
CANADA / JUDGMENT

R.L.M. v. L.A.M.

2007 BCSC 1233

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1233 R.L.M. v. L.A.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.L.M. v. L.A.M.,

2007 BCSC 1233

Date: 20070815

Docket: E063277

Registry: Vancouver

Between:

R.L.M. aka L.S.M.

Plaintiff

And

L.A.M. aka L.A.B.

Defendant

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the plaintiff

W. Ryan

Counsel for the defendant

F. Lowther

Date and Place of Trial/Hearing:

May 14 - 17; June 15, 2007

Vancouver, B.C.

INTRODUCTION

- [1] The plaintiff, R.L.M., and the defendant, L.A.B. were married on March 31, 1996, when he was 46 and she was 43. They lived together until separation on April 20, 2005 in a house purchased by the defendant shortly before the marriage, located on Bayview Drive in Delta. There are no children of the marriage.
- [2] The defendant completed a two year course at Langara College after graduating from high school in 1972. She has been continuously employed to the present date as a secretary for the Vancouver School Board.
- [3] The plaintiff was essentially unemployed or employed without remuneration throughout the marriage. His history of employment before his marriage to the defendant was somewhat sporadic. He brought essentially no assets into the marriage, while the defendant brought significant assets including funds to purchase the matrimonial home, R.R.S.P.'s, a pension, and savings. In an updated financial statement dated May 15, 2007 the defendant appended a Scott Schedule claiming the present value of her assets (excluding her pension) at \$1,106,954.51. The assets included the matrimonial home, which she valued at \$520,000 and a quantity of money which she received by way of inheritance, at least in part, during the currency of the marriage.
- [4] In his financial statement dated May 9, 2007, the plaintiff claimed assets of \$508,000 consisting of the matrimonial home, which he valued at \$500,000 and an \$8,000 R.R.S.P. which was disposed of after the separation in 2005. He claimed debt of \$36,000 in credit card charges.
- [5] The plaintiff seeks division of the matrimonial assets which he contends consists of the matrimonial home, a 1987 Chrysler motor vehicle, a 1993 Dodge motor vehicle, a 1988 Plymouth motor vehicle, a Suzuki motorcycle, funds in the defendant's chequing accounts amounting to \$2,635.42, accounts in TD Waterhouse in the amount of \$35,573.63, as well as monies received by the defendant as an inheritance and put in various investment accounts during the currency of the marriage, amounting to \$229,513.15. The plaintiff also claims an interest in the defendant's R.R.S.P.'s amounting to \$249,463.15 and gold and silver bars and coins valued at \$26,326 as well as an interest in the defendant's municipal pension.

- [6] The plaintiff contends that although the defendant brought the assets into the marriage, his contribution to the maintenance and accumulation of the family assets over the course of a 9 year marriage entitle him to an equal or significant portion of those assets on a division pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 (FRA). He also claims spousal support sufficient to enable him to set up his own business.
- [7] The defendant's position is that although the marriage lasted 9 years, it was a marriage in name only to which the plaintiff made little or no direct or indirect contribution, having essentially misled the defendant about his willingness and ability to earn income. The defendant concedes that the matrimonial home and her R.R.S.P.'s are family assets as well as the motor vehicles and some furnishings, but contends her inheritance, savings, and municipal pension are not family assets subject to division.
- [8] It is the defendant's position that in respect of the matrimonial assets, there should be a reapportionment in her favour, leaving the plaintiff with a spousal roll-over from the R.R.S.P.'s of \$50,000 and an additional \$50,000 from the balance of the matrimonial assets. The defendant takes the position that the plaintiff is not entitled to spousal support.

THE GOVERNING LEGISLATION

- [9] Family assets are defined in s. 58 of the FRA, the relevant portions of which read as follows:

- (1) Subject to section 59, this section defines family asset for the purposes of this Act.
- (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.
- (3) Without restricting subsection (2), the definition of family asset includes the following:
 - (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
 - (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan.

- [10] The onus of proof in relation to family assets is set out in s. 60 of the FRA, which reads as follows:

The onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.

- [11] Section 56 of the FRA provides when the entitlement to an interest in each family asset arises and what the interest constitutes. Section 56 reads as follows:

- (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when
 - (a) a separation agreement,

- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

- (a) an order under this Part or Part 6, or
- (b) a marriage agreement or a separation agreement.

