

CANADA / JUDGMENT

Prasad v. Prasad

2015 BCSC 207

COURT

Supreme Court of British Columbia

DECIDED

13 February 2015

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2015 BCSC 207 Prasad v. Prasad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Prasad v. Prasad,

2015 BCSC 207

Date: 20150213

Docket: E131291

Registry: Vancouver

Between:

Judith Anita Prasad

also known as Judy Prasad

Claimant

And

Daniel Jyanendra Vidyanand Prasad

also known as Daniel Prasad

Respondent

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Claimant:

A.L.B. Kaario

The Respondent, Mr. Prasad:

In Person

Place and Date of Trial:

Vancouver, B.C.

June 2-4, July 4 and

December 10, 2014

Place and Date of Judgment:

Vancouver, B.C.

February 13, 2015

I. Introduction

- [1] The parties began to live together in October 1970, and married on June 14, 1974. They separated on February 24, 2013.
- [2] The parties have two children. Their first child was born on June 26, 1970, and has health problems and is residing with the wife in the matrimonial home. Their youngest child was born on August 6, 1991, and is attending university and is also residing in the matrimonial home. The husband is currently 68 years old and the wife is 63 years old.
- [3] The wife commenced this action on April 29, 2013, seeking a division of assets and pensions, and spousal support. Although in her pleadings the wife sought an unequal division of assets and child support, she submitted at trial that an equal division of assets was appropriate, and did not argue any child support should be paid.
- [4] The wife also seeks a permanent protection order restraining the husband from directly or indirectly communicating with her, or attending at or near any places she regularly attends.
- [5] The husband opposes any award of spousal support on the basis that the wife is capable of working, whereas he has health problems which prevent him from working. As well, he submits the assets should be reapportioned in his favour because the wife did not make any contribution towards the acquisition of the assets, and to take into account a loan from his parents in the amount of \$40,000 which was used to purchase the matrimonial home. If the assets are to be divided equally, the loan from his parents in the amount of \$40,000 plus interest should be repaid, prior to the division. The husband also seeks occupational rent for the wife's occupation of the matrimonial home for the period from March 2013 to present in the amount of \$2,500 per month, and room and board in the amount of \$1,000 a month from the time their youngest child was 10 years old. Finally, the husband opposes the granting of a permanent protection order.

II. Issues

[6] The issues are:

- 1) Should there be a permanent protection order made restraining the husband from contacting the wife?
- 2) What is the appropriate division of family assets?
- 3) Is the wife entitled to either retroactive or future spousal support?

III. Background

- [7] The couple met in 1969 when they were both living in Edmonton, Alberta. The wife was working in a hospital during the summer and the husband was training to be a nurse's aide. The husband moved back to Vancouver in December 1969. The wife came to visit the husband in Vancouver in January 1970, but moved back to Edmonton in March of that year because she was pregnant with their first child and needed to obtain obstetric care. Their first child was born in June 1970.
- [8] After the birth of their first child, the parties were living apart and the wife obtained an order for child maintenance in Alberta. After she obtained the order, the husband travelled to Edmonton and brought the wife and their child back to Vancouver. The couple started living together in a basement suite with another person in October 1970. They later moved into a basement suite in a house owned by the husband's parents.
- [9] In February 1972, the husband purchased a house in Vancouver for \$19,000, with \$1,000 down payment. The parties lived in the ground level basement and rented the upstairs.
- [10] The wife started working part time when their first child was three years old. The husband was working night shifts and would look after the child while the wife was working. In 1981, the wife obtained employment with the Vancouver School Board as a teacher's aide, working with students with disabilities. She worked as a teacher's aide until 1984, when the parties moved back to Edmonton, so that the husband could further his education by obtaining his nursing degree.
- [11] When they moved to Edmonton, they sold the house in Vancouver. Prior to selling the house in Vancouver the couple had purchased a house in Edmonton for \$46,000. The monies they used to purchase the Edmonton property were \$5,000 from each of the parties, \$6,000 from the husband's grandfather's estate, and a \$30,000 mortgage registered against the house in Vancouver.
- [12] The husband pursued his nursing degree in Edmonton from September 1984 to December 1986. The wife worked from September 1986 to June 1989 in the Edmonton School Board as a teacher's aide.

