

CANADA / JUDGMENT

Pirozok v. Pirozok

2016 BCSC 1434

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1434 Pirozok v. Pirozok IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Pirozok v. Pirozok, 2016 BCSC 1434 Date: 20160802 Docket: E101251 Registry: Vancouver Between: John Morest Pirozok Claimant And: Janyce Pirozok also known as Frances Janyce Pirozok also known as Frances Janice Stevens Respondent Corrected Judgment: The text of the judgment was corrected throughout on March 24, 2017 Before: The Honourable Mr. Justice D.M. Masuhara Reasons for Judgment Counsel for Claimant: Christopher S. Flerlage Counsel for Respondent: Fred C. Lowther Place and Date of Trial: Vancouver, B.C. July 27-31, 2015 September 30, 2015 October 1-2, 2015 February 9, 2016 May 6, 2016 Place and Date of Judgment: Vancouver, B.C. August 2, 2016

Introduction

- [1] This is an action brought under the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). The parties were married December 24, 1997, separated in November 2008 and divorced in February 2015. The central dispute is whether Mr. Pirozok after leaving the family home in November 2008, is entitled to equal division of the net proceeds from the recent sale of the home of \$408,000. Ms. Pirozok argues that she is entitled to this entire amount on the basis of fairness as defined under s. 65 of the FRA.
- [2] Ms. Pirozok also seeks in her counterclaim retroactive and lump sum spousal support under the Divorce Act, R.S.C., 1985, c. 3 and the Family Law Act, S.B.C., c. 25.
- [3] This action was commenced by Mr. Pirozok on April 12, 2010. The statement of claim sought a divorce and equal division of the family home. The response and original counterclaim was filed July 19, 2013.
- [4] The trial of this action was scheduled to start originally in February 2015 but was adjourned because Mr. Pirozok had disengaged his lawyer. The trial was reset for April 20, 2015. The trial was again adjourned on that day because Mr. Pirozok retained at the last moment Mr. Flerlage, his current counsel. The trial started in July 2015. Closing arguments were made in May 2016.

- [5] The estimate for this trial was five days. It seems this estimate was underestimated by counsel for the parties to obtain an earlier trial date than had a proper estimate been made. As can be seen by the various continuations, the parties were not well served by this tactic.

Background

- [6] The parties met in 1996 and a relationship quickly developed. They began to cohabit in the Spring of 1997 and married December 24, 1997. There are no children of the marriage. It appears neither brought financial assets into the relationship. The parties separated on or about November 10, 2008. In February 2009, Mr. Pirozok left the lower mainland to reside and work in Alberta. He has resided there ever since. Ms. Pirozok remained in Burnaby and resided in the family home until its sale in April 2015. She has since purchased a condominium in Richmond and resides in it.
- [7] A declaration under s. 57 of the FRA, of no reasonable prospect of reconciliation was made on August 12, 2014. This date is the "triggering event." The parties obtained an order for divorce on February 2, 2015.
- [8] Mr. Pirozok is an electrician. He is presently 57 years old. When the parties first met, Mr. Pirozok was unemployed and renting a basement room in the home of a friend. During the relationship with Ms. Pirozok, he was able to utilize his skills to earn good income through working in the local TV and film industry. He created a company in 2000 called Pirozok Productions Ltd. through which he worked and split income for tax purposes with his wife. Each owned a 50% interest in the company. Mr. Pirozok was the president and Ms. Pirozok was secretary.
- [9] Ms. Pirozok is presently 59 years old. She met Mr. Pirozok at a time when she was working temporarily as a server in a hotel pub. She had been divorced. She started work for the BC Liquor Distribution Branch ("LDB") as a clerk on a part-time basis in 1999. From about 2008 onward she worked on average approximately 35 hours a week. Prior to 2008, she never worked more than 20 hours a week. In 2011, Ms. Pirozok testified that she was diagnosed with depression, anxiety and panic attacks. In 2013, after several months on short-term disability for her condition, Ms. Pirozok at the age of 57 elected to retire and has since received a pension from her employer of \$441/month.
- [10] As mentioned the key dispute in this case relates to the division of the proceeds from the sale of the family home. It has been referred to in this proceeding as the Strathmore Property. The home was purchased in February 2004. The purchase price was \$372,421. The parties were registered as joint tenants. The purchase was made possible by a down payment of \$ 43,508 and a mortgage granted to GMAC of \$316,455.

