
CANADA / JUDGMENT

Semnani v. Farajollahi

2011 BCSC 1222

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1222 Semnani v. Farajollahi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Semnani v. Farajollahi,

2011 BCSC 1222

Date: 20110912

Docket: E084172

Registry: Vancouver

Between:

Soudabeh Mortezaei Semnani

Plaintiff

And

Gholamreza Farajollahi

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Plaintiff:

Henning Wiebach

Counsel for the Defendant:

Hector MacDonald

Place and Date of Trial:

Vancouver, B.C.

August 8-12, 2011

Date of Written Submissions:

August 17 & 19, 2011

Place and Date of Judgment:

Vancouver, B.C.

September 12, 2011

INTRODUCTION

- [1] The plaintiff and defendant were married in Tehran Iran on July 17, 1986. They subsequently moved to Vancouver, Canada in 1997.
- [2] They have three children: two daughters aged 23 and 18, whose birthdays are approaching in September; and a son who is six years old and about to start grade 1.
- [3] The plaintiff mother is 43 years old. The defendant father is 52 years old. They separated in approximately April 2008.
- [4] In this matrimonial proceeding the parties disagree as to how their property should be divided, and also regarding custody of their son.
- [5] There were only two witnesses at trial: the plaintiff and the defendant. Many of the documents tendered contained hearsay evidence, some of it opinion evidence, such as appraisals of property in Iran. Some but not all of the challenges regarding this type of evidence were met through a document agreement of the parties; others through admissions made during cross-examination. Each party challenges the credibility of the other. Despite the challenges to credibility, no corroborating witnesses were called.
- [6] The parties seek a divorce, and I hereby so order.

PROPERTY DIVISION

- [7] The Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] provides pursuant to s. 56 that on divorce each spouse is entitled to a half-interest in each family asset (there being no triggering event in this case prior to now). However, the court may reapportion this division of property if the equal division would be unfair, taking into account a number of factors set out in s. 65 of the FRA, as follows:

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.

- [8] In addition, s. 66 of the FRA gives the court broad powers to make ancillary orders, including ordering a spouse to pay compensation to the other spouse if property has been disposed of, for purposes of adjusting the division of property.
- [9] The parties seek the Court's ruling on how to divide the only remaining significant asset of the parties in this jurisdiction, namely the proceeds of the sale of their family home located on Edgemont Boulevard in North Vancouver (the "Edgemont Property").
- [10] I have understood both parties to concede that each party can retain whatever other assets they currently have in their possession, which are generally agreed to be of little value.
- [11] The net proceeds from the sale of the Edgemont Property, in the amount of approximately \$422,000, were placed in trust with the plaintiff's lawyers when the property was sold on December 23, 2009. From this the parties agreed to pay out an unsecured line of credit of about \$20,000. There were other distributions made on an interim basis but without prejudice to the result at this trial.
- [12] The plaintiff seeks reapportionment to her of 100% of the proceeds of the sale of the Edgemont Property. The defendant seeks equal division of net proceeds of sale of the Edgemont Property after the parties paid off their unsecured line of credit, i.e. equal division of \$402,000.
- [13] In considering whether equal division of the proceeds of sale of the Edgemont Property would be fair or unfair, I must consider the entire financial picture of the parties. The factual issues between the parties, which impact on this larger financial picture, are:
 - 1. Does the plaintiff own property in Iran, with an Iranian description of Estate No. 432/218; Reg. No. 138652, Page 277 DD. Oct. 29, 1978, located at Tehran, Shemiran, Mobarek Abad 5th, Golestan Behesth Allen No. 6 & 8, District 11 (the "Golestan Property")?

2. Does the defendant own property in Iran, with an Iranian description of Property No. 2055/9, Reg. No. 36316, Page 342 DD. August 2, 1992, located in Roudehen, Damavand region (the "Roudehen Property"), or did he transfer it to his brother to pay off debts he owed his brother?
3. Does the defendant own part of his family's lumber business in Iran?
4. Does the plaintiff owe her father money and if so how much?
5. Does the plaintiff own other property in B.C., namely, an interest in a condominium?
6. What liabilities do the parties have?
7. What are the parties' respective incomes and abilities to become self-sufficient?

[14] My findings of fact determining these issues are as follows.

The Golestan Property

- [15] When the parties married, each of them owned an apartment in Tehran.
- [16] The couple began their married life living in the plaintiff's apartment, the Golestan Property, which was part of a complex owned by her other immediate family members. They lived there for approximately one-and-a-half years, followed by a break of approximately the same length when they lived in the defendant's property, after which they returned to live in the plaintiff's apartment and continued to live there until they moved to Canada.
- [17] The Golestan Property was part of an early distribution of the plaintiff's father's estate. She explained that her father, who is still alive, wanted his children to be able to inherit property after his death in equal shares, but the laws in Iran would have limited the daughters' share of this property. Therefore, he distributed shares in an apartment complex to his children while he was still living. The plaintiff received a one-sixth interest.
- [18] The plaintiff says that while a one-sixth interest in the property is registered in her name, she has no effective use of it. One reason is that she cannot readily travel back to Iran because of fear that the defendant will use the laws against her there that would prevent her from leaving. Another reason is that she has given her father complete control over the property during his lifetime, understanding that he put it in her name as part of estate planning only and wants to continue to enjoy the benefits of it during his lifetime.
- [19] To support her evidence that her father remains in control of the Golestan Property, the plaintiff points to a power of attorney given by her to her father dated July 27, 1986.
- [20] As well, the plaintiff testified that while she and her husband lived at the apartment, they paid rent to her father equivalent to the rent her husband received on his own apartment; then when he sold that property and purchased a house, did the same.

