
CANADA / JUDGMENT

Prasad v. Prasad

2020 BCSC 1476

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Supreme Court of British Columbia

DECIDED

5 October 2020

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2020 BCSC 1476 Prasad v. Prasad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Prasad v. Prasad,

2020 BCSC 1476

Date: 20201005

Docket: E056305

Registry: New Westminster

Between:

Saileshni Devi Prasad

Claimant

And

Herendra Prasad

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

In Chambers

Counsel for the Claimant (via telephone):

M. Dhanoya

Counsel for the Respondent (via telephone):

S. Roxborough

Place and Date of Hearing:

New Westminster, B.C.

August 21, 2020

Place and Date of Judgment:

New Westminster, B.C.

October 5, 2020

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Introduction

- [1] On August 21, 2020, there were two applications before me. The first application was filed by the respondent on July 15, 2020, seeking the net proceeds from the sale of the family residence, located at 10257 126 Street, Surrey (the "Family Residence"), be divided equally between the parties. The second application was filed by the claimant on August 13, 2020, seeking the net proceeds from the sale of the Family Residence be paid to the claimant. In the alternative, the claimant seeks to have the sum of \$185,893.97 paid by the respondent to the claimant before the balance of the net proceeds are distributed equally between the parties.
- [2] The fundamental disagreement between the parties is whether the net proceeds from the sale of the Family Residence should be divided equally or unequally between them. The claimant obtained a Final Order in June of 2019 ordering that title to the Family Residence be transferred to her name. The Final Order was issued as part of an undefended family law case as the respondent had not filed a response to the claimant's notice of family claim. The respondent did not apply to vary or set aside the Final Order, and instead filed a response to the notice of family claim in November of 2019, only after the claimant had entered into a contract of purchase and sale for the Family Residence. In considering these applications, I have decided to use my discretion to allow the respondent a final opportunity to bring an

application to vary or set aside the Final Order.

Relevant Background

- [3] The parties were married on December 12, 1994, and separated on June 1, 2018, although according to the respondent's counsel, the date of separation is contested. There are three daughters from the marriage: the children are currently aged 22, 18 and 16 years old.
- [4] After the parties separated, they, along with the children, continued to live in the Family Residence together. In addition, the respondent's parents lived in the home. The claimant alleges that the respondent's parents were paying \$1,000 per month in rent to the respondent.
- [5] The claimant works as a lab analyst. She claims her annual income is \$35,000 per year.
- [6] The respondent works as a printer. He was earning approximately \$50,000 per year prior to the Covid-19 global pandemic. He asserts his work hours have been reduced by half due to the pandemic.
- [7] On November 2, 2019, the claimant entered into a contract of purchase and sale for the Family Residence which completed on January 30, 2020. The purchase price was \$1,134,800. The claimant asserts there was a reduction of \$50,000 in the price due to damage done to the Family Residence by the respondent. There was an addendum to the contract of purchase and sale, dated November 12, 2019, that noted:

The Buyers and the Seller agree to reduce the purchase price of the property by \$50,000.00 (adjusted to \$1,084,800.00) due to all cosmetic repairs as identified in the Buyers property inspection performed on November 6th, 2019.

\$1,084,800.00

- [8] The net proceeds from the sale of the Family Residence were paid into the claimant's lawyer's trust account. The amount paid into trust was \$376,578.64.
- [9] The claimant currently rents a property with the three children.
- [10] The respondent currently lives with his sister and the respondent's parents are living in alternative accommodations. The respondent's mother is living in an assisted living residence. As of the date of the hearing of the application, the respondent's father was a patient at Surrey Memorial Hospital awaiting placement in a long-term care facility.