- [13] After graduation, the husband could not find employment as a nurse in Edmonton so he returned to Vancouver to obtain a job. The wife remained in Edmonton to sell the house. The house took a long time to sell, and was sold for \$40,000. The wife and child moved back to Vancouver in July 1989, after the school year was finished. The wife gave the sale proceeds from the house in Edmonton to the husband.
- [14] When the wife returned to Vancouver, she moved into the current matrimonial home which was under construction. The husband had purchased the lot and commenced construction of the house. The couple did not have any discussion about how the husband financed the lot and construction. According to the wife, the husband would have had the \$40,000 from the sale of the Edmonton house and \$60,000 from the sale of the house in Vancouver available to purchase the matrimonial home. The husband's evidence is that he borrowed \$40,000 from his parents to purchase the lot. The wife's evidence is that the husband did not tell her he had borrowed money from his parents to purchase the lot until after this litigation commenced.
- [15] When the wife moved back to Vancouver, the husband was working as a nurse. She found employment as a teacher's aide and worked in that position from 1989 to June 1991, when she left work because she was pregnant with their second child.
- [16] The wife's evidence is that she did not return to work after their second child was born because she did not have child care. The husband was working 12-hour shifts, which alternated between day and night shifts. As a result, it was difficult to work around his schedule.
- [17] The evidence is that the husband controlled the finances throughout the relationship. The husband takes the position that all of the parties' assets belong to him as he has been the one who has paid for everything, and the wife has not worked since the birth of their second child. The husband's evidence is that when he directed the wife to go back to work when their second child was older, she refused.
- [18] After the wife stopped working, the husband gave her an allowance of \$400 per month. The wife was struggling to maintain her car and purchase the household items she was responsible for purchasing, so she sold her car in 1994. Once the car was sold, the husband reduced her allowance to \$200 per month. When the wife started receiving \$250 per month from Canada Pension Plan in 2012, the husband stopped giving her an allowance.
- [19] The wife's evidence is that the husband also controlled what she did when he was at home. The husband agreed that he would not allow his wife to use the phone when he was at home because it was her time to talk to him.

- [20] The couple continued to live in the matrimonial home until the time of separation. The younger child was living with them at the time of separation. The older child has health issues, and moved back into the matrimonial home in August 2013, after the separation. The older child receives a disability pension. The younger child also continues to live in the matrimonial home with the mother, and is completing an undergraduate degree. The husband gives money directly to the younger child.
- [21] The husband retired when he turned 60 in 2006. His evidence is that he purchased a farm property in Saskatchewan from the monies he received for his banked sick time. The property is currently rented for \$5,000 a year. After retiring, the husband returned to work as a nurse on a casual basis until May 2013. The husband says he is no longer capable of working because of his age and health issues.
- [22] According to the wife, there has been a history of family violence since 1971, when the husband hit her, blackening her eye and breaking her nose. Throughout the relationship the husband threatened the wife verbally, repeatedly telling her he would punch her teeth down her throat. As well, the husband frequently pulled her hair, including pulling her around by her hair. The wife testified about an incident that occurred when the husband pulled out a handful of her hair in front of their niece. At one point, he apparently stood his granddaughter up by pulling her pony-tail.
- [23] In December 1986, there was an incident in which the husband shoved the wife into a protruding window-sill which hit her in the back. As a result, she had ongoing issues with her kidneys. The wife left home after the incident in December 1986, and found an apartment. Her intention was to leave the husband at that time. They stayed apart for six weeks, but the wife kept the apartment for six months. One of the issues between them at the time was the fact the husband would not put the wife's name on the title of the house in Edmonton. Apparently, she gave up her apartment when the husband agreed to put her name on the title.
- [24] The wife's evidence is that the violence continued during their relationship. The husband would "go from zero to a hundred" very quickly when he lost his temper, and take it out on her. She says he constantly threatened to hit her.
- [25] The wife testified there was an escalation in incidents in 2012 when their oldest child was having health problems. In the fall of 2012, after she had been visiting their child in hospital, she went to a friend's house to talk. The wife's evidence is that when she arrived home at 4:30 a.m., she was met at the door by the husband who was brandishing a meat cleaver. She called for her younger child who asked him for the meat cleaver. After hesitating, the husband gave the meat cleaver to the child.

