
CANADA / JUDGMENT

Sellars v. Harvey

2018 BCSC 1424

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1424 Sellars v. Harvey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sellars v. Harvey,

2018 BCSC 1424

Date: 20180823

Docket: E39321

Registry: Penticton

Between:

Lauren Mary Sellars

Claimant

And

Walter Charles Harvey

Respondent

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

The Claimant, Lauren M. Sellars:

In Person

Counsel for the Respondent:

Q. Fuglesteit

Place and Date of Trial:

Kelowna, B.C.

June 11-15, and July 16-19, 2018

Date of Written Submissions:

July 26 and August 3, 2018

Place and Date of Judgment:

Kelowna, B.C.

August 23, 2018

I. Introduction

- [1] Lauren Sellars and Walter Harvey began living together on Ms. Sellars' farm in October 1996, not long after they met. They are presently 56 and 66 years of age.
- [2] The parties were married on January 22, 2005 and separated on November 14, 2014. They were divorced on May 3, 2016. They have a daughter Sylvia who was born in 1997.
- [3] The issue before me is the division of family property. Relevant to that issue is the enforceability of an agreement entered into on April 23, 1997. The validity of this agreement is central to a claim by the respondent to an interest in Ms. Sellars' farm.

II. Background

(a) The Relationship

- [4] Ms. Sellars has little formal education. This is her second marriage. She and her former partner, Robert Vanderlip, have two children, Sapphire and Chelan. They are now 33 and 31 years of age.
- [5] Ms. Sellars and Mr. Vanderlip acquired a farm in 1984. It is 25 acres and is located in the interior of British Columbia between Keremeos and Osoyoos. The farm has orchards and other crops. In addition, Ms. Sellars maintained the business of breeding Norwegian Fjord horses.
- [6] When Ms. Sellars' relationship with Mr. Harvey began she had a herd of 17 registered Norwegian Fjord horses. She handled some 100 horses during her equine career. She is no longer breeding horses.
- [7] The farm was originally owned in joint tenancy by Mr. Vanderlip and Ms. Sellars. When they separated in 1996, Ms. Sellars' mother purchased Mr. Vanderlip's interest in the property.

- [8] Mr. Harvey is an orchardist. He was previously married as well. He and his then-wife separated in 1994 and divorced in 1996. He and his former wife have two children, Anina and Genevieve. They are 36 and 33.
- [9] Mr. Harvey grew up in Montana. He has a B.Sc. in forestry from the University of Montana. After graduating he worked in management positions in the forest industry in Brazil (1980 to 1983) and in Taos, New Mexico (1983 to 1991).
- [10] In April 1991, he and his wife and daughters moved to Osoyoos. He rented orchard land. By 1995 he was leasing three orchards: a ten acre orchard on which he was living, a five acre orchard and a three acre orchard. That year Ms. Sellars worked for Mr. Harvey, doing some sorting and packing work.
- [11] In 1996 Ms. Sellars' relationship with Mr. Harvey began. He began living with her at her farm in October 1996.

(b) The Marriage Agreement

- [12] Ms. Sellars testified that from the outset of their relationship she was determined to have a marriage agreement. As she put it, she had just gone through a separation. Her mother had helped her keep the farm in the family. Ms. Sellars wanted a marriage agreement that would preserve the farm for her children, her mother and herself.
- [13] Ms. Sellars testified that she told Mr. Harvey about her desire for a marriage agreement before he moved in. Soon after, she consulted a lawyer and had an agreement prepared. Her evidence is that she discussed with Mr. Harvey the need for an agreement "many times". He always agreed it was necessary. He did not, however, propose any revisions to what her lawyer had prepared. Nor did he seek legal advice.
- [14] In early 1997, Ms. Sellars and her mother made the decision to borrow money to purchase \$20,000 worth of fruit trees to expand the orchard. She decided that she had to have Mr. Harvey sign the agreement before buying the trees. Ms. Sellars told him that on their way to Ephrata, Washington, to pick up the trees. They stopped in Osoyoos and both of them signed the agreement in front of a witness.
- [15] The agreement essentially provides that assets held by each of them would remain that person's separate property. Articles 2.1 and 2.2 provide as follows:

2.1 Lauren represents and warrants that she has made a disclosure of substantially all her assets and liabilities in Schedule "A" to Walter.

