
CANADA / JUDGMENT

Starr v. Cusack

2013 BCSC 2000

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2000 Starr v. Cusack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Starr v. Cusack,

2013 BCSC 2000

Date: 20131101

Docket: E112564

Registry: Vancouver

Between:

Sandra May Starr,

also known as Sandra May Ryckman,

also known as Sandra M. Cusack,

also known as Sandra May Cusack

Claimant

And

Cecil Glendyn Valentine Cusack

also known as Glen Cecil Cusack,

also known as Cecil Glen Cusack,

also known as Cecil G. Cusack,

also known as Glen Cusack

Respondent

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Claimant:

D. Yamazaki

Counsel for the Respondent:

R. Cuddeford

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 14, 2013

Place and Date of Judgment:

Vancouver, B.C.

November 1, 2013

Introduction

- [1] This matrimonial action was heard by way of summary trial.
- [2] The claimant Sandra Starr, also known as Sandra May Ryckman, Sandra M. Cusack, and Sandra May Cusack (the "claimant"), seeks a declaration that the parties' marriage agreement is valid and enforceable. She then asks for a range of relief arising from its terms, including an order that the net proceeds of sale of the parties' former matrimonial home be paid \$86,125.82 to the respondent and \$334,368.00 plus interest to the claimant in satisfaction of their registered interests in that property. The amount of \$86,125.82 represents 12% of the net proceeds of sale after the deduction of amounts owing on line(s) of credit in the name of both parties.
- [3] The respondent Cecil Glendyn Valentine Cusack, also known as Glen Cecil Cusack, Cecil Glen Cusack, Cecil G. Cusack, and Glen Cusack (the "respondent"), alleges the marriage agreement had been repudiated by the claimant which he accepts. He then asks the court to reapportion the division of the parties' respective interests in the matrimonial home, as set out in the marriage agreement, pursuant to sections 65 and 66 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). In the alternative, he argues the claimant should be made to account to the respondent as follows: his share of the net proceeds of the sale of the matrimonial home should be distributed to him without deducting any amount for the repayment of line(s) of credit in the names of both parties, and the claimant should provide him with monies owed to him pursuant to the terms of the marriage agreement. This amount totals \$99,002.

Background

- [4] The parties were married on August 19, 1995. Both have adult children from previous marriages. At the time, the respondent was a sheet metal journeyman with his own business called Master Metal Products. The claimant was working for the Health Region.
- [5] After the marriage, the parties lived in a home the claimant had purchased in 1992. On April 24, 1997, the parties entered into a marriage agreement after receiving legal advice. The respective certificates of independent legal advice are attached to the agreement. The agreement provides that each party's assets would remain their sole property. The claimant is acknowledged as the sole owner of the then matrimonial home, and the respondent, the owner of his business. The agreement also provides for the management of assets and shared responsibility for joint expenses and debts during the marriage, as well as upon separation. In the event the parties contribute funds towards the purchase of another family residence, the agreement requires them, upon a subsequent sale of that family residence, to distribute the proceeds, after repayment of any mortgage, in proportion to their respective contributions. The parties expressly waive the right to seek spousal support in the event they separate.
- [6] The matrimonial home owned by the claimant was sold in 2000. The claimant used most of the proceeds to purchase a new matrimonial home with the respondent. The respondent contributed \$40,000.00 and the claimant approximately \$286,000.00 to the purchase. The parties registered the new matrimonial home in the respondent's name as to an undivided 12/100 interest, and in the claimant's name as to an undivided 88/100 interest.
- [7] In 2007, the claimant obtained an unsecured line of credit in her own name for \$70,000.00 dated June 19, 2007. She then provided the funds to her adult son for the purchase of a house. The respondent alleges the claimant threatened him with divorce if he did not sign a line of credit, secured against their home. The claimant denies this. The claimant says that at some later date in 2008 or 2009, the respondent offered to co-sign on the same line of credit to obtain a lower rate of interest by using the house as collateral. The later agreement is not in evidence. Before the respondent offered to do this, the claimant made all of the payments on the debt out of her own account. After the respondent co-signed on the line of credit, the claimant continued to make the payments herself. The evidence does not establish if they were made from her account or the joint account. The respondent says in the event of a separation or divorce he expected to be compensated for his share of the money the claimant gave her son. Paragraph 21 of the agreement requires the parties to reimburse the joint account if a parent, child or grandchild of either party becomes an expense of the joint account or joint assets not specifically listed in para. 20.
- [8] In 2009, the respondent closed his business. He moved some of his business equipment to the garage of the matrimonial home and continued to work part time.