- [26] Just prior to the final incident, the husband grabbed her by the scarf and ripped it. The last incident of violence occurred on February 24, 2013, and led to the husband being charged with assault. According to the wife, the husband threatened her with scissors and punched her in the right side.
- [27] After that incident on February 24, 2013, the husband was placed on bail. The bail provisions included a no-contact order, prohibiting the husband from contacting the wife. The wife testified that despite the no-contact order, the husband continued to call the matrimonial home. The husband has several outstanding charges of breaching the no-contact conditions he is under.
- [28] The husband testified that he has no recollection of any physical violence in the relationship. The husband's evidence is that he can neither confirm nor deny that he hit his wife because he cannot recall hitting her. The husband's explanation as to why he cannot comment on any of the incidents the wife testified about is that his memory is not good as a result of his health problems. His recollection is that his wife ran into a wall and hurt her nose, not that he broke it.
- [29] The husband agrees he ripped his wife's scarf, but says he had no intention to do so. The husband testified he was in a hurry and the wife was being slow and he wanted to get her going so he pulled her by the scarf.
- [30] The husband testified he could not recall pulling his wife's hair, nor his granddaughter's hair. However, he agreed he has not seen his granddaughter for over a year. As well, the husband testified he could not recall standing at the door with the meat cleaver when his wife came home.
- [31] When questioned about an incident in the hospital where the wife alleges he punched her, the husband's evidence is that he does not remember punching her, but he may have pushed her. He explained that people push other people in the hospital. The husband then stated if he pushed her it was not intentional and he does not recall the incident.
- [32] When asked about threatening his wife with scissors, the husband agreed he was cutting coupons and may have walked towards his wife with scissors in his hands but says the scissors were not intended to hurt anyone. He does not remember punching his wife. The husband takes the position that if he punched his wife she should have gone to the hospital. He says that without medical evidence, the wife has no proof that he hit her. The husband says that if he was being so aggressive, the wife would not have stayed with him for 45 years.
- [33] The husband agrees he does have some impulse control issues, but says he is now seeking help by going to a psychiatrist.
- [34] During the course of the trial the husband apparently threatened to hit the wife's counsel. When asked about threatening her lawyer, the husband said he did not remember doing that, but said the lawyer had infuriated him with his questions.

- [35] The husband says he did not breach the no-contact provisions. The husband asserts the phone in the matrimonial home belongs to him, and he can phone it any time to speak to his children. He denies trying to contact his wife on the phone after the no-contact order.
- [36] The husband's position is that he will not agree to stay away from the matrimonial home, and stop communicating with his wife. The husband takes the position the matrimonial home belongs to him, and says the relationship with his wife is still strong enough and he should be able to communicate with her.

IV. Should there be a permanent PROTECTION order made restraining the husband from contacting the wife?

- [37] As stated earlier, the wife is seeking a permanent protection order restraining the husband from contacting her under s. 183 of the Family Law Act, S.B.C. 2011, c. 25 ["FLA"].

- [38] The relevant portions of s. 183 of the FLA provides:

183 (1) An order under this section

- (a) may be made on application by a family member claiming to be an at-risk family member, by a person on behalf of an at-risk family member, or on the court's own initiative, and
- (2) A court may make an order against a family member for the protection of another family member if the court determines that
 - (a) family violence is likely to occur, and
 - (b) the other family member is an at-risk family member.
- (3) An order under subsection (2) may include one or more of the following:
 - (a) a provision restraining the family member from
 - (i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,
 - (ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,
 - (iii) following the at-risk family member,
 - (iv) possessing a weapon, a firearm or a specified object, or
 - (v) possessing a licence, registration certificate, authorization or other document relating to a weapon or firearm;
 - (b) limits on the family member in communicating with or contacting the at-risk family member, including specifying the manner or means of communication or contact;
 - (e) any terms or conditions the court considers necessary to

- (i) protect the safety and security of the at-risk family member, or
 - (ii) implement the order.
- (4) Unless the court provides otherwise, an order under this section expires one year after the date it is made.
- (5) If an order is made under this section at the same time as another order is made under this Act, including an order made under Division 5 [Orders Respecting Conduct] of Part 10, the orders must not be recorded in the same document.

[39] The factors to be considered in determining whether to make a protection order under s. 183 are set out in s. 184. The relevant portions of s. 184 provide:

184 (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

- (a) any history of family violence by the family member against whom the order is to be made;
 - (b) whether any family violence is repetitive or escalating;
 - (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
 - (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
 - (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
 - (f) the at-risk family member's perception of risks to his or her own safety and security;
 - (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.
- (4) The court may make an order under this Part regardless of whether any of the following circumstances exist:
- (a) an order for the protection of the at-risk family member has been made previously against the family member against whom an order is to be made, whether or not the family member complied with the order;
 - (b) the family member against whom the order is to be made is temporarily absent from the residence;

- (c) the at-risk family member is temporarily residing in an emergency shelter or other safe place;
- (d) criminal charges have been or may be laid against the family member against whom the order is to be made;
- (e) the at-risk family member has a history of returning to the residence and of living with the family member against whom the order is to be made after family violence has occurred;
- (f) an order under section 225 [orders restricting communications] has been made, respecting the at-risk family member, against the family member against whom the order is to be made.

[40] Family violence is defined in s. 1 of the FLA as follows:

"family violence" includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[41] Section 188 of the FLA provides for the enforcement of any order made under s. 183 as follows:

- s. 188 (2) A police officer having reasonable and probable grounds to believe that a person has contravened a term of an order made under this Part may
 - (a) take action to enforce the order, whether or not there is proof that the order has been served on the person, and
 - (b) if necessary for the purpose of paragraph (a), use reasonable force.