2.2 The property listed in Schedule "A" hereto and all other property owned by Lauren at the date of this Agreement, and any accretions thereto, income therefrom and all property hereafter acquired by Lauren through inheritance, gift or otherwise and all proceeds of and property acquired in substitution for any such property or income (referred to collectively as "Lauren's Separate Property") has been, is and will be the separate property of Lauren and is to remain the separate property of Lauren, to be disposed of or otherwise used as she thinks fit and no item of

Lauren's Separate Property is to be a joint asset, (subject only to other provisions of the Agreement) whatever the use to which it may be put, and regardless of any contribution made by Walter whether direct or indirect and whether by work, money or money's worth, nor will any such contribution by Walter in respect of the acquisition, management, maintenance, operation or improvement of any of Lauren's Separate Property give rise to any right of compensation, except as otherwise agreed in writing by the parties.

[16] There are identical clauses in respect of Mr. Harvey's assets.

[17] Article 2.5 then provides:

If: (a) the parties purchase property in both their names from funds in a joint account unless they otherwise agree in writing as to its ownership, that property is deemed to be owned by the parties equally as joint tenants and in the event of termination of co-habitation the parties agree to sell it and the proceeds will be divided equally between the parties;

(b) either party purchases property, in his or her name alone from funds held in the joint account, one-half of the property so purchased by one party will be deemed to be held in trust for the other party, such that on a sale of the property during the co-habitation or after termination of co-habitation, the proceeds of sale will be divided equally between the parties.

[18] Articles 4.1 and 4.2 address "Gifts and Windfalls":

4.1 This Agreement will not prevent either party from making gifts to the other and such gifts are to become part of the separate property of the donee.

4.2 All inheritances, gifts or windfalls received by either party are to be the separate property of the done or recipient thereof.

[19] Article 5 is entitled "Lauren's Residence":

5.1 Lauren is the registered owner in joint-tenancy with Elizabeth Ella Sellars of the real property located at Cawston, British Columbia, legally described as:

P.I.D. 014-982-854

Parcel A (DD 136887F and Plan B6433) of District Lot 1186 Similkameen Division Yale District ("Lauren's Residence and Farm)

5.2 Walter and Lauren acknowledge and agree that Lauren is the sole owner of her interest in Lauren's Residence and Farm.

5.3 Walter and Lauren agree that any work performed by Walter or any monetary contribution made by Walter to Lauren's Residence and Farm shall be deemed to be occupational rent and Walter shall not be entitled to compensation for same unless otherwise specifically agreed to by the parties in writing.

[20] Article 6 then sets out what happens if the parties separate:

6.1 If either of the parties at any time ceases to cohabit:

- (a) Lauren will retain all Lauren's Separate Property and continue to be responsible for her personal liabilities.
- (b) Walter will retain all Walter's Separate Property and continue to be responsible for his personal liabilities.
- (c) Property purchased in both parties names and property acquired after co-habitation that is acknowledged to be joint property will continue to be owned as property in subparagraph 2.5(a), and be disposed of accordingly.
- (d) Property purchased from any joint account in one party's name will continue to be owned as provided in subparagraph 2.5(b) and be disposed of accordingly.
- (e) Except as otherwise agreed in writing the parties will continue to be responsible for their several and joint debts and liabilities.

6.2 Neither party shall claim maintenance support or alimony against the other pursuant to the Family Relations Act of British Columbia or under any other statute of like import of British Columbia or any other jurisdiction.

[21] Article 8.1 addresses legal advice:

8.1 a) Each of the parties has obtained independent legal counsel and with the assistance of his or her counsel, and upon considering the advice of such counsel, each has agreed to enter into this Agreement on terms and conditions herein set forth; or

- b) The parties have been advised to seek independent legal advice regarding this Agreement but have declined to do so.