- [9] The parties' marriage agreement requires the parties to contribute equally to their joint account. In compliance with the agreement, their practice throughout the marriage was to each deposit equal amounts into the account on a monthly or bi-monthly basis. When they did not have sufficient funds to pay for large expenses, such as vacations or property taxes, they would each contribute the shortfall on an equal basis. In late December 2010, the parties travelled to South America. The respondent contributed an extra \$10,000.00 to their joint account for unforeseen expenses during the trip. At the end of the trip \$3,500.00 of the \$10,000.00 remained in the joint account. The claimant made no extra contribution. Instead she did not require the respondent to contribute to the joint account for two months. She acknowledges that there remains a shortfall owing to the respondent. She estimates the amount of that shortfall to be \$2,800.00. The respondent's estimate is \$3,900.00.
- [10] The parties separated in February 2011, with the respondent moving out of the matrimonial home on March 7, 2011. The marriage agreement requires the parties to share equally in the cost of rent for a second residence for the party not in possession of the matrimonial home after separation. The claimant did not pay half of the respondent's rent, although he continued to contribute to the joint account in compliance with the marriage agreement until the sale of the matrimonial home. According to the claimant, the respondent did not inform her of where he was living or how much he was paying for rent. The respondent says that he did discuss with the claimant the requirement that she pay half his rent. He relies upon a document entitled "Costs of Second Residence" that lists expenses for storage and rent in 2011, totalling \$3,468.32, of which he says the claimant owes him half. At the hearing, the claimant complained the document had not been disclosed to her and was not listed in the respondent's list of documents.
- [11] Further, the respondent says that after separation, he was surprised to discover that the claimant had obtained a second line of credit in the amount \$10,000.00 the year before. He has no knowledge of what the claimant used the money for and did not consent to it being paid from the parties' joint account. In response, the claimant says the respondent is referring to a line of credit with the Bank of Montreal that they both took out during their marriage to pay for a debt they jointly incurred. She provides no further details, although her evidence regarding almost all other aspects of their joint finances is very specific. No documents confirming the existence and terms of this second line of credit agreement with the Bank of Montreal are in evidence.
- [12] On July 28, 2011, the sale of the matrimonial home was completed for \$790,000.00. The gross proceeds of the sale were \$781,809.80. An "Order to Pay" prepared by Wayne Ryan dated July 27, 2011 and amended and signed by the respondent only, shows two separate payout amounts for a Bank of Montreal Mortgage from the gross proceeds of \$54,382.68 and \$5,965.34. These amounts have been written in by hand and replace a single amount of \$60,353.66 that is crossed out. The initials "G.C." appear next to the changes. Towards the bottom of the Order to Pay, an entry which reads "balance payable by Cecil Glendyn Valentine Cusack and Sandra May Cusack", is crossed out and replaced by: "to be held in

trust G.C.".

- [13] With the consent of the respondent, \$300,000.00 was advanced to the claimant to facilitate the purchase of a new property, leaving a sum of \$417,715.12. An amount of \$420,493.82 remains in trust including interest as of July 19, 2013. At the hearing the claimant argued that by signing the Order to Pay, the respondent consented to pay half the lines of credit as required by the marriage agreement. The respondent strongly disagreed, arguing he only signed the document to facilitate the claimant's purchase of a new property.
- [14] In or about May 2011, the respondent purchased a home in Maple Ridge which had an approximate value of \$187,000.00.
- [15] The claimant filed a notice of family claim on August 18, 2011, seeking orders for divorce, change of name, and costs. The marriage agreement was filed the following day. The respondent filed a response and counterclaim on August 24, 2011, seeking orders for divorce, spousal support, and reapportionment of family assets on the grounds the parties need to maintain their financial independence, and costs. The claimant's response to the counter claim was filed September 26, 2011.
- [16] The respondent closed the parties' joint account on or about November 10, 2011, paying an overdraft fee.
- [17] The parties are both of retirement age. The claimant, now about 66, remains employed full time as a payroll benefits reconciliation clerk with Health Shared Services BC. She has worked for the Health Region for over 26 years. In 2012, her Line 150 income was \$61,391.00. She expects her income for 2013 to be \$57,579.48. She plans to retire when this proceeding is concluded. At that time, she estimates her income will drop to \$30,432.00 including her pension benefits, CPP, and Old Age Security. The claimant's most recent sworn financial statement lists other financial assets in the amount of \$438,454.12 and RRSPs valued at \$109,735.00. She has not included any income from these sources in her estimate of her post retirement income. The mortgage on her current home is listed at \$174,929.00.
- [18] The respondent is now 72. He is retired and receives CPP and Old Age Security benefits. In his most recent sworn financial statement, he says he receives \$13,273.32 from CPP and OAS and \$12,000 in RRSP income for a total annual income of \$25,273.32. His financial statement values the respondent's RRSPs at \$117,417 and his other financial assets at \$15,641.45. Unlike the claimant, he does not have a private pension. His mortgage liability is listed as approximately \$85,000.00. The respondent's line 150 income for 2012 was \$18,112.28.
- [19] At the summary trial, the respondent advised the court that he was not advancing his counter claim for spousal support.
- [20] The parties were divorced by Order of the court on March 6, 2012.

Issues

The court is required to decide the following issues:

- 1) Repudiation:
 - a. Did the claimant breach the marriage agreement?
 - b. If so, did the breach(es) amount to repudiation of the agreement?
 - c. If there was any breach(es) of the marriage agreement, are damages appropriate?
- 2) Reapportionment: should the proceeds of sale of the matrimonial property be reapportioned pursuant to s. 65 of the FRA?