- [42] In this case, the wife alleges there has been a pattern of verbal, emotional, and physical abuse throughout the relationship. The wife testified regarding a number of events where the husband threatened and assaulted her, including the events right before the separation. The wife's evidence is that the husband's abusive behaviour was escalating, likely as a result of the stress of their older child's serious illness. The wife testified that the violence had increased just prior to separation, with the husband threatening her with a meat cleaver and scissors.
- [43] The wife expressed concern that the division of what the husband considers his assets and pension will result in a further stress on the husband, and he is likely to react violently towards her.
- [44] As stated earlier, the husband purports not to recall any of the violent incidents the wife has testified about. Rather than denying the incidents took place, he simply says he cannot recall assaulting or threatening the wife.
- [45] It was apparent from the husband's evidence and submissions that he has little respect for his wife, and thinks she is lazy. According to the husband, rather than going to work when their youngest child turned 10, the wife chose to stay at home, sleep all day, watch television all night, eat cookies and drink tea. The husband does not acknowledge the wife's role in child rearing, or in supporting him by moving for his career.
- [46] It is apparent from the evidence that the wife gave up her jobs to move for the husband so that he could further his career, and to look after the children. The evidence is that the husband left the bulk of the child care to the wife, and would not accommodate her working by looking after the children when she was at work unless it suited him.
- [47] The husband does admit to some acts of physical violence. For example, the husband admits pulling the wife by the scarf and ripping it, and that he may have pushed her in the hospital.
- [48] While denying he threatened the wife with a meat cleaver, the husband's evidence is somewhat consistent with the wife's evidence on that point. His evidence when asked about the meat cleaver incident was that he was often awake at 4:30 a.m. to start his shift, and that he has a meat cleaver. He could not recall threatening his wife with it. The husband then went on to state that the fall of 2012 was a very stressful time for him, and the wife may have perceived the situation as such, i.e. that he was threatening her with a meat cleaver.
- [49] When asked if he had told the wife he would punch her teeth down her throat, the husband's evidence was that he was not sure. The husband agreed that sometimes he has problems controlling his impulses and says he is currently seeing a psychiatrist. The husband's evidence is that his impulse control is fairly well managed, so the wife should have no fear.
- [50] What is concerning about the husband's lack of recollection regarding the violent incidents his wife testified about is that during the trial the husband threatened to assault the wife's lawyer, and then stated he could not recall the incident the next day. Although initially denying he had threatened the wife's lawyer, when pressed the husband agreed that he

became enraged by the questions of counsel and reacted. In response to questions about the incident, he stated, "you rubbed it on me and infuriated me." It is apparent from his evidence regarding the incident with the lawyer the fact the husband does not recall incidents of violence towards the wife does not mean they did not occur.

- [51] The husband did not deny pulling the wife's hair, punching her, pushing her into a wall, or threatening her with a meat cleaver and scissors. Instead, he said he does not accept the acts of violence occurred because he cannot confirm them. The husband went on to state he could not deny they happened either because he cannot recall.
- [52] Since the no-contact order was put in place the husband has telephoned and come to the matrimonial home. The husband takes the position that despite a no-contact order he can telephone the wife's residence because it is his telephone and he can phone to speak the children anytime. He says he went to the house to drop off clothing and food for the children.
- [53] When the husband was asked if he would agree to stay away from the matrimonial home and his wife, he said he would not. The husband stated he would not agree to stop communicating with his wife.
- [54] Having heard the testimony of both parties, I accept the wife's evidence regarding the ongoing nature of the violence in the relationship. Not only has the husband been violent towards the wife, but it is apparent from her evidence that other family members, including the parties' children, a niece and a grandchild, have been subjected to and witnessed violence in the home. It is clear from the evidence that the husband has significant impulse control and anger management problems.
- [55] I am of the view this is an appropriate case in which to make a protection order based on a review of the various factors set out in s. 184 of the FLA.
- [56] Many of the factors referred to in s. 184 are present in this case. There is a history of family violence by the husband against the wife from the beginning of their marriage, including physical, verbal and emotional abuse. I accept the wife's evidence the violence has escalated as the husband has aged and experienced greater stress.
- [57] Based on his evidence, it is clear that a division of what he considers to be "his assets" will be very stressful for the husband. In my view, the wife's perception that her risk will increase when the assets are divided is well founded.
- [58] In my view, given his history of violent behaviour and his reaction to the questions of the wife's lawyer at trial, it is likely the husband will react violently towards the wife if there is a division of the assets and pensions of the parties which does not weigh heavily in his favour. It is also clear from his evidence the husband will not agree to stay away from the wife and stop communicating with her.
- [59] Accordingly, I am making the following protection order pursuant to s. 183 of the FLA:

- The husband is restrained from the following activities without further order of the Court:
- directly or indirectly communicating with the wife;
- attending, at or near or entering a place regularly attended by the wife, including the residence, property, or business of the wife, even if the husband owns the property, or has a right to possess the place;
- following the wife;
- A police officer having reasonable and probable grounds to believe that the husband has contravened a term of this order may:

§ take action to enforce the order, whether or not there is proof that the order has been served on the person, and

§ if necessary for the purpose of enforcing this order, use reasonable force.