- [21] The plaintiff says that her father continues to take the benefit of the Golestan Property. As her counsel puts it, while she will have the benefit of that asset on her father's death, at present it is not an asset she can presently exploit.
- [22] The defendant challenged the plaintiff's evidence that her father has the full control and benefit of the Golestan Property. The defendant says that the power of attorney does not specifically deal with the Golestan Property, but is merely a general power of attorney. I do not see this as contradicting the plaintiff: a general power of attorney would appear to give the father power to deal with the property, although I heard no evidence on Iranian law.
- [23] The defendant also denies paying rent to her father, and said that when they lived in the Golestan Property, he simply paid over the rental monies he received on his apartment property to his wife, the plaintiff, and did not know what she did with it and never asked her. He says that he did not ever rent out the house he purchased because it was unliveable.
- [24] I do not think it plausible that in all the time the defendant was renting his apartment and living at the plaintiff's apartment, he never asked the plaintiff what she did with the rental money he gave her. I also find it unlikely that after owning a rental property, he would have sold it to purchase a property that was unliveable and that could not be rented. I therefore prefer the plaintiff's evidence on this point and find it more likely than not that the couple did pay rent to the plaintiff's father.
- [25] Nevertheless, I also conclude that the plaintiff has an enforceable legal interest in the Golestan Property. She may feel morally constrained to make choices with that property, due to her feelings of obligation to her father, but she does not contend that she is subject to any legal constraints in treating that property as her own. While it is out of this jurisdiction, the Golestan Property is part of the overall financial picture that needs to be taken into account upon the division of family assets within this jurisdiction.
- [26] The Golestan Property is currently rented out but the plaintiff said she did not know for how much.
- [27] She says that she signed a power of attorney in favour of her mother so that after her father passes away, her mother will be able to collect the rent.
- [28] I will address the value of the Golestan Property shortly.

The Roudehen Property and Loans from the Respondent's Brother

- [29] Eventually while the couple were still living in Tehran in the plaintiff's apartment, the defendant sold his apartment in Tehran and used the proceeds to purchase a house. He later sold that property to purchase a property in the suburbs of Tehran, in an area called Roudehen, the Roudehen Property.

- [30] The plaintiff and defendant, and their family, used the Roudehen Property as a vacation and weekend home. At one point, the defendant did extensive renovations to the property, with the view of opening a business selling furniture, but never did pursue that business idea. However, the property does support both a residential premise as well as a commercial one.
- [31] The defendant says that in January 2008 he agreed to transfer the Roudehen Property to his brother Hamid, to pay off a debt he owed his brother. However, when he went to register the transfer, he was blocked from doing so because the plaintiff had filed a claim to her "mehrreh".
- [32] There was not a detailed explanation of the Iranian concept of mehrreh at trial but the sense of it from both parties was that it is an amount of money determined at the time of marriage, which must be paid by the husband to the wife upon her claiming it. Here, the plaintiff admits that she has made a claim for mehrreh in Iran, and has been awarded a judgement in regards to it, registered against the Roudehen Property. This has, to date, prevented the defendant from transferring the title of the property to his brother.
- [33] The plaintiff challenges both the fact of the defendant's debt to his brother Hamid, and his agreement to transfer the property to pay this debt, and says that neither can be accepted as true. The plaintiff was not told about either of these things until this action was started.
- [34] The defendant says that the debt to his brother was in the amount of USD \$236,000. He said the debt related to payments his brother Hamid made to him after the defendant moved to Canada.
- [35] The defendant claimed this money came to him from his brother Hamid by payments over time, in several different ways:
1. deposits to the plaintiff's bank account that she held jointly with her father and which she used to pay household expenses;
 2. money sent by the defendant's brother Hamid or brother Ali directly to the defendant in the United States to help him pay his credit card bills;
 3. cash payments to the plaintiff or the defendant on their visits to Iran;
 4. payments into accounts of people in Iran who had friends or relatives in the U.S. or Canada, in return for those friends or relatives making U.S. dollar payments to the defendant.
- [36] I did not accept the evidence of the defendant that his brother Hamid had loaned him money in these several ways, adding up to USD \$236,000, and that in return the defendant paid off the debt by agreeing to transfer the Roudehen Property to his brother. The defendant's story regarding the transfer of the Roudehen Property to his brother did not fit with other evidence or common sense.
- [37] For example, the evidence indicated that the Roudehen Property was worth significantly more than the claimed debt.

