
CANADA / JUDGMENT

Santelli v. Trinetti

2018 BCSC 300

COURT

Supreme Court of British Columbia

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2018 BCSC 300 Santelli v. Trinetti

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Santelli v. Trinetti,

2018 BCSC 300

Date: 20180301

Docket: E130621

Registry: Vancouver

Between:

Rosanna Santelli

Claimant

And

Aldo Franco Trinetti

Respondent

Before: The Honourable Mr. Justice Smith

Reasons for Judgment

Counsel for the Claimant:

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Counsel for the Respondent:

J. Dubas

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Place and Date of Trial:

Vancouver, B.C.

April 18-21, 24-28, May 3-4,

September 25-29 and

December 5-7, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 1, 2018

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introduction

- [1] The claimant, Rosanna Santelli, and the respondent, Aldo Trinetti, were married on August 11, 2001 and are the parents of eight-year-old twins. The respondent permanently moved out of the matrimonial home in August 2013, although the parties had been separated while living under the same roof for some time before that.
- [2] The issues in this divorce action include the enforceability of a marriage agreement, division of property, child support, custody, access, and spousal support.
- [3] The marriage agreement at issue provided that each party would retain as separate property the assets they owned before the marriage. The respondent's separate property included the house that became the matrimonial home and which he subsequently transferred into joint tenancy. The claimant relies on that transfer. The respondent says he is still entitled to full ownership of the home under the marriage agreement, while at the same time claiming an interest in the assets that were identified as the claimant's separate property.
- [4] The claimant is now 53 years old and works as a legal assistant. Her annual employment income is \$52,467. She also holds a minority interest in a number of real properties, the other owners of which are her mother, brother and the estate of her father (the "Santelli Holdings"). The claimant says that she plays no role in the management of those properties and receives no income from them, although some income is attributed to her and declared on her tax returns.
- [5] The respondent, who is now 50 years old, is a stonemason and 50% owner of a company called Landrock Landscaping Ltd. ("Landscaping"). The other owner is his brother-in-law, Vincenzo D'Arpino. The respondent also owns shares in other companies with real estate interests, but his current financial position is unclear. None of the companies in which he holds shares have produced recent financial statements and he was often unable to provide financial details in his testimony. He frequently said that such questions should be directed to Mr. D'Arpino, but Mr. D'Arpino's evidence did not clearly address all the matters on which

the respondent had deferred to him.

- [6] The claimant has interim sole custody of both children - a girl S. and a boy C.(the "Children") - and exclusive interim possession of the former matrimonial home. Both Children are currently in grade three. C. was diagnosed with severe Attention Deficit Hyperactivity Disorder ["ADHD"] in July 2014 and requires one-to-one learning assistance.

Interim Applications

- [7] The claimant filed her notice of civil claim on March 6, 2013. That was shortly before the new property division regime in the Family Law Act, S.B.C. 2011, c. 25 ("FLA") came into force, meaning that property issues in this action are still governed by the former Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). Over the next four years, there were a number of interim orders, the most relevant of which were as follows.
- [8] After a judicial case conference before Master Caldwell on June 26, 2013, the parties consented to an order that the respondent vacate the matrimonial home by August 1, 2013 and that the claimant would have exclusive occupancy until further order.
- [9] On November 28, 2013, Master Tokarek ordered that the claimant have interim sole custody of the Children and that the respondent pay interim child support of \$1,734 per month and interim spousal support of \$785 per month, based on an annual Federal Child Support Guidelines ("FCSG") income of \$120,000. Master Tokarek ordered that a rental property owned by the parties and in which the respondent was then living (the "Sowden Street Property") be listed for sale, with the parties having joint conduct of sale. The respondent was also ordered to produce a number of categories of financial documents and was restrained from dealing with family assets, including bank accounts in his name.
- [10] On June 25, 2014, Justice Bernard varied the order of Master Tokarek to give the claimant sole conduct of sale of the Sowden Street Property and to require the respondent to deliver vacant possession by July 15, 2014. The claimant's application that the respondent be found in contempt for failing to produce the documents ordered by Master Tokarek was adjourned.
- [11] On September 3, 2014, Master Taylor approved the sale of the Sowden Street Property, with counsel for the claimant to hold half of the net sale proceeds in trust for the claimant and half in trust for the respondent. However, the claimant received \$70,000 from the respondent's share for arrears of support and reimbursement of the mortgage and other expenses relating to the Sowden Street Property.
- [12] On October 24, 2014, Master McNaughton (as she then was) made a declaration under s. 57 of the FRA that there was no prospect of reconciliation.

- [13] On November 27, 2014, Master Harper ordered that \$10,000 from the funds held in trust for the respondent by counsel for the claimant be forwarded to the respondent's counsel as an advance on assets. She also ordered that the respondent have supervised access to the Children on their upcoming birthday.
- [14] On December 10, 2014, Master Taylor ordered that ongoing interim child and spousal support payments pursuant to the order of Master Tokarek be paid each month until May 1, 2015 from the respondent's share of the Sowden Street Property sale proceeds. An application by the respondent to vary the order of Master Tokarek was dismissed. Master Taylor also ordered continued supervised access to Children for the respondent and production of a report on the Children pursuant to s. 211 of the FLA.
- [15] On April 28, 2015, the parties consented to an order to continue payment of child and spousal support from the respondent's share of the funds held in trust.
- [16] On January 13, 2016, Master Baker ordered that the respondent's pleadings be struck unless the respondent produced a list of documents and specified financial documents by February 12, 2016. The financial documents listed in that order included most of the documents that Master Tokarek had ordered the respondent to produce more than two years earlier.
- [17] On February 1, 2016, Master Scarth ordered further continuation of the practice of interim child and spousal support being deducted from the funds held to the respondent's credit in the claimant's solicitor's trust account.
- [18] On March 3, 2016, the respondent's pleadings were struck pursuant to the previous order of Master Baker. The respondent filed new pleadings on May 9, 2016, although counsel for the claimant says the required financial disclosure had still not been made.
- [19] On June 2, 2016, Master Bouck dismissed the claimant's application to strike the respondent's new pleadings, but ordered the respondent to produce a complete list of documents along with all of the documents specified in the order of Master Baker by June 10, 2016.
- [20] On June 23, 2016, Master Scarth ordered, by consent, an adjournment of the trial, then set for June 27, 2016, to April 18, 2017, peremptory on the respondent. She also ordered that the respondent produce the balance of documents covered by Master Baker's order. Those documents were stated to be in control of third parties and the order stated that if third parties did not produce them, the respondent was to provide a satisfactory explanation from the third parties why they were not available or when they would be.
- [21] On February 6, 2017, Justice Williams ordered Landscaping and two other companies in which the respondent owns shares, to make financial documents available for review and copying at the office of counsel for those companies.

[22] On March 24, 2017, Master Harper ordered three financial firms and two banks to produce the respondent's account documents. She dismissed an application by the respondent for production of documents.

[23] On April 6, 2017, Justice Sharma dismissed the respondent's appeal from Master Harper's order and his application to adjourn the trial.

The governing legislation

[24] The new property division regime in the FLA came into force as of March 18, 2013. The claimant filed her notice of family claim 12 days earlier. Section 252 of the FLA therefore requires property issues in this action to be determined in accordance with the former FRA as if that legislation had not been repealed.

[25] Section 56 of the FRA gave parties a prima facie equal interest in "family assets":

56 (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.

(4) This section applies to a marriage entered into before or after March 31, 1979.

[26] A declaration under s. 57 of the FRA that there was no prospect of reconciliation - a "triggering event" for the purposes of property division - was made in this case on October 24, 2014.

[27] Unlike the FLA, which defines "family property" as any property owned by a spouse, subject to specific exceptions, the FRA defined family assets based on their use and/or the direct or indirect contributions made by a spouse. The relevant sections were:

58 ...

- (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.

...

59 (1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

- (2) In section 58 (3) (e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

60 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.

[28] Section s. 56(3)(b) made clear that division of family assets under the FRA could be varied by the parties through a marriage agreement. The definition and requirements for such an agreement were set out in s. 61(2) to (4):

61

- (2) A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
- (a) management of family assets or other property during marriage, or
- (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.
- (3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.
- (4) Except as provided in this Part, if a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

...