[22] The parties signed the agreement in front of a witness on April 23, 1997.

[23] Schedule A to the agreement sets out Ms. Sellars' assets. She lists horses and foals, her one-half interest in the farm, two bank accounts, and a 1986 Ford. Mr. Harvey does not list any assets in schedule B. It has been left blank.

[24] The agreement is accompanied by a signed statement from Ms. Sellars that she consulted a solicitor prior to signing the agreement and that the solicitor explained to her the nature and effect of the agreement. A similar statement was prepared in Mr. Harvey's name but not signed. There is a statement prepared for Mr. Harvey which he did sign. It states:

I, WALTER HARVEY, certify that I have been advised to seek independent legal advice regarding this Agreement and my rights, and I have decided not to seek independent legal advice regarding this Agreement and my rights. I have made the decision not to seek independent legal advice or [sic] my own free will and without any undue influence or coercion on the part of LAUREN MARY SELLARS or her solicitors.

- [25] Mr. Harvey signed this at the same time and in front of the same witness as the agreement itself.
- [26] Mr. Harvey's evidence is very different. He testified that Ms. Sellars "sprung" the agreement on him as they were leaving to pick up the trees in Ephrata. He testified that he "didn't recall" seeing the agreement before. He maintained that they never talked about the agreement. He testified that he "trusted her" (although he did not explain the relevance of that point). He denied seeing a draft of the agreement.
- [27] He also denied being advised to get legal advice. When it was pointed out that he signed a statement saying that he had been advised to get legal advice, he testified that he did not read the agreement. The statement was shown to him at trial. His evidence then changed. He conceded that she had advised him to seek legal advice and that he decided not to.
- [28] I do not believe Mr. Harvey's testimony that he had not seen the document before April 23. His version is highly unlikely. If he had been told about his right to get legal advice on April 23, he was not under any pressure to sign the agreement. That is, he could easily have said that he wished to see a lawyer and that would have been that. Moreover, and more seriously, he has stated under oath two different answers to the question of whether he was advised to get legal advice. He first denied it. He then said he was in fact advised to get legal advice.
- [29] In November 2005, Ms. Sellars purchased her mother's half interest in the property for \$42,500. She described the amount as "a gift" because the price was substantially below the market value.
- [30] Ms. Sellars testified that after the wedding in January, 2005, she offered to renegotiate the marriage agreement. Mr. Harvey wanted to be on title to the farm property. She testified that they discussed his buying into the farm "many times". She offered to sell him one half interest in the property for \$100,000. She said it had to be in writing in a legal document, "witnessed by lawyers". She said he had to commit to making mortgage payments.
- [31] Ms. Sellars' uncontradicted testimony is that Mr. Harvey never did see a lawyer to carry out this transaction. He has not made one mortgage payment.
- [32] The parties kept their financial affairs entirely separate over the years. They never had a joint account. Ms. Sellars paid the mortgage payments and payments on her line of credit.

[33] The exception was one transaction in which she participated. In January 2013, she co-signed a loan to enable him to buy a new truck. He made the payments. He did not permit her to drive it. Associate Chief Justice Cullen made an order enabling her to cease being responsible for the loan.

(c) The House

[34] When Mr. Harvey moved in, Ms. Sellars and her children were living in a 100-year old structure on the property.

[35] In 1998 they began building a 2,800 square foot house made of straw bales, an unusual method of construction. Ms. Sellars testified that the home was built slowly as her budget allowed.

[36] The family moved into the home in April 2006. At that time there was no running water and no kitchen. There were no windows. The house is still not finished.

[37] Ms. Sellars said Mr. Harvey helped with construction. His view of the matter is that he did almost everything himself. He testified that he put \$80,000 of his own money into the house. He said that Ms. Sellars contributed \$40,000. Ms. Sellars agrees she put in \$40,000. She estimates his contribution at \$12,000.

(d) The Orchard

[38] By the time Mr. Harvey moved in with Ms. Sellars, he had given up two of his leased orchards. He continued to lease the three-acre orchard in Osoyoos. He kept it until 2006. The property was then developed by the owner. Mr. Harvey has chosen not to lease any other orchard property.

