
CANADA / JUDGMENT

Stevens v. Stevens

2019 BCSC 596

COURT

Supreme Court of British Columbia

DECIDED

17 April 2019

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2019 BCSC 596 Stevens v. Stevens

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stevens v. Stevens,

2019 BCSC 596

Date: 20190417

Docket: 39848

Registry: Penticton

Between:

Colleen Jane Stevens

Claimant

And

Dana Phillip Stevens

Respondent

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Claimant:

D.M. King

The Respondent on his own behalf:

D.P. Stevens

Place and Date of Trial:

Penticton, B.C.

February 26 - 28;

March 1, 4-8, 2019

Place and Date of Judgment:

Penticton, B.C.

April 17, 2019

- [1] Almost immediately after the parties separated, the respondent ousted the claimant from their family business. The primary issue at the trial was whether the parties' remaining assets should be reapportioned in the claimant's favour to take into account the collapse of the business only 15 months later.

Background

- [2] The parties commenced cohabitation in 1988 when the claimant wife moved into the husband's property in Princeton, BC. They married in 1996 and separated on June 22, 2015. There are no children of the marriage.
- [3] At the commencement of the relationship, the claimant was working during the winters at a daycare located at Apex ski resort and in the summers at a ranch owned by her parents. She had attended university for a time but did not complete a degree. She had obtained a certificate in Early Childhood Education.
- [4] The respondent worked at Weyerhaeuser in the road maintenance department. Weyerhaeuser owns and operates a mill in the Princeton area. The respondent had worked for Weyerhaeuser since he was 17 years old, having only completed grade 10.
- [5] In 2005, the parties established the family business, Hayes Canyon Road Maintenance Ltd. (the "Company"). The respondent had heard that Weyerhaeuser might be looking to contract out its road maintenance work, which was a concern because the respondent feared he could lose his job. He approached Weyerhaeuser and it was agreed that he would continue to perform the road maintenance work as an independent contractor. The parties then incorporated the Company which purchased from Weyerhaeuser the equipment needed to operate the business, financed in part by a mortgage on the family home. The Company would be working predominantly but not necessarily exclusively for Weyerhaeuser.
- [6] The parties both worked for the Company which sustained the family as the sole source of income from inception until separation.

- [7] Following separation, the respondent excluded the claimant from the Company. In September 2016, the Company lost its primary contract. Eventually the Company was deemed bankrupt following a failed proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, and there is nothing left of the Company to divide or apportion between the parties except for a dividend for wages to the respondent for work done in the final months of operations.
- [8] The primary remaining assets of the parties are the former matrimonial home, which the claimant would prefer to keep, and the respondent's pension.
- [9] Both parties have since obtained other employment, each earning approximately \$88,000 per year at a local mine.

Positions of the parties

- [10] The claimant says the respondent deliberately ousted her from the Company for no valid reason and the loss of the Company followed as a consequence of his conduct. The Company was a significant asset and the parties' sole source of income.
- [11] She says fairness requires that the remaining assets be reapportioned in such a manner as to allow her to keep the former matrimonial home and argues her interest in the respondent's pension can be reapportioned in favour of the respondent in order to accomplish this objective. She says the respondent should also be responsible for the second mortgage on the home.
- [12] The respondent denies that he deliberately caused the Company to fail. He says there was simply not enough money to pay all of the ongoing expenses, including those expenses that were ordered by the court on an interim basis in this proceeding, all of which culminated in an inability on the part of the Company to fulfill its contractual obligations to Weyerhaeuser and the loss of that contract.
- [13] He takes no issue with the claimant retaining the home provided he receives his equity. He says the family assets should be divided and the parties should simply go their own ways. To this end, he says his pension should be divided in accordance with Part 6 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"), the various costs orders made during this proceeding should be set aside, and the claimant can pay him his half of the equity in the home if she prefers to keep it.

Issues

- [14] The primary issues for determination are:
- a) Should the remaining family assets be divided equally or should they be reapportioned in the claimant's favour?

- b) Should the respondent's IWA pension be reapportioned in his favour as opposed to pursuant to Part 6 of the FLA?
 - c) What is the appropriate valuation date for the former matrimonial home?
- [15] After determining those questions, I must then decide the appropriate framework for a possible buyout by the claimant of the respondent's interest in the former matrimonial home.

Legal Framework

- [16] The presumption under the FLA is that the parties have an equal entitlement to the family assets and are equally responsible for the family debts:

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

- [17] A party claiming that certain property is excluded from family property bears the burden of proving the exclusion:

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) inheritances to a spouse;
- (b.1) gifts to a spouse from a third party;

. . . (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

- [18] The claimant argues that the respondent's conduct after separation resulted in the loss of the Company as family property that would otherwise have been subject to equal division and therefore seeks to reapportion the remaining assets to accomplish a fair outcome on the facts of the case. She relies on s. 95 of the FLA, and in particular, s. 95(2)(f) and (g) as authority for the remedies she seeks. The relevant portions of s. 95 are as follows:

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
- (b) divide family property as required under Part 6 [Pension Division].

- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

...

- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith, . . .

[19] This court considered the difference between subsections 95(2)(f) and (g) in *J.D.G. v. J.J.V.*, 2016 BCSC 2389. At paras. 238 and 239, Justice Fleming held the following after consideration of decisions under the old Family Relations Act, R.S.B.C. 1996, c. 128, on the question of blameworthiness or fault:

[238] In *Jacoubson v. Jacoubson* (1991), 60 B.C.L.R. (2d) 40 (C.A.), the court had interpreted *Newson* as providing for compensation orders where assets have been deliberately given away, disposed of, or wasted to defeat the interest of the other spouse or reducing the amount available for distribution. Lawrence emphasized however it was not the motive for depletion or wasting of assets that triggered the court's jurisdiction to reapportion family assets. Instead, it was the fact they had been depleted or wasted, thereby defeating the intent of the FRA to effect an equal division of all (family) assets. Accordingly, the appropriate inquiry when applying s. 65 was not whether the spouse's unreasonable conduct was responsible for the loss, but whether as a result, he or she reduced the amount available for distribution in circumstances that rendered an equal division unfair.