[29] However, s. 65 gave the court jurisdiction to re-apportion assets, including assets covered by a marriage agreement, based on fairness:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,

- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

...

the marriage agreement

- [30] The claimant and the respondent entered into a marriage agreement a few days before their wedding at the insistence of the claimant's father, who instructed a lawyer to draft the agreement. Clearly, the claimant's father wished to protect assets owned by himself and his family, in which the claimant held a minority interest, from any future claims by the respondent.
- [31] The respondent signed the agreement on August 7, 2001 and the claimant did so the following day after they each received independent legal advice. There is no suggestion that the document fails to meet the definition and requirements of a marriage agreement set out in s. 61.
- [32] Under the agreement, all property that either party brought into the marriage was to remain his or her separate property, along with any increases in the value of that property, all property acquired in replacement of or substitution for that property, all income from that property and all assets arising from that income. Any assets subsequently received by either party by way of gift, inheritance or windfall were also to be separate property. The agreement stated that it could only be amended "by a written agreement executed in the same manner as this agreement."
- [33] Schedules to the agreement identified the specific property of each party that was to remain separate. It was apparent from those schedules that the financial position of the parties was far from equal, at least in terms of the numbers of assets held.
- [34] On the claimant's side, the list of separate property included her interest in the Santelli Holdings, which were:

- A 25% interest in each of two neighboring properties on 152 Street in Surrey, British Columbia.
- A 25% interest in a property on Victoria Drive in Vancouver.
- A 33% interest in a property on East 32 Avenue in Vancouver.
- A 24% shareholding in Bencar Holdings Ltd. ("Bencar"), which owned properties on East Hastings Street and on East 41 Avenue in Vancouver.

The claimant's parents and/or her brother Franco Santelli held the remaining interests in the Santelli Holdings.

- [35] The claimant's employee pension and registered retirement savings plans were also identified as her separate property. The RRSPs were stated to have a total value at the time of the agreement of \$160,617.
- [36] Title searches and property tax notices attached to the marriage agreement indicate that the total net value of the fractional property interests the claimant held in her own name was approximately \$341,000. The property owned by Bencar had a total net value of approximately \$1.5 million, although Franco Santelli testified that the claimant did not in fact hold a 24% interest in the company at the time.
- [37] The separate property of the respondent included a house he owned on West 15th Street in North Vancouver and shares in a company identified as "Landrock Landscaping/Excavating Ltd."
- [38] Although the marriage agreement attached documents indicating the value of the claimant's separate property, it included no information about the value of the respondent's property. However, other evidence shows that his North Vancouver house had an assessed value of \$374,000 and was subject to four mortgages with a total amount owing of approximately \$352,000. Three of those mortgages were from private lenders.
- [39] The agreement referred to "Landrock Landscaping/Excavating Ltd.", but no company by that name existed at the time. The respondent and Mr. D'Arpino each held 50% of the shares in Landrock Landscaping Ltd. Landrock Excavating Ltd. ("Excavating") was a separate company in which the respondent held one third of the shares, but he transferred those shares to Mr. D'Arpino in 2003. Another company called Landrock Landscaping & Excavating Ltd. ("L & X") was not incorporated until 2003.
- [40] The respondent testified that before signing the marriage agreement he discussed it with a friend who explained that he would keep his house in the event the marriage ended. That is the only aspect of the agreement the respondent now says he understood.
- [41] When he was reminded in cross-examination that the claimant also retained separate property under the agreement, the respondent said he did not know that at the time. I do not accept that evidence, which is inconsistent with the fact that he clearly received, and acknowledged receiving, independent legal advice about the marriage agreement. It is also

inconsistent with his discovery evidence read in as part of the claimant's case. The respondent was asked on discovery if he understood that the claimant was to keep all of the assets on her list, plus any increase in their value, and he said that he did.

The transfer of the matrimonial home

- [42] The house identified in the marriage agreement as the respondent's separate property became the matrimonial home and remained the matrimonial home throughout the marriage. On January 15, 2002 - five months after the wedding - the respondent transferred ownership of it to himself and the claimant as joint tenants.
- [43] The respondent relies on the marriage agreement to say that the home remains solely his separate property, but also seeks a \$1 million compensation payment in respect of the claimant's portion of the Santelli Holdings, which the marriage agreement identified as her separate property but which he says are family assets.
- [44] The claimant also seeks sole ownership of the matrimonial home - the half interest for which she is currently on title and the balance as compensation for other family assets and/or as part of lump sum child and spousal support. In all other respects, she relies on the marriage agreement.
- [45] The transfer of the matrimonial home into joint tenancy took place in association with refinancing. The four mortgages against the property were replaced by a single bank mortgage of \$303,750 and a loan of \$45,000 from the claimant's parents, secured by a second mortgage. The transfer of title was registered at the same time as the new mortgages.
- [46] The claimant testified that this refinancing took place because the respondent was missing mortgage payments and asked for financial assistance from her family. She said that both the bank and her family insisted that she go on title in order for the refinancing to proceed. The respondent said the claimant approached him with a suggestion that her family could help him get a better interest rate. He agreed that the refinancing lowered his interest costs, but said he did not really need new financing.
- [47] The respondent testified that, when he signed the transfer documents, he did not understand that he was putting the claimant on title to the house. That is inconsistent with his evidence that put to him from his examination for discovery, where he agreed the claimant's parents wanted her on title as part of the transaction.
- [48] The documents were prepared by and executed in the presence of the claimant's parents' solicitor, James Comparelli. Understandably, Mr. Comparelli had no independent recollection of the transaction, but testified that, based on his normal practice, he would have explained that the claimant and the respondent would both have to be owners in order to obtain the refinancing and would have explained the legal effect of joint tenancy. He agreed that there was no discussion of what would happen in the event of a divorce and the respondent was not sent for independent legal advice about the property transfer.

- [49] The respondent's evidence that he did not understand he was giving the claimant a legal interest in his property cannot be believed. It is inconsistent not only with his own discovery evidence and the evidence of what Mr. Comparelli told him at the time, but also with subsequent events. Those subsequent events include a later refinancing of the home in which he and the claimant both had to sign mortgage documents that clearly showed they were joint owners.
- [50] The claimant says the transfer into joint tenancy was in consideration of the claimant providing her covenant on the new mortgage and the loan of \$45,000 from her parents. Alternatively, the claimant says the marriage agreement was amended. In either case, the effect would be to make the matrimonial home a family asset. She further argues that, if the marriage agreement still excludes the matrimonial home, it is unfair to her and requires re-apportionment under s. 65 of the FRA.
- [51] The claimant relies on s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 which creates a statutory presumption that persons registered on title to property are presumed to hold the legal and beneficial interest. That section says that a registered indefeasible title is "conclusive evidence at law and in equity that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title".
- [52] In *Guiomar v. Prevost*, 2009 BCSC 307, the court found that a party alleging an agreement under which property would be his alone, although registered in joint title, had failed to rebut the presumption arising from s. 23(2). However, that was a case of a common law relationship to which the FRA did not apply. It is fundamental to the scheme of the FRA that legal title to property is not necessarily conclusive in the division of assets.
- [53] In *Wu v. Sun*, 2010 BCCA 455, it was alleged that a matrimonial home had been transferred to the husband by his parents, but the husband argued that his parents remained the beneficial owners. The court said at paras. 17 and 18:
- [17] It seems to me that if an individual, as in this case the mother, knowingly enters into a transaction for a sensible business purpose, namely to change to non-resident status for tax purposes, it would not be appropriate to allow that person to resile from such arrangement when it would serve her economic interests to do so. It would be permitting something in a nature of a fraud upon the public authorities and I do not consider a court should countenance such conduct.
- [18] The Supreme Court of Canada has made it clear in cases such as *Pecore v. Pecore*, [2007] 1 S.C.R. 795, that it is a question of fact as to what is the intention of a party transferring property to a third party for no consideration. In some circumstances, it may be appropriate to infer a resulting trust or a constructive trust, but the conclusion to be inferred in the individual case will depend on a consideration by the trier of fact of all the circumstances of the case.

- [54] The circumstances that must be considered in this case include the existence of the marriage agreement. Although I find that the respondent fully understood that he was putting the claimant on title to the house for the purposes of obtaining financing, that is not necessarily inconsistent with a marriage agreement setting out how the property was to be treated in the event of marriage breakdown. The marriage agreement stated: "The parties may amend this agreement only by a written agreement executed in the same manner as this agreement."
- [55] It is clear that, at the time of the transfer, no one turned his or her mind to the question of whether the transaction was intended to vary the marriage agreement. The only documents signed and witnessed in January 2002 were standard property transfer and mortgage documents.
- [56] I therefore find that the transfer of the matrimonial home into joint tenancy in January 2002 did not constitute an amendment to the marriage agreement. That finding does not resolve the question of whether the agreement operates fairly in the current circumstances or whether reapportionment is necessary under s. 65. That issue must be addressed later in these reasons.

