for payments made to the Canadian Tire MasterCard account. To the extent that either party made payments to this or any other debt after separation, reimbursement will be made from the family property to the payor spouse. The parties will have leave to make further representations concerning the calculation of accrued interest and payments made if not accurately reflected in these reasons.

Contempt order Section 183 Fine

- [184] The respondent claims that the claimant has breached several orders requiring him to produce documents and information. He was dilatory in providing some documents, including F8 Financial Statements, and very specific financial information from the businesses.
- [185] The claimant said he did not intentionally disobey Beames J.'s order concerning a meeting between the parties' accountants to permit the respondent to obtain some insight, information or opinion as to the value of the businesses. Regrettably, the order identified two specific accountants. Due to unforeseen circumstances, the respondent was unable to use either of those accountants. The claimant's accountants declined to give the information to a third person whom the respondent had asked to assist her in this matter because that person was not described in Beames J.'s order. In light of the way this order was worded, I find the claimant not responsible for this failure to disclose accounting information. Nevertheless, the respondent was denied access to information that may have been germane to the valuation of the businesses.

- [186] The claimant believed that he had provided all of the information requested with the exception of a 2015 financial statement concerning Dan's Place, the inventory list, equipment list, and some bank statements. In my view, the claimant was dilatory in the production of some information and simply failed to produce documents and information that would obviously have been important in determination of the value of both businesses.
- [187] Concerning the broader aspects of the claimant's failure to produce documents and information, the respondent contends that her ability to present evidence concerning the value of the businesses' assets was limited by the claimant's failure to provide timely disclosure of those entities' financial records.
- [188] The respondent had initiated civil contempt proceedings against the claimant for various breaches of the production orders. That application was initially presented in a chambers hearing before Madam Justice Beames. It was apparently adjourned and the respondent was under the misapprehension she could simply renew the application at trial. During argument, the respondent continued the argument for contempt and coupled this submission with an application under s. 213 of the FLA for a fine for his non-production of documents.
- [189] She eventually abandoned the contempt application and confirmed she wished to proceed with a claim under s. 213 and not the contempt proceedings.
- [190] In *J D. G. v. J.J.V.*, 2013 BCSC 1274, Punnett J. addressed issues of non-disclosure and delay disclosure of financial information in the context of the remedies available under the contempt provision of the Rules are section 92 of the Family Relations Act, R.S.B.C. 1996, c. 128. He quoted Mr. Justice Fraser in *Cunha v. Cunha* (1994), 1994 CanLII 3195 (B.C.S.C.), 99 B.C.L.R. (2d) 93 (S.C.), at para. 9:

Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation and impairs the ability of one party to properly prepare and present a case concerning the assets of the other. The prolonged stress of unnecessary battle may lead weary and drained [parties] simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done. Non-disclosure also has a tendency to deprive children of property support.

- [191] Punnett J. at para. 27, discussed non-disclosure in the context of contempt proceedings and the remedies for non-disclosure available under the FLA:

in all but the most egregious cases an application under section 213 should be made initially.

- [192] The claimant conceded that he had not provide some up-to-date financial information from Dan's Place, various bank statements, an inventory list, a list of equipment, and a summary of shareholders loans owed by Smart Parts.

- [193] The respondent was denied access to a substantial volume information that may have been germane to the valuation of the businesses. The claimant's failure to fully and fairly disclose all up to date financial information was an impediment to the respondent's attempt to prove the companies value.
- [194] The claimant believed that he had provided most of the information requested with the exception of a 2015 financial statement concerning Dan's Place, the inventory list, equipment list, and some bank statements. However, on cross-examination it became clear that his failure to produce documents was widespread. In my view, the claimant was dilatory in the production of some information and simply failed to produce documents and information that would obviously have been important in determination of the value of both businesses.
- [195] As is often said, withholding of documents, whether intentional or unintentional, is a cancer in the family law litigation process. In this case, non-production and dilatory production of documents significantly hampered the respondent from obtaining evaluation of the businesses.
- [196] I have made findings of fact concerning the value of Smart Parts based on the only information available. I have not been able to make a determination as the value of Dan's Place because of the absence of information concerning the assets and bank records. In consequence of the claimant's failures to comply with orders respecting disclosure and his overall disclosure obligation I exercise my discretion to fine the claimant for his failures, pursuant to s. 213(2)(d) of the FLA. I order that the claimant pay a fine of \$2,500.

Conclusion

- [197] The family property described in these reasons will be divided equally between the parties subject to the exclusions identified.
- [198] Each party will retain the assets described above and compensate the other for one-half of the value of those assets except where I have concluded otherwise.
- [199] The parties will each share one-half of the family debt.
- [200] The respondent's obligation to pay child support is extinguished as of August 31, 2015 and the claimant will repay any monies paid by the respondent since that time.
- [201] The claimant will pay the sum of \$2500 as a fine under s. 213 of the FLA.
- [202] The parties will be reimbursed those costs and expenses incurred by them since separation as set out in these reasons.

[203] I have not addressed the question of costs; if the parties are unable to agree on how to deal with costs, they are at liberty to make further written argument on this issue. The claimant's argument must be received within 30 days of the date of the date of these reasons and the respondent's reply submissions must be received within 14 days after. If the claimant makes no submissions as to costs within 30 days than the respondent may make submissions alone within 45 days of the date of these reasons.

"The Honourable Mr. Justice Armstrong"

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