Litigation Background

- [11] The claimant filed a notice of family claim on October 19, 2018, seeking child support and the payment of special expenses for the youngest daughter's piano lessons. The claimant sought an unequal division of family property and family debt on the basis that after separation, the respondent, without her consent, withdrew \$15,000 from a joint bank account, and that since June 1, 2018, the respondent has been collecting \$1,000 per month as

rent from his parents. She also sought an unequal division of the value of the Family Residence on the basis that she contributed financially towards the acquisition, improvement, and maintenance of the property, she contributed labour towards the maintenance and improvement of the property, and her attention to the household and child rearing allowed the respondent to devote his efforts to the acquisition, maintenance, and improvement of the property.

- [12] The claimant says that on October 27, 2018, the eldest daughter served her father, the respondent, with the notice of family claim at the Family Residence. I should note that having children serve legal documents on their parents is a practice that should be discouraged. The respondent disputes that he was properly served.
- [13] The respondent did not file a response to the notice of family claim within the time period provided by the Supreme Court Family Rules, B.C. Reg 169/2009 [Rules]. Rule 4-3 requires that a response to family claim be filed within 30 days after being served.
- [14] On December 17, 2018, the claimant sought a desk order divorce. In support, an affidavit of personal service was sworn by the eldest daughter. The eldest daughter states that she handed the notice of family claim to her father at the Family Residence on October 27, 2018 at 10:30 a.m.
- [15] The desk order divorce was not granted at that time. The claimant's lawyer, Mr. Dhanoya, advised that it was rejected by the registry. Mr. Dhanoya's recollection was that it was rejected because not enough time had passed for the response to family claim to be filed.
- [16] On June 4, 2019, the claimant applied for a desk order divorce a second time. In support, the claimant swore two affidavits: a child support affidavit in Form F37 and an affidavit in Form F38. Attached to the requisition that was filed was a draft of the order sought. Of significance is that the draft order sought an unequal distribution of the Family Residence with title to the Family Residence being transferred to the claimant.
- [17] The affidavits in support of the final order did not provide any evidence as to why there should be an unequal distribution of the Family Residence in favour of the claimant.
- [18] On June 21, 2019, Justice Duncan signed the final order (the "Final Order"). The significant portions of the order provided:

This family law case coming on as an undefended family law case without an oral hearing under Rule 10-10 of the Supreme Court Family Rules, and on considering the evidence put forward;

THIS COURT ORDERS THAT:

Subject to section 12 of the Divorce Act (Canada), the claimant, Saileshni Devi Prasad, and the respondent, Herendra Prasad, who were married at Nadroga, Fiji on December 12, 1994, are divorced from each other, the divorce to take effect on the 31st day after the date of this order.

THIS COURT ORDERS THAT:

Upon the court considering the evidence put forward the names and birth dates of the children of the marriage are as follows:

THIS COURT ORDERS THAT:

1. Pursuant to Section 16 of the Divorce Act (Canada), the Claimant shall have sole custody and day-to-day care of the child(ren) who shall primarily live with her;

UPON the Court determining the Claimant to have a guideline annual income of \$35,000.00 per year and the Respondent to have a guideline annual income of \$50,000.00 per year;

THIS COURT ORDERS THAT:

3. Pursuant to the Child Support Guidelines, the Respondent shall pay the child support table amount of \$781.00 retroactively from the 1st day of June, 2018, and continuing on the first day of each month thereafter, for so long as the children are entitled to support, subject to section 150 of the Family Law Act;

and;

4. pursuant to section 7 of the child support guidelines, the Respondent shall pay \$156.00 each month towards the special or extraordinary expenses for [the youngest daughter's] Piano Lessons, beginning on the 1st day of June 2018, and continuing on the first day of each month thereafter, for so long as [the youngest daughter] is enrolled in the Piano Lessons and is entitled to support.

THIS COURT FURTHER ORDERS THAT:

5. Pursuant to section 95 of the Family Law Act, family property is to be unequally divided. The family property is the home located at 10257 126 Street, Surrey, BC, V3V 5E8 which is to be transferred to the sole name of Saileshni Devi Prasad within 30 days of the date of this order.

