
CANADA / JUDGMENT

Tran v. Tran

2009 BCSC 1647

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1647 Tran v. Tran

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tran v. Tran,

2009 BCSC 1647

Date: 20091130

Docket: E6761

Registry: Chilliwack

Between:

Thuan Tran also known as Thomas Tran

Plaintiff

And

Trang Phuong Tran

Defendant

Before: The Honourable Mr. Justice G.R. Gaul

Reasons for Judgment

Counsel for the Plaintiff:

R. W. Krentz

Counsel for the Defendant:

R. G. Pederson

Place and Date of Trial:

Chilliwack, B.C.

December 8-12, 2008

New Westminster, B.C.

May 14-15, 2009

Place and Date of Judgment:

Chilliwack, B.C.

November 30, 2009

[1] The issues to be determined in these family law proceedings are as follows:

- a. Divorce;
- b. Custody and guardianship;
- c. Spousal and child support;
- d. Determination, valuation, and division of family assets; and
- e. Costs

Background

- [2] Both the plaintiff and the defendant were born in Vietnam during turbulent times. The plaintiff, born in 1969, is now 40 years old. The defendant, born in 1978, is now 31 years old.
- [3] The plaintiff fled Vietnam in or around 1979 and after spending some time in refugee camps, he arrived in Canada and settled in Kitimat, British Columbia where he was sponsored by the local Rotary Club. He lived with his brother and uncle, both of whom had escaped Vietnam and arrived in Canada before him.
- [4] The plaintiff moved to Abbotsford, British Columbia in the summer of 1987 where he completed his high school education and graduated in 1988.
- [5] During the latter part of the 1980s, the plaintiff worked at a number of jobs, primarily in the restaurant industry as a cook.
- [6] In 1989 the plaintiff became a Canadian citizen.
- [7] In the mid-1990s, the plaintiff and his brother began the process of sponsoring their mother and sister so that they could immigrate to Canada.
- [8] In April 1998, the plaintiff bought a house at 3685 Nanaimo Crescent in Abbotsford for \$182,500. Of the purchase proceeds, \$136,000 was secured by way of a mortgage against the property.

- [9] In September 1998, the plaintiff's mother and sister immigrated to Canada and began living with the plaintiff in the Nanaimo Crescent residence.
- [10] In 1999, the plaintiff purchased a Vietnamese restaurant. The plaintiff claims he borrowed \$100,000 from a friend, John Ho, a portion of which was used to purchase and convert the restaurant from a Vietnamese to Chinese menu. The plaintiff worked at the restaurant preparing the food items as did his mother and sister.
- [11] The restaurant was sold in 2001. It is unclear what the sale price was or how much, if any, profit the plaintiff made on the sale.
- [12] The defendant was raised in Vietnam in a middle class family who ran an electronics store. She completed her high school studies and went on to study economics at the local university in Bac Liêu, Vietnam. While attending university, the defendant also worked part-time in her family's business.
- [13] In the summer 2001, the plaintiff travelled to Vietnam and met the defendant. After a brief courtship, the parties were married on 30 December 2001 in Bac Liêu, Vietnam.
- [14] Although she wished to do so, the defendant did not immediately return to Canada with her husband. She remained in Vietnam until the proper immigration approval was obtained from the Canadian government; a process that took more than two years.
- [15] In December 2002, the defendant purchased a business property at 3363 South Fraser Way in Abbotsford and began converting the premises into a take-out Chinese Restaurant called "The Flaming Wok" (the "Restaurant").
- [16] To purchase the Restaurant, the plaintiff refinanced the mortgage on the Nanaimo Crescent property to approximately \$165,000 and took a second mortgage for approximately \$60,000. The plaintiff operated the Restaurant as a sole proprietorship. Although his mother and sister worked in the Restaurant, they possessed no legal interest in the business or premises.
- [17] In March 2004, the defendant arrived in Canada and began residing with the plaintiff, his mother and his sister at the Nanaimo Crescent property.
- [18] Aside from some precious gold jewellery, the defendant had very few personal items of value.
- [19] The defendant immediately began to work at the Restaurant alongside the plaintiff. The business was a successful one and was the family's sole source of income.
- [20] The Restaurant also acted as a "second home" to the Tran family, as they often used it to prepare and consume their meals together or to entertain guests.
- [21] The Restaurant is open for business six days a week, usually from 4:00 pm to approximately 10:00 pm. The plaintiff is regularly present at the Restaurant and usually arrives there about one hour before it opens.