Current Status of Property Identified in the Marriage Agreement

The Matrimonial Home

- [57] The claimant currently lives with the Children in the former matrimonial home pursuant to the order that gave her interim exclusive occupancy. The respondent has made no contribution to mortgage payments since, at the latest, the summer of 2013.
- [58] The appraised value of the home, as of February 2017, was \$1.52 million. After deducting the outstanding balance on a mortgage and a secured line of credit, the net equity is \$1,127,241.

The Santelli Holdings

- [59] The claimant continues to hold her 25% interest (her mother holds the remaining interest) in the Surrey properties identified in the marriage agreement, which are now the site of a small shopping centre. The 2016 assessed value was \$13.4 million.
- [60] She also still has a 25% interest in the Victoria Drive property. Her mother owns 50% in her own name and 25% as Executrix of the Estate of her husband, the claimant's father, who died in 2015. The property's 2016 assessed value was \$3.8 million.
- [61] The East 32nd Avenue property referred to in the marriage agreement is now owned jointly by the claimant and her brother following the death of their father. Its 2016 assessed value was \$1.9 million.

- [62] The reference in the marriage agreement to the claimant's 24% interest in Bencar was, according to Franco Santelli, an error. In any event, any common shares the claimant held were held through a family trust that was wound up in 2015. Her interest now consists entirely of preferred shares with a stated value of \$322,928.
- [63] Bencar no longer owns the properties it owned at the time of the marriage agreement, but owns four other properties with a total assessed value, in 2016, of \$4.28 million. Three of those properties generate rental income. The company's financial statements for the year ending July 31, 2016, show total net rental income, after tax, of \$82,000, with payment of \$95,000 in dividends. Liabilities on the balance sheet include \$2.2 million owed to shareholders, which presumably includes the claimant's preferred shares.
- [64] The evidence of the claimant and her brother was that any income from Bencar credited to either of them is automatically redeposited in the company. Similarly, their evidence was that rental income from the properties shown on the claimant's income tax returns (approximately \$125,000 in each of 2015 and 2016) is not actually paid to her.

The Claimant's Financial Assets

- [65] The claimant still holds RRSPs, although there have been changes in the institutions and account numbers. They now have a total value of \$307,000. The claimant testified that any significant capital contributions since the date of the marriage agreement were gifts from her parents.

Landrock Landscaping Ltd.

- [66] The respondent continues to be a 50% owner of Landscaping with Mr. D'Arpino holding the other 50%. Although not accurately named in the marriage agreement, I find that this was a company that the respondent operated and in which he owned shares at the time of the agreement and was intended to remain his separate property.
- [67] Landscaping has prepared no financial statements beyond the year ending March 31, 2014. Mr. D'Arpino said he instructed his accountant not to prepare statements for subsequent years because he did not want to pay for them. However, the 2014 statement was prepared only in January 2017, as were earlier financial statements going back to 2008. Mr. D'Arpino said none of his companies keep ledgers. Bank statements that have been produced for Landscaping end in January 2014.
- [68] The 2014 financial statement for Landscaping show its major asset as \$150,000 in "advances to related companies" and its major liability as \$103,000 "due to shareholders". The same statement showed a net loss of \$22,830 on gross revenue of \$473,593.
- [69] The respondent said the business formerly done by Landscaping is now done by Landrock Construction Ltd. ("Construction"), a company owned by Mr. D'Arpino in which the respondent has no interest. Landscaping now acts as a subcontractor to Construction.

- [70] Mr. D'Arpino said he no longer wants to be a partner with the respondent. At one point in his evidence, he said the plan is for the respondent to form a new company on his own while Mr. D'Arpino retains full ownership of Landscaping. At another point, he said Landscaping will be closed down when the respondent starts his own company. At yet another point, he said Landscaping cannot be wound up because it owes him money.
- [71] Mr. D'Arpino says that Landscaping is currently losing money, but in the absence of current and comprehensible financial records, it is impossible to determine what business it is doing, its income, or its value.
- [72] Whatever business is being done and whatever company is doing it, there is clearly an active business. The respondent told the author of the s. 211 report that his stone masonry business is one of the biggest such businesses in the city. He testified that he has to be on site every day supervising a crew of eight or nine employees, but would only be able to support two or three employees and would have to acquire equipment if he begins operating independent of Mr. D'Arpino.
- [73] In view of the respondent's grossly inadequate financial disclosure, I draw the adverse inference that there has likely been a deliberate diversion of work and assets from Landscaping to Construction in order to hide the respondent's true financial position.

Assets Acquired During the Marriage

- [74] During the marriage, other assets were acquired that in most but not all cases, are agreed to be family assets under the FRA and not subject to the marriage agreement.

The Sowden Street Property

- [75] The Sowden Street Property was a house next door to the matrimonial home. The parties jointly purchased it in August 2005. While they were together, it was rented and rental income was sufficient to cover the property expenses. The respondent moved into the Sowden Street Property when he left the matrimonial home and remained there until it was sold.
- [76] As indicated in the history of interim orders above, sale proceeds were held in trust, but child and spousal support payments owed by the respondent were paid from his share of those proceeds. As a result, the amount held in trust for the respondent has now been reduced to only \$962.34 while \$174,705.36 is held in trust for the claimant.
- [77] The claimant says the Sowden Street Property was a family asset. The respondent says it was purchased through refinancing of the matrimonial home, which was his separate property under the marriage agreement. Therefore, he says, the Sowden Street Property was also his separate property because it was "derived" from his separate property. He wants all of the sale proceeds now being held in trust for the claimant to be paid out to him along with reimbursement for some of the funds that have been deducted from his share.

[78] The portion of the marriage agreement the respondent relies on reads as follows:

14. The following is Aldo's separate property ("Aldo's Separate Property"):

- (a) the assets listed in schedule A and all assets received by Aldo after the date of this Agreement by way of gift, inheritance or windfall,
- (b) all substitutions and replacements for (a),
- (c) all increases in value, however arising, of (a) and (b),
- (d) all income, however arising, of (a), (b), and (c), and
- (e) all assets arising, in whatsoever manner, from such income referred to at (d), and all substitutions therefrom or thereto.

(The paragraph relating to the claimant's separate property is identically worded except that it refers to "Schedule B").

[79] The Sowden Street Property was acquired in 2005 for a total price of \$535,000. Of that, \$347,750 came from a mortgage on the property itself. Refinancing of the matrimonial home contributed a further amount of just under \$180,000. Therefore, the property was purchased only partially from refinancing of the matrimonial home.

[80] More importantly, I find that borrowing on the security of property for the purpose of acquiring a separate asset does not bring the new asset within any of the categories of separate property set out in the agreement. The Sowden Street Property did not replace or substitute for the matrimonial home under subparagraph 14(b). The matrimonial home never produced income under subparagraph (d), so the Sowden Street Property could not be an asset "derived" from any such income under subparagraph (e).

[81] I find that the Sowden Street Property and the proceeds of its sale were and are family assets.

Landrock Landscaping & Excavating Ltd.

[82] The respondent owns a 33% interest in L & X. That company was incorporated in 2003, with the other shareholders being Mr. D'Arpino and his wife, the respondent's sister Angela D'Arpino.

[83] L & X owns a house in Lake Cowichan, British Columbia which has a 2017 assessed value of \$226,000. The balance owing on the mortgage, according to a statement dated June 8, 2016, was a little more than \$88,000, meaning that the one third of the equity attributable to the respondent equals approximately \$46,000.

- [84] It is not clear what other assets or income, if any, L & X has. No financial statements have been prepared for any period after 2010. As with Landscaping, Mr. D'Arpino said he has not wanted to pay for the preparation of financial statements because the company was losing money.
- [85] The respondent has produced bank records for L & X but they end in September 2014. Those statements indicate significant activity in the account, including large single deposits made at or near the middle of each month. Those deposits totalled more than \$1.7 million in 2013 but end in mid-2014. Mr. D'Arpino said those regular payments were from a contract for rock work that was subsequently lost, but no further evidence was produced on that point.
- [86] The claimant says that the respondent's shares in this company are a family asset, based on the fact that income from it was used for family purposes during the marriage and on her indirect contribution by way of household management and child rearing responsibilities.
- [87] Counsel for the respondent concedes the shares would be a family asset but for the fact they were identified as separate property in the marriage agreement. As counsel for the claimant points out, this cannot be the company referred to in the marriage agreement because it was not incorporated until two years later.
- [88] In any event, counsel for the respondent says his shares have no value because any equity in its remaining property is owed to Mr. D'Arpino in repayment of tax and other debts that he paid in respect of the property.
- [89] I find the shares are a family asset and will deal with later in these Reasons with the alleged amounts owed to Mr. D'Arpino.