[239] This analysis appears consistent with s. 95(2)(f), not (g), which allows the court to consider whether a spouse, after separation, has caused a significant increase or decrease in the value of family property or debt beyond market trends, focusing on the effect of the conduct only. In contrast, s. 95(2)(g) includes a fault element or motive for spousal conduct. It applies where "a spouse, other than a spouse acting in good faith", disposes of or substantially reduces the value of family property.

[20] In order to succeed under either subsection, the claimant must show that the respondent was the cause of the loss of the Company and that as a result, it would be significantly unfair to apply the presumptive rule of equal division.

[21] The claimant also seeks to utilize a valuation date for the matrimonial home other than the date of the trial, which is the presumptive date under s. 87 of the FLA.

[22] The home was appraised on two occasions, firstly in November 2016, which was 17 months after separation, and then again immediately prior to trial. The value increased by \$65,000 in the intervening 27 months. The claimant argues that the circumstances here warrant an exception to the general rule that the date of trial should be used.

Should the remaining assets be reapportioned in the claimant's favour as a result of the loss of the Company?

[23] I will review the circumstances of the Company before separation, the respondent's actions after separation, the subsequent bankruptcy of the Company, and whether causation has been established.

The Company before separation

[24] When the parties incorporated the Company, the claimant held 49% of the shares in the Company and the respondent the other 51%. The respondent was the only director; the claimant was an officer. The Company purchased the equipment needed to operate the business from Weyerhaeuser for approximately \$190,000 and was financed at least in part by a mortgage on the family home.

[25] The Company was responsible for building, maintaining and decommissioning logging roads in the summer and for ploughing snow and otherwise keeping the logging roads open during the winter. The parties had clearly delineated roles and each worked full time for the Company. The respondent was responsible for operating the machinery, negotiating contracts with Weyerhaeuser, supervising field employees, and generally ensuring the Company's operational obligations to Weyerhaeuser were met. The claimant, despite little prior experience, became the bookkeeper for the business after receiving some training from the Company's accountants, Kemp Harvey. She was also the Company's safety officer and was required to attend regular safety meetings in order to keep the Company in good standing with Weyerhaeuser as a contractor.

[26] In the years that followed, the parties made three decisions that caused the Company's ongoing expenses to increase significantly. First, the Company purchased the premises it had been renting for approximately \$210,000. A loan was provided by the vendor in the form of a vender take-back mortgage and a further portion of the purchase price was financed with a small loan secured against the home. The monthly mortgage payments exceeded the rent the Company had been paying. Second, the business purchased a new, special-ordered, customized Western Star truck in 2012. This cost \$391,000 and was also financed in part through a loan which was secured against the house. Finally, the Company bought a new backhoe for more than \$200,000, which was also financed.

[27] The respondent gave evidence, as did some of his other witnesses, to the effect that the older equipment purchased from Weyerhaeuser was frequently in need of repair resulting in downtime and a loss of productivity. The new equipment resulted not only in increased productivity but also better hourly rates from Weyerhaeuser.

[28] Notwithstanding these increased payments and even though the claimant, presumably with the benefit of hindsight suggested that they were not required, the efficacy of prior business decisions are not germane to the dispute.

- [29] Following the separation and continuing through the trial, the respondent was adamant that the source of the family's woes was overspending for which he considered the claimant to be solely or at least primarily responsible.
- [30] The parties used the Company as if it were their personal bank account. Each had personal credit cards and the majority of both the Company expenses and the parties' personal expenses were charged to those cards. The personal credit cards were paid from the Company bank account, including not only the Company expenses but also personal expenses. The largest recurring expense charged to the personal credit cards was fuel for the Company vehicles and equipment.
- [31] Much time at the trial was spent reviewing personal expenses charged to personal credit cards which were then paid by the Company. The respondent was of the view that these various and sundry personal expenses that were paid by the Company was evidence of either fraud or incompetence on the part of the claimant as a bookkeeper.
- [32] However, there was no evidence to support the respondent's allegations of impropriety on the part of the claimant. Both parties called bookkeepers as witnesses during the trial. The claimant called Linda Wittur, formerly a bookkeeper with the Company's accountant, Kemp Harvey. Joy Klassen testified for the respondent. Ms. Klassen was hired by the respondent on behalf of the Company a few months before the Company ceased operations.
- [33] Both Ms. Wittur and Ms. Klassen gave evidence that it is not necessarily improper for the owners of a company to make use of company funds for personal expenses so long as everything is properly reported at the end of the year and adjustments are made. If a company pays a personal expense, there needs be an adjustment to the shareholder's loan account.
- [34] Ms. Wittur testified that if there was a shortage of funds in the Company, it was the claimant's paycheque that was held. In such a case, the payroll was calculated but no cheque was issued and the Company would show a liability owed to the claimant which would be posted to the wife's shareholder's loans. By contrast, the husband's paycheque was generally paid.
- [35] In April 2015, the parties took a second mortgage against the house in the amount of \$74,000 because the parties' credit card balances were extremely high. Consistent with the respondent's allegations that the claimant was either a spendthrift or incompetent, he was adamant that the claimant had racked up a massive amount in new credit card debt in the month following the second mortgage because there was \$23,000 outstanding on her credit card at the end of May 2015. His assumption was that the claimant's credit card had been paid off in April, but the evidence is clear that while the respondent's credit card was paid off in full. The balance on the claimant's card had been reduced but not cleared by the second mortgage proceeds. The May statement reflected an approximate balance of \$23,000 that remained outstanding, all of which predated the second mortgage.