- [22] In May 2005, the parties began experiencing marital troubles. The defendant wished to have a family home with the plaintiff that did not include his mother and sister, but the plaintiff was not prepared to alter the family living arrangements.
- [23] In August 2005, the parties' only child, Austin, was born. Following his birth, the defendant remained at home caring for the child while the plaintiff continued working at the Restaurant with his mother and sister.
- [24] Tensions between the plaintiff and defendant did not subside and in December 2005 the parties agreed upon a trial separation. During this interval the defendant travelled with Austin to Toronto, Ontario.
- [25] The defendant and Austin returned to Vancouver in January 2006 and resumed living at the Nanaimo Crescent property with the plaintiff and his relatives.
- [26] In 2007 discord between the parties surfaced again and in April of that year, the plaintiff moved upstairs in the family home leaving the defendant and Austin in the downstairs suite. For all intents and purposes the marital relationship had come to an end and the parties separated.
- [27] In May 2007, while the defendant was still residing in the basement suite of the family home, the plaintiff launched these family law proceedings and had the writ of summons and statement of claim served on the defendant. Later that month, the defendant left the family residence with Austin and moved to rental accommodations in Vancouver.
- [28] During the spring and early summer of 2007, communications between the plaintiff and defendant were strained. It was not until 9 July 2007 that a Court order setting out an access schedule was agreed upon by the parties. At the same time, the Court made a s. 67 Family Relations Act, R.S.B.C. 1996, c. 128, ("FRA") order prohibiting the plaintiff from disposing of any property that was or could be a family asset.
- [29] On 20 August 2007, a s. 57 of the FRA order was made declaring there was no reasonable prospect of reconciliation between the parties.
- [30] On 20 June 2008 the defendant became a Canadian citizen. Presently she is attending Vancouver Community College taking English language courses. On the weekdays Austin is with the defendant and she is in school, he attends a daycare that is located at the defendant's school.
- [31] The defendant also works part-time on the weekends as a waitress at a Vietnamese restaurant in metro Vancouver.
- [32] Once the defendant's language training is completed in a year or so, her plans include taking a hair dressing program at Vancouver Community College so that she may find employment in that area.

Credibility and Evidentiary Issues

- [33] What evidence is accepted by the Court and the weight attributed to that evidence is heavily dependent on the credibility of the witnesses.
- [34] Although the defendant testified with the assistance of a Vietnamese interpreter, her answers were generally clear and responsive. There were a few contradictions in the defendant's evidence; however I did not find them to be damaging to her trustworthiness. Over all, I found the defendant to be a credible witness.
- [35] My view of the plaintiff's evidence is markedly different. On a number of occasions I found the plaintiff's testimony on important issues conflicted with what he had said previously at his examination for discovery in March 2008. One example of such a conflict relates to the plaintiff's explanation for the marital breakdown. At examination for discovery, the plaintiff attributed the marital failure to the defendant's desire to be in control of the Restaurant's finances. At trial, the plaintiff again blamed the defendant for the marital breakdown but on this occasion he ascribed the reason to the defendant being upset with him for his refusal to sponsor her parents' immigration to Canada. Oddly, notwithstanding these differing positions and the continual blame the plaintiff directed towards the defendant, the plaintiff maintained throughout his testimony that he and the defendant got along fine, even after a trial separation, and that the principal conflict was not between the two of them but between the defendant and the plaintiff's mother and sister.
- [36] For her part, the defendant described her relationship with the plaintiff as a healthy one at the outset that soured over time. She acknowledged that she had some difficulties with the plaintiff's mother and sister; however the main problems were with the plaintiff. In large part the difficulties related to the parties' personal finances, family home and the amount of time the plaintiff was spending away from home with his friends. According to the defendant, by the end of the marital relationship, the plaintiff was violently arguing with her and causing her to feel intimidated and threatened. I found the defendant's evidence on the issue of the marital breakdown to be more believable than the plaintiff's.
- [37] The plaintiff also claimed that the defendant travelled to Toronto, Ontario with Austin in December 2005 without telling him where they were going and that for a considerable amount of time he did not know their whereabouts. In contrast, the defendant testified that she obtained the plaintiff's permission prior to embarking on the trip with Austin and that their departure from Vancouver could not have been a surprise to him.
- [38] To a large degree the defendant's version of events relating to the trip to Toronto was corroborated by the evidence of the defendant's aunt, Mai Quach. Ms. Quach testified that she came to Vancouver in December 2005 because she and her sister (the defendant's mother) were concerned for the defendant as they had not spoken with her for an extended period of time. She and her husband met with the defendant at the Nanaimo Crescent property and took her to a local Vancouver area hotel where they were staying. Upon speaking with the defendant Ms. Quach noted that the defendant was depressed and upset

by the failing state of her marriage. According to Ms. Quach the defendant asked her to intervene on her behalf and obtain the plaintiff's permission for her and Austin to travel to Toronto. Ms. Quach complied with that request and eventually obtained the plaintiff's consent for the trip. Ms. Quach also explained how she was the person who took care of the defendant's travel arrangements.