- [38] When the couple immigrated to Canada, they provided sworn statements to Canadian officials regarding the value of their property. In 1996, they had the Golestan Property and the Roudehen Property appraised by a person that the defendant agreed was a qualified appraiser, and he valued the two properties at the equivalent of USD \$277,715 and USD \$257,143 respectively. In other words, the two properties were quite close in value. The parties provided this information to Canadian immigration officials, and the defendant admitted at trial that he believed it to be true at that time.
- [39] In support of his position that the plaintiff owns property of value, the defendant put forth at trial an appraisal of the Golestan Property conducted in June 2010 on his behalf by the same appraiser. He appraised the property at 12,750,000,000 rial, equal to CDN \$1,262,376. Clearly the property value had gone up significantly since 1996.
- [40] Other documents were put forth by the plaintiff to show that in respect of her claim for mehrieh in Iran, the Roudehen Property had been appraised at 12 billion rial in January 2010, which the defendant admitted is in the range of CDN \$1.2 million.
- [41] These appraisal documents do not necessarily prove the truth of their contents, but it is interesting that both parties make roughly equal assertions of value regarding the other's Iranian property. To some extent, these assertions amount to an admission against interest given that the two properties started out roughly equal in value.
- [42] The defendant suggested in his evidence that he had difficulty selling the Roudehen Property, which he had tried to do in 1996 for the equivalent of USD \$125,000. He said that sale was unsuccessful. Furthermore, he said that there were taxes involved in the transfer of the Roudehen Property and that brought the value of the property transfer to his brother at approximately USD \$300,000.
- [43] The defendant's evidence was not credible. Why would a person rely on a failed sale in 1996, to value a property approximately fourteen years later? The defendant chose not to put in his own appraisal evidence of the Roudehen Property. I can only conclude that he could not provide appraisal evidence that would dispute the inference that the Roudehen Property retained a roughly equivalent value to the Golestan Property, which he did have appraised, of approximately CDN \$1.2 million.
- [44] It makes no sense that the defendant would transfer the Roudehen Property, worth in the range of CDN \$1.2 million, to pay off a debt to his brother of USD \$236,000.
- [45] Furthermore, the defendant's evidence about the property transfer to his brother was inconsistent. On his examination for discovery, he suggested he had given his brother a power of attorney to do what he wanted with the property. This is clearly a different concept than a transfer of the property, even in Iran, as was clear from the whole of the evidence where other powers of attorney were discussed. He also suggested in his evidence at one point that his brother "seized" the Roudehen Property, again something different than a transfer.

- [46] The transfer document tendered by the defendant to prove that he transferred the Roudehen Property to his brother appeared to me as tailored to match the defendant's story at trial, but in the details it was inconsistent with the defendant's explanation of the transaction.
- [47] The translated Roudehen Property transfer document, as put forward by the defendant, stated that the buyer (the defendant's brother) paid the price equivalent to 3 billion rials, "through foreign currency drafts from 1996 [through] Jan. 20, 2008 and part of [the] price was deposited to accounts of persons introduced by the seller through foreign currency drafts". This would suggest that the total loans from the brother Hamid to the defendant amounted to 3 billion rials and was paid in foreign currency drafts.
- [48] Yet, according to the defendant's evidence at trial, the total loans as of January 2008 were just under 2 billion rials and the purchase price was bumped up to 3 billion rials to recognize that taxes would have to be paid in relation to the transfer.
- [49] Even this does not make sense because the defendant agreed that the higher the price of the transfer, the higher the tax: why would they inflate the purchase price by almost one-third, and then pay more tax?
- [50] Furthermore, according to the defendant, all of the money loaned to him by his brother was always paid in rials, some of which was given directly to him or the plaintiff in Iran, and some of which was paid into other Iranian's accounts in Iran. These were not all foreign currency drafts.
- [51] These are small details regarding the purported transfer document, but telling ones given their inconsistency with the defendant's evidence.
- [52] The defendant admitted he had no written loan agreement with his brother. He also had no contemporaneous ledger or record to show the many payments over the years that he claimed made up the loan from the brother.
- [53] Instead, at trial the defendant relied on an untranslated Farsi document purportedly created by his brother, as the summary of all the payments made over the years. Yet this purported ledger showed loans continuing to be made past January 2008, when the purported Roudehen Property transfer took place to pay off the loans. This ledger became the foundation for the defendant's after-the-fact creation of his own records for presentation at trial. However, the brother was not called as a witness at trial and so did not prove the underlying facts of this document, nor did he corroborate the defendant's story.
- [54] I was not persuaded by the defendant's evidence regarding the purported debt to his brother or the transfer of the Roudehen Property.
- [55] I conclude that the defendant still owns the Roudehen Property, and that it is roughly of equivalent value to the plaintiff's Golestan Property. I also find that any monies advanced by the defendant's brother Hamid to the defendant were not a loan.

The Lumber Business in Iran

- [56] The plaintiff agrees that the defendant's brother Hamid sent some money to her bank account. However, she said that her husband told her it was from the family business in Tehran, a lumber business, which the defendant used to work in before moving to Canada. She said he never told her he was borrowing money from her brother. She believes that the defendant still owns part of that business and receives money from it.
- [57] The defendant denied that he owns any part of the lumber business in Tehran. He does not dispute that he used to work in it.
- [58] The plaintiff says that the defendant should not be believed. He is the oldest child in his family, worked in his father's lumber business before moving to Canada, and both of his parents are deceased.
- [59] The plaintiff testified that the couple had a high standard of living when they were living in Tehran and the defendant was working in the lumber business. She explained that they had trips to Europe and Dubai, and they owned two cars.
- [60] The plaintiff says that the defendant's evidence that he has not seen his parents' Wills lacks credibility. Her counsel argues that the defendant's refusal to disclose the details of his parents' bequests should cause the Court to draw an adverse inference against him, on a similar basis as where a party to matrimonial litigation conceals assets, as in *Cunha v. da Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.) at para. 11.
- [61] The defendant denied that he had seen his parents' Wills. It was pointed out to him in cross-examination that in his Financial Statement sworn in this matter on January 6, 2009, he listed as an asset "Father's Estate (Mother has life estate) -- Iran" value "unknown", and that since then the defendant's mother had passed away. The defendant admitted putting this on his Financial Statement, but it is not necessarily inconsistent with his evidence that he had not seen his parents' Wills. He suggested also that his siblings were fighting about the estate and felt it was unfair that he inherit any of it because he had received his parents' financial help to purchase the first apartment he bought in Tehran, and his siblings had not received similar help. He suggested for this reason that he had effectively disclaimed any inheritance.
- [62] I find it helpful to consider this evidence in context of the way the parties have lived in Canada since leaving Iran, and at present.
- [63] The parties have not lived a lifestyle that would indicate that the defendant has been receiving significant dividends of some sort from a family business elsewhere. Their lifestyle in Canada has been relatively modest.
- [64] Furthermore, the parties' pursuit of employment in North America is inconsistent with the notion that they had a large amount of family wealth to support them. When the defendant came to Canada he sought a college certificate as an office assistant; after that he worked in a rug shop and the plaintiff worked as a seamstress. Later, the defendant travelled to the