0884049 B.C. Ltd

- [90] Another property in Lake Cowichan, totalling 40 acres, is owned by 0884049 B.C. Ltd., a company in which the respondent owns 50% of the shares and Mr. D'Arpino owns the balance. He concedes that those shares are a family asset, but there are no financial statements for the company.
- [91] The property was purchased in 2010 for \$1.1 million. The assessed value in 2017 was \$990,000. It has been subject to foreclosure proceedings, but Mr. D'Arpino testified that he paid \$50,000 to the mortgagee in early 2017 in order to preserve that property after there had been an order for sale. An affidavit from the mortgagee that was filed in the foreclosure proceeding said the amount owing under the mortgage as of January 2017 was \$526,288. That makes the respondent's half share of the net equity worth \$231,856. Mr. D'Arpino suggested that he expects to acquire full ownership of the property as part of the repayment for debts the respondent owes him.
- [92] Two other properties in the Cowichan area that the respondent had an interest in have been sold in foreclosure proceedings.

0883935 B.C. Ltd

- [93] The respondent is the sole shareholder in 0883935 B.C. Ltd., which owns two commercial properties on Terminal Avenue in Nanaimo, British Columbia. That is also agreed to be a family asset but, once again, proper valuation is not possible because no financial statements have been prepared since 2013. A bank statement for the company that the respondent put into evidence only covers the period from January 2011 to February 2013.
- [94] The total assessed value of the Nanaimo properties is \$1,002 million with mortgages totalling \$619,230. One of those mortgages is to a company called C & H Filter Holdings Ltd. ("C & H") for \$277,000. C & H obtained judgment against the numbered company in that amount, plus interest, in January 2016.
- [95] The respondent collected antique or collector cars, some of which were also used to secure debt on the Nanaimo properties. In a loan application dated July 4, 2014, the respondent represented that the vehicles had a total value of \$340,000. The same amount appears on his sworn Form 8 financial statement, filed in this proceeding on October 20, 2014. A subsequent financial statement, dated April 14, 2017, values the cars at \$115,000.
- [96] The reduced value may reflect the fact that some cars were seized in payment of the C & H mortgage on the Nanaimo properties, but the respondent was unable to offer any clear explanation of what took place or provide documents. He said he doesn't know where the cars are.
- [97] If the cars were accurately valued by the respondent on his first financial statement and some have been seized in satisfaction of the C & H mortgage, the maximum amount still owing on that mortgage would be \$52,000. That would leave the total secured debt at \$394,230 and net equity at \$607,770. In the absence of any better financial information from the respondent, I find that to be the case.

The Respondent's Other Assets

- [98] The respondent holds three securities accounts with a total value, as of April 2017, of \$41,870 and which are conceded to be family assets. The claimant also seeks compensation for the fact that the respondent withdrew \$57,799 from one of these accounts on February 25, 2013 when the parties were clearly living separately under the same roof and shortly before the commencement of these proceedings.
- [99] The respondent owns a life insurance policy, on which the claimant is a revocable beneficiary, and is conceded to be a family asset. The cash surrender value of the policy as of January 1, 2017 was \$14,144 but the schedule of assets prepared by the claimant's counsel uses an earlier value of \$9,969 and I will use that value.

- [100] The respondent also owns a house on Grand Boulevard in North Vancouver in which he currently lives with his father and his sister, Gemma. He acquired that house from Gemma in 2008 and says he did so because it was being foreclosed upon. The house has an assessed value of approximately \$1.5 million and, according to the respondent's most recent financial statement, the outstanding mortgage debt is approximately \$1.1 million.
- [101] The respondent's father previously lived in a neighboring property on Grand Boulevard that the respondent acquired from him in 2010. That house was sold in foreclosure proceedings in 2016. The claimant does not allege either Grand Boulevard property to be a family asset. However, proceeds from sale of the property sold in foreclosure were used to pay down mortgages on the Nanaimo property.
- [102] The respondent also owns a half interest in a property in Whistler that the claimant does not allege to be a family asset.

The Respondent's debts

- [103] At this point, it is necessary to deal, to the greatest extent possible, with the respondent's assertion that his assets, other than the former matrimonial home, are essentially worthless because he is, in the words of his counsel, "mired in debt".
- [104] Unlike the FLA, the FRA did not make specific provision for division of "family debt", but the case law recognized that debts could be taken into account for purposes of re-apportionment of assets under s. 65. However, there had to be a "discernable nexus" between the debt and some family purpose or benefit: *Bryan v. Chapman*, 2011 BCCA 278 at para. 43.
- [105] The respondent's evidence about his asserted debts was often vague and contradictory, with frequent statements that he was unaware of the details and necessary evidence would have to come from Mr. D'Arpino.
- [106] To the extent cheques, bank statements, and other documents were put to the respondent as proof of these debts, they frequently dated from 2013 or earlier with no further documentation of the source of funds, the terms under which they were advanced, how they were used or the current state of the purported debt. For example, the respondent identified a statement from a personal bank account, ending in January 2013 and said that a number of large deposits would represent loans advanced to him from various sources. He did not link that to any loan agreements, promissory notes or other supporting documentation.
- [107] The respondent's evidence was that at least some of his debt was incurred in providing financial assistance to his father and Gemma, who has some sort of disability. This included refinancing of the Grand Boulevard properties. As admirable as those efforts may be, they cannot be characterized as family debts for which the claimant must bear responsibility.

- [108] Counsel for the respondent says there are debts to Mr. D'Arpino of about \$850,000 for various advances and corporate shortfalls and that cheques and other documents have been put forward that make this debt "not open to dispute". The documents put forward by both parties at trial consist of nine large binders, plus 90 loose exhibits. A bald statement in argument that proof can be found somewhere in that mass of paper is not helpful.
- [109] The respondent's most recent Form F8 financial statement, dated April 14, 2017, refers to an unsecured debt to Mr. D'Arpino of \$794,166.31. This is said to consist of corporate shortfalls and loans to cover expenses. When asked about this at trial, the respondent could not provide any details as to how this number was arrived at, saying that it came from Mr. D'Arpino and his accountant. That specific figure was never put to Mr. D'Arpino.
- [110] One of the attachments to the respondent's financial statement is a letter from the accountant, Mr. Radbourne, dealing with one portion of the alleged debt - contributions owed by the respondent to Landscaping and to L & X for the years 2012 to 2015. That figure totals \$222,994.63. However, Mr. Radbourne was not called to give evidence as to how that figure was arrived at, the current state of shareholder accounts or any other matter relating to the companies in which the respondent has an interest.
- [111] One would normally expect the current debts between a company and its shareholders to appear on current financial statements. That would be the starting point for any analysis of obligations owing between shareholders, but that analysis cannot take place in this case because the necessary starting point does not exist.
- [112] One document put into evidence was a single handwritten page prepared by Mr. D'Arpino that purports to set out amounts he was owed. As best I can understand the document and Mr. D'Arpino's evidence about it, it appears to show debts of about \$300,000, although some of that debt was incurred for the benefit of the respondent's sister.
- [113] The document is undated - and Mr. D'Arpino said it was created "so long ago I can barely remember this". It is attached to another document, dated November 1, 2012 in which the respondent agreed to transfer a half interest in the Nanaimo property to Mr. D'Arpino in payment of his debt. That transfer never took place and Mr. D'Arpino testified that he is no longer interested in becoming an owner of that property.
- [114] Other documents identified by Mr. D'Arpino in his evidence include cheques deposited to L & X in 2010 and 2011 and a series of cheques from L & X payable to the respondent in 2013. None of that assists in determining the respondent's present financial position.
- [115] The respondent may have debts to Mr. D'Arpino and others. He certainly seems to have had a practice in the past of relying on private lenders to refinance debts that he had failed to service. But he has been unable to put forward reliable evidence on which the Court can determine the amount of that debt or identify the necessary "discernable nexus" between the debt and some family purpose or benefit.

[116] In that regard, I am particularly unable to rely on the evidence of Mr. D'Arpino where it is not clearly supported by documents or other evidence. Much of the confusion and uncertainty about the respondent's financial position flows directly from Mr. D'Arpino's refusal to permit the preparation of current financial statements. Document production was delayed and chambers applications were made necessary by his resistance to producing the corporate documents that did exist.

[117] Further, he has indicated an intention to actively assist the respondent against the claimant. In a text message to the claimant dated February 20, 2015, Mr. D'Arpino said:

U have crossed the line Rosanna and now I am involved with the lawyer and hiring a team and I will help Aldo to get what he is entitled to. Perhaps your brother may have to come up with more than the \$70 wedding gift.