- [11] In December 2005, Mr. Pirozok was terminated from his job working on a TV production and subsequently prohibited from working on any other Warner Bros. production. He was fired for being intoxicated. Mr. Pirozok denies this but gave no credible explanation for why he would be disciplined in such a severe manner. It is notable that he did not pursue any grievance.
- [12] On January 26, 2006, the Pirozoks granted a second mortgage to Capital Direct Lending for \$58,900. The monies obtained under the mortgage went to pay out credit cards and debts leaving \$8,443 for the parties.
- [13] In May 2007 the Pirozoks granted a mortgage to TD Canada Trust for \$412,500. This amount was used to pay off the balance of the GMAC mortgage, the Capital Direct mortgage; and a line of credit and other debts.
- [14] In January 2008, the parties rented a home in Mexico and stayed there for a month. They invited family members to stay with them. They paid for the flights of Ms. Pirozok's daughter and her daughter to visit.
- [15] In August 2008 a mortgage was granted to TD Canada Trust in the amount of \$503,600. The funds were used to payout the Canada Trust May 2007 mortgage and other debts specified. In July or August 2008, the value of the Strathmore Property was approximately \$528,000. The existing TD Canada Trust mortgage of \$390,000 was paid off, and \$104,000 of debt was also paid out.
- [16] In early November 2008, Mr. Pirozok slipped and fell injuring his back and ribs at work. He was unable to work and made a WCB claim. He collected benefits for the period November 4, 2008 to February 3, 2009.
- [17] On November 10, 2008, the parties went to Citifinancial and obtained a loan for \$10,000. While driving from the loan company with the cheque an argument ensued over the cheque which had been provided by Citifinancial. Mr. Pirozok demanded the cheque and Ms. Pirozok refused to hand it over. The argument turned physical and Ms. Pirozok exited the car on Kingsway and contacted the police who were situated nearby. Mr. Pirozok was quickly located and detained by the police. Charges laid against him included assault, unlawful confinement and driving while impaired. He was kept overnight and then released on recognizance. Mr. Pirozok returned to the Strathmore residence and found that Ms. Pirozok had gone to live with her daughter. She remained with her daughter until February 15, 2009. It appears that some communications occurred between the parties where Ms. Pirozok believed that Mr. Pirozok would be vacating the property and that she could move in.
- [18] On February 15, 2009 she attended the residence to move in but Mr. Pirozok would not let her in. The police were called and attended. The result was that Ms. Pirozok moved back into the home and Mr. Pirozok based on his conversation with the police packed and vacated. It appears that he moved into a local hotel. A few months later Ms. Pirozok's daughter and granddaughter moved in with her and began paying rent of \$1,500. Ms.

Pirozok's brother also at some point moved to the property and paid rent. Ms. Pirozok gave different accounts of what he was to pay.

- [19] From the date of separation, Mr. Pirozok did not pay any spousal support. However, he continued to service the Citifinancial debt which was at about \$21,000. At the time of the house sale, the balance was \$18,000.
- [20] In May 2009, the parties once again went to Citifinancial to borrow money. They were provided a loan of \$22,926. This amount was used to pay off the previous Citifinancial loan of \$10,000, to pay a few months of missed mortgage payments and other debts. This left a balance of \$13,511 which was deposited into their joint account to pay an overdraft of \$2500. This left \$11,000. Ms. Pirozok says that Mr. Pirozok took all of this amount and left for Alberta.
- [21] Mr. Pirozok did at some point in 2009 move to live and work in Alberta.
- [22] Sometime in 2009, Pirozok Productions Ltd. was dissolved. It did not have any assets and had a debt owing of \$27,000 for outstanding GST remittances.
- [23] In November 2009, Ms. Pirozok's father died. He had been diagnosed with cancer ten months earlier.
- [24] In April 2010, Mr. Pirozok commenced this action.
- [25] Around July 2010, Ms. Pirozok had a nervous breakdown and obtained short-term disability benefits for about three to four months.
- [26] In 2011, Ms. Pirozok was diagnosed with depression and anxiety. Ms. Pirozok elected to leave the Liquor Distribution Branch in 2013 and receive a retirement pension.
- [27] Ms. Pirozok was having difficulties paying the expenses for the property. A property tax sale notice from the City of Burnaby was issued for unpaid property taxes in 2010 and 2011. Demands for arrears in mortgage payments were delivered by TD Bank and their solicitors in 2010 and 2011. Through her own efforts she was able to satisfy the demands of the City and the bank.
- [28] Ms. Pirozok filed her response and counterclaim in July 2013. She amended her counterclaim in June 2014 to include retroactive and lump sum support.
- [29] Ms. Pirozok tried to find work, however had difficulties with anxiety. In 2013 she worked for two weeks at the PNE fair. In 2014, she worked for 3½ months at Edgewater Casino.
- [30] In 2013 Ms. Pirozok earned \$4,415 as employment income and \$5,389 as retirement pension income. In 2014 Ms. Pirozok earned \$5,389 as employment income and \$5,302 as retirement pension income. In 2015 Ms. Pirozok earned \$2,700 and \$5,300 as retirement pension income.