- [39] I accept the defendant's version of events and find that the parties needed and agreed to take a "time out" to assess the state of their relationship. The parties agreed it would be good for the defendant to travel to Toronto and spend time with her relatives who resided in that city. Ms. Quach's evidence supports this conclusion. To a certain degree the plaintiff's evidence supports the conclusion also as he acknowledged that he met the defendant at the hotel after she had left the family home with her aunt and uncle and gave the defendant a considerable amount of money. I find these funds were to assist the defendant and Austin during their trip to Ontario.
- [40] A final example of the questionable evidence presented by the plaintiff relates to the sale of three of his automobiles. During his examination for discovery, the plaintiff attested to the fact that he sold these vehicles in August 2007. He reconfirmed this fact in his Financial Statement sworn on 30 April 2008 and filed in these proceedings. During cross-examination, the plaintiff changed his evidence and insisted that he sold the vehicles in 2006 and not 2007. Naturally this is an important distinction as the sale of the vehicles in August 2007 would have been after these proceedings were launched and potentially in breach of the s. 67 FRA order made in July 2007.
- [41] I note that the plaintiff's mother and sister did not testify at trial. I find they would likely have given relevant and highly probative evidence that would have been of assistance in resolving a number of contentious issues in this litigation. No explanation was offered for the fact that these two potentially critical witnesses did not testify. An adverse inference may be drawn against a party who fails to call available witnesses (see: *Wu v. Sun*, 2009 BCSC 985). In the circumstances of this case I draw the inference that their evidence would not have been favourable to the plaintiff's case.
- [42] On the whole I had difficulty accepting any of the plaintiff's testimony and unless specifically indicated otherwise in these reasons, where there is a conflict on the evidence between the plaintiff and the defendant, I have preferred the evidence of the defendant and have given it greater weight.

Divorce

- [43] Both parties seek an order of divorce. The parties have lived separate and apart since 21 April 2007 and as there is no prospect of reconciliation, I will grant the order sought.

Custody and Guardianship

- [44] The parties agree that they should share custody and guardianship over their 4 year old son Austin. There is, however, no agreement on where the child's principal residence should be. The plaintiff claims Austin should reside principally with him in Abbotsford; while the defendant argues the boy should reside with her in Vancouver.
- [45] In August 2007, the parties consented to a joint parenting arrangement whereby Austin would reside with the plaintiff from 10:30 a.m. on Saturday until 10:30 a.m. on Tuesday each week and with the defendant for the balance of the time. That arrangement presently remains in place.
- [46] The plaintiff now argues that the shared parenting arrangement is no longer feasible and needs to be altered so that Austin can spend all of his week days with him and three out of four weekends with the defendant. The plaintiff maintains that until Austin enters elementary school he can spend all of the statutory holidays with the defendant; however, once the child begins elementary school, the proposed schedule should be amended again so that the parties share the child's school holidays.
- [47] The defendant submits that the child care arrangement that has been in place since the summer of 2007 has worked reasonably well. She admits that the schedule entails some inconveniences for the parties; however she is prepared to work through them in order to ensure the child maximizes his time with each parent. The defendant points to the fact that Austin is not yet in elementary school and that once he begins the situation relating to his care and custody will likely need to be changed. As a result, the defendant suggests the present child arrangement remain in place until such time as Austin is about to begin school at which time a new custodial arrangement can be agreed to by the parties or imposed by the Court.
- [48] The determination of this issue begins with and is governed by the principles set out in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the FRA. Both of these statutes make it clear that the best interests of the child must remain paramount.
- [49] Section 16 of the Divorce Act addresses the question of the best interests of the child by requiring the Court to ensure that the child has as much contact with each parent as is consistent with the best interests of the child.
- [50] Section 24 of the FRA sets out additional guidelines for the consideration of the children's best interest. These guidelines include:
- The well-being of the child;
 - The child's views, if appropriate;
 - The love, affection and ties that exist between the child and others;
 - The child's education and training; and

- The capacity of the parent to exercise custody, guardianship or access rights and duties.

[51] The plaintiff acknowledges that the defendant breastfed and provided the primary care for Austin immediately following his birth. However, he also asserts that he has been actively involved in the day-to-day care of Austin since his birth. The fact the plaintiff is an engaged and proud father who plays with his son was confirmed by the testimony of Eileen O'Neil, and Colin and Sylvia Steward, all of whom are neighbours of the plaintiff.