Events after separation

- [36] The parties separated on or about June 22, 2015, when the respondent ended the relationship. He left the family home and went to live in a suite he had created on the business premises.
- [37] The separation immediately became very acrimonious. There were numerous interim applications resulting in various orders, many of which were not complied with. These need to be reviewed in some detail to give context to the claimant's argument that the loss of the Company is the fault of the respondent.
- [38] On July 23, 2015, the respondent purported to terminate the claimant from her role as bookkeeper and indicated his intention to "hire a professional". Shortly thereafter, the respondent gained access to the matrimonial home through a second storey window and took the claimant's computer and the business records.
- [39] The respondent took the position following separation that because he was the majority shareholder and sole director, he and he alone had the right to make decisions on behalf of the Company. He denied the claimant access to information about the Company and to the income generated by it and instructed others to provide information to him exclusively.
- [40] His conduct was not limited to the affairs of the Company. The claimant wanted to supplement her income by running a bed and breakfast out of the former matrimonial home but the respondent refused to cooperate and refused to sign the forms provided by the insurance company.
- [41] In the fall of 2015, he placed an advertisement in the local newspaper advising that he would not be responsible for any of the wife's debts, the presumed purpose of which would be to embarrass her.
- [42] On another occasion the respondent attended at the property, removed the license plates from her truck without warning and left a note on the windshield that said "no insurance".
- [43] On January 14, 2016, the parties entered into a consent order (the "Consent Order") that included an obligation on the part of the respondent to cause the Company to make monthly dividend payments of \$2,500 to the claimant, to keep the mortgages current, and to allow her to view the Company's financial information including bank accounts. The respondent was entitled to receive the same amount, and either party had leave to revisit the order in three months.
- [44] The respondent did not comply with many of the terms of the Consent Order. He did not cause the Company to pay the mortgages or to pay the claimant the monthly dividend.
- [45] On February 24, 2016, the respondent sent the claimant a lengthy email which included the following statements at its conclusion:

. . . I will not be working for you in any way. I have already told Norm and Cory I would finish the season and be done working for Weyerheuser [sic] if this doesn't turn out the right way and it seems that it isn't. There is going to be no money coming in for some time now so the longer it takes to split things up the less there is for either of us. I will not have a problem finding another job that is only 5 days a week 8 hrs only. I am happy now and in love and not going to be a slave to you or a dead horse that's always in the red.

- [46] The claimant says this email was prophetic and was a clear articulation of the respondent's intended path. This email will be addressed later.
- [47] The parties returned to court on March 31, 2016, at which time Master Scarth set the arrears under the Consent Order. This order was also made by consent.
- [48] Also in April 2016, the respondent traded in his Yamaha motorcycle, which clearly was a family asset, on a new Harley Davidson motorcycle for a purchase price of approximately \$46,000. A \$10,000 down payment was provided by way of a bank draft from the respondent's girlfriend, Lynn Borden. The remainder of the purchase price was financed, with the respondent committing to make monthly payments of \$642 per month. The disposition of the Yamaha motorcycle was a clear breach of an order made by Master McDiarmid in July 2015 that prohibited either party from disposing of assets.
- [49] Although the respondent was obligated by the Consent Order to ensure the mortgage was paid, he failed to do so and allowed the matrimonial home to go into foreclosure. Shortly thereafter, the claimant brought an application to have the respondent held in contempt.
- [50] On September 8, 2016, Mr. Justice Betton found the respondent to be in contempt of court.
- [51] The respondent argues that prior to the hearing of the contempt application, two orders were made that precluded him from paying the Company's bills which then caused the demise of the Company. In particular, he testified that the Company backhoe was in for repairs and that he was unable to retake possession of it in order to complete his work for Weyerhaeuser as he was unable to pay the repair bill of \$5,500.
- [52] I do not accept that the various court orders, were the cause of the demise of the Company. Findings of contempt are not made lightly. Justice Betton was clearly satisfied that the respondent had chosen not to comply with the previous court orders, as distinct from being unable to comply with them.
- [53] There was a delay in sentencing for the contempt which afforded the respondent an opportunity to purge his contempt, which he was able to do prior to sentencing. In the meantime, the claimant through her counsel, was able to negotiate a reinstatement of the mortgage on the family home for \$18,629.72, \$8,000 of which was from the respondent in accordance with Justice Betton's order with the remainder provided by the claimant, in part through borrowed funds.

Termination of Weyerhaeuser contract

- [54] In September 2016, Weyerhaeuser became concerned that the Company would not be able to satisfy its contractual obligations. Mr. Norman Druck, Operations Superintendent for Weyerhaeuser, testified at the trial. Mr. Druck was responsible for managing the contract with the Company on behalf of Weyerhaeuser. He was very careful when providing his testimony, and I accept his evidence in its entirety.
- [55] Mr. Druck testified that when Weyerhaeuser became concerned about whether the Company would be able to fulfill the contract, he spoke to the respondent and followed that meeting up with a letter which set out that the contract could and would be terminated unless the Company could satisfy Weyerhaeuser that it could satisfy its obligations.
- [56] The respondent did not provide Weyerhaeuser with the assurances it needed and Weyerhaeuser terminated its contract with the Company by letter dated September 30, 2016. The Company had no other work and ceased operations as of that date.