- [31] She has also taken on work cleaning and helping seniors with moving into their new homes. She does not report this income.
- [32] The TD mortgage renewal of \$468,279.92 of May 2013 indicates her bi-monthly mortgage payments were \$1,199. On a monthly basis this is \$2,598. The previous mortgage payments appear to have been only slightly higher.
- [33] On March 11, 2014, Mr. Pirozok was involved in a single car crash. He was a passenger in his mother's car. He suffered a fractured leg and broken wrist. He was transported to hospital and had an operation to repair the fractures. He was hospitalized for 45 days and on crutches for six months. He also had physiotherapy for close to two years. He returned to work through his Alberta union in July 2015. He continues to have pain and soreness in his leg. He testified that he has some limitations in the work that he can perform and is limited to lighter duty work assignments. Mr. Pirozok received some automobile accident insurance benefits as result of his injuries. He has a personal injury lawyer who has started an action on his behalf. I gather from the evidence that Mr. Pirozok is making a sizeable claim for damages.
- [34] At around the time of the accident Mr. Pirozok's medical documents show that he was consuming alcohol excessively.
- [35] In October 2014 Mr. Pirozok was diagnosed with prostate cancer. He had surgery to remove it.
- [36] The trial of the action was originally set for February 2015. On the first day of trial Mr. Pirozok showed up and requested an adjournment. He advised the presiding judge that he was expecting to obtain employment which would allow him to earn enough to hire a lawyer. The adjournment was granted but Mr. Pirozok did not obtain work until early July 2015 after being informed by his doctor in June 2015 that medically he was fit to return to work and therefore accident insurance benefits would be ceasing.
- [37] On February 2, 2015, Justice Pearlman ordered that Ms. Pirozok granted sole conduct to sell the Strathmore Property subject to court approval.
- [38] On April 7, 2015 Master Tokarek approved the sale of the Strathmore Property for the amount of \$925,000 and ordered the net proceeds to be held in trust by Mr. Lowther's firm. The sale however could not complete as unbeknownst to Ms. Pirozok and her counsel, Mr. Flerlage had registered a mortgage against the title to the Strathmore Property. The discovery of this charge against the property was the first time that Ms. Pirozok and Mr. Lowther learn of the involvement of Mr. Flerlage as counsel for Mr. Pirozok.
- [39] On April 20, 2015, Mr. Flerlage agreed to sign a removal of the mortgage to permit the completion of the sale of the Strathmore Property. The payout for the TD Bank mortgage was \$460,721.85 and the Citifinancial mortgage was \$18,449.51.
- [40] The net proceeds from the sale amounted to \$407,330.46.

- [41] As a result of an order by Justice Funt of April 20, 2015, Ms. Pirozok received 70% of the net proceeds from the sale of the Strathmore Property. That amount was approximately \$285,600. The order stated that the 70% was without prejudice to the claimant seeking an equal division and the respondent seeking 100% of the net proceeds. The balance of the funds, \$122,199 was ordered to be held in trust.
- [42] Ms. Pirozok used the monies she received from trust to purchase an apartment unit in White Rock which she moved into in May and to pay some debts. The April 20, 2015 order restrained her from disposing of the apartment unit.
- [43] In July 2015, Mr. Pirozok worked for a company called Black and McDonald but he testified that he had to quit because he had to attend this trial.
- [44] In July 2015, after the start of the trial, I issued an order requiring Mr. Pirozok to pay Ms. Pirozok support of \$2,000. Mr. Pirozok did not pay this amount. Ms. Pirozok has been permitted to access monies held in trust from the sale of the Strathcona Property. The amount is approximately \$17,000.
- [45] He hopes to find work on a large project in Alberta which will provide him full-time work for one to three years. He anticipates that the rate he will be paid is similar to that he has been paid at his last job. Family Relations Act
- [46] The parties have agreed that the net proceeds from the sale of the Strathcona Property is the only family asset in issue. Neither party holds any other asset of significant value. They have agreed each is entitled to their respective pensions.
- [47] Ms. Pirozok in seeking entitlement to 100% of the net proceeds from the sale of the family home relies upon s. 65 of the FRA. It is Mr. Pirozok's position that the proceeds be divided equally. Section 65 reads as follows: Judicial reapportionment on basis of fairness 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.
- [48] In respect to spousal support, Ms. Pirozok seeks spousal support on compensatory and non-compensatory grounds. The statutory bases are found in the Divorce Act, ss. 15.2(4) and 15.2(6) and in the Family Law Act, ss. 160-162. The Divorce Act provisions read as follows: 15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [49] The Family Law Act provisions read as follows: 160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support]. 161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time. 162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:
 - (a) the length of time the spouses lived together;
 - (b) the functions performed by each spouse during the period they lived together;
 - (c) an agreement between the spouses, or an order, relating to the support of either spouse.