[39] Ms. Sellars' farm at the time the parties started living together had two acres of orchard, alfalfa fields, vegetables, herbs, ginseng and the herd of breeding horses.

[40] The orchard has expanded significantly over the years.

[41] In 1997 they planted 3,910 trees. Mr. Harvey claims he contributed approximately \$10,000 to this venture made up of kelp, fish fertilizer compost, oyster shells, canola meal, cover crop seed, wire and posts. He testified that he and Ms. Sellars supervised the work. It took two months of 12 hour days, seven days a week.

[42] They had the benefit of assistance from many people: "willing workers", who contributed labour in return for room and board, Ms. Sellars' father, and her son Chelan.

[43] In 1999 they planted 1,310 trees. It took two months. They were working with very rocky soil and it was difficult.

[44] In 2002 they planted 395 trees.

[45] In 2006 they planted 680 trees.

- [46] In 2008 they planted 600 trees.
- [47] In 2009 they planted 200 trees.
- [48] In 2013 they planted 1,660 trees. Mr. Harvey testified that he paid for all the trees, \$16,600. He said that Ms. Sellars paid for all the trees in the first four expansions.
- [49] It takes approximately six years for newly planted trees to be productive.
- [50] The parties shared produce, both from the production of the Sellars' property and from the Osoyoos orchard that Mr. Harvey maintained for many years.
- [51] The parties each maintained separate proprietorships for selling fruit: Snowy Mountain Organics and Harvey's Orchards.
- [52] Each of the parties sold produce at farmers' markets in the Vancouver area. Each of them had their own separate businesses. Selling at markets entailed driving to the coast on weekends. Mr. Harvey had stalls at the most lucrative markets, Trout Lake and Kitsilano. She asked to share access to those but, she testified, he angrily refused.
- [53] Ms. Sellars was able to sell produce at other markets, in Vancouver's West End for example, but Trout Lake and Kitsilano vendor stalls are allocated on seniority. She has not had access to those.
- [54] Mr. Harvey stated that between 1997 and 2006 they sold fruit from both orchards. Ms. Sellars kept the proceeds of what she sold and he did the same. He testified that from 2006 on all of the produce came from the Sellars farm. She made the mortgage and line of credit payments.
- (e) Family Violence
- [55] Family violence has been a feature of this relationship. Ms. Sellars described Mr. Harvey as a violent and intimidating person, particularly when drunk. She testified that his drinking was problematic in the last approximately eight years of their relationship.
- [56] Ms. Sellars testified that Mr. Harvey erupted into fits of rage, often as a reaction to being asked to do something or pay something. She said he would scream untruthful and hurtful words, would grab and shake her, strike her and accuse her of having sex with workers on the farm, with his best friend, and with other women.
- [57] She said he threatened to kill her; on one occasion he pointed his shotgun over her head and fired it.
- [58] Ms. Sellars was not cross-examined about any of this. Mr. Harvey in his direct evidence did not rebut this testimony. His daughter Anina did dispute Ms. Sellars' recollection of one incident but he did not address it.