Repudiation

- [21] The respondent argues that following their separation the claimant repudiated the parties' marriage agreement and he accepts that repudiation. It is his principle submission that the repudiation occurred when the claimant sought to pay the respondent \$86,125.82, which is 12% of the net proceeds of sale after payment of the two lines of credit with the Bank of Montreal. The respondent submits the claimant's position effectively makes the respondent responsible for the claimant's decision to remove a portion of her contribution to the matrimonial home for the purpose of lending money to one of her children. The respondent characterizes her conduct as contrary to the heart of the agreement.
- [22] One of the other grounds for the argument of repudiation is the claimant's acknowledgement of amounts owed to the respondent for vacation money pursuant to the terms of the agreement, which she has not paid. Another is her failure to pay half of the cost of the respondent's rent following their separation, again in breach of the terms of the agreement.

Did the Claimant Breach the Marriage Agreement?

The Lines of Credit

- [23] With respect to the first line of credit, the only document before the court is the initial line of credit agreement signed by the claimant which is unsecured and thus not a mortgage. The respondent says, however, he agreed to co-sign the first line of credit secured against the matrimonial home, albeit under threat of divorce. He therefore does not appear to dispute that he is jointly responsible for repayment of the debt vis-à-vis the Bank of Montreal. He instead asserts the claimant should not require him to contribute to this debt given the terms of the marriage agreement. I note parenthetically the respondent makes no formal claim of duress or coercion arising from the claimant's alleged threat of divorce. Given the claimant's denial of any such threat, I decline to consider this issue further.

- [24] With respect to the second line of credit, the respondent says he only discovered this debt after separation. Having no knowledge of it, he did not consent to paying for it through the joint account. The claimant says in response the parties took out a joint line of credit during the marriage at the Bank of Montreal to pay for a debt incurred by both of them. The claimant has not identified the debt they both incurred or the surrounding circumstances. She also has not provided any documentary evidence setting out this second line of credit agreement or its nature and terms. The only evidence apart from what the claimant says, is an undated faxed copy of a letter from the Bank of Montreal to Ryan Law Group regarding a payout figure as of July 28, 2011 for a loan in the amount of \$5,965.34. The same amount is listed on the Order to Pay as the second of two handwritten amounts next to an entry for "Pay out of Bank of Montreal Mortgage" as of July 29, 2011.
- [25] I firmly reject the claimant's argument that by signing the Order to Pay, the respondent was acknowledging his obligation to pay half of each of the lines of credit as between the parties pursuant to the terms of the marriage agreement. This is entirely inconsistent with the handwritten changes to the document made by the respondent, his evidence, and his submissions on this point which I accept.
- [26] Having rejected the claimant's above argument, I now turn to the provisions of the marriage agreement.
- [27] When interpreting a contract, the court seeks to give effect to the true intention of the parties. To the extent possible, effect should be given to all of the provisions of the contract. It is a well-known rule of contract interpretation that the various clauses of a contract cannot be considered in isolation but must be interpreted in the context of the entire agreement: see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 1st ed. (Markham, ON: LexisNexis Canada Inc., 2007) at p. 11. One of the purposes of this rule is to eliminate inconsistencies and ambiguities in contracts. When a contract is read as a whole, different parts of it should, if possible, be reconciled with one another to eliminate inconsistencies. Thus the court should strive to harmonize apparently conflicting terms in a contract provided that doing so does not result in an absurdity: *Canadian Contractual Interpretation Law* at p. 13.
- [28] The parties here intended that each remain the sole owner of the property they brought into the marriage. The sharing of joint expenses and the use of the parties' joint account is highly prescribed. The recitals set out the parties' purposes in entering the agreement as follows:
1. to resolve ownership and management of all property, real or personal, communal or otherwise, owned or which may be owned by either of them jointly or severally;
 2. to resolve management, ownership, and division of all family assets and other property during their marriage;

3. to resolve ownership and division of family assets and other property on the making of an order for dissolution of marriage or judicial separation or a declaration of nullity of marriage; and
4. to resolve ownership and division of family assets and other property upon the death of either of the Parties.

[29] Other paragraphs of the agreement of particular relevance to the issue of the lines of credit are as follows:

B. FAMILY RESIDENCE

10. In the event of the sale of the New Residence, the proceeds of sale therefrom, after paying all usual costs of disposition and repaying any mortgage, shall be distributed in a manner proportionate to the Parties' respective contributions towards the purchase of the New Residence.

C. MANAGEMENT OF ASSETS AND RESPONSIBILITY FOR EXPENSES

20. The Joint Account may be used for costs associated with the parents, children or grandchildren of either of the Parties. These costs to be paid from the Joint Account shall be limited to Christmas, birthdays, weddings, graduations, special achievements, family dinners at the Parties' home or away, transporting Sandra's parents, emergencies, and other activities mutually agreed upon.
21. If a parent, child or grandchild of either of the Parties becomes an expense of the Joint Account, or Joint Assets, except as provided in paragraph 20, then Glen or Sandra shall, to the best of their ability, reimburse the Joint Account.