Discussion A. Credibility

- [50] There are conflicts in the testimony between the parties that impact upon issues in this case. As a result, I will address credibility first. Ms. Pirozok's testimony was shown in cross examination to conflict with other evidence including prior statements that she had made regarding the November 10, 2009 incident. Often she could not recall events, relied upon broad sweeping statements of being physically and verbally abused by Mr. Pirozok during the entirety of their marriage. Her counsel's opening statement asserted that the evidence would show that Mr. Pirozok took all of the \$10,000 from the Citifinancial loan - this was shown not to be correct; that the evidence would show that on November 10, 2008 that Mr. Pirozok during the incident "grabbed the money and took it for himself". Ms. Pirozok agreed that this was not the case. She also in relation to Mr. Pirozok having issued thousands of NSF cheques conceded in cross examination that she had exaggerated and could only point to a few such cheques.
- [51] Her testimony of Mr. Pirozok's unbridled spending was brought into question in cross examination when asked why she continued to have her pay cheques deposited into the joint account for many months and other credits when Mr. Pirozok still had the ability to withdraw from the account, until around the end of September 2009 when she made the account a "deposit only".
- [52] She also said that Mr. Pirozok told her he did not want her to work, yet it is clear that she did work and at substantial hours per week.
- [53] Her counsel's opening also stated that the evidence would show that on November 10, 2008, while driving and being choked by Mr. Pirozok that Ms. Pirozok "had to jump from the moving vehicle to escape him." However in her testimony, she agreed that she told the police, as shown in her statement to the police, that the vehicle was at a stop when she got out. She maintained at trial that the vehicle was moving notwithstanding her statement to the police. She explained that she did not tell the police that the vehicle was moving because

she did not want her husband to get into trouble otherwise she feared that he would kill or cause her serious harm. In the context of Ms. Pirozok telling the police that she had been assaulted and choked by Mr. Pirozok just prior to her getting out of the vehicle, I found it difficult to accept that she would hold back this detail of getting out of a moving vehicle - the explanation is inconsistent with common sense and diminished her credibility.

- [54] Ms. Pirozok's evidence regarding the rent her daughter and her brother paid or was to pay her for residing at the Strathcona Property was unclear and contained inconsistencies.
- [55] Though I accept her testimony that there was discord in the marriage; unfortunately, Ms. Pirozok's overall poor recall, including inconsistencies, and her broad and sweeping assertions as to the abuses and failings of Mr. Pirozok reduced the reliance that could be placed on her testimony. The anxiety and depression she testified to may have played a role in this.
- [56] Mr. Pirozok's time in the witness stand also showed a level of unreliability. His recall of the chronology of things was weak. His response to questions in direct examination seemed robotic. I found his recounting of the events surrounding his firing from the Smallville production and all other Warner Bros. productions as less than forthright. He stated that he was fired simply for having a woman sit with him in a truck at a set by the generators he was managing. He had no explanation for why he had to be driven home by co-workers when though he had his own car at the location. He did not contest his dismissal under his collective agreement.
- [57] In my view, the relationship between the parties in the latter years of the marriage was difficult and unhappy. A clear stressor was financial. Alcohol appears also to have been a contributor. The evidence in my view demonstrates that there was some physical and verbal abuse against Ms. Pirozok which was deplorable. However, based on the evidence, Ms. Pirozok was prone to exaggeration particularly in regard to Mr. Pirozok. I have approached the testimony of each party with reservations as to their reliability.
- [58] I turn now to the financial issues. In determining financial issues in a family dispute, the approach is to deal first with division of family assets and then spousal support. B. Division of Family Assets
- [59] I start by noting that the only factors for consideration in reapportionment are those set out under s. 65(1).
- [60] An initial determination with respect to the Strathmore Property is whether Mr. Pirozok gave the property to Ms. Pirozok when he left the home in February 2009. While this was not specifically addressed in closing submissions, I wish to state my view as to this assertion. Ms. Pirozok states that Mr. Pirozok stated to her as he was escorted by the police from the home that she "could have the f--ing home". On the other hand Mr. Pirozok says that he did not want to vacate but prior to his leaving the house he discussed with Ms. Pirozok her moving into the house and that she was to make the payments on the 1st mortgage and that

he would make the payments on the 2nd mortgage; that the house would not be sold until her granddaughter finished elementary school (she was in Grade 4 or 5 at the time and attended a school very close to the house which went to Grade 7); which would be about 1½ years at the time.