- [59] It was only in re-examination of Mr. Harvey that he said for the first time that he did not threaten Ms. Sellars. This is not proper re-examination. It did not arise from cross-examination but, in any event, I do not believe him.
- [60] Ms. Sellars' daughter Sapphire testified. She testified she witnessed a lot of violence; she said that her mother experienced violence many times.
- [61] Sapphire also said that her brother Chelan was traumatized by violence on the part of Mr. Harvey. She said that he would cry when required to spend time at his mother's home. She said Mr. Harvey "dragged, hit and pushed around" Chelan.
- (f) Litigation History
- [62] The parties separated on November 14, 2014. They have been in court on a number of occasions. Mr. Harvey continues to live on the property. He has been residing in the old house which is across the street from the straw bale house and the rest of the property.
- [63] On September 24, 2015, Justice Beames made a Protection Order restraining Mr. Harvey from communicating with Ms. Sellars except through counsel, from following Ms. Sellars, and from possessing a firearm. Her Ladyship gave Mr. Harvey the right to farm a portion of the property.
- [64] On March 1, 2016, Mr. Harvey appeared on a without-notice basis. Master Wilson made an interim order preventing Ms. Sellars from pruning trees on property that Beames J. had ordered to Mr. Harvey for farming purposes. This interim order expired April 1, 2016.
- [65] In March 2016 Ms. Sellars sought an order ending Mr. Harvey's access to any part of her farm. The parties were also in contention about how much income Mr. Harvey generated by selling produce from his portion of the farm.
- [66] Associate Chief Justice Cullen heard the matter on May 2 and 3, 2016. His Lordship maintained the status quo for the 2016 growing season. That is, the respondent could harvest fruit and vegetables during the 2016 growing season from the portion of the property allocated under the order of Beames J. There were other ancillary orders as to hours of access to the property and requiring the claimant not to prune trees in the portion that had been allocated to Mr. Harvey. He also made a number of orders requiring Mr. Harvey to disclose his income from the property.
- [67] The order expired on December 31, 2016. On March 30, 2017, Master Wilson made an order extending this access for the 2017 growing year.
- [68] No application was made to extend the order for 2018 until recently. Master Wilson declined to renew it. Thus, Mr. Harvey does not presently have access to any part of the orchard. He continues to live in the old house.

III. Credibility

- [69] I have already explained that I have rejected Mr. Harvey's evidence on two important matters: the circumstances leading to the signing of the agreement and his late denial of threatening Ms. Sellars.
- [70] But I also conclude more broadly that, where Mr. Harvey's evidence conflicts with that of Ms. Sellars, I generally prefer Ms. Sellars' evidence. There are several blatant contradictions in Mr. Harvey's evidence.
- [71] First, he asserted in his evidence that that he and Ms. Sellars did not split the fruit from the orchard. I pursued that with him because it is different from Ms. Sellars' evidence. He then agreed that they did split the fruit.
- [72] Second, on April 19, 2016 he swore in an affidavit that Ms. Sellars did not pay for the trees 100% by herself. He deposed "we have received grants for the trees from the Okanagan Valley Tree & Fruit Authority". By "we" he means "she". He then went on to swear that "the labour and material was funded by me for planting the trees. Ms. Sellars' contribution was nothing". In his evidence he had a new version of this allegation. He testified on July 16 that "she contributed in every respect".
- [73] Third, in an affidavit he deposed that Ms. Sellars did not have an organic farm until he arrived in her life in 1996. He admitted in cross-examination that was untrue. Her farm was organic long before he arrived. There is evidence of her membership in an organic farmers association in 1991. Ms. Sellars testified her farm was organic well before that.
- [74] Fourth, he deposed on April 1, 2016:
- When the written agreement was signed the expectation was that I would continue to lease or rent other orchards in order to provide income for myself. While Ms. Sellars and I would live together I would not work her property. Over time it developed that if we worked together on her property things would be better for both of us and we could spend more time together.
- [75] This is not true. When the agreement was signed Mr. Harvey was already down to one orchard, the smallest of the three he had previously leased. Moreover, on the very day they signed the agreement they drove to Ephrata, Washington to purchase 3,900 trees. He spent two months planting them. He was already working her property when he signed the agreement.
- [76] In fact he admitted as much in an affidavit signed a month earlier. On March 1, 2016, he deposed that he managed the orchard for the past "almost 20 years".
- [77] There is one further issue of fact. Mr. Harvey testified that during their marriage, two or three times a year Ms. Sellars assured him that if they separated she would share the farm with him. Ms. Sellars denies this.

[78] I do not accept Mr. Harvey's testimony in this regard. First, for reasons I have explained, I find his credibility wanting. Second, this assertion is frankly unlikely. Ms. Sellars was at one time prepared to make Mr. Harvey a half owner of the farm if he paid her \$100,000 and committed to make mortgage payments. This is an offer she made to him during the marriage. It is entirely inconsistent with that fact that she would simply assure that she would give him half the farm if the marriage broke down.