[118] Such statements by a witness or a party can often be disregarded as things said in the heat of a specific moment of conflict. But in his testimony almost three years later, Mr. D'Arpino confirmed his continuing animosity toward the claimant by referring to her as a "rat".

[119] Mr. D'Arpino also acknowledged these statements attributed to him in a letter from counsel for the respondent to counsel for the claimant dated June 10, 2016:

In this respect, as part of getting disclosure from Vince D'Arpino I promised him I would advise your client through you that he is essentially fed up with your client making false claims. He said to me that your client knows that other than assisting with financing she put nothing into the matrimonial home, or any of the other assets she has made a claim over.

He stated to me that he has advanced money to Mr. Trinetti during the relationship and if matters in the divorce are not resolved he will pursue these claim (sic.) including against your client. He also told me that based on work he has done on the matrimonial home, and for your client's brother and her late father, he has claims he can make against your client and her family, and he intends to do so if my client's divorce is not resolved. I state this from him because this is the basis of which he has agreed to assist with document disclosure to this point.

[120] The clear implication is that alleged debts owed to Mr. D'Arpino by the respondent will only be pursued to the extent they can be used to offset claims by the claimant.

[121] Because I have found the evidence of the respondent and Mr. D'Arpino to be unreliable, I am not prepared to give effect to evidence of undocumented and unsecured debts in the valuation of family assets or in considering the means and needs of the parties.

the Santelli Holdings

[122] Counsel for the respondent says the claimant's share of the Santelli Holdings, identified as her separate property in the marriage agreement, are family assets. He submits that the income from the claimant's share of the rental properties was "given back to her family by her choice", amounting to a deprivation of the family. Having declared income from the rental properties pursuant to a statutory requirement under the Income Tax Act, R.S.B.C.

1996, c. 215, he says the claimant cannot now deny that it is her income. He also says funds from Bencar were used to pay property taxes on the rental properties and that tracing makes Bencar a family asset.

[123] Further, the respondent relies on the fact that in 2005, the claimant listed these assets in an application for a new mortgage on the matrimonial home, which was part of the financing of the purchase of the Sowden Street Property. He says the use of those assets to acquire another family asset makes them family assets as well.

[124] In my view, those submissions have nothing to do with the FRA definition of family assets in s. 58, which requires ordinary use for a family purpose. The meaning of that was discussed by the Court of Appeal in *Haring v. Haring*, 2011 BCCA 65 at paras. 32 and 33.

[32] The case authorities assist in determining what is meant by the phrase "ordinarily used by that spouse for a family purpose". "Ordinary use" means use in the course of a customary mode of life of the family, rather than special, occasional, or casual use: *Elsom v. Elsom* (1982), 35 B.C.L.R. 293 (S.C.) at 306, *aff'd* (1983) 49 B.C.L.R. 297 (C.A.). Occasional or incidental use of an asset, including capital property, does not "taint" an asset so that it becomes a family asset: *Schlatter v. Schlatter* (1982), 41 B.C.L.R. 278, 32 R.F.L. (2d) 119 at para. 14 (C.A.); *Stuart v. Stuart* (1996), 21 B.C.L.R. (3d) 65, 22 R.F.L. (4th) 26 at paras. 59-60 (C.A.). However, where both the income and the capital of an asset are used for a family purpose, the asset may be considered a family asset: *Brainerd v. Brainerd* (1989), 22 R.F.L. (3d) 113 at 121 (B.C.C.A.); see also *Wang v. Poon*, 2008 BCCA 442, 84 B.C.L.R. (4th) 199 at paras 17-19.

[33] In *Evetts v. Evetts*, [1996] B.C.J. No. 2614 (C.A.) at para 23, Justice Lambert summarized some guidelines for the determination of whether a capital asset will be considered to be a family asset:

. . . The fact that income from a capital asset is used occasionally for a family purpose does not of itself make the capital asset a family asset (*Stuart v. Stuart*). The fact that capital from the asset is used from time to time, when required, for a family purpose may be an indication that the asset is a family asset (*Brainerd v. Brainerd*). But the distinction between income being used for a family purpose and capital being used for a family purpose is not, in itself, determinative (*Starko v. Starko*). So the fact that only income is used for family purposes does not necessarily mean that the capital asset itself is not used for a family purpose. The use of the asset to provide financial security and protection against erosion of income or other family misadventure in the future may constitute a present ordinary use for a family purpose (*Tezcan v. Tezcan*; *Folk v. Folk*). The fact that the words "ordinarily used...for a family purpose" are the governing words in the statute means that the use pattern must be examined in each case to determine whether, in the ordinary course, the present use commitment to meet a present or future need includes a use for a family purpose. Ordinary use for a family purpose is not inconsistent with ordinary use for other purposes."

[Emphasis added]

- [125] In *Devine v. Devine*, 2012 BCCA 509 [Devine], the appellant received shares in two companies as gifts from her mother. Dividends were paid out at the mother's sole discretion. Dividends from one company were the family's principal source of income, but dividends from the other were paid only twice during an eight-year marriage.
- [126] The Court of Appeal in *Devine* concluded that the trial judge erred in finding that all of the shares were family assets in para. 39:
- [39] The onus is on the spouse seeking to oppose a claim under s. 56 to prove that the property in question is not ordinarily used for a family purpose: Family Relations Act, s. 60. In my opinion, the appellant has met this onus: the use of dividends from 812Co on two occasions during the eight year marriage cannot reasonably be said to constitute "ordinary use" as contemplated by s. 58(2) of the Family Relations Act.
- [127] The claimant testified that she played no role in the management of the Santelli Holdings or of Bencar and never received the income that was attributed to her from those sources. This evidence is confirmed by the evidence of her brother and there is no contrary evidence of money flowing into a family account or being used for family purposes on even rare occasions.
- [128] The respondent also says he contributed to the properties by assisting for about a month with construction work at the Surrey property, doing snow removal from the properties on multiple occasions and providing masonry work. The major work appears to have actually been done on a neighboring property owned by another family company in which the claimant holds no interest. In any event, all of this evidence was denied by Franco Santelli, who said the respondent was at the Surrey property for about an hour during construction work, that he never did snow removal and that any work to be done on the commercial properties was performed by a hired property manager. He conceded that the respondent did some repairs to a stone wall at one of the rental properties.
- [129] The respondent's evidence is inconsistent with his discovery evidence, in which he said he never had anything to do with the claimant's separate assets. I find that any occasional work he may have done on the properties was likely minimal and did not amount to a significant contribution to their value.
- [130] Finally, the respondent says that the claimant's father promised him that he, the claimant and their Children would benefit from these properties. The claimant was not said to be part of these conversations and her father is dead and conveniently unavailable to confirm or deny that evidence. In any event, I find that to be a statement unlikely to have come from the same man who insisted on a marriage agreement to prevent any possible claim by the respondent.

[131] This evidence appears to be intended to attract the benefit of what Justice Finch said in *Hefti v. Hefti*, 57 B.C.L.R. (3d) 171 at paras. 30 and 32:

30 In my respectful view, in the absence of clear evidence to the contrary, it would seem to be a natural inference that monies inherited by one spouse would, in the usual course, be used to the mutual benefit of both parties to the marriage, whether for present or future purposes, accepting always that upon a marriage breakup such assets may be reapportioned in the inheritor's favour

...

32 In my view, in the absence of any finding by the learned trial judge as to the use of these assets for future financial security, and in the absence of persuasive evidence that there was no such mutual intention, I would hold that the inherited accounts are family assets because they must be taken to have been held, as a matter of natural and probable inference, for the purposes of providing both parties with financial security in their later years.

[132] However, the Court of Appeal subsequently made it clear in *Dawson v. Dawson*, 2012 BCCA 410 at para. 40 that this is not the law:

[40] The inference advanced by Mr. Justice Finch was not adopted by the majority in *Hefti*. Nor have subsequent decisions of this Court approved it. Instead, the authorities establish that the question of whether an expected future inheritance is a family asset is a fact-based inquiry in each case, directed to ascertaining whether the parties planned to use it for a family purpose such as future financial security: *Whitaker v. Whitaker*, 2010 BCCA 248 at paras. 23-29.

[133] If the marriage had lasted, the parties may at some point have benefitted from the holdings of the claimant's family, but there is no evidence of any specific discussion of that and the claimant's minority interest meant that the matter was, to a large extent, outside their control.

[134] I therefore find that the claimant has met the onus of proving these assets were not ordinarily used for a family purpose and that, even in the absence of the marriage agreement, they would not be family assets.