[12] Reapportionment of the undivided half interest in each family asset provided for in s. 56 can be made on the basis of fairness in light of the factors set forth in s. 65 which reads as follows:

- (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.

- [13] Provision for the division of pensions determined to be matrimonial assets is made under Part 6 of the FRA - Division of Pension Entitlement.

THE PLAINTIFF'S EVIDENCE

- [14] The plaintiff was born and grew up on a farm in Manitoba. Although he considered taking over the family farm and took some courses towards a diploma in agriculture, he ultimately did not finish the course and did not take over the family farm. He eventually got a job as what he described as an experimental mechanic in which he designed equipment and obtained experience as a welder. He also worked as a drywaller. He became involved with a church and in the mid 1970's he went to a church college in Texas called Ambassador College, which he described as a liberal arts college. The college apparently closed after he completed his first year and according to his evidence, he had no opportunity to complete those studies. However, in a resume he subsequently prepared, he represented that he received a B.A. from Ambassador College. In cross-examination, he acknowledged that that was not true.
- [15] The plaintiff then went back to work as a mechanic in 1979 after a few years of drywalling. He testified that in 1983 he developed some back problems and was shifted to a "desk job" where he worked on designing processes for manufacturing plants. He was laid off in 1984. After that he received some land from his father, which he sold to his brother. He did various different jobs in the late 1980's and eventually moved to British Columbia in 1989. He testified that he had difficulty in finding work, although he worked for a few months in a machine shop, but left because "it was a long drive". He did some other jobs and then went on Employment Insurance and took a drafting course in 1990 and 1991 from BCIT, from which he obtained a certificate. Despite his certificate, he had difficulties with employment because he lacked the necessary computer skills. He worked in other jobs, none of which became permanent for various reasons. He moved to North Vancouver in 1993/94 and was hit by a car in a hit-and-run, testifying that he had damage to his knee for which he got rehabilitation and in respect of which he settled a claim for in 1994. Following that, he was on Social Assistance while seeking employment through various job clubs. During that period, he made contact with a company called Grizzly, which was building heavy duty trucks for logging. The trucks were "at the prototype stage". The plaintiff testified in cross-examination that he got a contract with Grizzly "to design equipment to make truck bodies" in the summer of 1996. He testified he was never paid anything for the work he did, as the idea was that he would only get paid if the company was successful. He testified he worked for Grizzly from around June of 1996 to November of 1996. The terms of his proposed remuneration were unclear and the company went into bankruptcy before he rendered a bill to it.
- [16] In the meantime, the plaintiff met the defendant in the spring of 1995. The plaintiff attended the Church of God International where the defendant and her brother, Walter, attended. The plaintiff, defendant and Walter began attending a church together in Tacoma and started a

congregation of that church in Vancouver. The plaintiff and defendant started dating. The plaintiff testified that they began looking for a house together to purchase about 6 months before they married and the defendant purchased the Bayview home with funds she got from selling another property she owned with her brother. The plaintiff was on social assistance at the time they got married in March 1996. He testified he told the defendant about his work and education history and she was aware that he was not working and on social assistance when they married. The defendant testified the marriage was never consummated, although "they continued to try unsuccessfully". He said that after they realized they would not have a normal sex life, they chose to continue with the marriage notwithstanding.

- [17] The plaintiff said that when the defendant bought the house they agreed that he would do some renovations to it, even though he had no previous experience. He described the renovations he did over the ensuing 9 years which included fairly substantial renovations to the basement involving the furnace room, a hallway, a bathroom, a recreation room and roughing out an area for a kitchen for a basement suite. He also put a central vacuum system in the house. He testified he closed off one side of the carport and also expanded the size of an outdoor deck. He testified that he had plans for further renovations which were interrupted by the separation.
- [18] The plaintiff also testified that he was involved in maintaining the yard and garden. He described the defendant as "an avid gardener" and testified that he "supported her 100%". He testified he did a lot of pruning and worked in the garden and did all the lawn cutting, trimming, and watering.
- [19] The plaintiff testified that at one point the roof needed replacing and they hired contractors to do that, but that he himself played a small role in helping with the re-roofing.
- [20] He said he put steel doors on the exterior of the house and dug and put in a new drainage system after discovering a leak in the basement.
- [21] The plaintiff conceded he did not work during the currency of the marriage except for the Grizzly job for 6 months for which he was not paid. He describes staying at home while the defendant went to work and he claimed to have done "homemaker type of work" testifying that he and the defendant "believed in equal partnership" and he "volunteered to do the laundry". He testified he usually made breakfast and usually made the defendant's lunch. He testified the defendant had some health issues which he addressed by getting the right foods, by teaching her to swim and encouraging her to exercise by walking and doing other recreational pursuits.
- [22] The plaintiff testified he usually did the dishes and repairs around the yard while the defendant did the vacuuming and dusting. He testified he "mostly" cleaned the upstairs bathroom, although the defendant occasionally did too. They shopped together.