[52] In support of his position on custody and access, the plaintiff points to the following: facts:

- The Nanaimo Crescent residence is a large 3 bedroom home with an unoccupied basement suite and a full backyard with plenty of room for Austin to play. It is located in a stable community close to public schools and other amenities;
- His work hours at the Restaurant allow him to spend quality time with Austin during the morning and all day on Monday;
- His mother and sister are available to relieve him of his duties at the Restaurant so that he can spend additional time caring for Austin;
- The Restaurant is an appropriate locale to have Austin, as it has an area where he can play and sleep and it allows him to spend time with his grandmother and aunt; and
- The plaintiff speaks English, encourages Austin to do likewise and has enrolled him in an early reading program within their community.

[53] The plaintiff submits that Austin has a close relationship with his paternal grandmother and aunt who reside with him in the Nanaimo Crescent residence. I accept that there is a familial relationship between the child and his relatives and that it may be a positive one; however the fact that the grandmother and aunt did not testify at trial diminishes the strength of this submission.

[54] The plaintiff is critical of the defendant's present circumstances, pointing to the fact that she lives in a small one bedroom apartment in a densely populated area of Vancouver. Moreover, according to the plaintiff the apartment building does not have any designated play area for children and therefore the defendant and Austin must travel to the nearest public park in order to play outside. Finally, the plaintiff argues that the defendant cannot provide the same level of care or attention to Austin as he can, given that she attends school during the day and must leave the child in daycare during this time.

[55] It is true that the defendant presently resides in modest ground floor rental accommodations in a split level house in Vancouver. Her suite consists of a bedroom, washroom, living room and kitchen. I accept the defendant's claim that she left the family home under duress and with little assistance from her husband following their separation and was compelled to find whatever accommodations she could with what little she had. In essence, she had to start a new home from scratch.

- [56] The owners of the building in which the defendant lives are Vietnamese and they reside in the upper portion of the home. There are other Vietnamese families in the neighbourhood along with families of other nationalities. According to the defendant, Austin has made friends with other children in community. There are public schools and parks in the neighbourhood as well as local markets and shopping centres.
- [57] The defendant's intention is to move to a larger more comfortable apartment within her present neighbourhood as soon as she is able to and argues that with a fair division of the parties' family assets she will have the financial wherewithal to do so. In the meantime, the defendant submits that her present residence is one that is appropriate to raise Austin.
- [58] A significant sticking point between the parties relates to the use of daycare for Austin. The plaintiff says daycare is never a suitable substitute for care that can be provided by a family member and that in the present circumstances his mother and sister are ready and able to assist in caring for Austin. The defendant maintains that daycare is healthy for Austin in that it exposes him to children of his own age in a milieu designed for children.
- [59] I disagree with the plaintiff's assertion and accept the defendant's argument on this point. Although I will not make a final determination on this issue at this stage, in my opinion it is quite likely that spending time in a daycare environment will be of greater long term benefit to Austin and of greater assistance to his personal growth and development than spending the same time in the small, limited confines of the Restaurant. Having heard the description of the Restaurant from the various witnesses, I agree with the defendant that it is a spartan environment with little for a child of Austin's age to do. I recognize that Austin's extended family may be around him whenever he is at the Restaurant, but they will be working and may not have the time or energy to care for him when the need arises. In contrast, the daycare for Austin proposed by the defendant is conveniently located at her school and will have other children of Austin's age with whom he can socialize and play in a healthy and nurturing atmosphere.
- [60] Presently I am not prepared to make an order of the nature sought by the plaintiff. At the moment, I agree with the submissions of the defendant and find that the status quo should not be disturbed as it allows for the child's maximum exposure to both parents in a reasonably stable joint parenting environment.
- [61] The jurisprudence that addresses the concept of "the best interests of a child" maintains that in some circumstances the status quo arrangement can be a significant factor in determining what is in a child's best interest (see: *Hill v. McCracken*, 2008 BCSC 932). According to both parties, the present joint parenting arrangement is working very well, notwithstanding the logistical inconvenience of having the shuttle Austin from Vancouver to Abbotsford and back on a weekly basis.

- [62] I find that for the time being it would be best to maintain the current arrangement relating to Austin's residence and access schedule, at least until he is about to enter elementary school. The defendant's residence will continue to be the child's primary residence and the plaintiff's access schedule will be as set out in the Court order pronounced on 20 August 2007.
- [63] Austin will not be starting school for another two years or so. In all likelihood a new access arrangement and perhaps a new principal residence will need to be determined on the eve of that happening. The parties will have leave to seek a review of the access schedule and Austin's primary residence prior to the start of his school year. If such a review is to occur, I urge the parties to initiate the review well in advance of Austin's first day of school. I also strongly encourage the parties to obtain a "best interests of the child" report prepared by an independent family counsellor, social worker or other qualified professional with a particular focus on the suitability of the parties' residences and the educational opportunities in the parties' communities. The contents of such an independent expert report would likely be of great assistance to the Court in determining whether to change Austin's access schedule.