[60] The husband is not entitled to apply to vary or amend this order for a period of three years following the making of it.

V. What are the Family Assets and what is the Appropriate Division

[61] The assets of the parties consist of the matrimonial home and its contents, the farm in Saskatchewan, some vehicles and equipment, and a number of bank accounts and pensions.

[62] This action was commenced under the FLA. The relevant sections of the FLA provide:

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or

(ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

(2) Without limiting subsection (1), family property includes the following:

- (a) a share or an interest in a corporation;
- (b) an interest in a partnership, an association, an organization, a business or a venture;
- (c) property owing to a spouse
 - (i) as a refund, including an income tax refund, or
 - (ii) in return for the provision of a good or service;
- (d) money of a spouse in an account with a financial institution;
- (e) a spouse's entitlement under an annuity, a pension, a retirement savings plan or an income plan;
- (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
- (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.

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.

87 Unless an agreement or order provides otherwise and except in relation to a benefit under a pension plan,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or
 - (ii) of the hearing before the court respecting the division of property and family debt.

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 benefits 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.
- 97 (1) For the purposes of giving effect to a division of property or family debt under this Part or Part 6 [Pension Division], the Supreme Court may
- (a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and

- (b) despite sections 94 (2) [orders respecting property division] and 215 (2) [changing, suspending or terminating orders generally], and subject to subsection (3) of this section, make any order that is necessary, reasonable or ancillary to give effect to the division.
- (2) Without limiting subsection (1), the Supreme Court may make an order to do one or more of the following:
 - (a) declare who has ownership of, or right of possession to, property;
 - (b) require that title to a specified property granted to a spouse be transferred to, held in trust for, or vested in the spouse, absolutely, for life or for a term of years;
 - (c) require a spouse to pay compensation to the other spouse if property has been disposed of, transferred, converted, or exchanged into another form, or for the purpose of dividing the property;
 - (d) require partition or sale of property and payment to be made out of the proceeds of sale to one spouse or both in specified proportions or amounts;
 - (h) subject to subsection (3), declare that one spouse is responsible for payment of an item of family debt and must indemnify the other spouse for the item of family debt;
 - (i) require the sale of property for the purposes of paying an item of family debt;
 - (j) transfer property to a spouse.

[63] In this case, the parties lived together for 43 years and were married for 39 years. The parties have lived apart since February 2013. The presumption is an equal division of the family assets.

[64] The property in issue was acquired during the marriage. Although the husband submits the wife did not work or contribute to the household expenses, it is apparent from the evidence that both parties worked and contributed to the acquisition of the family assets throughout their initial years together. The wife did not work outside the home after the birth of their second child in 1994, after the matrimonial home had been acquired. Part of the funds for the purchase and construction of the matrimonial home came from the sale of the property in Edmonton which the husband agrees the wife contributed to.

[65] The wife submits the family assets consist of the following:

Matrimonial home

\$640,000

Farm in Saskatchewan

\$175,000

Husband's municipal pension

Unknown value

Husband's employment pension

\$13,432

Olympia Trust RRSP

\$204,000

Jeep Commander Truck

\$12,000

Jeep Laredo and Lincoln Continental

Unknown value

Husband's CIBC account at time of separation

\$55,274

Wife's two Bank of Montreal accounts at time of separation

\$7,107.80

\$11,818.77

Wife's municipal pension plan

\$9,165.63

Wife's Vancity pension

\$2,370

Wife's RRSP at Bank of Montreal

\$9,614.47

RESP managed by husband - value on April 11, 2014

\$11,643.47

AGF account as of December 2012

\$1,925.95

[66] The husband agrees that the majority of the assets listed are family assets; however, he takes issues with the values the wife has assigned to them.