THIS COURT FURTHER ORDERS THAT:

6. Under Section 46(1) (a) of the Family Maintenance Enforcement Act, that the Respondent, Herendra Prasad, born June 23, 1969, be restrained from molesting, annoying, harassing, or attempting to molest, annoy, harass or interfere with the Claimant, namely, Saileshni Devi Prasad;

THIS COURT FURTHER ORDERS THAT:

7. the Claimant be given an interest in any and all vehicles currently in the Respondent's name, an interest in all financial assets including but not limited to all bank accounts, investment accounts, RRSPs and pension benefits in the Respondent's name.

THIS COURT FURTHER ORDERS THAT:

8. pursuant to section 91(1) and 91(2) of the Family Law Act the Respondent be refrained from disposing of any property that is or may be family property pursuant to Parts 5 and 6 of the Family Law Act.

THIS COURT FURHTER ORDERS THAT:

9. the Respondent provide an accounting with respect to all assets held or acquired during the marriage

THIS COURT ORDERS THAT:

12. All other claims herein are adjourned generally.

[19] On July 2, 2019, counsel for the claimant says that a demand letter, dated the same date, was sent by registered mail to the respondent at the Family Residence. The demand letter enclosed a copy of the Final Order and a Form A Transfer.

[20] On July 16, 2019, Navdeep Saini, legal secretary, swore an affidavit stating that she served the demand letter by registered mail and she attached as Exhibit "B" the tracking information. The tracking information provided as follows:

Delivery Date (yyyy/mm/dd) 2019-07-03

Signatory Name S PRASAD

Signature handwritten signature

[21] The handwritten signature appears to have the first initial as "S". There were three individuals living at the Family Residence on July 3, 2019, when the registered letter was delivered, who would potentially match the Signatory Name of "S. PRASAD". Those three individuals were the claimant, and her oldest and youngest daughters.

[22] On September 13, 2019, the claimant filed a notice of application seeking a vesting order that title to the Family Residence be transferred to her sole name pursuant to the Final Order. The application states at paragraphs 7 to 12:

7. On July 2, 2019, via her legal counsel, Christ & Co. Law Corporation, sent a letter to the Respondent via registered mail (the "Letter").
8. The Letter included a copy of the Final Order and a Form A transfer form (the "Form A") for the Respondent to sign in order to transfer the Property to the Claimant, pursuant to the Final Order.
9. The Claimant asked the respondent, via the Letter, to return the Form A by July 15, 2019, and further offered to pay to the Respondent \$100 towards the costs of having the Form A notarized.
10. The Letter was delivered to the Respondent on July 3, 2019 via registered mail.

11. The Respondent failed, neglected or refused to provide any response to the Letter.
 12. The Respondent has failed, neglected or refused to sign the Form A to transfer the Property to the Claimants [sic] sole name pursuant to the Final Order and that is why the Claimant Applicant is making this Application today for a Vesting Order to have the Property transferred to the sole name of the Claimant.
- [23] The notice of application dated September 13, 2019, relies upon the affidavit of Navdeep Saini made July 16, 2019.
- [24] On September 27, 2019, Gregory Carrington, process server, swore an affidavit of personal service stating that on September 17, 2019, at 10:10 am, he served Herendra Prasad with the notice of application dated September 13, 2019, the notice of family claim, the Final Order, and the Affidavit of Navdeep Saini. The remainder of the affidavit states as follows:
2. I do not know the person served and attached to this affidavit and marked as Exhibit E is a photograph that is a true likeness of the person I served, which photograph was provided to be [sic] by counsel for the Claimant, Saileshni Devi Prasad.
 3. Further, I verily believe that the person I served was Herendra Prasad because on the date of service, at approximately 10:10 am I noticed Herendra Prasad exiting the front door of the Residence and to gain his attention I said "Hello Sir."
 4. Herendra Prasad then looked towards me and hurried to his Brown Toyota Rav 4 vehicle.
 5. I again called out to Herendra Prasad and he stated that he was going to the store.
 6. Herendra Prasad then proceeded to enter his vehicle and close his drivers [sic] side door. At this point I noticed that the driver's side door window was open by approximately 2 inches.
 7. I informed Herendra Prasad that I am a process server attending to serve him court documents while showing Herendra Prasad the letter size orange color envelope addressed to Herendra Prasad.
 8. Herendra Prasad proceeded to reverse out of the Residence driveway, at which time I placed the Service Documents on the lower part of the front windshield of Herendra Prasad's brown Toyota Rav 4 vehicle.
- [25] The respondent disputes that he was served with documents by Mr. Carrington on September 17, 2019.
- [26] On October 4, 2019, the application of September 13, 2019, was heard before Justice Harvey who made a vesting order in favour of the claimant (the "Vesting Order"). It is noted in the preamble of the Vesting Order that Herendra Prasad, Application Respondent, was not appearing although duly served with the notice of application. In accordance with the Vesting Order, the Family Residence was transferred into the claimant's name on or about October 7, 2019.