Spousal Support and Child Support

- [64] I find that immediately upon arrival in Canada, the defendant fell into a disadvantaged position as compared to the plaintiff. She was unfamiliar with her environment, did not speak the local language, could not obtain employment, and had little social contact outside of the home. She did eventually participate in language courses offered at the local church. Notwithstanding that fact I find the defendant was living in an essentially isolated world but for the plaintiff and his family and that the situation soon became detrimental to her wellbeing.
- [65] As noted earlier in these reasons, I accept that the matrimonial relationship deteriorated as described by the defendant and also find that she cannot be faulted for leaving the family home and moving to Vancouver.
- [66] The plaintiff has, quite appropriately in my opinion, acknowledged that the defendant has been placed in a disadvantaged situation by the marriage and needs spousal support to assist her in gaining financial self-sufficiency. That leaves only the questions of quantum and duration to be determined.
- [67] To say that the plaintiff's financial record keeping practices are lax would be an understatement. He has intentionally mixed his personal expenses with those of the Restaurant and in doing so has made it practically impossible to determine his true employment income. He has used the Restaurant business for personal purposes, including regularly having family meals, and has taken funds from the business and given them to his mother and sister for their personal use. In other words, the plaintiff has used the Restaurant business as his personal bank, withdrawing funds at will for personal use

without any form of accounting.

- [68] The plaintiff submits that his annual income potential for the purposes of spousal support should be set at \$50,000 or less. I found the plaintiff's testimony and evidence in support of this position inadequate and wholly unconvincing. As with his testimony on other issues, I had difficulty accepting the truthfulness of the plaintiff's evidence relating to this issue.
- [69] Based upon the documentary evidence presented during the trial, I find that the gross sales of the plaintiff's Restaurant were \$126,254 in 2005, \$109,270 in 2006 and \$84,273 in 2007.
- [70] The plaintiff's claimed business expenses were \$48,419 in 2005, \$32,022 in 2006, and \$27,811 in 2007.
- [71] After deducting the claimed expenses from the gross sales, the average yearly income from the Restaurant for those three years is approximately \$70,500.
- [72] As previously noted, the plaintiff intermingled his personal expenses with those of the Restaurant. It is impossible to determine exactly what percentage of the business expenses is properly attributable to the plaintiff's personal use. Having reviewed the documentary evidence and having considered the testimony of the plaintiff and defendant, I accept the defendant's estimate of 20% and find that such a figure is likely a conservative one. Reducing the plaintiff's claimed expenses by that figure results in the average yearly income for the Restaurant for the years 2005 to 2007 to be approximately \$77,700.
- [73] I accept that the Restaurant's business revenues were declining over the years in question. I also recognized that for the past two years or so the economic climate in Canada has been a difficult one for everyone, including restaurant operators. In light of this I find that an imputed income of \$70,000 for the plaintiff would be appropriate in the circumstances of this case.
- [74] During the course of her evidence the defendant testified that she earned approximately \$50 a day in cash working as a part-time waitress. I find that it would not be unreasonable for the defendant to work two days a week, in addition to her part-time studies, and consequently impute an income to her of \$400 per month or \$4,800 per year.
- [75] In calculating the amount and duration of spousal support, I have used the imputed incomes of \$70,000 for the plaintiff and \$4,800 for the defendant. The fact that the defendant was compelled to remain in Vietnam for the first two years of the marriage does not alter the fact that the parties were married for six years and I have used that time period to define the length of marriage for spousal support purposes. I have considered and applied the Federal Spousal Support Advisory Guidelines to the circumstances of this case and have concluded that the plaintiff should pay the defendant \$1,528 per month for a period of 5 years.

[76] With respect to child support, I have considered the federal Child Support Guidelines, S.O.R./97-175 and particularly s. 9 of those guidelines as the present access arrangement results in each party sharing on a near equal basis the weekly care of Austin. I conclude it would be appropriate for the plaintiff to pay the defendant \$325 per month.

Family Assets

Determination & Valuation

[77] When the defendant immigrated to Canada in March 2004 following her marriage to the plaintiff in Vietnam approximately 2 ½ years earlier, she arrived with few personal belongings or assets and immediately became financially dependent upon the plaintiff.

[78] The plaintiff on the other hand had made for himself a comfortable life and was financially secure.