- [23] The plaintiff testified he took on some "financial duties" in the marriage in about 1996 or 1997. The defendant had accounts containing money and investments "scattered around" and they talked about consolidating them and talking to financial planners. He said later they discussed him taking over and managing the defendant's investments. The defendant's brother was investing some of the defendant's money with his own, so they asked him to transfer her funds back to her. He said he used some of the defendant's funds to buy gold and silver bars and coins and when he bought gold it was \$300 per ounce whereas now it is \$670 per ounce. When he bought silver, it was \$3 per ounce, now it is \$15 per ounce. He also bought Euros and Swiss currency.
- [24] He testified that he was given the defendant's power of attorney in around 1996 which allowed him to manage the funds. He said the power of attorney was never revoked until their separation and he managed the defendant's funds and investments consistently throughout that time. He said he did it on weekends and in the evenings or mornings and he identified a number of accounts which he had managed and which included some accounts into which they put the defendant's inheritance from her mother.
- [25] He testified that initially the defendant's brother, Walter, had co-mingled the defendant's inheritance with his and had invested the funds as one. The plaintiff said he got concerned and ensured the defendant's inheritance was transferred into accounts which he could manage.
- [26] The plaintiff said that the defendant had problems with stress when they first got married which had to do with job and home issues. He said he counselled her to get time off from work, which she did. He testified the first year of the marriage was a difficult adjustment, after which they "started to settle in and had some great times".
- [27] The plaintiff testified they always had difficulties, but that they became amplified in the last year and said the time he was taking to get the renovations done was an issue between them.
- [28] The plaintiff described the final break-up as occurring when the defendant disclosed to a friend that she was talking to on the telephone, that the plaintiff went to another church. The plaintiff said he got very upset and pushed the defendant against the pantry and yelled at her. He said several days later, after talking to a police officer, he left the house. Following the separation he went to a temping agency to try and get a job.
- [29] The plaintiff referred to his physical state. He testified that he initially became aware of having back problems in 1983 when he started to see a chiropractor. He described his problems as being provoked by heavy lifting. He said he was diagnosed with sciatica "shortly after the separation in April 2005". He experienced severe symptoms and numbness that he had not previously experienced. He testified the sciatic symptoms came after separation within about 3 or 4 weeks. He described being very sore on the left side of his hip and leg, making it very difficult to walk.

- [30] The plaintiff testified to his medical history, asserting that he had seen a chiropractor before and during the marriage and that the defendant was aware of that and was aware of his back problems and of the earlier hit-and-run that he had been involved in. He said the defendant would assist him by rubbing his back with liniment.
- [31] In about 2003 he purchased a piece of equipment called an inverter, which he used for back exercise and back realignment. It was in the basement recreation room. The plaintiff testified he used it at night before going to bed and found that it helped. He testified that the defendant had witnessed him using it.
- [32] The plaintiff was challenged in cross-examination on the credibility and reliability of his evidence generally. In regard to his evidence that he graduated from high school and his resume reflecting that, he acknowledged the truth of the following questions and answers at his examination for discovery:

Q Just pause for a moment. Now, what is your actual educational level that you have achieved in life? Do you have grade 12?

A Didn't complete.

Q Didn't complete grade 12. Okay. And so what level of high school education did you get to?

A Well, there was a couple of classes I didn't complete in grade 12. So I sort of did and - I graduated, but I had to finish them off in the summertime. I went to University of Manitoba -

Q I'm confused. So you did graduate? You did get your grade 12 or you didn't?