D. GENERAL

26. Each of the Parties shall be liable for one-half of any debt or liability incurred jointly.
- [30] Under the heading "Interpretation", there are also a number of provisions including para. 4 which provides the words and phrases contained in the agreement shall have the same meaning as assigned to the defined terms in the FRA. The agreement provides no definition for the phrase "Joint Asset" that appears in para. 21, or the phrase "incurred jointly" that appears in para. 26. No definition of these phrases appears in the FRA.
- [31] Applying the agreement to the lines of credit, para. 10 explicitly provides that the proceeds of sale of the former matrimonial home are to be distributed to the parties according to their respective contributions, subsequent to the repayment of "any mortgage". Although I accept the respondent's position that he was unaware of the second line of credit, the Order to Pay indicates that the loan in the amount of \$5,965.34 was for a Bank of Montreal mortgage. It follows that the claimant is not in breach in seeking to deduct this amount from the respondent's portion of the net proceeds of sale. With respect to the first line of credit, it appears the respondent has taken the position that it was jointly incurred. He admits to

having co-signed on the first line of credit, putting up as security the former matrimonial home. Accordingly, both paras. 10 and 26 of the agreement apply so as to make each party liable for half that debt. It follows that the claimant is not in breach in seeking to deduct the amount of \$54,382.68 from the respondent's portion of the net proceeds of sale.

- [32] As for paras. 20 and 21, when one reads the marriage agreement as a whole, there is no inconsistency or ambiguity regarding the application of the agreement to the lines of credit.
- [33] Paragraphs 20 and 21 indicate an intention on the part of the parties to expressly limit what expenses their adult children can make on the Joint Account or Joint Assets. Any expenses beyond those specifically listed in para. 20 result in the person who made them incurring an obligation to pay back that expense.
- [34] However, para. 21 must be read in light of paras. 10 and 26.
- [35] First, para. 21 places an obligation on "Glen or Sandra" to reimburse the Joint Account. On its face, para. 21 only applies where either Glen or Sandra unilaterally incurs an expense on the Joint Account or Joint Assets not listed in para. 20 in respect of their adult children. If an expense which would otherwise fall within para. 21 is a debt or liability "incurred jointly", then para. 26 - and not para. 21 - applies so as to make each party liable for half that debt or liability. That is the case with the first line of credit.
- [36] Second, para. 10 expressly provides for a specific type of expense, namely a mortgage. To the extent that it could be said the second line of credit was not "incurred jointly" within the meaning of para. 26, there is no conflict between paras. 10 and 21, as it is clear that para. 21 was not intended to apply to mortgages.
- [37] For these reasons, and despite the unfortunate lack of a proper evidentiary record, I find the claimant not in breach of the marriage agreement by seeking to deduct amounts owing on the lines of credit from the respondent's share of the proceeds of sale of the former matrimonial home.

The South American Vacation and the Respondent's Rent

- [38] On the evidence, it is clear that the claimant's failure to contribute to the parties' joint account equally for the cost of the South American vacation is a breach of para. 15 of the marriage agreement. The claimant admits as much. I accept the respondent's estimate of this cost which is \$3,900.00.
- [39] It is also clear from para. 9d of the agreement that she is required to pay half of the cost of the respondent's rent. Whether or not the respondent failed to list and previously disclose the Costs of Second Residence, is not an adequate answer, bearing in mind the respondent's evidence that he did discuss with the claimant his living and moving expenses and what she was supposed to pay.

[40] Further, the whole of the claimant's application is based on enforcing the terms of the marriage agreement. Paragraph 9d provides that both of the parties shall share equally in the cost of rent for a second residence for the party not in possession of the matrimonial home during separation. If not before, the claimant is aware now of the amount claimed by the respondent. She does not, however, suggest that she ought to pay any sum for the cost of the respondent's rent. By taking this position and failing to pay or offer to pay her share as part of the terms of the order sought, she commits another breach of the marriage agreement.

[41] I accept the respondent's estimate of his storage and rental costs, which is \$1,734.16. However, as para. 9d of the marriage agreement only refers to the cost of rent for a second residence, the respondent is only entitled to \$1,568.00, representing half the cost of rent.

If there was any Breach(es) of the Marriage Agreement, did the Breach(es) Amount to Repudiation of the Agreement?

[42] In light of my findings that the claimant breached the marriage agreement by failing to contribute equally to the joint account and by not paying for her portion of the respondent's rent expenses, I turn to consider whether these breaches resulted in a repudiation of the agreement.

[43] Both parties reference *Smith v. Lau*, 2004 BCCA 443, which approves of the following statement of the test for repudiation at para. 41:

The legal test for repudiation of a contract arising out of a fundamental breach was considered in this Court in *Ballantyne v. Grone* (1989), 22 R.F.L. (3d) 217 at 219-20, where Hinkson J.A. for the Court adopted the summary of the law stated by Cameron J. (as he then was) in *Borg-Warner Accept. Can. Ltd. v. Wyonzek*, [1981] 4 W.W.R. 193, 122 D.L.R. (3d) 737 (Sask. Q.B.) at pp. 744-45:

Whatever its limitations or the subtle shades of its essence the doctrine with all its imperfections is embedded in Canadian law and at least for the purposes at hand may be sufficiently if not exhaustively nor perfectly stated thus: a fundamental breach is one going to the very root of the contract; where one party fails to perform the very purpose for which the contract is designed so as to deprive the other of the whole or substantially the whole of the benefit which the parties intended should be conferred and obtained, such breach goes to the very root of the contract, and the party not in default is absolved from performing his end of the contract.