Bankruptcy

- [57] In November 2016, the respondent filed an application for leave to assign the Company into bankruptcy. The application was opposed by the claimant. Ultimately, the Company was deemed bankrupt as a result of an unsuccessful Division 1 proposal under the Bankruptcy and Insolvency Act. While the claimant argues that the bankruptcy was in breach of the s. 91 order of Master McDiarmid, I can draw no such conclusion as there was an evidentiary gap as to what happened between the application for permission to assign the Company into bankruptcy, which application was never heard, and the deemed bankruptcy.
- [58] The assets of the Company, including the equipment and the premises, were sold through the bankruptcy process.
- [59] The respondent's girlfriend, Ms. Borden, has been overly involved in this case. At the recent examination of the respondent for discovery, Ms. Borden burst into the room and made entirely inappropriate comments about the claimant and her counsel. She has verbally accosted the claimant in public places including at the local grocery store.
- [60] Shortly before trial, Ms. Borden attempted to obtain information from the claimant's accountant, Mr. Greg Casorso, under the false pretense that she was a lawyer and then that she was with the court.
- [61] The respondent filed or caused to be filed with the CRA supplementary T4 statements for 2015 resulting in a reassessment dated November 28, 2018, for an additional \$34,800. The claimant through her accountant successfully disputed the assessment.

Respondent's suspicions about the Company finances

- [62] Since separation, the respondent has doggedly pursued the notion that the claimant had been mismanaging the Company's money. Following separation and his termination of the claimant as the bookkeeper, he also terminated the Company's long-term accounting firm, Kemp Harvey, on the notion that he considered them allied with the claimant. He then hired KPMG in Kamloops to perform what was described as an audit. Clearly it was not a full audit as accountants use that term. KPMG's investigation turned up nothing untoward. The respondent did not disclose any report or findings from KPMG.
- [63] The respondent hired a new accountant for the Company in March 2016, Mr. Chris Kelley of McDonnell Voelkl. Despite the results of the KPMG review, the respondent requested that Mr. Kelley perform an audit back to 2012. Mr. Kelley testified at the trial. He had told the respondent that the cost of the audit would far exceed the value that could be obtained and did not do one.
- [64] Finally, the respondent sought to have the trustee undertake similar work under the guise of looking to find assets of the Company.
- [65] Despite the fact that no evidence of malfeasance on the part of the claimant has been unearthed in the three-and-a-half years since separation, the respondent persisted with his allegations through his direct evidence and his cross-examination of the claimant.

Did the respondent cause the loss of the Company?

- [66] I have no difficulty in concluding that the respondent treated the claimant very poorly following separation. He excluded her from the Company without any proper justification and was content to see her struggle while he moved on to a new relationship. He sought to embarrass her and stood by while his new partner did the same. He treated her in a disrespectful manner that was not warranted and disrespected the Court by ignoring orders, including those to which he had consented.
- [67] However, although subsections 95(2)(f) and (g) of the FLA contemplate different circumstances, each requires a party to show, in the context of a decrease in value or loss of family property, that the other party was the cause of the decrease; poor conduct alone absent causation is not sufficient to engage either subsection to justify a reapportionment.
- [68] The question is therefore has the claimant established on the evidence that the respondent caused the Company to fail? I have concluded that the answer is no.
- [69] The claimant points to the respondent's email of February 24, 2016, which she says betokened the respondent's intentions. The passage of the email to which the claimant refers specifically reads as follows:

. . . I will not be working for you in any way. I have already told Norm and Cory I would finish the season and be done working for Weyerhaeuser [sic] if this doesn't turn out the right way and it seems that it isn't. There is going to be no money coming in for some time now so the longer it takes to split things up the less there is for either of us. I will not have a problem finding another job that is only 5 days a week 8 hrs only. I am happy now and in love and not going to be a slave to you or a dead horse that's always in the red.

[70] However, although the respondent said in his email that he had advised Mr. Druck that he would finish working for Weyerhaeuser at the end of the season, Mr. Druck confirmed the respondent's evidence that no such conversation in fact took place. The comments are at the end of a lengthy email in which the respondent complains about the lack of money, the court orders (even though he had consented to the one that was seemingly causing him the most grief), and wanting to resolve the dispute.

[71] The respondent points to the hours he was working as inconsistent with an intention to ruin the business. Ms. Klassen prepared a summary of his hours worked and billed to customers from July 2015, the first full month following separation, to September 2016, when the Company ceased operations:

Pay Period	Month
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Total Hours	Worked
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JUL-15	
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193.00	
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AUG-15	
--------	--

188.50	
--------	--

SEP-15	
--------	--

168.50	
--------	--

OCT-15	
--------	--

133.50	
--------	--

NOV-15	
--------	--

209.00	
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DEC-15	
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178.50	
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JUL-DEC 2015	
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1,071.00	
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Pay Period Month

Total Hours Worked

JAN-16

216.00

FEB-16

175.50

MAR-16

164.50

APR-16

119.50

MAY-16

57.50

JUN-16

147.50

JUL-16

81.00

AUG-16

201.50

SEP-16

23.00

[72] Not counting the month of September 2016, when operations essentially ceased mid-month, the respondent averaged approximately 160 billable hours per month, which would not include time spent on administrative matters and maintaining the equipment. The respondent did not receive a salary during the 2016 fiscal year.

[73] I cannot conclude that the respondent stopped working in order to cause the Company to fail. I conclude that his email of February 24, 2016, was sent in frustration and did not accurately state his intentions.

[74] The claimant argues that by ousting her as the bookkeeper, which was clearly a key role in the Company, the respondent was reckless and the Company's failure was an inevitable and direct consequence of his ill-conceived decision. She says he wanted sole and complete control and having obtained it, he should bear the consequences.