A I graduated, yes.

Q Okay. I misunderstood what you said. I thought you said you didn't complete 12. But you say you finished the courses off in the summertime?

A I didn't finish them off.

Q You didn't?

Q No.

A You did not finish the courses off. So when did you get your grade 12?

Q It's like I did and I didn't. It's sort of one of those, you know - I had enough to, I guess, say I had a grade 12, but technically, you know - it wasn't an encumbrance to any further education. Like, I did go to university. I was accepted to the University of Manitoba, department of Agriculture.

- [33] He said that although in the early 1970's he still expected to take over the family farm, he went to Ambassador College in 1975 to get a B.A. degree. He agreed he did not actually get a B.A., although he represented on his resume that he had. He agreed it was a false representation, but claimed it was not his intention to mislead a potential employer.

[34] In relation to his computer design course at BCIT, the plaintiff testified that it taught him about different operating systems. He was cross-examined on his examination for discovery concerning his attendance at BCIT where he testified as follows:

Q So, in this resume that says you did AutoCAD BCIT 1991, that's false?

A Oh, I forgot about that.

Q Forgot about it?

A Yeah. That was a very short - I didn't - yeah, I don't - not sure. I didn't complete that.

Q Oh.

A Yeah.

Q You think you signed up for it? Did you even go to one class?

A I can't recall how many classes I went to.

[35] He testified that at the time of his examination for discovery he was trying to remember whether he finished his course at BCIT, and surmised that because the courses did not run back to back, he was confused about whether he completed the course or not.

[36] The resumes that were introduced into evidence identified the plaintiff's last name as S. He was asked why he changed his name from S to M before he was married. He said because it was awkward in British Columbia to answer to that name. People thought it was a Chinese name, so he took his mother's maiden name for convenience and in order to maintain a connection to his family.

[37] The plaintiff acknowledged that on his tax returns he reported as commission income, fees for managing the defendant's various investment accounts. The fees he charged showed up as a cost to the defendant in her tax returns which lessened her taxable income. He acknowledged that he received no actual payment from the defendant.

[38] The plaintiff acknowledged that even though he claimed to have back problems since 1983, in his resumes which were produced in the late 80's and early 90's, he claimed to be involved in various athletic pursuits including running, basketball and volleyball.

[39] He agreed he told the defendant when they met that he had a contract with Grizzly Trucks to design equipment to make trucks and bodies, but that he was never paid anything under that contract. He testified, however, that he saw the Grizzly contract as a potential career opportunity to get in on the ground floor of a new company.

- [40] The plaintiff agreed he told the defendant he wanted to be "economically productive" before they were married. He testified that after the Grizzly job did not work out he was "a little discouraged". There were some drain problems with the home so he focussed on the house and "we decided I should do the renovations". In response to the suggestion that the defendant was never o.k. with him not working, the plaintiff answered "you have to ask her about that".
- [41] The plaintiff agreed he brought no assets into the marriage. In relation to the renovations he agreed it was the defendant's desire to put a rental suite at the lower level. He agreed he told her he could do it. He could not recall if they talked about a time frame although it was always his intention to do it as soon as possible. He agreed it never actually got done and the defendant was upset that it wasn't done even over the course of 9 years.
- [42] In relation to the managing of the defendant's financial assets, the plaintiff testified that "much of it was monitoring" and that it included buying and selling options, stocks, mutual funds, gold certificates, and gold and silver leaves.
- [43] In connection with the household chores, the plaintiff agreed that the defendant did some cooking - sometimes she cooked dinner, sometimes he did.
- [44] The plaintiff agreed a criminal charge was laid against him arising out of the incident when he pushed her against the pantry at the time of separation, but the charge was dropped when he agreed to enter into a recognizance or peace bond.
- [45] He agreed that the defendant's inheritance from her mother was around \$240,000.