[Underlining added.]

[44] I find that the test for repudiation as a result of a fundamental breach sets a high bar that is simply not met on the facts of this case. Even if it is assumed that the claimant has failed to perform the very purpose for which the contract is designed, it cannot be said that such non-performance has deprived the respondent of "the whole or substantially the whole of the benefit which the parties intended should be conferred and obtained" by the marriage agreement. Although the claimant's breaches of the agreement deprived the respondent of some benefit owed to him under the agreement, they are not in the nature of a complete or

substantially complete denial of the benefit conferred upon him by the agreement.

- [45] For example, the respondent has obtained a benefit from the agreement in that it ensured his assets, as outlined in Schedule B to the agreement, are his "sole property and shall remain such, notwithstanding the occurrence of any of the events set out in section 43 of the British Columbia Family Relations Act" (para. 33 of the marriage agreement). There is no suggestion that benefit has been negated by the claimant's breaches.
- [46] I distinguish the case of *Owen v Owen*, 2011 BCSC 1284, relied upon by the respondent, where the court found that the respondent repudiated a separation agreement. In *Owen*, the parties entered into a separation agreement in 2008 which provided for spousal support of \$20,000.00 per month and an equal division of family property. By 2011, the respondent had never paid the full \$20,000.00 per month nor the accumulating arrears (which the claimant estimated at \$574,284.00). The respondent had also failed to equally divide an investment account.
- [47] Accordingly, I find the marriage agreement, although breached by the claimant, was not repudiated.

If there was any Breach(es) of the Marriage Agreement, are Damages Appropriate?

- [48] The respondent has not specifically pleaded damages for the claimant's breaches of the marriage agreement with respect to the South American vacation, or the respondent's rent.
- [49] However, it is a well-recognized principle that the Supreme Court's inherent jurisdiction permits it to "grant such remedies as may appear to be necessary to do justice" between the parties: see *Fraser, Horn & Griffin, Conduct of Civil Litigation in BC*, 2d ed. (Markham, ON: LexisNexis Canada Inc., 2007) vol. 1 at §5.6.
- [50] In *Williams and Rees v. Local Union No. 1562 of the United Mine Workers of America*, [1919] 1 W.W.R. 217 at 109 (Alta. S.C., App. Div.), rev'd on other ground [1919] S.C.J. No. 45, Beck J. put the proposition this way at para. 109:

I believe my brother judges accept the opinion I expressed son" e [sic] time ago as follows:--

That every superior court is the master of its own practice is a proposition laid down by Tindal, C.J., in *Scales v. Cheese* (1844), 12 M. & W. 685, 152 E.R. 1374, and adopting this, I think that, without any statutory rules of practice, the court can, should a case arise, even though the law be fixed as to the substantial rights of the parties, award such remedies, though they be new, as may appear to be necessary to work out justice between the parties. (*The Development of the Law*, 36 Can. Law Times, p. 382.)

- [51] It may be argued that to award damages in this case would contravene Rule 3-1(2)(b) of the Supreme Court Civil Rules, BC Reg 168/2009, which states that a notice of civil claim must "set out the relief sought by the plaintiff against each named defendant".

[52] However, in *Penderville Apts. Development Partnership v. Cressey Development Corp.*, [1990] B.C.J. No. 278 (C.A.), Madam Justice Southin emphasized that

[t]here are no absolute and untrammelled rights under the Rules and that every right under the Rules, being a procedural right, is subject to the overriding power of the Supreme Court to prevent its procedure being oppressive to any person who is within its jurisdiction.

[53] I find it would be oppressive to the respondent in these circumstances to deny him monetary relief for the claimant's breaches of the marriage agreement, due to failure on the part of his counsel to specifically plead such relief.

[54] Accordingly, I award the respondent \$5,634.16 in damages for the claimant's breaches of the marriage agreement (representing \$3,900.00 for the shortfall regarding the South American vacation, and \$1,568.00 for the claimant's portion of the respondent's rent) plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 ("COIA").

Reapportionment

[55] In addition to the argument regarding repudiation of the marriage agreement by the claimant, the respondent also seeks a reapportionment of the division of property set out in the agreement, pursuant to s. 65 of the FRA. The respondent proposes that the division of the parties' interests in the matrimonial home be reapportioned to grant the claimant 70% and the respondent 30%.

[56] By operation of section 252 of the Family Law Act, S.B.C. 2011, c. 25, the provisions of the FRA continue to apply to the parties' dispute over property division.

[57] Subsections 56(1) and (3) of the FRA provide that, each spouse is entitled, subject to the terms of a marriage agreement, to an undivided one-half interest in all family assets, upon the happening of a triggering event. Subsection 56(2) specifies that the interest of each spouse set out in subsection (1) is an undivided half interest as a tenant in common.