- [67] The husband submits the value of the farm property in Saskatchewan is between \$100,000 - \$115,000. However, in his 2013 financial statement the husband swore the farm had a value of \$175,000. He has provided no cogent evidence, such as an appraisal, that the farm is worth his current estimate. Nor has the husband provided any reason the property would have dropped in value since November 2013 when he swore his financial statement.
- [68] The only evidence the husband provided was a print-out of an internet page showing the sale of farmland in the area of his farm for \$115,367. That evidence is insufficient to establish that the farm property registered in the name of the husband has a value of \$100,000 - \$115,000. Having considered the evidence, I am of the view the appropriate value to assign to the farm is \$175,000, as set out in the husband's 2013 financial statement.
- [69] At trial, the husband took the position that the Jeep Commander was worth \$6,000. However, he has not provided any basis for his valuation. In his November 2013 financial statement and in his submission dated June 16, 2014, he assigned a value of \$12,000 to the vehicle. There are no values for the other vehicles which apparently are not operational. In my view, the appropriate amount to use in valuing the vehicles is \$12,000, as set out in the husband's earlier financial statement.
- [70] As stated earlier, the husband asserts that his parents loaned him \$40,000 to assist with the purchase of the lot on which he constructed the matrimonial home, and that amount has to be repaid, and therefore should be deducted from any amount to be divided between the parties. The husband's evidence is that he tried to pay the loan back to his parents but he was unsuccessful. His mother passed away in January 1989. His evidence is that his father is currently 91 or 92, and requires approximately \$2,800 per month for his upkeep. According to the husband, his father is managing, but he says he has to come up with some funds to repay the loan.
- [71] However, in his financial statement filed in November 2013, the husband did not indicate he owed any debt to his father. The husband initially agreed the November 2013 financial statement was correct but then stated he may have made a mistake on his financial statement.
- [72] The wife's evidence is that the first time the husband told her about the loan from his parents that he alleges was used to purchase the property was after the litigation commenced.
- [73] After the trial was completed, the husband made further submissions and the trial was reopened. When the trial was reopened on December 10, 2014, the husband sought to rely on a document entitled "Personal Loan Agreement" which purports to have been signed in 1987 to support his assertion that his parents had loaned him money to purchase the matrimonial home. The document sets out that the husband has borrowed \$40,000 from his father, with interest to be paid at 9% compounding. The original of the document was not produced.

[74] The husband's evidence is that he had always known about the document, and the original was in his father's files. However at his examination for discovery on August 16, 2013, the husband was asked about any documents evidencing the loan. He gave the following evidence:

Q 100: Are there any documents that say it was a loan?

A. Only the bank draft.

Q 101: Only the bank draft. So there was never any document saying you would pay interest on it or pay back at a certain time and signed by you and/or your spouse?

A. No.

[75] The husband's explanation as to why he did not produce the "Personal Loan Agreement" document earlier was unsatisfactory. His evidence that it was not until he was asked in court if there were any documents that he produced the document, despite saying there were no documents at the examination for discovery. The document is not an original, and his father did not testify. I agree with the counsel for the wife that there is doubt as to the document's authenticity.

[76] The evidence is that the husband has made no attempts to pay back the loan since 1987, despite the fact he has made significant investments. Having considered all of the evidence, I do not accept the husband's evidence that his parents loaned him \$40,000 for the purchase of the lot, and the loan has to be repaid.

[77] The husband agreed he had \$55,000 in a bank account when the parties separated. On July 14, 2013, he had \$30,700 in a CIBC account and agreed to a consent order that he would maintain a bank balance of \$10,000 in the account. On July 11, 2013, prior to the consent order, the husband withdrew \$20,000 from the bank account for a trip to Las Vegas. Despite the consent order, the husband reduced the balance in the account to \$2,410 by July 30, 2013. The husband's explanation was that he has sympathy for court orders, but he has to conduct his business activities.

[78] According to the husband, he spent \$30,000 on farm equipment which he purchased from his brother after the parties separated. He explained that his intention was to move to Saskatchewan to farm after he retired, but he took ill, so the equipment has not been used. His evidence is that despite the fact he is not using the equipment he has been unable to obtain a refund for it.

[79] As well, since separation, the husband lost approximately \$250,000 he had invested in League Investments. The husband testified the reason he could not pay the wife the spousal support he had agreed to pay her in the consent order was because League Investment defaulted in its payments to him. He agreed despite not paying the wife any spousal support, he spent \$500 on a wedding gift, and that he would rather buy the wedding gift than pay the wife support.

- [80] The husband disputes that the Olympia Trust RRSP in the amount of \$204,072 exists. He says that was part of the League Investments. However, in his 2013 Financial Statement, the League Investments in the amount of \$250,000 are listed separately from the Olympia Trust RRSP. The evidence is that as of January 15, 2014, the value of the Olympia Trust RRSP was \$204,072.89.
- [81] The husband's evidence that the Olympia Trust RRSP is the same fund as the League Investment fund is also inconsistent with the submissions the husband provided dated June 16, 2014. As of that date, he indicated the Olympia RRSP had a current value of \$201,285, made up of \$158,080 in principal, and \$43,205 in interest.
- [82] The husband argues that the wife did not contribute to the acquisition of the assets. However, as noted earlier, the evidence is that the wife worked during the beginning of the relationship and contributed to the purchase of the Edmonton property. Those funds were later used for the purchase and construction of the matrimonial home.
- [83] As well, I note that pursuant to s. 81 of the FLA, the presumption is that the parties are entitled to a one-half interest in family property, regardless of contribution, unless an equal division would be significantly unfair, considering the factors set out in s. 95.
- [84] The husband, in my view, has not established that an equal division of the assets would be significantly unfair, or that any of the factors enunciated in s. 95 of the FLA apply in his favour.
- [85] The husband submits he should receive compensation for the wife's room and board since the youngest child turned 10 because she refused to work outside the home. However, there is no basis in law for an award of that nature.
- [86] As well, the husband seeks to be compensated for occupational rent from the date of separation because the wife has remained in the matrimonial home. The two children were also residing in the matrimonial home. The husband was not contributing any spousal support as ordered. In the circumstances, I am of the view the issue of occupational rent should be considered in relation to the wife's claim for retroactive spousal support.
- [87] The wife seeks an equal division of the parties' pensions. Pensions are to be divided pursuant to Part 6 of the FLA. Section 84(2)(e) of the FLA provides that pensions are family property subject to equal division under s. 81. Both the husband and wife have various pensions. There is no evidence as to when the Canada Pension Plan and the other pensions the parties began accruing; however, the evidence is that the husband and wife were cohabitating most of their working life.