- [61] Given that the time when the statements were said to have been made was a highly emotionally charged period and the lack of reliability of the parties, I am not persuaded that any agreement had been reached regarding the Strathmore Property. Neither party provided corroborating or objective evidence to support their respective assertions as to an agreement regarding the family home. The objective evidence is that the title to the Strathmore Property remained in the name of the two parties as were the mortgages. Though I note that at some point following separation Ms. Pirozok was able to renew the first mortgage on her own. Also, Mr. Pirozok made payments on the Citifinancial mortgage.
- [62] No effort to have the title or mortgages changed to reflect a change in the ownership of the property was made. The police were called to force Mr. Pirozok out of the house and to allow Ms. Pirozok back in. Further, Mr. Pirozok commenced this action within 18 months of separation seeking an equal division of the Strathcona Property. As well, subsequent to separation the parties obtained further monies by granting a mortgage against the property.
- [63] In terms of the valuation date, the date of trial is appropriate. In this case, that value is \$407,330.46 plus interest.
- [64] Though the presumption of an equal share in this family asset would normally apply, Ms. Pirozok seeks a 100% share in the proceeds from the sale of the family home based on unfairness as defined under s. 65(1) of the FRA. The party seeking reapportionment has the onus to prove that equal sharing is unfair. The factors set out under s. 65(1) relied upon by Ms. Pirozok are s. 65(1)(b), (e) and (f).
- [65] Ms. Pirozok submits that she is entitled to 100% of the net proceeds because:
- (a) At the time of separation there was essentially no equity in the Strathcona Property. The first mortgage had a balance of about \$505,000; the Citifinancial mortgage balance was about \$21,000; and the value of the property was \$530,000.
 - (b) Mr. Pirozok never participated in any renewal of the first mortgage. Ms. Pirozok had to deal with getting a renewal on her own.
 - (c) At the time of separation Ms. Pirozok was left with the property, the debt, and the expenses (except for the Citifinancial debt). It was Ms. Pirozok's efforts and without any financial contribution from Mr. Pirozok towards the first mortgage, property taxes, repairs, etc., that maintained and preserved the property within the meaning of s. 65(1)(f).
 - (d) That Mr. Pirozok told Ms. Pirozok at the time of separation that the property was hers. I have already determined that there was no such agreement.

- (e) Mr. Pirozok has not paid any spousal support to Ms. Pirozok.
- (f) Ms. Pirozok since 2012 has received a small retirement pension and some income assisting seniors in their moves.
- (g) Mr. Pirozok was an abusive spouse.

(h) Mr. Pirozok during the marriage constantly dissipated the equity in the property.

[66] In response, Mr. Pirozok submitted that an equal division is appropriate because:

- (a) Mr. Pirozok contributed significantly financially to all aspects of the relationship.
- (b) There was an agreement that she could reside in the house until her grandchild completed Grade 7. I have already determined that while there may have been some discussion, there was no agreement made.
- (c) That Ms. Pirozok had the benefit of the house to reside in as well as rental income.

[67] The cases referred to by Ms. Pirozok included: *Bawtinheimer v. Bawtinheimer* (1985), R.F.L. (2d) 393 (B.C.C.A.); *Smith v. Smith* (1997), 28 R.F.L. (4th) 394 (B.C.C.A.); *Kopejtko v. Kopejtko* (1985) 49 R.F.L. (2d) 26 (B.C.C.A.); *Day v. Day* (1981), 29 B.C.L.R. 363 (S.C.); *Lunden v. Lunden*, 1996 CanLII 3164 (B.C.S.C.); *Leblanc v. Leblanc*, [1988] 1 S.C.R. 217; *Fobes v. Bowler* (1986) 2 R.F.L. (3d) 68 (B.C.C.A.) and *Martinelli v. Martinelli* (1981), 26 R.F.L. (2d) 1 (B.C.C.A.).

[68] The cases referred to by Mr. Pirozok included: *Dyndor v. Dyndor*, [1994] B.C.J. No. 2518 (S.C.); *Stasiewski v. Stasiewski*, 2007 BCCA 205; *Stojanovic v. Stojanovic* (1994), 7 R.F.L. (4th) 83 (B.C.C.A.); and *Jorgensen v. Jorgensen* (1998), 65 B.C.L.R. (3d) 124 (C.A.).

[69] The cases provide assistance, however, each case is determined on their unique circumstances. In the present case, while there are features which warrant a greater share to Ms. Pirozok, however, 100% entitlement has not been established.

[70] The subject property was purchased during the marriage. Mr. Pirozok contributed significantly to paying the mortgage through his much higher income during that time. It is clear that the parties used whatever equity they had in the property to finance their lifestyle (which was not extravagant). The parties did not have children to care for which distinguishes this case from some handed up by Mr. Pirozok. I do not find that the evidence establishes that it was solely Mr. Pirozok's unbridled spending that caused the parties to have to continually finance against the property. The evidence does not point to a single reason, rather it more likely that there were multiple reasons and that both were responsible for expenses that led to their need to borrow. Moreover, as stated in *Newson v. Newson*, (1986), 3 B.C.L.R. (2d) 1 at 20 (C.A.) section 65 "do[es] not provide a trial judge with a roving commission to inquire into the spending habits of the spouses during the marriage" and "do[es] not provide a basis for re-apportionment based on reckless, wasteful or improvident expenditures made by either of the spouses during the marriage."