[79] Generally, the date of trial will be the date used for valuing a family asset. The Court has the discretion to fix another date if the principle of fairness necessitates it; however the date should not be earlier than the triggering event (see: N.M.M. v. N.S.M., 2004 BCSC 346).

[80] I find there are four assets that can potentially be categorized as family assets for the purposes of division between the parties:

- The Nanaimo Crescent residence;
- The Flaming Wok restaurant and property;
- The plaintiff's vehicles; and
- The parties' bank accounts

Nanaimo Crescent Residence

[81] I have no difficulty in determining that the Nanaimo Crescent residence is a family asset. Although it was purchased by the plaintiff prior to the parties' marriage, the property acted as the matrimonial home and principal family residence for the plaintiff, the defendant, and their son.

[82] In July 2005, the plaintiff transferred two-thirds of his interest in the property to his mother. At the same time, the plaintiff's mother transferred half of her newly acquired interest in the property to the plaintiff's sister thereby making the three of them joint tenants with each having a one-third interest in the property.

[83] During the course of his evidence, the plaintiff explained that the transfer of the two-thirds interest in his home to his relatives had nothing to do with his marital difficulties or any desire to insulate the property from a claim by the defendant. Instead, he asserted that his mother and sister had always worked at the Restaurant without receiving any remuneration and had therefore earned their respective interests in the property. As noted previously in

these reasons, the plaintiff's mother and sister did not testify at trial and therefore the only evidence before me relating to the reason why the interest in the property was transferred comes from the plaintiff. On this issue I specifically disbelieve the plaintiff and find he was in fact trying to limit any claim the defendant might have to this family asset.

- [84] An appraisal report dated November 2008 and filed at trial assessed the value of the Nanaimo Crescent property at \$315,000. I accept this value for the purpose of dividing this asset.

The Flaming Wok Restaurant - 33363 South Fraser Way, Abbotsford, B.C.

- [85] The plaintiff argues that the Flaming Wok restaurant is a business asset and should therefore be excluded from the family assets pursuant to s. 59 of the FRA which reads:

Excluded business assets

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

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

- [86] I disagree with the plaintiff's position and find that the Flaming Wok restaurant and property are family assets. The Restaurant and premises were purchased in December 2002, a year after the parties were married. The purchase was financed by means of mortgages placed upon the Nanaimo Crescent property. In other words, the parties' matrimonial home was used as security to purchase the business.

- [87] The Restaurant was habitually used for a family purpose in that it was the sole source of family income and acted as the physical location where the family regularly prepared and had their meals. By all accounts attending at the Restaurant and using its facilities for family purposes was part of the Tran family's daily routine. The plaintiff agreed during the course of his evidence, that the Restaurant was much like a second home to the parties. I accept that evidence and find such customary use converted the Restaurant into a family asset (see: *Elsom v. Elsom* (1983), 49 B.C.L.R. 297 (C.A.)).

- [88] I accept that shortly after her arrival in Canada the defendant began working with the plaintiff at the Restaurant and that she performed a multitude of tasks necessary to the successful operation of the business. This fact also convinces me that the Restaurant business and its premises are family assets.

- [89] The plaintiff argues that in the event the Court holds the Restaurant is a family asset, then the \$100,000 loan he claims he received from Mr. John Ho to help finance the purchase of the first restaurant in 1999 should be factored into the equation. More specifically, the plaintiff maintains that the loan, no portion of which has been repaid, should be a family debt for which the defendant is equally liable.
- [90] There is no documentation supporting the existence of the loan nor did the evidence of Mr. Ho, who testified at trial, assist in determining the issue. The suggestion that Mr. Ho loaned the plaintiff \$100,000 without any security or documentation is incredible. Apparently the only condition on the loan was that it would have to be repaid when Mr. Ho needed the money. In 2001 Mr. Ho and his wife bought a home in Vancouver. They did not have sufficient funds to finance the purchase, so they had to borrow money from friends. In 2002, Mrs. Ho's restaurant was failing and she was in debt. As a result, she had to sell her business. On neither occasion, when the Ho's were facing financial problems did they seek any repayment from the plaintiff of the said loan. This conduct leads me to doubt there ever was a loan.
- [91] I am not satisfied that the plaintiff is indebted to Mr. Ho to the sum of \$100,000. Consequently, that sum will not be included in any final accounting of the family assets and debts.
- [92] Notwithstanding a request that he do so before trial, the plaintiff failed to produce a business valuation or any sort of assessment of the value of the Restaurant as a business venture. In other words, there is no evidence of the value of the business operations of the Flaming Wok restaurant.
- [93] It would be a pointless exercise to attempt to place a value on the Restaurant as a going concern for it would be completely speculative. A proper appraisal is required of not only the Restaurant's value as a going concern but also of the Restaurants' assets, including the land and premises associated with it.
- [94] The plaintiff is therefore directed to retain an independent professional business appraiser for the purpose of preparing a complete appraisal of the value of the Restaurant.
- [95] The 2008 BC Assessment Authority assessment report valued the Restaurant's land and premises situate at 33363 South Fraser Way, Abbotsford, British Columbia at \$197,200. With regard to the land, I find the plaintiff has acted in much the same way as he did with the family residence. That is, in 2005 the plaintiff transferred two-thirds of his interest in the property to his mother and sister in equal shares. Moreover, around the same time, he converted the business from a sole proprietorship into a partnership wherein he retained a 70% interest and claimed his sister had the remaining 30% interest.
- [96] The reasons the plaintiff provided for these transfers are similar to those given for the title transfers he made relating to the family home. I note that during cross-examination the plaintiff acknowledged there was no partnership agreement between himself and his sister,