[88] Under s. 81(b) of the FLA, the entitlement of each spouse to an undivided half interest in the other's pension arises on separation. The benefits that accrued under the husband's pensions and wife's pension's, including the municipal pensions and Canada Pensions Plans, from the date the parties began cohabitating or the date the benefits began accruing until the date of separation on February 24, 2013, shall be divided equally between the parties in accordance with Part 6 of the FLA.

[89] In my view, neither party has established that an equal division of the family assets, including the property, chattels, bank accounts, and pensions, would be significantly unfair. Accordingly, I am making the following division:

- The family home will be sold, with the wife to have conduct of the sale. Either party is at liberty to apply to the Court in the event there is a dispute regarding the sale price;
- The value of the farm property of \$175,000 will be divided equally;
- The amount in the husband's CIBC bank account at the time of separation of \$55,274 will be divided equally;
- The amounts in the wife's Bank of Montreal bank accounts at the time of separation of \$18,926.75 will be divided equally;
- The husband will reimburse the wife \$6,000 for half the \$12,000 value of the vehicles;
- The pensions of the parties will be divided equally in accordance with the provisions in Part 6 of the FLA;
- The RRSPs in the parties' names, including any amount in the Olympia Trust RRSP, will be divided equally by way of spousal roll over.

[90] In order to facilitate the division of the assets the husband will reimburse the wife the amount of \$87,500 for half the value of the farm, and \$6,000 for half the value of the vehicles from his share of the net proceeds from the sale of the matrimonial home. As well, the wife is entitled to the amount of \$18,174 to equalize the amounts in the parties' bank accounts at the time of separation. The husband will reimburse the wife that amount from his share of the net proceeds from the sale of the matrimonial home.

VI. Is the Wife entitled to Spousal support

[91] The wife seeks retroactive and future spousal support. The wife says that based on the husband's 2012 Income Tax Return he should have been paying between \$2,898 and \$3,758 of spousal support from February 23, 2013, until his 2014 tax return was completed in May 2014. Alternatively, at the least, he should have paid spousal support in the range of \$1,839 to \$2,382 as of January 1, 2014.

- [92] The wife argues that based on the median amount, the husband should have paid \$3,381 for a 10-month period, or \$33,810. The husband paid a total of \$2,300 before the consent order dated July 24, 2013, in which he agreed to pay \$850 per month. He paid an additional \$2,700 in maintenance after the order. The wife asserts that the net amount payable by the husband in retroactive spousal support is \$28,810.
- [93] However, there is evidence that the husband paid for the maintenance of the house, including the property taxes, hydro, natural gas, telephone, cable, and internet services for at least part of the time since separation. He agreed in the consent order to pay \$800 per month for the maintenance of the matrimonial home. The husband's evidence at trial is that he paid approximately \$800 a month for the maintenance of the matrimonial home where the wife and two children live up to the time of trial. As noted earlier, the wife has had exclusive occupancy of the matrimonial home since February 2013.
- [94] As indicated earlier, the husband takes the position the wife is not entitled to any spousal support because she could have gone back to work when the parties separated. By making an argument that the wife is not entitled to spousal support because she should have gone to work the husband is in effect arguing that income should be imputed to the wife.
- [95] The applicable purposes and principles relating to spousal support, including imputation of income for both child and spousal support, were reviewed in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 31-38. As noted at paras. 36 and 37:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.
- [96] The factors for whether to award retroactive child support from *D.B.S. v. S.R.G.*, 2006 SCC 37, have been applied to considering the appropriateness of retroactive spousal support: *Reis v. Bucholtz*, 2010 BCCA 115. The factors are: whether there is a reasonable excuse why support was not sought earlier; the conduct of the payor; and hardship occasioned by a retroactive award.