- [71] It is apparent that following separation Ms. Pirozok made the mortgage payments and other expenses for the preservation and maintenance of the property, she did not receive spousal support from Mr. Pirozok; however, she had the exclusive benefit of living in the home. Ms. Pirozok also had the benefit of rental income. She had at least three renters at times who paid or were required to pay significant rent to her. I also take into consideration the fact that Ms. Pirozok was at least by April 2010 put on notice that Mr. Pirozok was seeking an equal interest in the home. His demand for an equal share in the home was made within a reasonable period. Despite this Ms. Pirozok continued to occupy and retain the home. As well, since separation, Ms. Pirozok has a pre-trial order to access funds from the net proceeds purchased a condominium unit.
- [72] In my view, the preservation and maintenance factor has weight in this case. However, Ms. Pirozok's exclusive occupation of the property and receipt of rents affects this factor. In this regard I also factor in Mr. Pirozok's occupational rent submission. The economic and self-sufficiency factor in favour of Ms. Pirozok attracts greater weight. At the same time, I recognize that Mr. Pirozok made significant contributions to the home during the marriage and made payments on the Citifinancial mortgage following separation, though not all. As well, I have awarded Ms. Pirozok retroactive spousal support, as discussed below which addresses the financial aspects under s. 65. I conclude that the presumption of equal division is unfair and that a 75% reapportionment in favour of Ms. Pirozok would be appropriate and is so ordered. C. Spousal Support
- [73] Ms. Pirozok seeks spousal support under the Divorce Act and the Family Law Act retroactive to 2009. She seeks support on compensatory and non-compensatory grounds. Mr. Pirozok acknowledges in closing submissions that Ms. Pirozok was entitled to some spousal support. Thus, entitlement is not an issue.
- [74] The applicable provisions of the Divorce Act read as follows: Spousal support order 15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse. Interim order
- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1). Terms and conditions
- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just. Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse. Spousal misconduct
- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
Objectives of spousal support order
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [75] The applicable provisions of the Family Law Act read as follows: Duty to provide support for entitled spouse 160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support]. Objectives of spousal support 161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
 - (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;

(d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time. Determining spousal support 162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[76] The submissions of Ms. Pirozok with respect to the basis for spousal support entitlement are not entirely clear. It appears that in terms of compensatory grounds, reliance is placed on the following:

- (a) Initially she did not work as she travelled with Mr. Pirozok in his travels working at various camps in Alberta.
- (b) She was "instrumental in backing" and otherwise enabling [Mr. Pirozok] to work and advance as an electrician.
- (c) Mr. Pirozok told Ms. Pirozok she did not need to work; but nonetheless did get some work; but was dependent on Mr. Pirozok. Ms. Pirozok in her testimony stated that Mr. Pirozok did not want her to work.
- (d) The abuse and mistreatment of Ms. Pirozok by Mr. Pirozok caused her income earning ability to decline and diminish.

[77] In terms of non-compensatory grounds, Ms. Pirozok points to her limited income, diminished earning capacity as a result of her mental health condition and Mr. Pirozok's capacity to earn substantial income. She stated as well that she also testified that she assisted Mr. Pirozok in finding work in the film industry; however, in cross examination she testified that it was her brothers who told Mr. Pirozok how good it was to work in the film industry.

[78] As a result, Ms. Pirozok seeks spousal support based on an imputed annual income of Mr. Pirozok of \$120,000 from 2009 to present. For Ms. Pirozok, annual income used is: Year Income 2009 \$43,000 2010 \$41,000 2011 \$35,000 2012 \$7,512 2013 \$9,640 2014 \$10,691 2015 \$8,000 2016 \$8,000

[79] Based on the above inputs, the Spousal Support Advisory Guidelines results sought by Ms. Pirozok is in the mid to high range: Year Per Month 2009 \$1,300 2010 \$1,300 2011 \$1,400 2012 \$1,900 2013 \$1,800 2014 \$2,000 2015 \$2,000 2016 \$2,000

[80] The Spousal Support Advisory Guidelines indicates that for a relationship of eleven years, the period of spousal support would be in the range of eleven years from the date of separation.