United States to obtain a better job, which was working in a business that took over unsuccessful rug businesses and liquidated them. This could not have been an easy lifestyle, as it meant considerable travel without a solid home base, and took him away from his family in Vancouver. After returning to Vancouver, he again worked in a rug shop, then briefly in a coffee shop; and now he works in the warehouse of a dried fruit and nut business.

- [65] I also found it significant that when the defendant worked outside of Canada in the United States, he sent his entire pay to the plaintiff, and she deposited it in a bank account which she controlled. While the plaintiff is distrustful of a later drop in his income, this is not a case where throughout the marriage the defendant controlled the party's finances exclusively and kept the plaintiff in the dark.
- [66] I do not consider that the defendant's inability to produce his parents' Wills supports drawing an adverse inference against him that he has undisclosed assets. I do not have enough information to know whether or not receiving copies of his parents Wills would be typical or unusual in the Iranian context.
- [67] In my view, the defendant's lifestyle is inconsistent with the notion that he owns part of a successful business in Tehran.
- [68] I accept the defendant's evidence that he does not own a portion of the lumber business in Tehran.

Debts Owed to the Plaintiff's Father

- [69] The plaintiff says that her father loaned the parties \$100,000 to assist them in purchasing a house located on Edgemont Boulevard in North Vancouver. This became their family home, later sold during the course of the proceedings with the proceeds of sale held in trust. The defendant denied that the plaintiff's father loaned them money.
- [70] The parties provided me with no argument on the issue of the onus of proof and what presumptions might apply when a parent advances money to an adult child towards the purchase or maintenance of a home.
- [71] The leading decision on transfers from a parent to his or her adult child is *Pecore v. Pecore*, 2007 SCC 17. That case concerned the mixing of a father's money with that of his daughter in a joint account held by the two. In canvassing the law concerning the applicable presumptions influencing the status of the proprietary interest each side may have in the money, Rothstein J. held that the presumption of advancement, that is the presumption that a parent's advance is a gift, no longer applies to transfers from a parent to his or her adult child: at paras. 36 and 40. Instead, a gratuitous transfer of this sort is subject to a presumption of resulting trust in favour of the transferor, subject to being rebutted by the transferee. And while a parent's affection to his or her child is not a basis upon which to apply the presumption of advancement, Rothstein J. was unable to find any "reason why

courts cannot consider evidence relating to the quality of the relationship between the transferor and transferee in order to determine whether the presumption of a resulting trust has been rebutted" (at para. 37).

[72] In a decision which was made before Pecore, this Court in *Locke v. Locke*, 2000 BCSC 1300 did consider the presumption of advancement, but in doing so, reviewed the authorities and summarized the relevant factors to consider in determining whether transfers from a grandparent to a grandson to assist in the purchase of a home were a loan or a gift, at para. 20:

1. whether there were any contemporaneous documents evidencing a loan;
2. whether the manner for repayment is specified;
3. whether there is security held for the loan;
4. whether there are advances to one child and not others, or advances of unequal amounts to various children;
5. whether there has been any demand for payment before the separation of the parties;
6. whether there has been any partial repayment; and
7. whether there was any expectation, or likelihood, of repayment.

[73] In *M. (J.A.) v. M. (D.L.)*, 2008 NBCA 2, the New Brunswick Court of Appeal considered Pecore and then applied the above factors set out in *Locke* in determining whether transfers to an adult child were loans or gifts. A similar approach was followed in *E.P.J. v. A.P.E.*, 2010 BCSC 1121.

[74] I consider the following approach as consistent with the above authorities: that there is no presumption that the father's advances to his adult daughter were gifts; rather, there is a presumption of resulting trust which can be rebutted by evidence that the transfers were gifts; in considering whether or not the presumption of resulting trust is rebutted, the above factors summarized in *Locke* are helpful.

[75] The plaintiff did produce a promissory note dated September 16, 2005, witnessed by a solicitor, in which the plaintiff promised to pay her father USD \$67,225.82, without interest, upon demand. This promissory note pre-dates the marriage breakdown. Its authenticity was not challenged in cross-examination. However, the plaintiff described it as something she created as she "wanted evidence that something like that exists". It was not something the father demanded.