- [27] On November 6, 2019, the respondent filed a requisition seeking short leave to bring an application. The notice of application filed November 6, 2019, sought the following relief:
1. An order requiring that the net proceeds of the sale of the family residence located at 10257 126 St., Surrey, BC, V3V 5E8, legally described as be distributed equally between Mr. Prasad and Ms. Prasad.
 2. In the alternative, an order requiring the net proceeds of the sale of the Family Residence are to be held in trust in Mr. Prasad's trust account until further agreement or Court Order.
 3. An order for costs of this application.
- [28] In the factual basis of the application, the respondent claimed he was not served with the notice of application dated September 13, 2019, and that the Vesting Order was made in his absence.
- [29] In his affidavit sworn November 5, 2019, the respondent states he was not served with the application materials and he first became aware of the Vesting Order from his counsel on October 28, 2019. He states that he retained legal counsel on October 24, 2019, to represent him in a threatened foreclosure and in relation to his separation from Ms. Prasad. With respect to the Family Residence, he states the following:
12. As I have previously stated, I currently reside at the Family Residence. I have lived at the Family Residence since 2014, and have invested all of my money to its purchase and upkeep - totaling over \$75,000 in personal investments, and a \$140,000 downpayment I split with Ms. Prasad. This property is our Family Residence, and Ms. Parsad [sic] and I raised our children there. Most of my money and time has been invested in the maintenance and upkeep of this Family Residence.
- [30] This application was made without notice to the claimant. It was sent via email at approximately 10:30 p.m. on November 5, 2019, to counsel acting for the claimant. It was heard before Master Dick on November 6, 2019. On the face of the notice of application it does not indicate it was "without notice". Instead it appears to indicate that it was with notice to the claimant.
- [31] The order drafted by counsel for the respondent did not indicate this was a "without notice" application. The order of Master Dick filed on November 6, 2019, provided that the claimant be restrained from disposing of any family property including the Family Residence. The respondent's counsel stated during oral submissions that Master Dick directed counsel for the respondent to file the response to family claim, counterclaim, and Form 8 financial statement by the end of the following week. Master Dick's order does not reflect those directions.
- [32] On November 8, 2019, the respondent filed a response to family claim, a counterclaim, and a Form 8 financial statement. The response agreed with a divorce and an order for child support, but disagreed with the parenting arrangements, division of property, other

property claims, and the restraining order. The counterclaim sought an order for equal parenting time for both the claimant and respondent. It also sought an order for child support to be paid to the respondent. Further, it sought an equal division of family property and family debt and set out that a certificate of pending litigation would be registered against the Family Residence.

[33] The Form 8 financial statement confirmed that the respondent's income for child support purposes was \$52,385.00.