Valuation of Family Assets

[135] I find that the total value of family assets acquired since the marriage is therefore as follows:

Landrock Landscaping and Excavating (L & X) equity in Cowichan property (one third interest)

\$ 46,000

0884049 B.C. Ltd. equity in Cowichan property (half interest)

\$ 231,856

0883935 B.C. Ltd. equity in Nanaimo property

\$ 607,770

The respondent's investment accounts

\$ 41,870

Withdrawn during separation

\$ 57,799

Insurance policy cash surrender value

\$ 9,969

Antique and collector cars

\$ 115,000

TOTAL

\$1,110,264

[136] That total does not include the matrimonial home, which will be discussed below, or the proceeds from sale of the Sowden Street Property, which have already been divided. It also does not include the value of the respondent's shares in L & X, the value of which is unknown due to the lack of reliable information provided by the respondent.

Enforceability of the Marriage Agreement

[137] The marriage agreement provided that the respondent's house would remain his separate property but, as said above, that property became the matrimonial home and was transferred into joint tenancy early in the marriage. But for the marriage agreement, it would clearly be a family asset.

[138] Although the respondent relies on the marriage agreement to argue that the home remains his separate property, he argues that the agreement is otherwise no longer reasonable due to his present financial needs, including his debts and the need to provide a home for himself and his extended family.

[139] In *Hartshorne v. Hartshorne*, 2004 SCC 22 [Hartshorne], the Supreme Court of Canada set out a two-step test to establish the fairness of a marriage agreement. The court must first apply the provisions of the marriage agreement and assess and award the financial entitlements provided under it. The second step of the test is to apply s. 65(1) and determine if the contract operates fairly. The court stated at para. 47:

47 ... At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances are within the contemplation of the parties at the time the

Agreement was formed, and where the Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the Plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s. 65(1) of the Family Relations Act, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the Family Relations Act, striking an appropriate balance between the deference to the parties' intentions, on the one hand, and assurance of an equitable result, on the other.

[140] And at para. 44, the court stated:

44 ... Thus, central to any analysis under s. 65(1) of the FRA is consideration of how accurately the parties predicted, at the time of contract formation, their actual circumstances at the time of distribution, whether they truly considered the impact of their decision and whether they adjusted their agreement during the marriage to meet the demands of a situation different from the one expected, either because the circumstances were different or simply because implications were inadequately addressed or proved to be unrealistic

[My emphasis added]

[141] On the first branch of the Hartshorne test, applying the provisions of the marriage agreement would result in the respondent retaining full ownership of the matrimonial home, with a net value of \$1,127,241 and all of his shares in Landscaping, whatever their value may be. He would also have a prima facie entitlement to half the value of the family assets not subject to the agreement, being \$554,947.

[142] The claimant would have \$554,947 as her share of the after-acquired assets and the separate property identified in the agreement. To the extent the claimant could actually benefit from or eventually realize on the value of her separate property, it might have a value higher than the respondent's separate property. However, the parties in their agreement recognized that they were not necessarily bringing equal assets into the marriage and accepted the fact that each would retain whatever they brought in.

[143] The second branch of the Hartshorne test requires the Court to consider whether that division is fair having regard to the factors listed in s. 65.

[144] Sections 65(1)(a) and (b) refer to the length of the marriage and the length of separation. Those do not raise any specific considerations relevant to this case beyond the fact that the marriage was a relatively long one and there has been a lengthy period of separation. That makes it more likely that present circumstances will differ from those contemplated in the agreement.

[145] Sections 65(1)(c) and (d) refer to the date property was acquired and the extent to which one spouse acquired it through inheritance or gift.

- [146] All of the claimant's separate property, including her pension and her share of the Santelli Holdings, were acquired before the marriage. Most of the property was acquired as a gift from her parents, which was specifically acknowledged in the agreement, and there has since been a small increase in her holdings due to inheritance.
- [147] The respondent's business also existed before the marriage and he acquired the matrimonial home before marriage. Both were recognized as separate property in the agreement.
- [148] There are therefore no considerations specific to s. 65(1)(c) or (d) that in themselves render the agreement unfair in its present effect.
- [149] The respondent relies particularly on s. 65(1)(e) - the need of each spouse to become or remain self-sufficient. Throughout the marriage, both parties earned their separate income with the respondent's usually being larger. The respondent says the agreement is now unfair in light of his debts and ill health. I have already found his evidence about debt to be insufficient and unpersuasive. For reasons set out below in the discussion of child support, I also reject his evidence about ill health. I therefore do not find any variation is necessary to provide for his self-sufficiency.
- [150] There is a self-sufficiency concern in relation to the claimant. She has custody of the Children. The respondent did not pay child support when he was ordered to do so and all payments subsequently made came out of his share of the Sowden Street Property sale proceeds. That source has now been exhausted.
- [151] In view of the claimant's need to look after the Children and the respondent's history of failing to pay child support, the claimant may have to be free of dependence on him to the greatest extent possible: *Malhotra v. Malhotra* (1983), 49 B.C.L.R. 8 (C.A.) at para. 27.
- [152] The major factor that I find raises current unfairness comes under s. 65(1)(f) - "any other circumstances relating to the use of property". The matrimonial home, which was the respondent's separate property at the outset of the marriage, remained the matrimonial home throughout. It was the home in which the claimant was and remains the primary caregiver to the Children, one of whom has special needs. It is the only home those Children have ever known.
- [153] That is a circumstance that was not considered or adequately addressed at the time of the marriage agreement and I agree with the claimant's submission that the agreement would operate unfairly if it excluded her from any interest in the home.
- [154] I also note that the respondent does not oppose the claimant's continued custody, although he seeks improved access. In insisting on getting back full ownership of the house, he has either not considered or not shown any interest in the question of where those Children are going to live.

[155] I therefore find that the assets listed in the marriage agreement must be re-apportioned to the extent that the matrimonial home be treated as a family asset in which each party has a prima facie 50% interest, consistent with their registered title. The marriage agreement will continue to govern all other property it identified as separate property, including the Santelli Holdings, the claimant's RRSPs and employment pension.

Division of Family Assets

[156] I have found that the matrimonial home has a current net equity of \$1,127,241, while the total value of all assets acquired after the marriage, not including the Sowden Street Property, is \$1,109,895. The normal order would be equal division of both.

[157] But I have also considered the interests of the Children, the uncertain valuation of the other assets, for which the respondent must bear the responsibility due to his incomplete financial disclosure, and the fact those two amounts are almost equal. In those circumstances, I find the fairest result is for the claimant to obtain transfer of the respondent's interest in the matrimonial home while the respondent receives full ownership of all of the other assets listed in para. 135 above.

[158] There are currently four judgments registered against the respondent's interest in the matrimonial home. Two of them are also registered against all other properties in which the respondent has an interest and appear to be fully secured if they have not been at least partially satisfied. The other two were registered by the respondent's counsel.

[159] In any event, all of them were registered after the triggering event of a s. 57 declaration and after the claimant filed her Certificate of Pending Litigation, giving her priority.

[160] I therefore make an order under s. 66(2)(b) of the FRA, vesting title to the home in the claimant, subject only to the mortgages that predate her Certificate of Pending Litigation.

Custody and Access

[161] This is a divorce action with claims for corollary relief. Therefore, issues of custody, access and child support will be decided under the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.): Zhang v. Sun, 2016 BCSC 1418, at para. 249. That does not prevent the issue of guardianship or "parental responsibilities" being addressed and allocated according to the FLA.

[162] The claimant seeks sole custody under the Divorce Act, which she has had on an interim basis since the parties separated. The respondent seeks joint guardianship under the FLA but does not oppose the Children living primarily with the claimant.

[163] There are two issues complicating questions relating to the Children. The first is the boy, C.'s, severe ADHD. According to his treating pediatrician, Dr. Grace Yu, this is characterized by "hyperactivity, inattentiveness, impulsivity and quick temper". He has been medicated since age four and currently takes his medication twice a day. He requires a one-on-one learning assistant both in the classroom and in after-school care. In December 2016, his

after-school care provider withdrew care for him due to his behaviour. The claimant has had to make arrangements with her employer to leave work early so she can pick him up from school.

[164] The claimant believes the respondent lacks understanding of C.'s special needs. She is also concerned that, because the respondent is asthmatic, he would be unable to respond if, for example, C. were to suddenly run across a busy street.

[165] The respondent has previously had professionally supervised access, which he was required to pay for. During trial, I ordered that access could be supervised instead by his sister Angela.

[166] A second problem is the respondent's history of alcohol abuse. Both the claimant and Mr. D'Arpino described him as a "binge" drinker. At trial, I was told that he was facing criminal charges arising out of a fatal motor vehicle accident and was expected to enter a guilty plea that would likely result in a jail sentence of several months.