[58] The FRA explicitly recognizes marriage agreements as a mechanism governing the division of property upon marriage breakdown. More specifically, pursuant to section 61 of the FRA, parties are permitted to enter into marriage agreements before or during their marriage for the management or division of family assets or other property during the marriage or after separation. Subsections 61(3) and (4) provide that if a marriage agreement is in writing, signed by both parties and witnessed by one or more other persons, then its terms regarding ownership and division of family assets are binding regardless of whether there is valuable consideration for the marriage agreement.

- [59] A valid and binding marriage agreement does not preclude a reapportionment of family assets on the grounds of unfairness. Section 65 of the FRA stipulates that if the division of property under a marriage agreement is unfair, the court may make an order that the property be divided into shares fixed by the court. Subsection 65(1) sets out a list of factors the court must consider in assessing unfairness of a marriage agreement governing property division. They include:
- (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,
- [60] The effect of s. 65 is that even though a valid agreement is not set aside, its terms regarding division of property can be varied by the court. The courts have held that a properly negotiated agreement is not unfair simply because it produces a different result from the statutory scheme. In other words, a fair division is not necessarily an equal division: *Elliott v. Elliott*, 2007 BCSC 98.
- [61] The claimant relies on *Hartshorne v. Hartshorne*, 2004 SCC 22, where the Supreme Court of Canada considered the application of s. 65 of the FRA to a pre-nuptial agreement, in support of her position that the parties' marriage agreement is enforceable and fair.
- [62] In *Hartshorne*, the court identified fairness as the primary policy objective that guides the courts' role in the division of property upon marital breakdown. To give effect to this objective, the court determined that parties must be encouraged to enter into marriage agreements that are fair, and respond to the changing circumstances of their marriage by reviewing and revising their agreements for fairness when necessary: *Hartshorne* at para. 36. At the same time, however, the court prescribed judicial reluctance to second guess the private arrangements parties reasonably expected to rely upon: *Hartshorne* at para. 36. In discussing the need to reconcile respect for the parties' autonomy to arrange their own financial affairs in the event of a marital breakdown with substantive unfairness, the court focused on the operation of the agreement at the time the application for reapportionment is made.
- [63] *Hartshorne* sets out a two-step test to determine whether a marriage agreement operates unfairly and reapportionment is appropriate. Under the first step, the court must apply the agreement to determine the respective entitlements of each spouse. Then at the second step the court must consider the factors listed in s. 65(1) of the FRA and determine the issue of

fairness by examining whether the parties' present circumstances were reasonably contemplated at the time the agreement was signed, and, if so, whether the agreement made adequate provision for such circumstances. At para. 43, the court framed the second step in this way:

[t]he essence of this inquiry is whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed, and, if so, whether at that time the parties made adequate arrangements in response to these anticipated circumstances.

[64] On a plain reading of Hartshorne, even if the circumstances at the time of separation were within reasonable contemplation of the parties at the time the agreement was formed, the agreement may still be found unfair because the parties made inadequate arrangements in response to these anticipated circumstances. The case of *Waters v. Conrod*, 2005 BCSC 472, aff'd 2007 BCCA 230, supports this reading of Hartshorne. In *Waters* at paras. 42-43, Cole J. found that a marriage agreement was unfair notwithstanding the fact that the parties' circumstances at the time of separation were reasonably foreseen at the time of the agreement.

[65] At para. 47 of Hartshorne, the court further elaborated on the second step of the unfairness analysis:

At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which those circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances.

[66] It is clear that the primary policy objective of fairness will only be satisfied where the consequences of marriage breakdown are shared equitably in all of the circumstances, considering the factors listed in s. 65(1).

[67] The respondent did not make any submissions regarding the application of the two-step test in Hartshorne to advance his claim for reapportionment of the parties' shares in the matrimonial home, other than to comment that after a 16 year marriage more parity is in order. Nor did the respondent discuss the application of the factors set out in s. 65(1) to the circumstances of this case. Instead he argued about the general unfairness involved in the claimant's application to deduct the line of credit funds equally from the sale proceeds of the matrimonial home. He reviewed the undisputed evidence that the claimant made all payments on the line of credit from her own funds both before and after the respondent co-signed on the same. He described this evidence as establishing that the claimant recognized the respondent's responsibility vis-à-vis the line of credit was that of an accommodation

party. The respondent's basic assertion is that the claimant's decision to subsequently "stint" him makes this an appropriate case to vary the agreement. He submits that if the respondent is found equally liable for the lines of credit, the court ought to reapportion his share in the proceeds of the matrimonial home to 30%.