THE DEFENDANT'S EVIDENCE

- [46] The defendant was born in January 1954. Her brother is 5 years younger than she. She grew up in Vancouver with her brother and her parents; her father died in 1981 and her mother died in August 2001. She lived with her parents and brother continuously until she and the plaintiff were married in 1996. She took a 2 year secretarial course at Langara College and has worked for the Vancouver School Board since 1974. When she met the plaintiff in 1995, he told her that he was working at a North Vancouver company doing design drawings. Later, after they had been going out for a while, he told her the job was terminated and he had been doing the job voluntarily because he wanted to learn computer design. He told her that he was on social assistance, but that he had worked in welding and done metal work. He also told her that he had worked for a company called Versatile Corporation for 9 years. Later, after the separation, the defendant found a copy of the plaintiff's resume, which showed that he had worked at Versatile for only 6 years.
- [47] According to the defendant, the plaintiff also told her he could do mechanical engineering and had worked for a helicopter company, giving advice on mechanical engineering.

- [48] The defendant said she understood from the plaintiff that Ambassador College, where he testified he entered the B.A. program, was in fact a bible college and not a degree granting institution.
- [49] The defendant testified that before she met the plaintiff she realized she had to move out of the home she shared with her mother and brother and was looking to buy a home for herself. She bought the house on Bayview Drive in December 1995 and took possession on January 31, 1996. She paid \$270,000 for the house after selling her interest in a Windsor Street home, which she and her brother had jointly owned. She financed the balance of the house from savings, which left her with approximately \$80,000 in savings and an additional \$40,000 in R.R.S.P.'s at the time that she bought the house and shortly before she and the plaintiff were married.
- [50] She said that before she and the plaintiff got married, he expressed the belief that a husband should be a provider for his wife, and he was thinking of starting his own business in metal work or welding, or otherwise getting a job. She testified that the church that she and the plaintiff belonged to guided their beliefs with regards to men's and women's roles and that it emphasized that men should provide for their wives. She testified that the plaintiff told her he would try hard to seek employment.
- [51] According to the defendant, she heard about the plaintiff's job with Grizzly Trucks only after the marriage. She testified it involved the plaintiff designing a "jig" to accommodate an assembly line for the manufacture of trucks and he was to get paid when he finished. She confirmed that ultimately he was not paid for the work he did. He did no other work during the currency of the marriage. He thought he could invest the defendant's money and undertook to do that.
- [52] The defendant testified that throughout the marriage she asked the plaintiff to "get a real job and earn income".
- [53] After her mother's death in 2001 the defendant received an inheritance amounting to \$246,074.03. She testified the plaintiff invested her R.R.S.P. accounts but not her inheritance funds.
- [54] As far as his back problems were concerned, the defendant testified the plaintiff could do jobs as long as they did not involve heavy lifting. She testified that he was unable to perform sexually, but she did not learn about that until after the marriage. She asked him to consult a physician, but he did not follow through and do so. She was also unaware whether he went to see a physician about his back. He did see a chiropractor, but the defendant said it was not that often and it was for a neck or shoulder pain.
- [55] As far as the house was concerned, the defendant testified that when she bought it, she thought she would be on her own and wanted a suite in the basement, so she would not be alone in the house. After moving in, she decided to have a suite put in by contractors and wanted it done as soon as possible. The contractor she spoke to "didn't get back to her" and

ultimately the plaintiff undertook the renovations. The defendant testified that she helped him in various ways, both with the downstairs renovations and with the renovations to the deck which she testified she did approximately 65% of.

- [56] She testified the area of the basement that was set aside for a kitchen to form part of a suite was not properly or fully plumbed or ready for the necessary electrical components and she pointed out problems with the plumbing for the laundry appliances. She said the renovations which were done were not done to code and there were various electrical problems.
- [57] According to the defendant, the plaintiff had little to do with the roofing. He closed in one side of the carport and worked on the porch deck, but she did a significant amount of what was done herself. She testified it took 9 years to do what was done to the house and the basement suite was never finished. She said there were long periods where he did not do anything in respect of the renovations.
- [58] In connection with his homemaker duties, the defendant conceded that the plaintiff made some of her lunches, but she testified she made all the dinners, except that he would do some barbeques. She testified that he rarely made any dinners until the last 6 months of their cohabitation. He would put laundry in the washer and dryer, but would only put his laundry away, not hers, and she did the vacuuming and the bathroom cleaning.
- [59] The defendant testified that her Form 89s accurately set out her assets.
- [60] In cross-examination she denied that the plaintiff went to see a chiropractor for back problems more than 2 times, but agreed she may have given him massages for the relief of pain. She agreed that the plaintiff bought the inverter and she agreed it could have been in 2003.
- [61] She was asked whether the parties spent considerable time together during the marriage; she responded that the plaintiff made sure that they did and described him as having a controlling personality.
- [62] She denied that of the 9 years they were together they had 8 good years. She agreed they bicycled and swam together and travelled to the Gulf Islands. She agreed they shopped together. She denied that they had mutual friends. She said she had her own friends.
- [63] She did not draw up a will during their marriage. She agreed that she had granted the plaintiff a power of attorney, but reiterated that he was controlling. She agreed that she named him as the beneficiary of her assets but said it was because he insisted and had been upset when he saw her brother's name as the beneficiary on her investments. She was asked if she was happy with the investments he did, and she said no, generally not, but she was happy about the R.R.S.P. investments; they were her idea, and she also told him to invest money into gold. She said he just did what she requested him to do. She said she was basically unhappy because the plaintiff was never willing to make real money and that some of his investments did not turn out very well, although some did make money.