[34] On November 15, 2019, a second response to family claim was filed by the respondent. It appears to be the same as the first response to family claim so it is not clear to me why two were filed.

[35] On December 23, 2019, the claimant filed a notice of application seeking the following relief in para. 1:

A. the Order made after Application dated and entered on November 6, 2019 be set aside or dismissed;

B. alternatively, that the Amended Order made after Application, dated November 13, 2019, be set aside or dismissed;

C. the Respondent's Response to the Notice of Family Claim, entered on November 15, 2019 (the "Response"), be set aside or dismissed;

D. the Respondent's Counterclaim, entered on November 8, 2019 (the "Counterclaim") be set aside or dismissed;

E. the Respondent is to discharge the Certificate of Pending Litigation (the "CPL") registered on title to the property located at 10257 126 Street, Surrey (the "Property") forthwith;

F. alternatively, an Order stating that, after the payment of the usual adjustments, one-half of the net proceeds from the sale of the Property will to [sic] be paid to the Applicant and the other one-half of the net proceeds from the sale of the Property will be held in the Applicant's trust account pending further agreement of the parties or Court Order;

[36] The notice of application also sought special costs and punitive damages.

[37] In support of the December 23, 2019, application, the claimant swore her fifth affidavit on December 13, 2019. Marked as Exhibit "C" is what the claimant describes as a screen shot of the draft notice of family claim that was on the respondent's phone on October 12, 2018.

[38] The claimant states in her affidavit that counsel for the respondent was provided with a copy of the Final Order and the affidavit of personal service of the notice of family claim on November 4, 2019.

[39] On November 13, 2019, the order of Master Dick was revised to indicate that it was without notice. The revised order was filed on February 13, 2020.

- [40] On January 14, 2020, the respondent filed an application response to the notice of application filed on December 23, 2019. In the application response the respondent disputes that he was served with the notice of family claim until it was provided to his counsel on November 4, 2019. The respondent asserts that Master Dick directed that the response to family claim and counterclaim be filed by the end of the following week.
- [41] On January 14, 2020, the respondent swore his third affidavit in which he states that he was not served with the application made to obtain the Vesting Order and he first became aware of the Vesting Order on October 28, 2019, when it was sent to his counsel. He disputes that he was served with the notice of family claim and asserts that it was first served when it was sent to his counsel on November 4, 2019. With respect to the Family Residence he states:
20. I currently reside at the Family Home, along with my parents, my children, and Ms. Prasad. I have lived at the Family Home since 2013, and have invested all of my money in its purchase and upkeep - totalling over \$75,000 in personal investments, and a \$140,000 downpayment I split with Ms. Prasad.
21. This property is our Family Home. It was acquired in the course of my marriage to Ms. Prasad, and we raised our children there. Most of my money and time has been invested in the maintenance and upkeep of this Family Home.
22. I have been solely responsible for paying the utility bills, including BC Hydro, and Shaw Cable, as well as all of my children's expenses, such as school supplies, and graduation costs, since January of 2019 in order to support my family.
23. I am currently in the process of securing funding in order to buy out Ms. Prasad's portion of the Family Home, as it is very important for me to retain this property for the stability of my family and of my children.
- [42] The respondent further asserts that Ms. Prasad removed from the joint bank account the sum of \$15,643.13 for her own personal use in July of 2018 without his knowledge.
- [43] On January 16, 2020, the claimant swore her sixth affidavit in reply. Ms. Prasad confirms that she did remove \$15,643.13 from the joint bank account and the money has been used to support the children. She further alleges that Mr. Prasad removed the total of \$28,244 from the joint bank account and potentially other funds. Ms. Prasad disputes that Mr. Prasad made payments towards the Family Residence and claims that she made all payments towards the upkeep and maintenance of the Family Residence.
- [44] Of particular significance to these applications, Ms. Prasad states as follows:
22. I submit that Mr. Prasad must first apply to vary or set-aside the Final Order made in these proceedings before entering a Response to Family Claim or Counterclaim.
- [45] As of the date of hearing these applications, the respondent has not applied to vary or set aside the Final Order.