- [97] In this case, the evidence is the wife has not worked since 1994 when the youngest child was born. Her evidence is that she has arthritis in her knees which makes it difficult to get around. The wife's evidence was that she wanted to go back to work after the second child was born but it was difficult to work around her husband's shift work.
- [98] It is apparent, given the wife's age, health issues, and lack of training, that it would have been difficult for the wife to re-enter the labour market at the time of separation or now as the husband suggests. In the circumstances, I am of the view it is not reasonable to impute income to her.
- [99] I turn then to the issue of retroactive spousal support. I am satisfied the wife sought support within a reasonable time in the circumstances. However, in my view, there would be hardship if the award being sought by the wife was made. The award the wife is seeking is based on the husband earning \$100,000 from employment income. There does not appear to be any basis in the evidence, apart from a mortgage application, that the husband earned \$100,000 in 2013. That is not consistent with the evidence that the husband stopped working in May 2013, shortly after separation, at the age of 67, and the only income he receives is from his pension. The evidence is that the husband is no longer able to work because of his health problems.
- [100] In his submission the husband asserted he is now earning approximately \$2,951 per month from his various pensions. In his 2013 income tax return the husband indicates his employment income is \$18,600 approximately, and he received pension income and illness benefits in the amount \$51,688 for a total income of \$70,367.
- [101] The evidence is that the husband continued to maintain the matrimonial home after the separation to present, though there is evidence that he has not paid some bills. As noted earlier, the wife has had exclusive occupancy of the matrimonial home since February 2013. In my view, that should be considered in determining the appropriate amount for retroactive spousal support.
- [102] I was provided with a calculation that based on the husband having an employment income of \$69,379 and wife having an income of \$2,976, the range for spousal support was between \$2,044 and \$2,644. In this case, the husband has been paying \$800 per month for the maintenance of the family residence which the wife has had exclusive occupancy of; however, he has not paid the agreed upon spousal support. I note he consented to pay that amount of support when he was no longer working. The amount of retroactive spousal support payable pursuant to the order, up to and including January 2015 is \$14,450, less the \$2,700 paid, for a total amount owing pursuant to the order of \$11,750.
- [103] Having considered the circumstances of the parties, it is my view the appropriate award of retroactive spousal support is the agreed upon amount of \$11,750. That amount will be paid from the husband's share of the net sale proceeds of the family residence.

[104] In my opinion this is not an appropriate case in which to order the husband to pay future spousal support. Neither the husband nor the wife are working, nor is it likely either will work in the future. I have divided the pensions and RRSPs equally between them. Accordingly, I am not ordering any future spousal support.

VII. Conclusion

[105] There will be a protection order pursuant to s. 183 of the FLA that the husband is restrained from the following activities without further order of the Court:

- directly or indirectly communicating with the wife;
- attending, at or near or entering a place regularly attended by the wife, including the residence, property, or business of the wife, even if the husband owns the property, or has a right to possess the place;
- following the wife;
- A police officer having reasonable and probable grounds to believe that the husband has contravened a term of this order may
 - a) take action to enforce the order, whether or not there is proof that the order has been served on the husband, and
 - b) if necessary for the purpose of enforcing this order, use reasonable force.

[106] The husband is not entitled to apply to vary or amend this order for a period of three years from the making of it.

[107] The family assets and pensions will be divided equally between the parties as follows:

- The family home will be sold with the wife to have conduct of the sale. Either party is at liberty to apply to the court in the event there is a dispute regarding the sale price;
- The value of the farm property of \$175,000 will be divided equally;
- The amount in the husband's CIBC bank account at the time of separation of \$55,274 will be divided equally;
- The amounts in the wife's Bank of Montreal bank accounts at the time of separation of \$18,926.75 will be divided equally;
- The husband will reimburse the wife \$6,000 for half the \$12,000 value of the vehicles;
- The pensions of the parties will be divided equally in accordance with the provisions in Part 6 of the Family Law Act;
- The RRSPs in the parties' names, including the Olympia Trust RRSP which is valued at \$201,285, will be divided equally by way of spousal roll over.

- [108] In order to facilitate the division of the assets the husband will reimburse the wife the amount of \$87,500 for half the value of the farm, and \$6,000 for half the value of the vehicles from his share of the net proceeds from the sale of the matrimonial home. As well, the wife is entitled to the amount of \$18,174 to equalize the amounts in the parties' bank accounts at the time of separation. The husband will reimburse the wife that amount from his share of the net proceeds from the sale of the matrimonial home.
- [109] The husband will pay \$11,750 in retroactive spousal support to the wife, which is to be deducted from the husband's share of the net proceeds from the sale of the matrimonial home.
- [110] I will remain seized of the matter in regards to any directions necessary to facilitate the division of the assets, including the sale of the matrimonial home, and for settling the order.
- [111] Finally, the wife is entitled to her costs at Scale B.

"Gerow J."

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