- [75] Notwithstanding the respondent's decision to terminate the claimant from her position as the Company's bookkeeper in July 2015 because he wanted to hire 'a professional', no such professional was then hired. The respondent said he hired a bookkeeper in late August by the name of Lisa Lankinen, who he let go some three weeks later. However, I conclude that Ms. Lankinen was not hired until the spring of 2016. First, Mr. Kelley indicated he had referred Ms. Lankinen to the respondent and Mr. Kelley was himself not retained until approximately March 2016. Second, the order of Master Scarth of March 31, 2016, required the claimant to deliver the books to either Mr. Kelley or Ms. Lankinen.
- [76] The respondent, when asked during cross-examination about the bookkeeping function, said that Mr. Kelley was looking after it. This was also not true. Mr. Kelley confirmed during his evidence that he did not perform bookkeeping services. Mr. Kelley agreed that the claimant had been a key person in the Company and that the functions she had performed needed to be done by someone.
- [77] The respondent hired Ms. Klassen in July 2016, also at the recommendation of Mr. Kelley. By this time, the Company had been without a bookkeeper for approximately one year. Ms. Klassen testified that the books were in disarray when she assumed the bookkeeper role. She had no paper backup for any of the recorded entries and had six months of data to input when she assumed her position.
- [78] While maintaining proper books and records is necessary in all businesses, there is no evidence here that the lack of a bookkeeper caused the Company to fail. While Ms. Klassen initially worked 40 hours per week for the first few weeks, she was working around 20 hours per week once she had caught up.
- [79] A review of the Company's financial statements is suggestive of the problem. Kemp Harvey prepared the Company's financial statements until the October 31, 2014 financial year end, and Mr. Kelley prepared the statements for the 2015 and 2016 year ends. The Company's revenue showed steady increases until 2015 but dropped substantially in 2016, with a corresponding drop in gross profit.

Year End Revenue Gross Profit

2012 \$582,110 \$157,161

2013 \$588,910 \$216,575

2014 \$634,727 \$196,963

2015 \$677,685 \$232,970

2016 \$348,783 \$38,681

- [80] While there are fluctuations of varying degrees for the expense items, the drop in revenue and corresponding drop in gross profit is significant because any funds to be paid to the shareholders, whether as wages or otherwise, in addition to expenses such as interest charges, property taxes, and professional fees, are paid from gross profits. Mr. Kelley testified that from his perspective, the drop in income was the biggest factor because the Company was unable to pay its debts.
- [81] Neither party provided any evidence that would explain why there was such a significant drop in income in the 2016 year. The claimant argues that the respondent neglected the business, but there is no evidence to support that suggestion given the hours he worked. Even though 2016 was essentially an 11 month year given that operations ceased in September, a reduction in income of 48% cannot be explained by the loss of a month's work.
- [82] There are a number of possibilities for the reduction of the Company's income compared to previous years. If the respondent chose to turn down work that was available to the Company, causation may have been established. However, if there was simply less work to be done, the decline of the Company's income could not be said to have been caused by the respondent. Mr. Druck was not asked about the amount of work available or if the Company declined any work.
- [83] In the circumstances, I am unable to conclude that the loss of the business was caused by the respondent as opposed to other forces.

Summary

- [84] Since the claimant has not established that the respondent caused the loss of the Company, her claim for a reapportionment based on subsections 95(2)(f) and (g) of the FLA must fail.

Division of Assets

Matrimonial Home

- [85] When they commenced cohabitation, the claimant moved into the respondent's home, which consisted of a mobile home located on a piece of property owned by the respondent where he lived with his daughter from a prior relationship. At the time, the mobile home was three years old. The claimant opened a daycare on the property after the respondent made some improvements for that purpose.
- [86] In approximately 1993, the parties decided to build a new home on the property. The new residence was set-up with a dedicated space for the claimant to run her daycare. They also took in foster children from time to time. Following an incident in 2004 or 2005 involving one of the foster children, the daycare was forced to close and no foster children were placed with the parties thereafter.

Exclusions

- [87] The respondent agreed that the claimant received \$50,000 from her parents when the parties were having difficulties in completing construction of the new home on budget. He never saw the cheque and agreed the funds were never repaid. I am satisfied the gift from the claimant's parents was a gift to her alone.
- [88] The claimant agrees that the mobile home that was owned by the respondent prior to their relationship was sold for \$35,000. He had paid \$28,000 for the mobile home when he bought it. The respondent deposed that the proceeds were applied to their construction of the new home. The claimant said she is not able to confirm that it went into the construction costs, but this would seem to be a reasonable inference given that the parties also needed \$50,000 from the wife's parents. I am satisfied that the respondent is entitled to an excluded property claim for the value of the mobile home in the amount of \$35,000.
- [89] While the respondent also owned the land prior to the relationship as well, there was no evidence as to its value at the time of commencement of the relationship, nor of any associated debt. The respondent has therefore not proven that he is entitled to an excluded property claim for the value of the land.
- [90] I conclude that the claimant has proven an excluded property claim of \$50,000 for the funds received from her parents, and the respondent has proven his excluded property claim in the proceeds of the mobile home in the amount of \$35,000.

Value

- [91] Two appraisals were conducted on the home by a jointly appointed appraiser. No issue is taken with either valuation. The first appraisal was dated effective November 16, 2016, and estimated the value at \$655,000; the second appraisal was conducted just prior to trial and estimated a value of \$720,000.

Mortgages

- [92] The former matrimonial home is subject to three mortgages. The first mortgage is longstanding and had a balance of \$387,814.66 at separation and \$338,651 as at the date of trial.
- [93] The second mortgage is the mortgage taken out to pay down the parties' credit cards approximately two months before separation. The initial amount of the mortgage was \$74,000. The balance at the date of trial was \$65,169.32. This was referred to as a corporate mortgage; however, since it was taken out to pay the parties' credit cards, it should be considered as a mortgage of the parties even though the credit card debts paid or reduced included many Company expenses.

- [94] The third debt secured by the matrimonial home is a Company line of credit. There was nothing owed on the line of credit when the parties separated; however, the claimant withdrew \$10,000 to pay for legal fees on July 17, 2015. Only \$93.72 has been paid on the principal.