[46] The claimant further denies that the respondent spent over \$75,000 in improving or maintaining the Family Residence. She asserts that the \$140,000 down payment came from the net proceeds of the sale of the home that she and Mr. Prasad previously resided in.

[47] On January 21, 2020, Justice Jenkins heard the claimant's application filed on December 23, 2019, and made the following order (the "Jenkins Order"):

THIS COURT ORDERS that:

1. The Order of Master Dick made after application on November 6, 2019, including any amendments to the said Order, is dismissed.
2. The net sale proceeds, after the payment of the usual adjustments, from the sale of the residence located at 10257 126 Street, Surrey, BC, are to be held in the Claimant Applicant lawyer's trust account pending further agreement of the parties or court order.
3. The Respondent must discharge the Certificate of Pending Litigation (the "CPL") under Registration Number CA7862788, which CPL is registered by the Respondent on title to the Property, forthwith.

[48] According to the claimant's counsel who was in attendance at this hearing, the relief sought to set aside or dismiss the respondent's response to family claim and counterclaim was not heard and is still pending.

[49] The next step in this litigation was the filing of the respondent's application on July 15, 2020. It was returnable on August 7, 2020, but was adjourned to August 21, 2020.

[50] In response to the July 15, 2020, application, the claimant swore her seventh affidavit on August 12, 2020. In this affidavit, the claimant provides particulars of claims she has for maintaining the Family Residence, for mortgage payments she made, and for sums of money and personal assets she says the respondent wrongfully took.

Position of the respondent

[51] The respondent seeks the equal distribution of the net sale proceeds on the basis that he is in financial need and he requires the proceeds to support his family and to fulfil his financial obligations. He acknowledged that he had not applied to vary or set aside the Final Order and asks that he be permitted to do so.

Position of the claimant

[52] The claimant takes the position that the application of the respondent should be dismissed on the basis that the Final Order provides for an unequal distribution and for the Family Residence to be vested in her name. Since the respondent has not applied to vary or set aside the Final Order, the application is an abuse of process as the respondent is seeking to relitigate issues already addressed in the Final Order. The claimant submits that the principle of issue estoppel applies. She submits that as a result of the Final Order the court is

now functus officio and the court should not reopen the case.

- [53] The claimant submits that she is entitled to the net proceeds of the sale of the Family Residence and that the entire sum should be disbursed to her. In the alternative, she submits that she is owed the sum of \$185,893.97 by the respondent and that sum should be paid to the claimant prior to any distribution of the net proceeds.

Legal Principles

- [54] Under Rule 10-10 of the Rules, a final order was entered as this was an undefended family law case. The jurisdiction of the court to set aside an order made under R. 10-10 is by an application in the original proceeding: *Nichol v. Nichol*, 2015 BCCA 278 at para. 33; R. 10-5 and R. 10-6 regarding an application to change, suspend or terminate a final order. In such an application, the applicant must establish that he did not wilfully and deliberately fail to file a response, that the application to set aside the final order was filed as soon as reasonably possible after having knowledge of the final order, or a reasonable explanation can be offered as to any delay, and that the respondent has a defence worthy of investigation: *Nichol* at paras. 29-30 and 35.