- [81] The position of Mr. Pirozok is that there is no basis for support on compensatory grounds. It is submitted that Ms. Pirozok did not make sacrifices such as giving up a career to raise a family which is a typical qualifying factor. Mr. Pirozok specifically denied telling Ms. Pirozok not to work; rather he stated that she did not have to work if she did not want to, it was up to her. I accept his denial given that Ms. Pirozok did work at the LDB since 1999. There is no evidence of the type of work or amount of work Ms. Pirozok did prior to the relationship or evidence to establish some sacrifice or foregoing of a career opportunity. Insofar as seeking compensatory support based on Ms. Pirozok's assertion of physical abuse, Mr. Pirozok denies such abuse and that in any event, Ms. Pirozok was able to work full-time through 2011. Mr. Pirozok points as well to the lack of medical evidence to support the contention that Ms. Pirozok is unable to find full-time employment or whether her condition will not improve.
- [82] In respect to non-compensatory grounds or support, Mr. Pirozok submits that Ms. Pirozok "clearly is entitled to some spousal support" but argues that "it is impossible to know what her need actually is," as Ms. Pirozok does not report her self-employment income, based on her testimony; that it is apparent Ms. Pirozok can and has worked despite her claimed disability, and that her employment income appears to be understated for 2015.
- [83] It is the position of Mr. Pirozok that based on the foregoing arguments and the general lack of credibility of Ms. Pirozok, annual income of \$38,000 should be imputed to Ms. Pirozok. This amount is an average of her income from 2009 through 2011.
- [84] Based on an annual income of \$38,000 to Ms. Pirozok and \$120,000 to Mr. Pirozok, the range under the Spousal Support Advisory Guidelines is: Low: \$1,230/month Mid: \$1,435/month High: \$1,650/month
- [85] The circumstances in my view do not establish a compensatory basis. I do not accept that Mr. Pirozok told Ms. Pirozok not to work; rather, I accept the view that he indicated to her at some point that she did not have to work. There is little if any evidence of Ms. Pirozok putting aside any career aspirations or work opportunities for the benefit of Mr. Pirozok. Further, the encouragement or assistance she stated she provided Mr. Pirozok in seeking work in the film industry is not particularly remarkable in that this is the usual type of thing that all spouses would do or would be expected to do in any marriage. While there is some evidence of abuse, which is deplorable; the evidence shows that Ms. Pirozok was able to work significantly during the relationship and after separation. I do not find the abusive conduct based on the available evidence led to a diminishment in her ability to work. There is no medical evidence regarding the cause or causes of Ms. Pirozok's condition or of her capacity which led to her electing to take a retirement pension.
- [86] In my view, Ms. Pirozok has established that she has an entitlement to support based on the non-compensatory ground. Spousal support starting in 2015 should be based on an annual income for Mr. Pirozok of \$120,000. This is a figure used by the opposing parties, so I see no issue with this amount. While Ms. Pirozok has a disability pension from her employer, the

evidence is thin as to her inability to earn income greater than she has indicated. The concerns over the reliability aspects to her testimony leads me to conclude that she is capable of earning more than she has stated or argued and I set for support purposes her annual income at \$12,000.

- [87] The Spousal Support Advisory Guidelines range based on the above is as follows: Low: \$1,485/month Mid: \$1,732/month High: \$1,980/month
- [88] The parties basically lived off debt secured against the modest equity they had in their home. They did not live extravagantly but comfortably relative to their circumstances. They had vacations to Mexico on at least two occasions. I find the range as I have determined reasonable.
- [89] Given that Ms. Pirozok has been reapportioned 75% of the family asset, the circumstances warrant a lower level of spousal support. In this regard, I find that \$1500/month to be reasonable.
- [90] Ms. Pirozok worked largely part time during the marriage for the B.C. Liquor Distribution Branch. Ms. Pirozok's present income is from her pension of \$441/month, \$5300/year. She also earns some income by providing a downsizing service to senior citizens.
- [91] During a period in the marriage Mr. Pirozok's income earned through a corporation. This enabled him to split his income with his wife. For the purposes of those years when income was split, I have combined the split income and assigned it to Mr. Pirozok given that it was earned in Mr. Pirozok's capacity as an electrician. Retroactive Spousal Support
- [92] Ms. Pirozok seeks retroactive support from 2009. Her claim for spousal support was formally sought in July 2013 with the filing of her counterclaim.
- [93] In general, retroactive orders will be limited to three years from effective notice unless a justification has been established based on the established factors.
- [94] In respect to the above factors, Ms. Pirozok argues that she did not seek spousal support initially because of:
- (a) Fear and apprehension of Mr. Pirozok;
 - (b) The lack of financial resources to engage a lawyer; and
 - (c) There is no restriction under the Divorce Act on how far back retroactivity can be considered.
- [95] The factors to weigh in favour of ordering retroactive support include the following:
- (a) a need on the part of the claimant and the corresponding ability to pay on the part of the proposed payor;

- (b) some blameworthy conduct on the part of the intended payor such as incomplete or misleading financial disclosure;
- (c) necessity on the part of the claimant to encroach on her capital and to incur debt to meet expenses;
- (d) an excuse for a delay in bringing the application, when the delay is significant; and
- (e) notice to the intended payor of an intention to pursue support followed by negotiations to that end.