- [76] The plaintiff explained that her father first agreed to contribute towards the purchase of the Edgemont Property after she and the defendant had marital problems in 2001 and the defendant left the residence where they were living without telling her where he was or providing support. She said that her father wanted her and the children to have a place to live without paying rent. In her evidence, she reviewed her bank records to detail all of the advances made by her father to her over the years of the marriage.
- [77] However, I found some of the plaintiff's evidence as to the precise terms of any loan to be somewhat embellished. For example, the plaintiff said that her father loaned \$100,000 to help them buy the house. In fact, they plaintiff and defendant purchased the home in 2001 for the price of \$350,000 and paid only 10% as a down payment, with the rest being a loan secured by a mortgage. Even on her evidence when she reviewed her bank records to identify the payments received from her father, it was clear that he did not advance \$100,000 to her prior to the purchase of the property but paid her amounts over several years.
- [78] As another example, the plaintiff asserted that her husband said he would repay the money to her father in maximum three or five years. However, she did not explain who the defendant said this to and when, and what was the starting point of this time for repayment.
- [79] It was clear from the plaintiff's evidence that the father had not demanded any timetable in which to be paid back, nor had any repayments of the purported loan ever been made by her or the defendant during the marriage. The plaintiff said that she had made some interest payments to her father on the purported loan in 2007, but then agreed in cross-examination that they had never discussed the payment of interest.
- [80] This is a difficult issue to resolve without hearing any evidence from the plaintiff's father. While there was evidence that the plaintiff's father does regularly visit this jurisdiction, neither party sought to call him as a witness: the plaintiff did not call him to testify as to the amount and nature of the monies he advanced; the defendant did not subpoena him to testify that the monies advanced were a gift.
- [81] The court may only rely on the presumption of resulting trust where the court is otherwise unable to reach a conclusion on the direct and circumstantial evidence as to the transferor's actual intention: *Fuller v. Fuller Estate*, 2010 BCCA 421 at para. 47.
- [82] While I accept that the plaintiff's father gave her money, I do not accept that the money was a loan. I find the presumption of resulting trust to be rebutted by the whole of the evidence, direct and circumstantial.
- [83] While there was a promissory note, it was drawn up by the daughter without any request by the father. There was no timetable for repayment of any monies. There was no evidence of any security for the loan, or of how other siblings were treated, or of the father's financial circumstances. There was evidence that the father was protective and supportive of his daughter, as indicated by the fact that he had engaged in estate planning to ensure she would obtain a part of his estate in Iran. I conclude that the parties did not have the

expectation that these monies would be paid back.

- [84] Nevertheless, I accept that approximately USD \$67,000 monies were given by the plaintiff's father and used to help with the purchase, renovation and maintenance of the Edgemont Property, and as such, should be taken into account when I consider whether or not equal division of the family assets would be unfair pursuant to s. 65(1)(d) and (f) of the FRA.

Does the Claimant Own Other Property in British Columbia?

- [85] The defendant argues that the plaintiff has an interest in a condominium located at 1602-1211 Melville Street.
- [86] The plaintiff and her sister who lives in North Vancouver, Soheila Mortezaei Semnani, agreed to purchase this condominium in July 2007, as a pre-sale. In August 2007, they added a third sister who lives in England to the purchase contract, namely, Saideh Charlton. All three sisters were on title, as to a one-third interest each, when the sale ultimately closed in September 2008. However, the plaintiff subsequently came off title one or two months later.
- [87] The plaintiff acknowledged that she was on title for a time, but says that she did so only because it assisted the other two sisters in obtaining a mortgage, one of the sisters being a resident of England. The plaintiff says that she made no contribution to the purchase price. The defendant did not seriously challenge the plaintiff's evidence in this regard although he does not accept it.
- [88] I accept the plaintiff's evidence and conclude that she has no property interest in this condominium.

What liabilities do the parties have?

- [89] Certain debts of the parties, including their line of credit debt, were paid off when they sold the Edgemont Property. However, they both still have debts.
- [90] The plaintiff led evidence that since separation she has incurred debts which currently are outstanding in the amount of approximately \$126,000. She was not working and was living off borrowings from family and initially from a line of credit, supplemented by rent from the Edgemont Property. The plaintiff produced bank accounts to corroborate her evidence regarding receipt of monies from family members.
- [91] She claims that this level of debt recognizes that she has taken on more than an equal share of family obligations and that the defendant paid no child support or any other support since they separated in March 2008.
- [92] The defendant argues that the plaintiff has been living extravagantly. However, I did not find her expenses as explained by her to be extravagant.