Respondent's International Woodworkers of America pension

- [95] The respondent had a pension through the International Woodworkers of America while he worked for Weyerhaeuser. He was able to maintain the pension and continued to make contributions to it through the Company until approximately October 2016.
- [96] The parties retained an actuary in October 2017, to provide them with some pension valuation scenarios. Although the scenarios have some minor flaws - they use the wrong date of cohabitation and separation for example - I accept that the value of the respondent's pension accrued during the relationship is approximately \$294,000, with each party presumptively entitled to one half. A downward adjustment is appropriate on a valuation to take into account income tax obligations.

Should the pension be reapportioned to the respondent?

- [97] The claimant wishes to keep the matrimonial home, and, in order to facilitate that goal, she seeks to have the respondent's pension reapportioned to him as a method of reducing the amount of any equalization payment she would have to make.
- [98] The general rule for dividing employment pension is set out in Part 6 of the FLA. The court has the jurisdiction to depart from those provisions under s. 95(1) of the FLA if it would be 'significantly unfair' to divide family property as required under Part 6.
- [99] In *J.(N.A.) v. J.(P.L.)*, 2014 BCSC 948, Justice Harvey was asked by the husband to divide the wife's teacher's pension by way of a notional forced buy out of his interest. He held that the court's discretion to make such orders should be exercised 'sparingly':
- [207] The default position for the division of an employment pension is Part 6 of the FLA. While the court has discretion to depart from the formula contained within Part 6, it should be exercised sparingly and usually at the behest of each of the parties or for the purposes of adjusting the division: *Strahl v. Strahl* (1985), 60 B.C.L.R. 197, 44 R.F.L. (2d) 189 (B.C. C.A.); *Andrews v. Andrews* (1995), 11 R.F.L. (4th) 117, 52 A.C.W.S. (3d) 1289 (B.C. S.C.).
- [208] In *Strahl*, the B.C. Court of Appeal noted that property rights in a pension, such as the claimants, is not a present right, but a future right, subject to the contingencies of future happenings which may prevent either or both of the spouses from personally enjoying its fruition.
- [100] The effect of such an order would be a reduction of the respondent's immediately available capital in exchange for a higher income if and when he draws his pension. The valuation of the pension in evidence is based on actuarial data and assumptions of life expectancy.

Calculations are made based on a discount rate which changes based on interest rates. If the pension were reapportioned wholly in favour of the respondent, the question of whether he would enjoy the fruits of the pension is unknown, whereas the claimant would receive an immediate benefit at full value.

- [101] There is authority for reapportioning pensions wholly to one party to be offset by other assets. In *Touwslager v. Touwslager* (1992), 63 B.C.L.R. (2d) 247 (C.A), the Court of Appeal confirmed that the "division of family assets between the parties must be a fair division" and concluded on the facts that the pension should be awarded to the husband and the home to the wife. The facts in *Touwslager* were different, however. The wife was an immigrant from the Netherlands who had been out of the workforce for 23 years, having been the primary caregiver for the parties' children; she was not self-supporting and was unlikely to become so.
- [102] In this case, the claimant has demonstrated she is well able to support herself. She is resourceful, starting a bed and breakfast business while finding work as a haul truck driver at the mine and earning significant income. This is not a situation where reapportioning the pension to the respondent is the only way to ensure that the claimant can maintain suitable housing.
- [103] The question is whether it would be significantly unfair to apply the presumptive rule for the division of the pension under Part 6 of the FLA. I conclude that it would not. The parties are in almost identical situations. They earn approximately the same amount and they are of a similar age. They even work for the same employer, such that any contingencies regarding the future of that employer apply equally.
- [104] The pension will be divided using the provisions found under Part 6 of the FLA. However, since the Company in which the claimant had an equal interest made all the required contributions after separation, the claimant's interest will be calculated using the last date the Company made a contribution as opposed to the separation date.

Valuation date for the home

- [105] The claimant seeks a valuation date other than the date of trial, ostensibly as an alternative method of reapportioning the home in her favour.
- [106] Section 87 of the FLA provides as follows:
- 87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,
- (a) the value of family property must be based on its fair market value, and
 - (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or

(ii) of the hearing before the court respecting the division of property and family debt.

[107] The home was appraised on two occasions, firstly in November 2016, which was 17 months after separation, and then again immediately prior to trial. The value increased by \$65,000 in the intervening 27 months. The claimant argues that the circumstances here warrant an exception to the general rule that the date of trial should be used.

[108] In *Kumagai v. Campbell Estate*, 2018 BCCA 24, D. Smith J.A. held that using a valuation date other than the trial date constitutes a reapportionment. Therefore, it must be demonstrated that it would be significantly unfair to use the trial date:

[75] The date of the hearing for the valuation of net family property is the presumptive valuation date. Where family property is the increase in value of excluded property (being property acquired by a spouse before the relationship between the parties began), the value of that property is determined presumptively at the date of an agreement between the parties or the date of hearing.

[76] A departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA. Section 95 expressly provides for the reapportionment of net family property if an equal division would be "significantly unfair." Under the former FRA, a change in the valuation date from the date of hearing was determined to be an effective reapportionment of the family assets. See *Martelli v. Martelli* (1981), 33 B.C.L.R. 145 at para. 28 (C.A.); *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1 at para. 55 (C.A.); *McPhee v. McPhee* (1996), 22 R.F.L. (4th) 302 at paras. 10-13 (B.C.C.A.); and *Fisher v. Fisher*, 2009 BCCA 567 at para. 61. The same reasoning, in my opinion, should be applied to the comparable provisions of the FLA. Any departure from the presumptive equal division of net family property under s. 81 of the FLA must therefore be made pursuant to s. 95(1) of the FLA, which imposes a threshold finding that an equal division of the net family property would be "significantly unfair" before any reapportionment of the net family property can be ordered.

[109] Aside from the claimant's arguments that unfairness would result from use of the date of trial due to the loss of the Company, which I have already found has not been proven to have been caused by the respondent, the claimant also argues that she has maintained the home with little or no contribution from the respondent and if it were not for her efforts to reinstate the mortgage following the respondent's failure to follow court orders, the property would have been lost.