- [68] Given the absence of submissions from the respondent on the application of the Hartshorne test, I embark on that analysis somewhat reluctantly. The onus of proof lies on the person seeking reapportionment: *Toth v. Toth*, [1995] B.C.J. No. 1993 at para. 62 (C.A.).
- [69] The first step of the Hartshorne test involves applying the agreement. Pursuant to paras. 10 and 26 of the marriage agreement, the respondent would receive 12% of the net proceeds from the sale of the matrimonial home after deducting the amounts owing on the lines of credit. That leaves him with \$86,125.82. The claimant having already received a \$300,000.00 advance on the net proceeds, would receive an additional \$334,368.00 to equal her 88% interest in the matrimonial home. The parties waived their right to seek spousal support under the agreement. The parties would also retain their own assets, defined as sole property under the marriage agreement.
- [70] The second step of the Hartshorne test is to determine with reference to the factors in s. 65 of the FRA whether the agreement operates unfairly, in light of the circumstances existing at the time the agreement was entered into and what has occurred since.
- [71] Although the respondent speaks of the claimant's breaches of the agreement giving rise to unfairness, the agreement itself is the primary source of the respondent's discontent, that being the clauses requiring the parties to make equal contribution to joint debt or mortgages.
- [72] One of the most significant changes in the parties' circumstances since the agreement was made is the closing of the respondent's business and his retirement. The other significant change was the introduction of the first line of credit in the name of the claimant, and then in both parties' names, secured against the matrimonial home. Prior to the first line of credit the matrimonial home was unencumbered.
- [73] I find all of these changes were reasonably foreseeable at the time the parties signed the marriage agreement. The closing of the respondent's business and his retirement were clearly within the reasonable contemplation of the parties, who were contracting a marriage agreement in the context of a second marriage. As for the first line of credit secured against the matrimonial home, it was reasonably foreseeable at the time of the marriage agreement that the claimant's adult son might impose a significant expense on the respondent. The parties explicitly attempted to limit one spouse's liability for the expenses of the other's spouse's adult children in paras. 20 and 21 of their marriage agreement. The enumeration of acceptable expenses in para. 20 of the agreement underscores the parties' intention, at the time of contracting, to shield themselves from liability for potentially large expenses imposed by their respective adult children down the road.

- [74] In my view, unfairness arises in this case, not from unanticipated circumstances at the time of the marriage agreement, but from inadequate provision in the agreement for reasonably anticipated circumstances. In this regard, the instant case resembles *Waters*. While the changes in the respondent's situation since the marriage agreement were reasonably anticipated at the time that agreement was signed, the agreement itself made inadequate provision for those anticipated changes.
- [75] Paragraphs 10 and 26 of the marriage agreement provides for an equal obligation to pay a mortgage or jointly incurred debt or liability without any regard for the relative benefits received by each spouse for the mortgage or debt. Under those clauses, one spouse could jointly incur a mortgage or debt with the other, derive no benefit therefrom, and still be required to repay half of the mortgage or debt. Indeed, this is precisely what has happened. The first line of credit was not incurred for the parties' joint benefit or purpose but solely to facilitate the claimant lending money to her adult son. The respondent was not aware of the second line of credit, and there is no evidence that he derived any benefit from it. In the context of the respondent's post separation financial position, which was reasonably foreseeable at the time of the agreement, paras. 10 and 26 are inadequate and applying them creates an inequitable result.
- [76] My finding that the marriage agreement made inadequate provision for reasonably anticipated changes in the parties' financial circumstances is based upon the relevant factors in s. 65. The most important factors in this case are s. 65(1)(e) and (1)(f).

Section 65(1)(e): The Needs of Each Spouse to Become or Remain Economically Independent and Self Sufficient

- [77] Both parties need to be economically independent and self-sufficient. These needs are determined with reference to their standard of living prior to separation, as well as their financial circumstances arising out of their post separation circumstances: *Fong Estate v. Fong*, [1983] B.C.J. No. 2103 at para. 26 (C.A.).
- [78] In terms of the parties' post separation financial circumstances, the respondent has been retired since some time in 2009. The claimant continues to be employed full time although she intends to retire in the near future. She will encounter a drop in income at that time, but will continue to earn significantly more than the respondent because of her private pension, her sizeable financial assets, and her RRSPs. The respondent is confined to income from his CPP and OAS, as well as some income from his RRSPs. Although the relative incomes of the parties have not varied substantially since their separation because the respondent was already retired, and they both now own their own homes with not insignificant mortgages, the respondent has a low income and is at risk of an almost 50% drop in that income, when income from his RRSPs which he now values at \$117,417.00 is no longer available.

- [79] It should be stated that while the marriage agreement provides for the claimant's contributions to the respondent's rent, both parties have waived an entitlement to spousal support. Therefore, this case is unlike *Hartshorne*, where the availability of spousal support was a significant factor in addressing the different economic positions of the parties. Moreover, in *Hartshorne* the wife was able to secure re-employment as an associate at a law firm. Obviously, the respondent's position is not comparable in that regard.

Section 65(1)(f): Other Circumstances Relating to the Acquisition, Preservation, Maintenance, Improvement or Use of Property or the Capacity or Liabilities of a Spouse