no financial consideration received from his sister for her 30% interest in the business and that his sister's name was not placed on the Restaurant's business license. The plaintiff also agreed that he, his mother and sister were concerned about the defendant's desire to assume a greater role in operating the Restaurant and felt the need to protect the business against that happening. From all of this I conclude that in making the transfers the plaintiff was attempting to insulate these assets, or a substantial share of them, from the defendant and any potential claim she might make to them.

[97] In my opinion, the land and premises associated with the Restaurant, as well as the Restaurant business itself are all family assets subject to being divided between the parties.

Vehicles

[98] It is unclear exactly how many and what type of automobiles the plaintiff owned when he married the defendant. On the evidence before me I am satisfied that during the course of the marriage the plaintiff had at least a 1955 Austin Healey, a 1961 Triumph TR3 and a 2002 Honda Accord.

[99] These vehicles were used during the course of the marriage and were therefore family assets.

[100] For reasons that are not altogether clear, the plaintiff sold these vehicles in 2007. The plaintiff presented no documentary evidence indicating the sale price he received for these assets. Nor was any independent valuation provided regarding the worth of the vehicles.

[101] The only evidence before the court is contained in the plaintiff's Financial Statement sworn 30 April 2008. I have used these amounts as the starting point for the determination of the value of the vehicles and have rounded the figures up to the nearest thousand.

[102] I set the value of the vehicles the plaintiff sold at \$68,000. The plaintiff will be responsible for compensating the defendant for half of that amount.

Bank Accounts

[103] The defendant had a Scotia Bank account that she opened in 2007. The account was primarily designed as a savings account for the Child Tax Credits that the defendant received on account of Austin.

[104] On 18 May 2007, only days after the defendant had left the matrimonial home, she withdrew \$7,500 from this account. The plaintiff claims that those funds were family assets and should be incorporated into any final accounting and determination of the division of family assets. I agree with the plaintiff and the sum of \$3,500 will be set-off against the funds he owes the defendant on account of his selling the family automobiles in 2007.

[105] The plaintiff's account was also with the Scotia Bank. The account served as both the plaintiff's personal account as well as the Restaurant's bank account. It would also appear that funds were drawn from this account and given to the plaintiff's mother and sister for their personal expenses.

[106] The account had approximately \$2,000 in it at the triggering date and I find this sum is one that is divisible between the parties.

Reapportionment

[107] Section 56 of the FRA governs the division of family assets and creates a statutory presumption mandating that family assets be divided equally between the parties.

[108] However, a Court can stray from this presumption of equality when it is satisfied that an equal division would be unfair to one of the parties. The burden of persuading the court to depart from an equal division of family assets lies on the party seeking the unequal division. In such a situation, the Court will have regard to the following provisions of section 65 of the FRA:

- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
 - (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when the property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient,
or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse

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

[109] The defendant came from a middle class family in Vietnam. She was studying at the university level and would likely have graduated and gone on to work in her family's business or her own venture. But for her marriage to the plaintiff, she would not have altered the course of her life as she did and emigrated from Vietnam.