IV. Analysis

(a) Validity of the Agreement

[79] The first question is whether the agreement is valid as a matter of common law: *Rick v. Brandsema*, 2009 SCC 10. There was no duress or undue influence here. No question of unconscionability arises.

[80] There is no allegation that Ms. Sellars misrepresented her assets in Schedule A to the agreement.

[81] Mr. Harvey alleges the document was "sprung" on him as they were about to leave to pick up trees in Ephrata. But I have found as a fact that that was not the case. He had plenty of opportunity to consider his position, obtain legal advice or to make a counter proposal. He is after all a university educated professional, with far more formal education than Ms. Sellars.

[82] Mr. Harvey chose to do none of these things. I conclude that the contract is enforceable at common law.

(b) The Proper Legislative Scheme

[83] The next question which arises is whether the matter falls to be determined under the current legislation, the Family Law Act, S.B.C. 2011, c. 25, or the Family Relations Act, R.S.B.C. 1996, c. 128. The Family Relations Act was in force when the agreement was signed.

[84] Section 252 of the Family Law Act states that a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of the Family Law Act must be started or continued under the Family Relations Act. This Court has subsequently confirmed that this section applies to marriage agreements: *McHale v. McHale Estate*, 2015 BCSC 993 at paras. 68-72; *Mohammadi v. Mohammadi*, 2016 BCSC 1873 at para. 48.

[85] The decision in *Bradley v. Callahan*, 2017 BCSC 2266, is remarkably similar to the present circumstances. In that case the parties signed a marriage agreement and married in 1997 and then separated in 2014. The issue before the court was solely whether the marriage agreement was governed by the Family Law Act or the Family Relations Act. Justice Smith determined that the agreement was governed by the Family Relations Act and speaks to some of the consequences of that determination in his reasons for judgment.

[86] I am satisfied the Family Relations Act applies.

(c) Division of Property

[87] In determining a proper division of property, ss. 56 and 65 of the Family Relations Act are relevant:

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.

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

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

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

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.
- [88] The effect of s. 56 is that, subject to the marriage agreement and s. 65(1), the parties are entitled to a half interest in each family asset. The asset in issue in this case is the farm.
- [89] As a preliminary point, there was some disagreement regarding the arrangement that existed between the parties.
- [90] Ms. Sellars accepts that Mr. Harvey did work on the farm. He paid utility bills, particularly in the latter years. He contributed food and money from time to time. But, she argues, all of this constituted "occupational rent". The agreement makes it clear that that does not give him a right to an interest in the property listed in Schedule A. She provided him with a place to live. As well, he made a very good living selling fruit from the orchard. Starting from 2006, when he no longer had the orchard in Osoyoos, all the fruit came from the farm.
- [91] Ms. Sellars argues that, since the marriage agreement anticipated exchanging produce with each other as "gifts", any contributions or improvements to the farm were in lieu of rents. She says that Mr. Harvey's contribution to the farm was either a gift or provided under a legal obligation from the marriage agreement that he would provide assistance in return for 50% of the produce from the farm without any rental.
- [92] I respectfully disagree. The marriage agreement makes no mention of sharing the farm's production on an equal or any other basis. There is a mention in the marriage agreement of the parties providing gifts to each other but that has no application here. This was not an exchange of gifts. It was a different, second, understanding that they reached.
- [93] On all the evidence, I conclude there are two agreements. First, there is the marriage agreement. The basic principle of that agreement is that what the parties owned does not become joint property. Second, the parties reached an understanding that they would share equally the production of the farm. This was a sensible arrangement. It was no doubt based on Ms. Sellars' notion that they were a couple and that Mr. Harvey was contributing to the maintenance of the farm, the horse business, and the home.
- [94] Turning first to the marriage agreement, article 2.2 of the marriage agreement clearly excludes from division under s. 56 Ms. Sellars' half interest in the farm at the time the agreement was entered into, subject to s. 65(1).