- [93] In addition, the plaintiff's father, on her behalf, paid off a debt the plaintiff and defendant owed in the amount of \$17,600 which represented the loss on sale of a condominium the two had purchased pre-separation but which they later sold at a loss after separation. This condominium was located on Dawson Street, in Burnaby.
- [94] The payment of the \$17,600 shortfall was part of an agreement between the plaintiff and the defendant, whereby the defendant was to take on the couple's share of liability in relation to another condominium purchase, in a development called "Pure" located on Hornby St. in Vancouver.
- [95] The "Pure" purchase was another condominium pre-sale. The plaintiff had agreed to purchase this property in May 2007, and then, also as of May 2007, assigned it to the defendant and the defendant's brother. The defendant and his brother did not complete the purchase and were then sued by the vendor.
- [96] Apparently it was understood by the plaintiff that the lawsuit involving the Pure property would be resolved by payment of an amount by the defendant and his brother to a bond company. The defendant's share of this amount was roughly equivalent to the \$17,600 shortfall that the parties owed on the Dawson St., Burnaby property. This led to the parties' agreement that the defendant would take care of the liability on the Pure purchase, and the plaintiff (through her father's help) would pay off the liability on the Dawson Street, Burnaby property.
- [97] While the plaintiff's father did pay off the liability for the Dawson Street, Burnaby property, the defendant reneged on his end of the bargain and did not pay off the liability in relation to the Pure property purchase. Further, as a result of positions taken by the defendant in that litigation, the plaintiff has been added as a defendant to that litigation for damages in the amount of \$32,120. I am mindful not to make findings of fact that might embarrass the trial judge in that litigation. The end result of this is that the lawsuit in relation to the Pure property remains a contingent liability for both parties.
- [98] As for the defendant's own liabilities, he alleges he owes his sister approximately \$9,000 borrowed from her from January 2009 until March 2010. During that time he underwent serious neck surgery and was living with her, and had no other source of income other than withdrawals from his RRSP. Unlike the plaintiff, he did not produce supporting bank documentation of these payments from his sister, but he says they were all cash payments.
- [99] As well, the defendant claims to owe \$12,000 on a Canada Trust line of credit. He complains this is money that the plaintiff took from his line of credit in July 2009 without his knowledge. The plaintiff says that she had a power of attorney over that bank account, and needed the money to pay her expenses. Regardless, I do find that this is a liability that needs to be taken into account in considering the appropriate division of assets.

- [100] The defendant also claims to owe the Bank of Montreal \$10,000 but did not put in bank records confirming this debt and so I am not persuaded that this debt exists or should be taken into account.
- [101] Finally, in terms of debts, the defendant claims to owe half of a legal bill of \$25,000 in relation to the lawsuit regarding the Pure property. No corroborating evidence of this was introduced. I find it reasonable to not take this into account, even if it did exist, on the basis that it is reasonable to expect that both the plaintiff and defendant will have legal fees to pay in relation to that lawsuit.

What are the parties' respective incomes and abilities to become self-sufficient?

The plaintiff's income and ability to become self-sufficient

- [102] While the plaintiff did complete high school in Tehran, she married the defendant in July 1986 when she was 19 years old and he was 27 years old. It was an arranged marriage.
- [103] The plaintiff did not work outside the home when they lived in Iran. The parties' first child, a daughter, was born just over a year after they were married, in September 1987; their second child, another daughter, was born five years later in September 1992. The plaintiff had the assistance of people coming to clean the house every week, but she was the person in charge of the home and children.
- [104] When they moved to Canada in 1997, both parties started taking English courses and new immigrant courses. The youngest child was put in daycare and the oldest child was attending school. Approximately one year after they moved to Canada, the plaintiff began working at an alteration business as a seamstress, in a shopping mall outlet. She was paid approximately \$8 or \$9 an hour.
- [105] The plaintiff worked for approximately two years part-time in her job as a seamstress. She then became the store manager and became working full-time almost until the end of 2003. However, the plaintiff developed carpal tunnel problems and found it difficult to keep working, having to decrease her hours to a part-time level in 2004, and then stopped this work altogether that same year.
- [106] Since then, the plaintiff has had several health problems.
- [107] In May 2005, the plaintiff gave birth to the parties' youngest child, a boy, and she has not worked in paid employment since then.
- [108] This was a difficult birth, involving a c-section. During the procedure, the plaintiff stopped breathing. Following the birth of her son, the plaintiff had a number of other operations: operations for carpal tunnel on her hands in May and June 2005, and in June 2006 uvulopalatoplasty and tonsillectomy surgery. Because of ongoing problems, this latter surgery was followed up by further related surgery in November 2008. The plaintiff also had hysterectomy surgery in September 2008. She also experienced problems with anxiety

attacks and depression, and has seen medical professionals and received medication in relation to these conditions in 2009 and continuing.

- [109] The plaintiff continues to have problems with her hands, and moving into her right elbow. She has been receiving physiotherapy treatment, and cortisone injections.
- [110] In the meantime, the plaintiff took courses in 2008 and 2009 from a private college in relation to business and accounting. These courses were training her for an entry level position, but she realized that this would involve keyboarding, which will be a problem for her given her ongoing health problems with repetitive use of her hands. She also is not fluent in English. She wants to take some courses in AutoCAD because it involves using a mouse to operate a computer program rather than typing. She tried to take some online courses in 2010, but found it too much for her to manage, with three children at home, while she was struggling with depression and while in the midst of this litigation.
- [111] The plaintiff made some efforts to obtain employment in June 2010, applying at three retailers to work as cashier or bookkeeper, but she was not interviewed or hired. She also went to China on trips in 2010 and 2011, at her father's request, to see if she could export goods from China to Iran, but that has not been fruitful and she does not intend to pursue it.

The defendant's income and ability to become self-sufficient

- [112] The defendant graduated from high school in 1978, with two years university after that.
- [113] Before the parties married, the defendant was working in his father's lumber business in Tehran, selling wood products such as plywood and lumber. He continued in this business after marriage until the parties moved to Canada in 1997.
- [114] The defendant took English courses and new immigrant courses when he first came to Canada. He then took an office assistant course at a community college.
- [115] Some time in or around when the defendant took the office assistant course, he obtained a job selling rugs at a rug store in North Vancouver.
- [116] Later in 2000 the defendant quit the job selling rugs, and he and the plaintiff had a marital dispute in which the police intervened. The defendant left the home and did not contact the plaintiff for awhile. The plaintiff visited Iran with their oldest child, and left the other daughter in the care of her brother's family.
- [117] The defendant then found a job in the U.S. through a friend. He began working for a company known as "Miresco", which bought rug companies going out of business and liquidated the inventory. Initially the defendant worked in his personal capacity, but to simplify tax matters, incorporated a B.C. company called Eximfar Holding Ltd. ("Eximfar") which then contracted to Miresco. The defendant owns 75% of the shares and the plaintiff 25% of the shares of Eximfar.