[110] In *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 39, the British Columbia Court of Appeal held that any increase in value is generally shared:

[39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.

- [111] In this case, the value of the home increased due to market forces. Section 95(2)(f) of the FLA excludes increases in the value of family property that are due to market trends as a basis for unequal division.
- [112] In *E.H.H. v. C.L.M.*, 2017 BCSC 1299, Justice Young expressed the opinion that paying the mortgage while living in the home does not justify using a different valuation date at para. 96:
- [96] It remains my view that there should be compelling evidence to depart from the standard valuation date as the date of trial thereby disentitling one property owner the benefit of the increase in value of property which is brought about by market forces and not as a result of direct effort of the other party. The fact that one party stayed in a home and paid the mortgage is not sufficiently compelling evidence to depart from the standard valuation date. In fact, it is fairly commonplace. If every time it occurs the court values the property at the date of separation, then s. 87 of the FLA would become meaningless. Adjustments can be made for the payment of mortgage and the benefit of occupational rent. There has to be something more to compel a departure from the date of trial valuation as there was in *Slavenova and Davie*.
- [113] I conclude that the valuation date should be the date of trial.
- [114] The claimant will therefore have the opportunity to purchase the respondent's interest in the former matrimonial home based on its present value, after taking into account the mortgages. However, in order to determine the amount of any buyout, there are other adjustments that must be taken into account, including but not limited to payments made by the claimant on the mortgages since separation. These adjustments are discussed below.

Adjustments - other assets and liabilities

Claimant's truck

- [115] The claimant has retained the 2010 Silverado truck she drove during the relationship. There is little evidence of its value, but the claimant suggested she had received an estimate from a local dealership indicating \$12,000. In the absence of better information, I determine its value to be \$12,000 which results in the sum of \$6,000 owed to the respondent.

Respondent's credit card debt

- [116] The respondent says he is entitled to credit for the majority of the debt on his credit card because he incurred the vast majority of the charges when he was trying to keep the Company going following separation. However, he admitted that the card was used for both business and personal expenses and no attempt was made to separate the two. No adjustment is appropriate for the respondent's credit card.

Qtrade Account

- [117] The claimant set up an investment account through Valley First Credit Union referred to as a "Qtrade" account. Ms. Patricia Lind, a senior financial advisor with Valley First, gave evidence regarding the various transactions through the Qtrade account.
- [118] The account was initially set up by way of a transfer from the claimant's TFSA account in the amount of \$17,421.78 in 2014. This amount included a \$5,000 gift given to the claimant by her parents. The remainder was therefore family property.
- [119] Subsequently the claimant was provided with \$80,000 to hold in trust for her elderly parents. These funds remained in the Qtrade account until May 5, 2017, when, following the death of the claimant's mother, the trust funds plus the accrued interest totalling \$13,403.83, were withdrawn from the Qtrade account and put into the claimant's personal account. The withdrawal was directed by the claimant's father who wished to distribute by way of gift one-third of the funds to each of his three surviving children. As such, the claimant kept her one-third share. Since neither of the parties held a beneficial interest in the trust funds during the relationship, they are not family property and not subject to division or valuation.
- [120] The claimant ran a Pampered Chef business as a way to make some additional money. It involved sales of kitchen wares through home parties. She accumulated approximately \$10,000 which she added to the Qtrade account in April 2015. There is no question that this \$10,000 is a family asset and subject to equal division between the parties.
- [121] Notwithstanding the large volume of documents tendered at trial, I am unable to determine whether that portion of the Qtrade account that was family property, namely the \$12,421.78 from the initial deposit plus the \$10,000 from Pampered Chef, appreciated in value during the relationship. However, assuming that the initial deposit earned a similar return to the trust funds, it would have grown by around 16% to around \$14,500. Assuming little or no growth to the Pampered Chef portion, which was added to the account much later, the family property portion of the Qtrade account is valued at \$24,500 to which the respondent is entitled to credit for half, or \$12,250.

Food truck

- [122] The parties owned a food truck which was acquired for the purpose of earning additional money. It was sold and the proceeds, which amount to \$5,500, are currently in trust with the claimant's solicitor. This is acknowledged to be family property and subject to equal division.

Respondent's motorcycle

[123] As indicated earlier, the respondent traded in his Yamaha motorcycle, which was clearly family property, in contravention of Master McDiarmid's order. The trade-in value according to the contract to buy the Harley Davidson was \$6,696; however, he had previously indicated in a Form F8 Financial statement that it was worth \$8,500. In the absence of other evidence, I find its value to be \$8,500 and that the claimant is entitled to credit for one-half of that amount, or \$4,250.

Other businesses

[124] The parties ran various other side businesses during the marriage but none have any value for division purposes.

Chattels

[125] I understand the parties have essentially agreed on the division of the remaining chattels. Previously, the respondent provided a list to the claimant who agreed with the exception of four items - a compressor, a quad, a saddle, and the lawnmower at the former family home.

[126] Although the claimant has made the agreed upon items available to the respondent, he refused to collect them unless he could take everything he had asked for. At trial, he agreed the claimant could keep the four items listed in the preceding paragraph.

[127] The respondent said he wanted an order that he be entitled to go through the home one more time to see if there is anything else he wants. He has had plenty of time to figure out what he might have missed when preparing his prior list. That request is denied.

Previous Legal Fees

[128] Adjustments must be made for legal fees incurred after separation for the parties' family law lawyers that were either paid from family property or remain outstanding and need to be addressed.

[129] As indicated above, the claimant utilized a Company line of credit that is secured against the home to pay a retainer to her lawyer in the amount of \$10,000. The current balance is \$9,902.28. The respondent is entitled to credit for half of that amount. The respondent paid \$3,500 from a joint account to one of his former lawyers shortly after separation; the claimant is entitled to credit for half of that amount.