[95] Ms. Sellars also argues that the agreement covers property acquired after the agreement was signed. Specifically, she claims that it covers the other half interest in the farm that she purchased from her mother in 2005. As she put it:

Clause 2.2 also specifically provides for my retaining full ownership of my farm, without further compensation to Mr. Harvey, after my purchase, out of my sole funds, of my mother's interest in my farm at a gift price in 2005.

[96] I disagree. The agreement says that the property in Schedule A will remain her property. That is the property owned by her at the date of the agreement in 1997.

[97] In addition to the property in Schedule A, the agreement also states that "accretions thereto, income therefrom, and all property here and after acquired by Lauren through inheritance, gift or otherwise" will be and is to remain "the separate property of Lauren".

[98] She purchased the one-half interest. I do not believe it is an "accretion" to her property. The term "accretion" typically refers to land added, for example, when a river subsides and one's property becomes larger.

[99] Did she acquire it through "inheritance, gift or otherwise"? The principle of interpretation of ejusdem generis holds that "otherwise" has to be read as if it is of the same ilk as "inheritance and gift", i.e., something she did not pay for: *Bank of Montreal v. Irwin*, 6 B.C.L.R. (3d) 239 at para. 19 (C.A.). However, she did pay for the half interest.

[100] The principle of contra proferentem holds that if there is an ambiguity, it must be resolved in favour of Mr. Harvey because Ms. Sellars was responsible for drafting the contract.

[101] So for these reasons I conclude that "family property" includes a one-half interest in the farm property.

[102] Having reached this conclusion as to the meaning of the marriage agreement, I turn to whether the division of property under s. 56 and the marriage agreement is unfair under s. 65(1).

[103] Ms. Sellars' position is that any reapportionment should be in her favour. She argues that Mr. Harvey should not receive a half interest in the one-half portion that she acquired from her mother. He was well rewarded for his efforts by taking so much of the fruit.

[104] Mr. Harvey argues that the marriage agreement has operated unfairly because the parties did not envision the joint working of the farm.

[105] The starting point for considering a marriage agreement is *Hartshorne v. Hartshorne*, 2004 SCC 22.

- [106] In that case Mr. Justice Bastarache acknowledged the importance of courts respecting agreements that spouses have entered into freely. That is so even if the effect of such an agreement may differ from what would be achieved under the applicable legislation. Mr. Justice Bastarache explained that the review function is engaged at the point where the fairness of an agreement becomes an issue:
- [35] The FRA explicitly recognizes marriage agreements as a mechanism to govern a division of property upon the dissolution of marriage. To be enforceable, however, any such agreement must operate fairly at the time of distribution. If it does not, judicial reapportionment of property will be available to achieve fairness.
- [107] It is clear, therefore, that the fairness of the agreement must be considered from today's perspective. The question is whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties when the agreement was formed: *Hartshorne* at para. 43.
- [108] What can be said of this agreement? It was one-sided, in the sense that it was Ms. Sellars who wished to protect the farm in the event the marriage came to an end.
- [109] But, as I have already said the parties' circumstances were within the reasonable contemplation of the parties when the agreement was made. They were in fact leaving that day to obtain a large number of trees to develop the orchard. By then, Mr. Harvey had only one of the three orchards that he used to maintain.
- [110] I recognize that Mr. Harvey made major contributions to the farm. He also contributed some funds and some labour to the construction of the house. It is impossible to determine with any precision the monetary value of his contribution. He provided the court with a large number of receipts but it is not possible to determine which receipts relate to the house, the farm or his business. Given my conclusions about the parties' credibility, Ms. Sellars' estimate of \$12,000 is closer to the value of his contribution than \$80,000, his estimate.
- [111] I do recognize, and find, that the farm is now more valuable as an income producing orchard than it was at the time he moved in.
- [112] However, it cannot be said that the marriage agreement operated in a manner that is unfair to Mr. Harvey. He was able to make a living by sharing the production. He chose not to find other orchard space when his three-acre orchard lease could not be renewed. The fairness of that is this: Mr. Harvey contributed labour around the farm, and in return he received the benefits of the proceeds of half the fruits and vegetables. He ran his business through a proprietorship called Harvey's Orchards. He did not contribute to the mortgage or the line of credit.
- [113] What is striking is the gross disparity in income between these two persons who supposedly shared the produce from the farm.