THE PRESENT FINANCIAL POSITION OF THE PLAINTIFF

- [64] In his financial statement dated December 5, 2006 the plaintiff disclosed an annual income of \$4,478 consisting of self-employment of \$3,758 and other employment income of \$720. He claimed annual expenses of \$15,720. In a later financial statement dated May 9, 2007 he claimed assets of \$508,000 consisting of the value of the Bayview Drive house and an R.R.S.P. which he disposed of in 2005 and 2006.
- [65] For 2006 he showed income of \$500; for 2005, \$13,808; and for 2004, \$9,000. He testified that the back problems he has experienced and the sciatica he was diagnosed with after separation impair his ability to work.

THE PRESENT FINANCIAL POSITION OF THE DEFENDANT

- [66] In her financial statement dated December 20, 2006, the defendant disclosed annual income of \$41,962.67 consisting of employment income of \$38,927.48, EI benefits of \$1,239, interest and investment income of \$2,400, and other income of \$150, less union dues of \$753.81 for 2005. She listed as assets \$50,181.05 in various accounts, including a Van City Vancouver Employees Savings Plan in the amount of \$11,026 (\$12,911 at time of trial), and \$229,513.15 in various other accounts and investment accounts, which she identified as investments from the inheritance from her mother, following her mother's death in August 2001. She testified that of those accounts, two accounts, one in the amount of \$93,000 and one in the amount of \$38,083.92, were acquired after separation, in January and April 2006 respectively. The other accounts comprising the inheritance were acquired in September 2001 and June 2002.
- [67] The defendant also identified R.R.S.P.'s in the amount of \$249,463 and a pension with an unknown value.
- [68] She identified 42 ounces of gold bars/coins worth \$25,830, 19 ounces of which she claimed were acquired before her marriage, and 41 ounces of silver coins valued at \$496.
- [69] The defendant valued the matrimonial home at \$475,000 and a number of vehicles amounting to \$4,400. In the result, she claimed her total assets, apart from her R.R.S.P.'s and pension, to be \$785,420. The R.R.S.P.'s were valued at \$249,463.15. Her pension was estimated by the plaintiff in the Scott Schedule with a value of \$250,000. The defendant claimed annual expenses of \$41,040.
- [70] In her updated financial statement dated May 15, 2007 she claimed a credit card debt of \$15,000 and appended a document entitled "Scott Schedule of L.B." which showed her total assets at the time of marriage to be \$400,944.59 (excluding her pension), assets acquired during the marriage at \$246,074.03; assets at date of separation at \$844,511.96 including the house then valued at \$415,000, and funds from her inheritance acquired during the marriage totalling \$192,488.56. Finally, she claimed her assets as of May 11, 2007 to be \$1,106,954 including the valuation of the house at \$520,000 and the total inheritance fund valued at

\$235,671. The defendant's pension was not valued.

ANALYSIS AND CONCLUSION

(i) Determination and division of Matrimonial Assets

[71] It is quite evident that there is great disparity between the position of the plaintiff and that of the defendant. The issues for resolution are first, in light of the provisions of the FRA, what assets under the control of the defendant are matrimonial assets, and second, what division of those assets is appropriate having regard for the mandate to be fair and the factors listed in s. 65 of the FRA. Third, it is necessary to determine, in light of the determination and division of assets, whether, and if so, in what amount and for what period, spousal support should be ordered.