- [80] The claimant contributed 88% of the cost to the purchase of the matrimonial home with the proceeds of sale from her own home which the respondent also lived in during the early part of their marriage. At the outset of the agreement, the claimant had a company pension through North Shore Health, CPP credits, RRSPs of approximately \$30,000.00, her own bank accounts with unknown balances and her interest in the previous matrimonial home assessed at \$303,000.00. The claimant now has approximately \$438,000.00 in financial assets. The respondent conversely has accumulated almost none. Both parties saw a comparable rise in the value of their RRSPs during the marriage. The only joint debt of the parties is the first line of credit amount incurred in order for the claimant to assist her son in purchasing a house which was originally in the amount \$70,000.00 but reduced to \$54,382.68 at the time it was repaid in July 2011.
- [81] As noted by the Court of Appeal in *Beese v. Beese*, 2008 BCCA 396 at para. 46, the significance of family debt to the issue of reapportionment has been discussed by many authorities, including *Stein v. Stein*, 2008 SCC 35. The term "family debt" has no statutory significance. It has evolved to designate a liability of either or both of the spouses incurred for a family purpose, reflecting the reality that in order to ensure fairness both debts and assets must be considered after marriage breakdown: *Stein* at para. 10. It is s. 65(1)(f) that provides the court with the legislative authority to consider debts incurred by spouses during a marriage as grounds for reapportioning family assets: *Hart v. Hart*, 2012 BCSC 334 at para. 223.
- [82] In *Hart*, the court relied upon the decision of Mr. Justice Lambert in *Mallen v. Mallen*, [1992] B.C.J. No. 648 (C.A.). Mr. Justice Lambert held the FRA does not require the same approach to be taken in every case when debts are incurred by one or both spouses prior to the triggering event: *Mallen* at para. 4. He stated the proper focus for the examination of a debt should be on the nature and purpose of the borrowing and on the expenditure of the borrowed funds: *Mallen* at para. 6. If the funds were used to acquire a family asset or for a family purpose, it is likely an equal sharing of the debt or liability will be required; if the funds were used for an entirely personal reason by one of the spouses, it is likely that equality and fairness will require that spouse to bear the whole burden of the debt after the triggering event: *Mallen* at para. 6.

- [83] Examining the nature and purpose of the line of credit debts in the instant case, it is apparent that the funds were used in a way that secured no benefit for the respondent. The claimant provided the funds from the first line of credit to her adult son for his purchase of a home. Similarly, there is no evidence that the funds from the second line of credit secured any benefit for the respondent, or were used to acquire a family asset or for a family purpose. In light of these circumstances, I find that equality and fairness, as discussed in *Mallen*, require the claimant to bear the whole burden of the line of credit debts.
- [84] In this regard, I note the case of *Crawford v. Crawford*, [1994] B.C.J. No. 2370 (S.C.), where the court reapportioned the parties' respective interests in the family home partly on the basis that to equally divide a joint loan for which the petitioner apparently received no benefit would have resulted in unfairness. The parties' sole asset consisted of their home, which had a net value of \$31,144.00. The court found that family debts consisted of \$5,340.00. The petitioner had signed a joint loan under pressure from the respondent which was secured against a truck purchased by the respondent. The truck was seized by the creditor and the joint loan was being sued upon. On an equal division of the home, after allowing for family debts, each party would have been entitled to \$12,902.00. However, partly because of the loan obligation, the court found it would be unfair to divide the family assets equally, and so ordered a 70/30 division of the home in favour of the petitioner.

Conclusion on Reapportionment

- [85] In concluding the marriage agreement operates unfairly, I am aware there is a range of what may be considered fair in such a case and reasonable deviation from that range need not result in a reapportionment. The allocation of debt that arises from the operation of the marriage agreement, in light of the relatively poor financial circumstances of the respondent, is what grounds my finding of unfairness here. At age 72 and retired, the respondent is not in a position to better his income. He faces a future in which his already low income will only continue to decline and by almost as much as half. Consequently, the loss of any amount of his interest in the net proceeds of the sale of the matrimonial home is a significant one for him.
- [86] Accordingly, I find that the proceeds of sale of the matrimonial home should be reapportioned such that the respondent receives his 12% share of the net proceeds of sale of the matrimonial home without deducting an amount for any mortgage. That leaves the respondent with \$93,368.25.

Summary

- [87] I assess damages against the claimant in the order of \$5,634.16 plus interest pursuant to the COIA which she shall pay to the respondent forthwith for breaches of the marriage agreement;

[88] I order that from the funds held in trust representing the remaining net proceeds of sale from the sale of the matrimonial home and all interest earned on the same shall be paid to the parties as follows:

- a. \$93,368.25 of the net proceeds of sale (being his 12% share of the net proceeds of sale prior to the deduction of any mortgage) plus a proportionate share of any interest accrued shall be paid to the respondent;
- b. the balance of the net proceeds of sale, plus the balance of any interest accrued shall be paid to the claimant.

[89] I further order the following:

- a. the claimant shall be the sole owner of personal and family property registered in her name;
- b. the claimant shall be solely responsible for all debts registered in her name;
- c. the claimant shall indemnify and save harmless the respondent from any and all actions, causes of action and claims which have arisen or may arise with respect to any debts or obligations incurred by the respondent as security for loans and obligations incurred by the claimant;
- d. the respondent shall be the sole owner of personal and family property registered in her name;
- e. the respondent shall be solely responsible for all debts registered in her name;
- f. the respondent shall indemnify and save harmless the claimant from any and all actions, causes of action and claims which have arisen or may arise with respect to any debts or obligations incurred by the claimant as security for loans and obligations incurred by the respondent;
- g. the respondent's claim for spousal support is dismissed; and
- h. the balance of the relief claimed in the claimant's Notice of Claim and the respondent's counterclaim shall be dismissed.

[90] Both parties have asked the court to reserve on the issue of costs.

"Madam Justice M. Fleming"

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