[114] In fact, on the evidence, this understanding of sharing the farm products 50/50 operated very much to the benefit of Mr. Harvey. He received, sold and retained the proceeds of far more than 50% of the production.

[115] The parties' respective gross incomes from the farm for the for the years leading up to separation are instructive:

2011

2012

2013

2014

Ms. Sellars

\$32,375

\$31,244

\$37,949

\$59,565

Mr. Harvey

\$101,827

\$126,800

\$133,218

\$180,066

[116] Mr. Harvey says that he was responsible for more of the overhead. He hired more employees and had more expenses than the claimant. That may be. However, on the material before me it is impossible to quantify his expenses. I frankly do not believe the expenses he claimed for income tax purposes. In any event, he clearly received and sold far more of the produce than Ms. Sellars.

[117] I find that this gross disparity in income is based on at least three factors:

- (a) His violent behaviour was effective in obtaining more than his share. Ms. Sellars testified that "Mr. Harvey used bullying, threats of violence, intimidation and fits of rage to get what he wants".
- (b) Mr. Harvey travelled to Vancouver on winter weekends and sold fruit at winter markets. Ms. Sellars stayed home looking after the farm and their daughter. He conceded in an earlier affidavit that this would account for about \$30,000 per annum. So even on his evidence, he received more than 50% of the produce.

- (c) The most remunerative summer markets are at Trout Lake and Kitsilano. Mr. Harvey had stalls there. When Ms. Sellars asked to sell at his stalls, she testified, he refused.
- [118] Mr. Harvey has enjoyed a good income. He has helped himself to far more than the half share of the produce that he and Ms. Sellars agreed upon.
- [119] It is impossible to measure precisely the number of hours put in by Mr. Harvey or the number of dollars he contributed to the home and the orchard. Reapportionment is not an exercise in forensic accounting: *Y.U. v. A.S.*, 2004 BCSC 1763 at para. 44.
- [120] I have considered the factors in s. 65(1). Paragraphs (a), (e) and (f) are of particular relevance here.
- [121] First, the duration of the marriage together with the period of cohabitation was 18 years, a lengthy relationship
- [122] Section 65(1)(e) inquires as to the needs of each spouse to become or remain economically independent and self-sufficient.
- [123] Mr. Harvey argues that he is essentially destitute, but the evidence does not establish that. He has not had access to the Sellars' farm since 2017, yet he is still selling fruit at markets.
- [124] As well, I find it significant that Mr. Harvey is not pursuing a claim for spousal support. He originally sought it, but is no longer doing so. Mr. Harvey argues that the marriage agreement precludes a claim for spousal support. That is not a persuasive argument. His whole case is based on a claim that the marriage agreement is invalid and, in the alternative, unfair, and should therefore not be enforced. I therefore infer that his decision not to pursue spousal support is evidence of his lack of need for spousal support.
- [125] Section 65(1)(f) refers to "any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse". This circumstance that is relevant here is Mr. Harvey's taking of more than 50% of the produce from the farm. It is in this respect that the evidence of family violence is relevant. One of the reasons he ended up with more than half the produce is his bullying and intimidation of the claimant.
- [126] As noted, Mr. Harvey is presumptively entitled to 25% of the value of the farm, being half of the portion that Ms. Sellars purchased from her mother. However, having regard to all the factors in s. 65(1), I conclude that Mr. Harvey should receive compensation representing 12.5% of the value of the farm, that is, 25% of the value of the family asset.
- [127] If the parties cannot agree on the value of the property they are directed to agree on an appraiser of the property. They will share equally in the costs of the appraisal.
- [128] Unless the parties otherwise agree, Mr. Harvey has 90 days to vacate the property. Any charge registered by Mr. Harvey against the property including any certificate of pending litigation shall be removed.

V. Costs

[129] Both parties have enjoyed a measure of success. There will be no order as to costs.

"The Honourable Mr. Justice Kelleher"

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