[96] The factors that have been considered to weigh against ordering retroactive support include the following:

- (a) an order would cause an unreasonable unfair burden to the intended payor, especially to the extent that such a burden would interfere with on-going support obligations;
- (b) the only purpose of the award would be to redistribute capital; and
- (c) a significant, unexplained delay in bringing the application.

[97] In my view, the three-year limit is appropriate in this case.

[98] My finding of income for determining retroactive support are as follows: Ms. Pirozok Year Income 2010 \$41,151 2011 \$35,353 2012 \$12,000 2013 \$12,000 2014 \$12,000 2015 \$12,000

[99] I have increased Ms. Pirozok's income in 2012 to present as Ms. Pirozok has not reported her income from her work assisting seniors' downsizing. Mr. Pirozok Year Income 2010 \$93,535 2011 \$45,375 2012 \$146,400 2013 \$97,089 2014 \$97,000 2015 \$120,000

[100] The SSAG results from the above levels are: Year SSAG low SSAG mid SSAG high 2010 \$655 \$764 \$873 2011 \$125 \$146 \$167 2012 \$1,680 \$1,960 \$2,240 2013 \$1,064 \$1,241 \$1,418 2014 \$1,062 \$1,240 \$1,417 2015 \$1,350 \$1,575 \$1,800

[101] Based on these amounts, the following would be owed for the relevant time periods: Period

months

SSAG low SSAG mid SSAG high Jul 2010 1 \$655 \$764 \$873 Aug-Dec 2010 5 \$3,275 \$3,820 \$4,365 Jan-May 2011 5 \$625 \$730 \$835 Jun 2011 1 \$125 \$146 \$167 Jul-Dec 2011 6 \$750 \$876 \$1,002 2012 12 \$20,160 \$23,520 \$26,880 Jan-Jun 2013 6 \$6,384 \$7,446 \$8,508 Jul 2013 1 \$1,064 \$1,241 \$1,418 Aug-Dec 2013 5 \$5,320 \$6,205 \$7,090 Jan-May 2014 5 \$5,310 \$6,200 \$7,085 Jun 2014 1 \$1,062 \$1,240 \$1,417 Jul-Dec 2014 6 \$6,372 \$7,440 \$8,502 2015 12 \$16,200 \$18,900 \$21,600 Aug 2010-2015 \$66,647 \$77,764 \$88,869

[102] In my view, a lump sum retroactive award is appropriate because Mr. Pirozok has the ability to pay (from the proceeds of the sale of the family residence), a history of non-payment, and Ms. Pirozok needs capital to become self-sufficient: *Racco v. Racco*, 2014 ONCA 330 at para. 31. Given the failure of Mr. Pirozok to pay court-ordered support in the past, I order

that the lump sum be payable by means of a compensation order from Mr. Pirozok's portion of the proceeds from the sale of the former family residence: see D.J.F. v. V.J.F., 2013 BCSC 2019 at para. 99. This amount is set at \$72,000 subject to what follows.

- [103] The SSAG amounts should be reduced to account for the fact that, unlike periodic support payments, lump sum payments are not tax-deductible for the payor and are not taxable income for the recipient: *Robinson v. Robinson*, 2012 BCCA 497 at para. 33. While DivorceMate can calculate the net present value of a lump sum payment ordered in lieu of future support payments, it is less useful for lump sum retroactive awards because it uses a discount rate of 0.5% based on the rate of return for Government of Canada real return bonds.
- [104] Therefore, it may be appropriate to make a deduction for this.
- [105] In my view, a deduction of 28% is appropriate in the circumstances. This is the approximate midpoint of the difference in the marginal tax rates of the parties from 2010 to 2015. This results in \$51,840. I also make an adjustment for occupational rent of \$6,000 (net) over the period. As a result of the foregoing, I set retroactive support at \$45,840.
- [106] This amount is to be deducted from Mr. Pirozok's share from the net proceeds of sale.

Conclusion

- [107] Ms. Pirozok is entitled to 75% and Mr. Pirozok 25% of the net proceeds from the sale of the Strathcona Property.
- [108] Ms. Pirozok is entitled to spousal support of \$1,485 per month from January 1, 2016. Such support to be paid the first day of each month, unless the parties agree in writing to another date. The support obligation will continue through November 2019 and thereafter end.
- [109] Ms. Pirozok is entitled to retroactive spousal support from August 2010 to December 31, 2015 in the amount of \$45,840. Such amount is to be deducted from Mr. Pirozok's interest in the net proceeds.
- [110] From Mr. Pirozok's share of the proceeds from sale, \$18,000 is to be held in trust. If Mr. Pirozok pays to Ms. Pirozok on time his monthly support payments for one year, the first of the month following this decision; then the entire amount is to be released to Mr. Pirozok. If Mr. Pirozok did not meet his obligation, then any amount owing will be deducted from the amount held in trust and the remaining balance is to be held for another one-year period on the same basis. "The Honourable Mr. Justice Masuhara"

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