Analysis

- [55] The respondent has not filed an application to vary or set aside the Final Order. It is not clear to me why the respondent has not made this application. The respondent was specifically advised at para. 22 of affidavit #6 of the claimant, sworn January 16, 2020, and by the claimant's counsel in a letter dated on or about April 23, 2020, that the first step the respondent needed to take was an application to vary or set aside the Final Order.
- [56] Without an order to vary or set aside the Final Order there is no basis on which the respondent can seek the payment of any of the net proceeds from the sale of the Family Residence. The Final Order is for an unequal distribution of the Family Residence with title being vested in the claimant. As such, the respondent's application filed on July 15, 2020, is dismissed. The claimant is entitled to her costs since she should not have had to respond to this application. It was premature, destined to fail, and there was no legal foundation for the orders sought.
- [57] What I am struggling with is whether I should exercise my discretion to give the respondent an opportunity to make an application to vary or set aside the Final Order. I am guided by the overarching principle of what would most serve the interests of justice.
- [58] I have decided to exercise my discretion to allow the respondent an opportunity to bring an application to set aside the Final Order for the following reasons:
1. The notice of family claim was allegedly served by the oldest daughter on her father - a practice which counsel should avoid;

2. There was no evidence in support of an unequal distribution of the Family Residence only to the claimant in the claimant's affidavit materials in support of the Final Order. I note that the affidavit in support of the desk order divorce states that the claimant believes that the facts in the notice of family claim are true, but in the notice of family claim there is no evidence indicating the amount of net equity in the Family Residence and whether it should be entirely given to the claimant. This raises the issue of whether the Final Order allowed for the division of property in a manner that was significantly unfair within the meaning of s. 95 of the Family Law Act, S.B.C. 2011, c. 25; and
 3. There is an issue respecting the affidavit of ordinary service sworn by Navdeep Saini since the tracking information attached as exhibit B appears to support that the respondent was not served by registered mail, but a S. Prasad was served.
- [59] The respondent has until November 4, 2020 to file and serve an application to vary or set aside the Final Order, and the affidavit materials in support of that application must address the legal principles listed at para. 54 of these reasons. The claimant then has 15 days from receipt of the respondent's application materials to file and serve any response materials. I am seized with hearing this application. The parties can consult with court scheduling for a date when I can hear this further application. There should be no delay in seeking a date for the hearing of the application to vary or set aside the Final Order. If the respondent does not file and serve the application materials within the time limits provided, then the total of the net sale proceeds are to be paid to the claimant.
- [60] I now turn to the claimant's application for the payment out of the net proceeds. Since the claimant is caring for the children of the marriage, the respondent is in arrears on the payment of child support for the children, and the claimant has provided some evidence to support payments she has made towards the maintenance and preservation of the Family Residence, I am convinced that half of the net proceeds should be forthwith paid out to the claimant. This will provide her and the children with some funds to ensure they have appropriate living accommodation while there is this further delay arising from the failure of the respondent to file the proper application. The claimant is entitled to the costs of her notice of application filed August 13, 2020.
- [61] I see this as the respondent's final opportunity to make the proper application in this case, being an application to vary or set aside the Final Order. If he fails to do so, then his only remedy with respect to the Final Order would be an appeal, assuming that an appeal is still open to him.
- [62] The following orders are made:
- a. The respondent's application filed July 15, 2020, is dismissed with costs payable to the claimant.
 - b. The claimant is entitled to costs from the respondent for her application filed August 13, 2020.

- c. The claimant is entitled to one-half of the net sale proceeds from the sale of the Family Residence located at 10257 126 Street, Surrey, BC, V3V 5E8, and legally described as:

PID: 010-185-933

LOT 15 SECTION 29 BLOCK 5 NORTH RANGE 2 WEST NWD

PLAN 16417

which is currently being held in a trust account by the claimant's lawyer, forthwith paid to her.

- d. The respondent has until November 4, 2020 at 4 p.m. to file and serve an application to vary or set aside the Final Order filed June 21, 2019 ("Final Order").
- e. The claimant has 15 days from receipt of the respondent's application materials to file and serve any response materials.
- f. I am seized with hearing the application of the respondent to vary or set aside the Final Order.
- g. If the respondent does not file and serve an application to vary or set aside the Final Order on or before 4 p.m. on November 4, 2020, the remaining proceeds from the sale of the Family Residence held in the trust account of the claimant's lawyer shall be paid to the claimant.

"Forth J."

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