[118] The defendant's job involved travelling to different locations in the U.S. He worked roughly nine or ten months out of a year but would return to visit the plaintiff and their children the other approximately two or three months of the year.

[119] According to the tax slips issued by Miresco, which are not disputed, the income paid to Eximfar as a result of the defendant's services, was as follows:

2003

\$44,883.44

2004

\$62,614.98

2005

\$56,649.37

2006

\$126,012.01

2007

\$70,457.82

2008

\$21,822.14

(Ex. 3 tab 47).

[120] The plaintiff was suspicious of the drop in income between 2006 and 2007, and speculated that the defendant must have diverted monies to an undisclosed location. However, the defendant denies this and explained that this change in income was due to changes in the U.S. economy. I accept the defendant's evidence in this regard.

[121] In 2007, the defendant returned to Vancouver and worked for awhile in a rug store. He left to work with Miresco from January to March 2008, when he quit and returned to Canada. The couple soon separated after that.

[122] The defendant did not obtain paid employment for some considerable time after the parties separated. He cashed in some RRSP savings in 2008 and 2009. He claims that this was for two reasons: he was looking after the parties' youngest child, the son, on weekends, and most retail jobs require some weekend work; and he had neck pain that ultimately required surgery in May 2009. The defendant produced a letter from his physician, which he relies on, which stated that the usual recovery from this type of surgery is two to three months. The defendant says that his mother died during that time period, which also made the situation hard for him.

- [123] Eventually the defendant took a part-time job in a coffee shop in August 2009. Again, he says the job did not last because he was unable to work weekends due to taking care of the parties' youngest son as their custody arrangement at that time was that the plaintiff would have the child during the week and he would have him during the weekends. The plaintiff was not asked if she could take the child in order to accommodate the defendant's work schedule.
- [124] In September 2010, the defendant started working in the warehouse of a dried fruit and nuts business. His responsibilities include taking orders, invoicing, making deposits to the banks, and some deliveries. This is a full-time job and his monthly income is \$1,707.62 currently, which amounts to \$20,491 per year.
- [125] Each of the parties argues that the other one has been under-employed since they separated.
- [126] I am not satisfied on the evidence that either one is currently deliberately under-employed. Neither one has professional training. Both have limited English language skills. I do not believe that either one has reached their full employment potential. But of the two, the plaintiff has the greatest barriers to becoming self-sufficient. The defendant's history proves that he is able to earn a living much better than he is earning now and I find that there is a greater chance that he will be able to increase his income over time.
- [127] The plaintiff is impaired from working with her hands. I find that with her lack of job skills and job experience it will be extremely difficult for her to find employment.

PROPERTY DIVISION - ANALYSIS AND CONCLUSIONS

- [128] The overall financial picture of the parties reveals that they both have roughly equal-value assets in Iran. In addition, the plaintiff has advanced a claim to "mehr" in Iran secured against the defendant's Roudehen Property.
- [129] The plaintiff has much greater outstanding liabilities than the defendant.
- [130] The plaintiff's father contributed approximately USD \$67,000.00 to the maintenance and renovations of the Edgemont Property, adding to its value. Although I have not mentioned this earlier, I also take into account the fact that the defendant also contributed some labour and time to the renovations of that property.
- [131] The plaintiff is going to have a much more difficult time becoming economically self-sufficient than the defendant, who is already self-sufficient. Whereas the defendant is currently earning \$20,000 a year and in the past has earned much more than this, the plaintiff has no income and her employment prospects are slim. She is living on the support of other family members.

- [132] Considering all of the factors set out in s. 65 of the FRA, I conclude that equal division of the proceeds of sale of the Edgemont Property would be unfair. I conclude that what would be fair would be to allocate the proceeds, after deduction of the \$20,000 which was used to pay off a line of credit debt, namely the remaining proceeds of \$402,000, by allocating 85% to the plaintiff and 15% to the defendant i.e. \$341,700 to the plaintiff and \$60,300 to the defendant.
- [133] I am advised that the defendant has already received \$20,000 on a without prejudice basis, as a pre-trial distribution of part of the proceeds of sale of the Edgemont Property. The resultant order will be that the defendant shall be distributed \$40,300 from the funds held in trust, and the balance shall be declared the property of the plaintiff.

CUSTODY AND ACCESS

- [134] At the time of separation, all three children continued to live with their mother, the plaintiff.
- [135] The eldest two children, two daughters, moved out of the home in March 2011 and share an apartment. The oldest child is a university graduate and works for a financial institution. The middle child who lives with her is a second year student in university. The plaintiff still provides her with some financial assistance.
- [136] The youngest child, the son, is 6 years old. He will be starting grade 1 in September 2011. Originally, the plaintiff was the only parent involved in looking after the son. Then, from the end of April to December 2010, the defendant took care of the son on weekends. In December, the defendant unilaterally decided to take care of the son on only one day per week, Sunday afternoon to Monday morning.
- [137] At that time, looking after the other two children, having her own medical issues and financial issues, the plaintiff became overwhelmed and she told the defendant she could not handle looking after the son for six days per week. The defendant gave her a choice: that he would either continue looking after the son for one day per week, or he would take the son from Monday through Friday. The plaintiff agreed that the defendant could take care of the son from Monday through Friday. He has since done so, and she takes care of the son on weekends.
- [138] The plaintiff continues to pay for most of the son's out-of-pocket expenses and is given the responsibility of taking him to any medical appointments or taking care of him when he is sick.