[167] In the opinion of Dr. Michael Elterman, who prepared the report pursuant to s. 211 of the FLA, there is an element of denial in the respondent's approach to both of these issues. He says there is a "pattern of minimization" around his thinking about C.'s special needs, and:

I would note that the psychological testing states that he acknowledges that alcohol has been a major problem in his life. I believe that Mr. Trinetti minimizes and denies a problem with alcohol and I strongly suspect that it is not an issue that has now been fully dealt with. He is correct in saying that he likely has not drunk when he has the children or endangered them by drinking and driving. His reasoning, however, about this is like someone saying that there is no reason to buy insurance since we have never yet had a fire at our house. The testing suggests that he is not likely able to cut down despite efforts at sobriety.

[168] The respondent says he is willing to take training to better understand and deal with C.'s special needs. Dr. Elterman concludes:

I am quite sure that Mr. Trinetti would go over the obstacles put in his way, but he does not speak about [C.] as having an ADHD problem, but rather sees him as a more normal child who just needs more time with his father. The question of parenting without supervision may be less related to training than it is to questions of risk around Mr. Trinetti's use of alcohol. What Mr. Trinetti could do to improve his position is to become better educated about [C.'s] needs for structure and routine and how to handle situations where he becomes overstimulated by activity. Both parents are willing to provide for the needs of the children in the best way that they know how. I think that in terms of parent capacity, Ms. Santelli is far more equipped to provide for the children's needs, particularly around things relating to [C.'s] special needs.

My opinion is that while the parents are joint guardians, that the day-to-day parenting responsibilities should be with Ms. Santelli.

- [169] Dr. Elterman recommends that the respondent have the Children every second weekend from Saturday at 10:00 a.m. until Sunday at 5:00 p.m. and on Saturday from noon to 6:00 p.m. on the alternate weekends. Dr. Elterman recommends this access be supervised by a family member.
- [170] I accept Dr. Elterman's recommendation except that I specify the respondent's sister Angela as the family member who must be present. His other sister and his father are not suitable supervisors due to their own physical limitations. When Angela is not available, the respondent may retain a professional access supervisor. As Dr. Elterman recommends, the overnight visits will be at Angela's home with her present. I also add a condition that the respondent not consume alcohol during or for 24 hours prior to his times with the Children.
- [171] The respondent submits these arrangements, particularly the requirement that access be supervised, be reviewed six months after the respondent's release from his anticipated custodial sentence, provided he has taken some training with respect to proper parenting strategies to deal with his son's ADHD. This training would be from a person directed by Dr. Yu or Dr. Elterman.
- [172] I agree that a review would be appropriate, but find the timeline suggested by the respondent to be far too short, given the magnitude of the issues he must deal with and the highly contentious nature of this litigation so far. I order that the matter may be reviewed two years from the date of this Judgment. Before any such review, the parties will obtain an updated s. 211 report from Dr. Elterman or, if he is not available, another person qualified to prepare such a report who is appointed by agreement of the parties or order of the Court.
- [173] As to guardianship, s. 41 of the FLA lists the defined parental responsibilities and s. 40(3) permits the Court to determine which of those responsibilities should be exercised by one parent and which will be exercised jointly. I find that the submission of the claimant best reflects the current situation, including the respondent's need to acquire a better understanding of C.'s needs and the current limited ability of the parties to communicate.
- [174] Specifically, the following responsibilities listed in s. 41 will be exercised by the claimant alone, subject to a requirement to respond to any reasonable requests by the respondent for information about the decisions she has made.
- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
 - (b) making decisions respecting where the child will reside;
 - (c) making decisions respecting with whom the child will live and associate; and
 - (d) making decisions respecting the child's education and participation in extra-curricular activities, including the nature, extent and location;

...

- (f) subject to s. 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

...

- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

[175] The parties will jointly exercise the following parenting responsibilities:

- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (j) requesting and receiving from third parties health, education or other information respecting the Children; and
- (k) subject to any applicable provincial legislation:
 - (i) starting, defending, compromising or settling any proceeding relating to the child and
 - (ii) identifying, advancing and protecting the child's legal and financial interests;

not including these proceedings or anything arising from them.

[176] The respondent may apply for expanded parenting rights and responsibilities as part of the review authorized in para. 172 above.

[177] The respondent seeks an order that he be permitted to telephone the Children for 20 minutes every second day at 7:00 p.m. while he is serving his anticipated custodial sentence on the driving charge and that the Children be brought to visit him for two hours each Sunday. I agree that the telephone calls to the Children are appropriate, subject to the discretion of the jail authorities, including their discretion over timing. I am not prepared to make an order that the Children visit him because I do not know what facility he will be in or whether the physical arrangements made for visitors will be suitable for Children of that age. The respondent will have liberty to apply after he is sentenced and the place of detention is known.

Child support

- [178] The respondent is required to pay child support based on his guideline income pursuant to the FCSG. The problem is that his inadequate financial disclosure makes it impossible to ascertain his income.
- [179] The respondent and Mr. D'Arpino say he is now paid a salary of \$5,000 a month from Landscaping, which acts as a subcontractor to Mr. D'Arpino's separate company, Construction. But because the respondent and Mr. D'Arpino are the two shareholders of Landscaping, they are in a position to determine what income that company pays to the respondent and to allocate revenues among the different companies. The lack of current financial statements makes it impossible to determine what funds earned or retained by Landscaping are available for child support.
- [180] The respondent's Form F8 financial statement, sworn in October 2014, stated an annual income of \$120,000. Similar evidence was presumably before Master Tokarek a year earlier when he found that to be the respondent's FCSG income for the purpose of interim child and spousal support.
- [181] That income figure he declared on a sworn court document has absolutely no relationship to his income tax returns. They showed line 150 income of \$9,000 in 2013, \$12,000 in 2014 and \$12,000 in 2015. His 2016 income tax return has not been produced.
- [182] The respondent could not explain why he declared income of \$9,000 for 2013 while receiving \$77,048 from L & X during that year. Mr. D'Arpino testified that this represented income that had become payable in 2012 (when the respondent's tax return showed income of \$80,000) but was not paid until 2013 because 2012 had been a bad year. Of course, there are no financial statements from that company for the relevant period to confirm that, but as counsel for the claimant puts out, financial statements for Landscaping (prepared in January 2017) show similar net income for 2012 and 2013 in a closely related business.
- [183] The respondent says he was unable to work from 2013 to 2016 and is still limited in his ability to work due to health problems. He has asthma, which the claimant does not dispute, and says he has been hospitalized on several occasions for severe asthma attacks. Even after being released from hospital after those attacks, he said full recovery from each attack took weeks or months.
- [184] When a party asserts a medical reason for reduced income and reduced ability to pay child support, there is a self-evident obligation to support that assertion with some medical evidence. The respondent did not produce a single page of medical records from hospitals or treating physicians to support his testimony about previous or ongoing health problems. There are no medical reports offering opinions about the impact of his condition on his past or future ability to earn income. I therefore do not accept that there are any medical limitations on the ability of the respondent to earn income.

- [185] The respondent's 2014 Form F8 financial statement reports employment income of \$90,000 from Landscaping. It also refers to "other income" of \$30,000 and says that, in addition to his employment income he was "self-employed as a property manager" for 0883935 B.C. Ltd, the company that owns the Nanaimo properties. The obvious inference is that the \$30,000 was generated from rental income on those properties.
- [186] The respondent testified that one of the Nanaimo properties is now leased to two tenants who each pay \$3,000 a month. The other is leased for \$5,000 a month although he says the tenant is currently only paying half that amount because the building requires extensive repairs. There is no further evidence about the nature or cost of those repairs and no current financial statements to show whether or by what amount the rental income exceeds expenses.
- [187] I find that all of the respondent's evidence and financial disclosure, or lack of it, have been an attempt, with Mr. D'Arpino's assistance, to obfuscate his current income and financial position.
- [188] Non-disclosure of financial information has frequently been described as the "cancer" of matrimonial litigation: *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.) and *J.D.G. v. J.J.V.*, 2013 BCSC 1274 at para. 1. As between the parties, the one whose financial disclosure is inadequate must bear the consequences: *D.J.F. v. V.J.F.*, 2013 BCSC 2019 at para. 99.
- [189] The interim order for child and spousal support was based on evidence before the Court at the time that the respondent's income was \$120,000 per year. A later attempt to vary that order was dismissed. Nothing in the respondent's evidence at trial has persuaded me that he is no longer earning, or is no longer capable of earning, at least that amount.
- [190] I therefore find that the respondent's FCSG income is \$120,000 a year and order child support pursuant to the current guidelines of \$1,781 a month. It follows that I do not accept the respondent's counsel's submission that there has been an overpayment of child support for which the respondent is entitled to be reimbursed.
- [191] The respondent will also pay his proportionate share of special and extraordinary expenses, which I find to be the cost of after school and summer care, organized sports activities, and educational assistance to C. related to his special needs. The claimant identified a number of receipts in her evidence and her counsel, in closing submissions referred to an amount of \$1,100 per month per child. Although the claimant was not challenged on specific expenses in cross-examination, it is not clear to me if the total referred to by counsel consists entirely of expenses in the categories I have referred to. It is also not clear to me why the expenses would be equal, given C.'s special needs. If counsel are unable to agree on what these expenses are, or on the appropriate amounts, they may make written submissions.