[72] It is clear that the matrimonial home, the defendant's R.R.S.P.'s, and the defendant's municipal pension are matrimonial assets, the former by reason of its use for matrimonial purposes and the R.R.S.P.'s and pensions arising from the provision of s.58(3)(d) of the FRA.

[73] The furnishings and vehicles are, as well, matrimonial assets.

[74] Of the savings investment accounts, the plaintiff concedes the Van City Vancouver Employees Savings Plan valued at \$12,911 (as of the trial date) is not a matrimonial asset. He claims that he was involved in managing the other accounts, including the R.R.S.P.'s, in order to increase their value so that the defendant could retire early and the parties could have security in their retirement years. The plaintiff submits that on the basis of the evidence before me, I should conclude that the defendant's inheritance formed part of the funds which he managed and which were similarly family assets. In his submissions, the plaintiff points to the lack of evidence of what investments formed part of the inheritance, what investments existed at the time of the marriage or what their value was. The plaintiff pointed out that the only direct evidence as to the nature and value of the defendant's investments and savings were in the exhibits entered by the plaintiff, pertaining to the most recent value of the investments in the defendant's name, which leaving aside the Van City Vancouver Employees Savings Plan of \$12,911 and the defendant's chequing account, amounted to 12 accounts totalling approximately \$546,000.

[75] In my view, the defendant has not discharged the onus on her pursuant to s. 60 of the FRA to prove that the various investments over which she presently has control, were not matrimonial assets. Although, in relation to her inheritance, the defendant has testified the plaintiff had no role in managing the funds, some of which she testified were acquired by her after separation, she has provided no direct evidence to demonstrate that the plaintiff played no role in managing those she received before separation. Given the concession by the defendant that the plaintiff had her power of attorney to manage the investments, on balance, I find the evidence relating to the inheritance money to be inconclusive and hence, am unable to conclude that they were not matrimonial assets: see *Rytir v. Rytir* (1987), 11 R.F.L. 3d 239 (B.C.C.A.).

- [76] It follows therefore that the next issue, that is whether in light of the demands of fairness and the factors set forth in s. 65 the assets should be reapportioned and if so, to what degree.
- [77] I have concluded in light of all the evidence that fairness in this case demands that the matrimonial assets be substantially reapportioned in favour of the defendant. Although the marriage could be described as of moderate length, at 9 years, I do not accept that the plaintiff's role in it offered much by way of contribution, either directly or indirectly, to the acquisition, accumulation or maintenance of the matrimonial assets.
- [78] I do not accept that the plaintiff is incapable of manual work as he claims, nor do I accept that his role in the marriage was agreeable to the defendant. It is clear on her evidence, which I accept on this point, that she expected and requested the plaintiff to earn income to contribute to the matrimonial assets. Of those contributions to the home by renovation, there is no evidence that they have increased the value of the home to any extent, if at all. I note in particular that the renovations were not done to code and the suite that was contemplated was never finished.
- [79] So far as his management of the defendant's investments are concerned, there is similarly no evidence that his involvement meaningfully improved the value of the assets over what they would have been had they been left in the state they were in before he commenced managing them. The defendant testified that the plaintiff was successful in increasing the value of the investments in some years and unsuccessful in others. Although the value of the gold and silver has increased significantly, it is the defendant's evidence that she told the plaintiff to make those investments and they constitute a relatively small part of the overall assets. All the assets are the product of the defendant's efforts and financial contributions or from her inheritance from her mother.
- [80] The activities which the plaintiff testified to undertaking with regard to the homemaking, improvement and maintenance of the home I find to be exaggerated and of limited significance in the overall scheme of things. I do not find that the plaintiff adopted a role in the marriage that disadvantaged him. I find rather that he was disadvantaged by his own lack of effort to seek or maintain remunerative employment and by being content to accept what came his way through the efforts of the defendant.
- [81] In light of my findings of fact, the factors of the duration of the marriage and the dates when the assets at issue were acquired are less of an issue than they might otherwise be in determining a fair division of matrimonial assets. The fact that the marriage was moderately long and the matrimonial home was acquired at the outset of the marriage and other assets accumulated in the course of the marriage (except for some of the inheritance which the defendant acquired post-separation) does not weigh heavily against reapportionment in favour of the defendant in the circumstances of this case. What is clear is that the matrimonial assets were acquired by the defendant either through inheritance or through her essentially unaided efforts in working and saving. Those are factors which weigh in favour of reapportionment to the defendant under s. 65(1)(d) and (f).