- [139] The plaintiff would prefer that custody of the son be shared on a more equal basis, so that he resides with her from Wednesday after school or daycare until Sunday mornings, and that he reside the remaining time with the defendant. She also requests joint guardianship, leaving her with the ability to make decisions if the parties do not agree, subject to the defendant being able to make an application to the court to review any decision he disagrees with, pursuant to s. 32 of the FRA.
- [140] The defendant seeks that the present custody arrangement with respect to the son be continued: he would have the son during the week; and the plaintiff would have the son during the weekends.
- [141] The defendant gave no evidence that would support limiting the plaintiff's access to the son. The plaintiff clearly has an important role in her son's life and has had primary responsibility for him for most of his life.
- [142] I consider it in the best interests of the parties' son that he maximize contact with both parents. The schedule proposed by the plaintiff appears reasonable and will allow the defendant to work on Saturdays which he has complained he has been unable to do in the past. I therefore order that the parties have joint custody and joint guardianship of their son, on the parenting schedule as proposed by the plaintiff, namely, that the son reside with her from Wednesday after school or daycare until Sunday mornings at 10:00 a.m., and that he reside the remaining time with the defendant. The party who is the custodial parent of the son at the time he is due for school must ensure he is delivered for school.
- [143] I also found that the plaintiff was more reasonable in her evidence in terms of her tone of communications. In the course of his evidence, the defendant often broke into a litany of irrelevant complaints against the plaintiff. It is evident to me that the parties may have some difficulties on occasion reaching decisions.
- [144] The parent who has the responsibility of the day-to-day care of the child at the time a significant matter affecting the child occurs must inform the other parent of that matter.
- [145] As well, each parent must discuss with the other any significant decisions that have to be made about the child and the parties must try to reach agreement on those major decisions.
- [146] If the two parties cannot agree about a major decision despite their best efforts, then the plaintiff has the right to make the decision. The defendant will then have the right, under s. 32 of the FRA, to ask for review of any decision that he considers to be not in the best interests of the child.
- [147] Each parent has the right to get information about the child directly from third parties, including teachers, counsellors, daycare staff, medical professionals, and third party caregivers.

- [148] I also make an order that neither party may take the son out of the country without the written consent of the other party.
- [149] The submissions of the defendant also requested that his Iranian passport be released to him. However, there was evidence that this may contain a passport of the son as well. I am not prepared to order release of the passport without sufficient assurances that the defendant's passport will not enable the defendant to take the son out of the country without the written consent of the plaintiff. I recommend that the parties do their best to find a solution to this issue whereby the defendant can obtain his passport and at the same time the plaintiff can remain confident that it will not allow him to take the son out of the country.

CHILD AND SPOUSAL SUPPORT

- [150] The plaintiff seeks retroactive child support and spousal support in her original statement of claim. However, this was not argued at trial.
- [151] Given my findings regarding the parties' respective incomes since separation, it is unlikely these claims would be successful in any event.
- [152] I further note that prospective child support must take priority over any claim to spousal support when the income available to discharge such obligations is modest or limited; this is consistent with the purpose of s. 93.2 of the FRA and s. 15.3 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [153] I have taken into account the plaintiff's difficulties in becoming self-sufficient in the apportionment of property.
- [154] I therefore dismiss any claims for retroactive child support or for spousal support.
- [155] The parties will be sharing roughly equal custody of their son. Based on the defendant's income of \$20,491 per year, the plaintiff's lack of income, and the Federal Child Support Guidelines, SOR/97-175, I order that the defendant pay child support to the plaintiff of \$185 per month commencing the 15th of September and continuing on the 15th of each month thereafter.
- [156] As well, the parties are to provide each other with copies of their filed income tax returns, and that of any related company, by the 30th of June, and any notice of assessment or reassessment from Canada Revenue Agency with ten days of receipt of same, each year while their son remains a child of the marriage with the meaning of the Divorce Act. I recommend to the parties that if there is a material change in income they simply agree to change the amount of child support based on application of the Guidelines, but if they are not able to reach agreement, then either party will always be at liberty to apply to court to vary child support based on a material change in circumstances.

- [157] Given the defendant's overall superior income earning potential and the fact he will not be paying spousal support, and because I consider it would be a hardship for the plaintiff currently to contribute to these expenses, I consider it appropriate that the defendant bear the cost of extraordinary expenses of the parties' son, within the meaning of s. 7 of the Guidelines, such as day care while the custodial parent is attending at employment, and health or dental related expenses that are not covered by insurance.
- [158] The plaintiff was successful and is entitled to her costs on scale on the basis of a case of ordinary difficulty, unless there are matters of which I am unaware such as offers to settle which the parties wish to address. If there are such matters, I ask the parties to bring an application to address costs in a timely way.

"S.A. Griffin, J."

The Honourable Madam Justice Susan A. Griffin

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