- [110] The defendant argues that an equal division of the family assets would be unfair given the "asset disposal spree" the plaintiff embarked upon when marital troubles arose and it became apparent that the marriage was foundering. As the value of the assets available for distribution has diminished significantly on account of what the defendant argues was the plaintiff's attempt to shield them from her legitimate claim, the defendant submits it would be appropriate to reapportion what is left of those family assets 100% in her favour.
- [111] The defendant contends that she requires such a reapportionment of the family assets because of her need to become self-sufficient and in advancing this claim she relies primarily on s. 65(1)(e) of the FRA.
- [112] It is an accepted fact that the defendant is presently incapable of being self-sufficient. She is in the process of reaching that point; however she has not arrived as of yet. I find, given the cultural, linguistic and educational challenges the defendant faces, it will take a significant amount of time before she is financially self-sufficient.
- [113] The plaintiff submits that the assets that may be subject to division between the parties under the FRA consist of his 1/3 interest in the Nanaimo Crescent property, his 1/3 interest in the Restaurant premises, the vehicles and the funds in his savings account. He also argues that the defendant should be responsible for a portion of the loan from John Ho.
- [114] Had the plaintiff maintained his complete interest in the Nanaimo Crescent property and the Restaurant and premises, it is quite likely that he would have had a strong case to argue that an equal division of those assets with the defendant would be unfair. The result may well have been a reapportionment in the range of 30 - 40% to the defendant, perhaps less, with the remaining balance to the plaintiff. However that cannot now happen and the sole reason for that lies at the feet of the plaintiff. He chose to transfer a significant portion of his assets to his relatives and I find he did so in order to deliberately frustrate the defendant's rightful claim to a portion of them.
- [115] In addition to ordering a reapportionment, the Court may make a compensation order against a party who deliberately wastes, disposes or hides assets with the aim of reducing the amount available for distribution to the other party (see: *Jacobson v. Jacobson* (1991) 60 B.C.L.R. (2d) 40 (C.A.)).
- [116] In the circumstances of this case, I find an equal division of the plaintiff's 1/3 share of the family residence and the Restaurant property would be unfair to the defendant especially in light of the steps the plaintiff has taken to put those assets out of her reach. I therefore reapportion those family assets as follow:
- The plaintiff's 1/3 interest in the Nanaimo Crescent property is reapportioned 100% to the defendant;
 - The plaintiff's 1/3 interest in the Restaurant property is reapportioned 100% to the defendant;

[117] The parties will share equally the value of the plaintiff's automobiles as well as the funds in their respective bank accounts at the date of the triggering event.

[118] The parties will have leave to make submissions on the division of the Restaurant's value once an independent appraisal has been completed.

Costs

[119] The defendant has been successful at trial and she is therefore entitled to her costs on Scale B.

Summary

[120] In summary, I make the following orders:

- Divorce: subject to s. 12 of the Divorce Act, the plaintiff and defendant are divorced from each other, the divorce to take effect on the 31st day after the date of this order;
- Custody and Guardianship: the parties shall have joint custody and joint guardianship of their child Austin;
- Austin's access schedule: Austin's principal residence shall be with the defendant. The plaintiff will have access to Austin on a weekly basis from Saturday at 10:30 a.m. to Tuesday at 10:30 a.m.;
- Child Support: the plaintiff shall pay the defendant \$325 in child support commencing on 1 December 2009 and continuing until Austin is no longer a child of the marriage as defined under the Divorce Act or further order of the Court
- Review of Access Schedule and Child Support: Either party may have Austin's access schedule and principal residence reviewed by the Court prior to the child commencing his elementary schooling. At such time, the child support payments may also be reviewed;
- Spousal Support: the plaintiff shall pay the defendant spousal support in the amount of \$1,528 beginning 1 December, 2009 and continuing on a monthly for a period of 5 years;
- Family assets: the following items are declared to be family assets:
 - o The matrimonial home located at 3685 Nanaimo Crescent, Abbotsford, British Columbia;
 - o The business interests and good will of the Flaming Wok Restaurant;
 - o The land and premises located at 33363 South Fraser Way, Abbotsford, British Columbia, that are associated with the Flaming Wok Restaurant;
 - o The plaintiff's three motor vehicles; and
 - o The parties' bank accounts
- Division of Family Assets:

- o The plaintiff's interest in the land and premises located at 3685 Nanaimo Crescent, Abbotsford, British Columbia is reapportioned 100% to the defendant;
 - o The plaintiff's interest in the land and premises associated with the Flaming Wok restaurant located at 33363 South Fraser Way, Abbotsford, British Columbia is reapportioned 100% to the defendant
 - Compensation Order: The plaintiff shall pay the defendant \$34,000 as compensation for her half interest in the three motor vehicles the plaintiff sold in 2007 and \$1,000 for her share of the plaintiff's bank account as at the triggering date for a total of \$35,000. The defendant shall pay the plaintiff \$3,750 for his half share of the bank account proceeds she withdrew in May 2007. In the result, the plaintiff will pay to the defendant \$31,250 compensation; and
 - Costs: the defendant is entitled to her costs on Scale B.
- [121] There will be liberty to apply for directions whether in respect to the implementation of any of the terms of this judgment or any matter that has not been addressed.

"The Honourable Mr. Justice Gaul"

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