- [82] The duration of the period the parties have lived separate and apart is, I conclude, a neutral factor in this case. The single factor which weighs in the plaintiff's favour in determining an appropriate division lies in s. 65(1)(e) - the needs of each spouse to become or remain economically independent and self-sufficient.
- [83] In this case, the plaintiff is 57 years of age, had a somewhat spotty employment record before the marriage and occupied himself with matters that did not advance his ability to become or remain economically independent or self-sufficient during the marriage. Although he claims that due to his back problem and post-separation diagnosis of sciatica, he is prevented from certain kinds of work, he produced no medical evidence in support of that contention. In light of his demonstrated tendency to exaggerate, I do not accept that his physical problems are the impediment to work he makes them out to be and find that he is capable of earning income through employment consistent with his age, employment history and experience.
- [84] The fact remains, however, that he has limited his opportunity to acquire employment and accumulate capital through his decision not to work during the currency of the marriage. As I have found that decision was not the product of agreement between the parties, or one which was required to fulfill family responsibilities, it follows that this is not a case where the plaintiff's economic plight can be attributed to the marriage.
- [85] In my view, having regard to all the circumstances and the factors set forth in s. 65 of the FRA, it is appropriate to reapportion the matrimonial assets 75% in favour of the defendant, and 25% to the plaintiff.
- [86] This is not a case, such as those relied on by counsel for the defendant in submissions, where the conduct of the plaintiff depleted the matrimonial assets, or put the economic self-sufficiency of the defendant at risk by his actions during the marriage, justifying an even greater reapportionment in favour of the defendant. Rather, it is a case where the plaintiff has not made a meaningful contribution to the matrimonial assets either directly through earning income or indirectly by sacrificing opportunities to fulfill a necessary role in the marriage. For those essential reasons, I conclude it would be fair to substantially reapportion the matrimonial assets in favour of the defendant, but not to the extent which she seeks.
- [87] I find the total exigible matrimonial assets apart from motor vehicles and furnishings to be \$958,850.16, consisting of the matrimonial home, which I value at \$500,000, the savings in the defendant's name, including the gold and silver, but excepting the Vancouver Vancouver Employee Savings Plan, amounting to \$66,705, R.R.S.P.'s in the amount of \$249,463.15 and the defendant's total inheritance, which I find to be \$273,765.93 as of the trial date, less the amounts she received post-separation of \$93,000 (approximately) and \$38,083.92, which yields a net asset to be divided of \$142,682.01.

- [88] I also find that the plaintiff is entitled to an interest in the defendant's pension plan in accordance with the provisions of Part 6 of the FRA. That interest amounts to 50% of the defendant's interest acquired from the date of marriage to the date of trial when the divorce was granted, there being no earlier triggering date.
- [89] The defendant will be entitled to retain all household furnishings presently in her possession. The plaintiff is entitled to retain all household furnishings presently in his possession. The plaintiff is entitled to possession of the Inverter exercise machine, the 1988 Plymouth motor vehicle and the Suzuki motorcycle. The defendant is entitled to the 1987 Chrysler and the 1993 Dodge motor vehicle.

(ii) Spousal Support

- [90] In light of the matrimonial assets awarded to the plaintiff and my findings as to his ability to work, I am not satisfied it is appropriate to award spousal support. The plaintiff will have sufficient capital to start a business, should he desire to do so, or may otherwise acquire remunerative employment to aid in establishing his economic independence and self sufficiency. Having regard for the principles governing an award of spousal support set forth in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 and the provisions of s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), I am satisfied the plaintiff's entitlement to a portion of the matrimonial assets is sufficient to address his needs without an award of spousal support.
- [91] The parties should bear their own costs of this action unless there is some issue of which I am unaware, in which case there is liberty to apply.

"A.F. Cullen J."

The Honourable Mr. Justice A.F. Cullen

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