- [192] The claimant seeks an order for lump sum child support. Such orders are exceptional and restricted to cases where there are special circumstances such as animosity between the parties, the paying party's inability to make periodic payments, difficulties enforcing orders for support, and the risk that the available monies will be otherwise squandered or dissipated. They are more common where children are only two or three years away from being self-supporting: *Komori v. Malins*, 24 R.F.L. (4th) 1, at paras. 71 and 72.
- [193] It is true that there is animosity between the parties and the respondent initially failed to comply with an order for interim support, but support was eventually paid out of the sale proceeds from the Sowden Street Property. I presume that, in the absence of those proceeds, the claimant may have had difficulty collecting the support that was ordered, but cannot speculate on how effective enforcement measures might have been. Because support has been paid from the Sowden Street Property proceeds, it cannot be said the respondent is currently in disobedience of the interim order.
- [194] I also find that, given the age of the Children and the length of time child support will be required, the amount that would be required for a lump sum award would be simply unrealistic.
- [195] Although not a proper case for lump sum award, there have been sufficient difficulties in the past to justify an order for security under s. 213 (2)(c) of the FLA. I therefore order that the respondent post security in the amount of \$42,700, representing two years of basic child support payments. That payment will be supplemented by further security representing two years of the special and extraordinary expenses when that amount is finalized. The funds will be paid into either a solicitor's trust account, a designated account at a chartered bank or an account established by the Director of the British Columbia Family Maintenance Enforcement Program. Funds may be drawn from that account on the first day of every month commencing March 1, 2018.
- [196] The respondent submits that he should not be required to pay child support while he is in custody or for three months following his release. In my view, the respondent cannot rely upon his own wrongdoing to escape his child support obligations. This is particularly true when he is a 50% shareholder in the company from which he receives income and is therefore in a position to draw income in any event if he chooses to do so.

Spousal support

- [197] The claimant seeks an order for spousal support. I am not persuaded there is a continuing need or entitlement. In addition to her employment income, the claimant declares rental income for tax purposes. Although I accept her evidence that this income has not actually been paid to her in the past, she has a legal right to demand it based on her partial ownership of the property.

[198] The respondent's obligation to pay spousal support will end as of March 1, 2018. The respondent argues that the claimant was never entitled to spousal support and should therefore be required to repay \$40,820 in spousal support that she has received pursuant to the interim order. No authority is cited in support of that position, which appears to me to be motivated primarily by vindictiveness.

other orders

[199] In her notice of family claim, the claimant says she and the respondent separated in May 2011. The respondent disputes that date, but agrees that they were separated by August or September 2012. I am satisfied they were living separate and apart (albeit under the same roof) when this proceeding began and have certainly been separated for more than a year.

[200] The grounds for divorce under s. 8(2)(a) of the Divorce Act have been established and I make a divorce order on the usual terms.

[201] Pursuant to the Marriage Agreement, each party is entitled to retain whatever contents of the matrimonial home they brought into the marriage, along with anything that is a direct replacement for those items. All other contents will be divided equally and the parties have liberty to apply if they cannot agree on the division.

[202] The November 28, 2013 order of Master Tokarek included a restraining order. Under that order, the respondent was not to communicate with the claimant, except for the purpose of arranging access to the Children, not to attend the matrimonial home or the claimant's work premises and not to possess any weapon. The claimant seeks a continuation of that order.

[203] The restraining order was presumably made under s. 183 of the FLA, which also provides that such orders expire after one year unless the court otherwise orders. The order does not appear to have been explicitly extended by any of the subsequent orders. Section 183 provides that such orders are to be made if the court determines that family violence is likely to occur. Whatever basis there may have been for concern at the time of Master Tokarek's order, there is no evidence of a continuing risk of family violence. However, I will order that communication between the claimant and the respondent be restricted to matters concerning the Children or other communications necessary to implement the orders made in these reasons. Such communication will be conducted only by text messages (or by email while the respondent is in custody.)

[204] I have commented at several points on the respondent's incomplete or misleading financial disclosure. His financial disclosure was at issue in at least six of the pre-trial applications that took place. Pursuant to s. 213(2)(d)(ii) of the FLA, I order that the respondent pay \$5,000 to the claimant as a penalty for the non-disclosure.

[205] The claimant has asked to reserve submissions on costs until after judgment. I will hear those submissions provided that a request for a hearing date is made to trial scheduling within 60 days of the date of this Judgment.

CONCLUSION

[206] I make the following orders:

- (1) The parties are divorced from each other, the divorce to take effect on the 31 day after the date of these Reasons.
- (2) The assets listed in the marriage agreement are re-apportioned pursuant to s. 65 of the FRA to the extent that the former matrimonial home be treated as a family asset.
- (3) Pursuant to s. 66(2)(b) of the FRA, title to the former matrimonial home is vested solely in the claimant, subject only to the mortgages that predate her Certificate of Pending Litigation;
- (4) All of the other assets listed in para. 135 above will be the sole property of the respondent.
- (5) The marriage agreement will continue to govern all other property it identified as separate property, including the Santelli Holdings, the claimant's RRSPs and employment pension;
- (6) The respondent will have the Children every second weekend from Saturday at 10:00 a.m. until Sunday at 5:00 p.m. and on Saturday from noon to 6:00 p.m. on the alternate weekends. The respondent's access is to be supervised by the respondent's sister Angela D'Arpino. When Angela is not available, the respondent may retain a professional access supervisor. The overnight visits will be at Angela's home with her present. The respondent will not consume alcohol during or for 24 hours prior to his times with the Children.
- (7) Custody and access may be reviewed two years from the date of this Judgment. Before any such review, the parties will obtain an updated s. 211 report from Dr. Elterman, or, if he is not available, another person qualified to prepare such a report who is appointed by agreement of the parties or order of the court.
- (8) Parental responsibilities listed in s. 41 of the FLA will be exercised as set out in paras. 174 and 175 above. The respondent may apply for expanded parenting rights and responsibilities as part of the review outlined in (7) above.
- (9) The respondent will be permitted to telephone the Children for 20 minutes every second day while he is serving his anticipated custodial sentence on the driving charge, subject to the discretion of the jail authorities. The respondent will have liberty to apply for an order regarding visitation by the Children while he is serving his anticipated custodial sentence after he is sentenced and the place of detention is known.
- (10) The respondent is to pay child support of \$1,781 a month, based on a FCSG income of \$120,000 a year.

- (11) The respondent is to pay his proportionate share of special and extraordinary expenses, being the cost of after school and summer care, organized sports activities and educational assistance to C. related to his special needs. If counsel are unable to agree on what these expenses are, or on the appropriate amounts, they may make written submissions.
- (12) The respondent is to post security in the amount of \$42,700, representing two years of basic child support payments. That payment will be supplemented by further security representing two years of the special and extraordinary expenses when that amount is finalized. The funds will be paid into either a solicitor's trust account, a designated account at a chartered bank or an account established by the Director of the British Columbia Family Maintenance Enforcement Program. Funds may be drawn from that account on the first day of every month commencing March 1, 2018.
- (13) The respondent's obligation to pay spousal support will end as of March 1, 2018.
- (14) Pursuant to the marriage agreement, each party is entitled to retain whatever contents of the matrimonial home they brought into the marriage, along with anything that is a direct replacement for those items. All other contents will be divided equally and the parties have liberty to apply if they cannot agree on the division.
- (15) Communication between the claimant and the respondent is restricted to matters concerning the Children or other communication necessary to implement the orders made in these reasons. Such communication will be conducted only by text messages (or by email while the respondent is in custody).
- (16) Pursuant to s. 213(2)(d)(ii) of the FLA, the respondent will pay \$5,000 to the claimant as a penalty for non-disclosure.
- (17) Counsel may make further submissions on costs.

"Smith J."

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