[130] Another of the respondent's former family law lawyers, Mr. William Clarke, obtained a judgment in the amount of \$13,000 which is registered as a charge against the respondent's interest in the home. There is a suggestion that Mr. Clarke has agreed that if the home is vested entirely in the claimant following the trial, he would voluntarily remove the charge.

[131] The order I am making does not vest the home entirely in the claimant, although she has the option to purchase the respondent's interest in it. If Mr. Clarke is to be paid, clearly that payment would be on the respondent's account.

Other adjustments

Previous costs awards

[132] I am aware of no basis to upset prior costs awards made by the Court during this proceeding. As such, any orders for costs that remain unpaid must be taken into account when calculating the amount required in order for the claimant to buy the respondent's interest in the home.

Mortgage payments since separation

[133] The respondent was ordered to pay \$8,000 into the claimant's solicitor's trust account for the purposes of attempting to reinstate the mortgages. As set out above, he had already been ordered to keep the mortgages current but had failed to do so. The mortgages were reinstated following a payment to the solicitors for Valley First Credit Union of \$18,629.72.

[134] The claimant had to arrange for the remaining \$10,629.72 from other sources, which she said included some funds from the Qtrade account and also money borrowed from her father. However, the evidence from Ms. Lind was that there were no withdrawals from the Qtrade account during that time period. Regardless of the source, there is no question that the claimant was the sole source of the additional funds.

[135] Had the claimant not taken steps to reinstate the mortgages, it is likely that the property would have been lost through the foreclosure. Moreover, the property subsequently appreciated by \$65,000 between the reinstatement and the trial. The claimant is therefore entitled to reimbursement of one half of the additional funds sourced by the claimant to effect the reinstatement.

[136] The claimant has been the person to ensure that the mortgages have been paid and the home preserved. She also has had the benefit of residing in the home. The respondent lived in the suite on the Company's business premises without payment of any rent from the date of separation until the property was sold in or about September 2018. Following the sale of that property, the respondent has been living in rental accommodation.

[137] It would be unfair if no account were taken for the payments made by the claimant to keep the mortgages in good standing. While a party who makes the mortgage payments may also be expected to account for the benefits of occupation, the fact that the respondent lived in the Company property at no charge is unusual and warrants some adjustment.

- [138] The respondent purged his contempt in September 2016, but the Company ceased operations shortly thereafter. On March 1, 2017, Justice Grauer ordered the respondent to pay \$500 per month commencing on that date towards the mortgage on the former matrimonial home. He continues to make those payments.
- [139] I conclude that it would be fair in all of the circumstances that an adjustment be made such that the parties contribute equally to the mortgage payments between when the respondent purged his contempt and when the commercial premises were sold, such that the respondent had to pay his own housing expenses. I do not have sufficient information to be able to determine the amount of the adjustment with regard to the payment of the two mortgages. The respondent is entitled to credit for the payments made pursuant to Justice Grauer's order.
- [140] If the parties cannot agree as to the accounting, I direct that there will be a reference to the registrar pursuant to Supreme Court Family Rules, B.C. Reg. 169/2009, Rule 18-1(1), whose findings will be certified under Rule 18-1(2).

Respondent's dividend in the bankruptcy

- [141] The respondent's claim for wages was allowed in the amount of \$46,479.79 based on an hourly rate, even though he was never paid on that basis by the Company.
- [142] I conclude that no adjustment need be made for the dividend. The dividend was for work done by the respondent on the Company's account after the separation, but predated when the Company ceased operations, and was billed to Weyerhaeuser. Since he purged his contempt around the same time, being September 2016, I see no reason why he could not receive some compensation for his efforts.

Spousal support

- [143] The claimant seeks an order that she be entitled to spousal support, not based on current need but on a compensatory basis, should her current employment cease to be available to her. She says that the respondent has far more marketable skills than she.
- [144] Both parties are in the position of having current and relatively recently obtained employment that pays a good wage. Both parties have shown themselves to be resourceful. Following the separation, the claimant obtained part-time work for the local Heart and Stroke Foundation before she obtained work at the mine, initially as a part-time janitor and then as a full-time haul truck driver. She has many skills, including as a bookkeeper. For his part, the respondent has over 40 years of experience with Weyerhaeuser, primarily in the road building business, and obtained his job at the mine not long after the Company shut down.
- [145] The eventuality I am asked to address is the claimant's employment prospects should the mine close, albeit there is no evidence as to the likelihood of that occurring.

- [146] In the event that the mine were to close and the parties each lost their jobs, I suspect that the respondent may have a more difficult time in finding a job than would the claimant given the more limited nature of the jobs for which he would be qualified, but if he were successful, he would receive a higher wage. In the circumstances the options are to leave both parties with the ability to claim for spousal support in the future or foreclose that option for both.
- [147] I consider the latter to be preferable. The parties both worked throughout the relationship and had no children. The parties have both demonstrated a willingness to work hard and the ability to find work in short order. The claims for spousal support are dismissed.

Disposition

- [148] The claimant will have the option to purchase the respondent's interest in the former family home based upon its current value and balance owed under the mortgages at the date of trial, and subject to the adjustments set out above. She will have 60 days to decide whether to purchase the property from when the outstanding costs orders have been assessed and the accounting for the mortgage payments have been agreed or determined, and a further 28 days to complete her purchase. The respondent shall sign such documents as may be required to give effect to any sale.
- [149] If the claimant is not in a position to purchase or chooses not to do so, the property will be sold with the parties to have joint conduct of sale. In the event the property is to be sold, either party has leave to apply to a Master of the Court for directions.
- [150] If either party wishes to speak the issue of costs, they may arrange to do so by contacting Supreme Court Scheduling within 21 days of the date of these reasons.

"Wilson J."

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