
CANADA / JUDGMENT

Volik v. Lisovska

2011 BCSC 22

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 22 Volik v. Lisovska

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Volik v. Lisovska,

2011 BCSC 22

Date: 20110110

Docket: 08-2166

Registry: Victoria

Between:

Michael Volik

Claimant

And:

Olexandra Lisovska

Respondent

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

Counsel for the Claimant:

Z. Tabaczuk-Porter

Counsel for the Respondent:

B. J. Kitzke

Place and Date of Trial:

Victoria, B.C.

July 20, 21 and 23, 2010 and

October 13, 14 and 15, 2010

Place and Date of Judgment:

Victoria, B.C.

January 10, 2011

INTRODUCTION

- [1] There are two main issues in this matrimonial proceeding: first, the division of family assets, including any reappportionment; and second, the respondent wife's entitlement to and the amount of spousal support.
- [2] The claimant husband seeks a divorce on no fault grounds. I am satisfied that the parties have lived separate and apart since May 2008 and that all the requirements of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) (Divorce Act), have been met. I grant the order for divorce, subject to s. 12 of the Divorce Act, to take effect on the 31st day after the date of these reasons.
- [3] The claimant is age 56 and the respondent is age 48. They married in Victoria, B.C., on March 1, 2007. The marriage was short in duration lasting a little over one year. There are no children of the marriage. On April 20, 2009, the court granted a declaration, pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 (FRA), that there is no reasonable prospect of reconciliation between the parties.

BACKGROUND

- [4] The pre-marriage history is brief. The parties met once many years ago and then, in 2006, renewed their acquaintance over the Internet. At that time, the claimant lived in Victoria; the respondent is a Ukrainian citizen and lived in Kiev, Ukraine. The parties developed a relationship and, by February 2007, agreed to marry and live in Victoria.
- [5] Because the parties did not marry before the respondent came to Victoria, she had to obtain a visitor's visa to come to Canada. After the marriage, the claimant sponsored the respondent and she obtained permanent resident status and eventually a work visa. Since the separation, the claimant has revoked his sponsorship and, accordingly, the respondent's immigration status and entitlement to remain in Canada, as she wishes to do, is unsettled. The evidence did not address whether the claimant remains obligated, pursuant to the sponsorship agreement, to support the respondent, although he obviously takes the position that he is not.

- [6] Before coming to Canada, the respondent lived with her son, then a student and now a recent university graduate, in an apartment in Kiev. The respondent is well educated and completed a post-secondary degree in design and technology. She has held various positions throughout her working life in Ukraine including working at a television station for the last 15 years before resigning her position to come to Canada. She started at the station as a computer programmer and worked her way up to a management position where she earned the equivalent of \$7,000 USD per month.
- [7] Unfortunately, and in spite of the respondent's education, training and career in Ukraine, her employment opportunities in Canada have been, to this point, limited to low paying physical jobs. Although the respondent's ability to communicate in English has improved during her time in Canada, she still speaks English with a pronounced accent and, while testifying, demonstrated that her English vocabulary and grammar skills are still limited.
- [8] As a result, the respondent has not succeeded in finding employment that would allow her to use her computer skills because of her limited language skills. I doubt that she will ever be employable at a similar level in Canada as she was in Ukraine.
- [9] The respondent described herself as well-off in Ukraine. She and her son own the Kiev apartment, which he still lives in, and she had saved about \$70,000 USD before coming to Canada. There is a dispute about the value of the Kiev apartment that I will later discuss, although it never became a family asset. The value of the respondent's interest in the Kiev apartment is relevant only insofar as it relates to her ability to achieve and maintain self-sufficiency.
- [10] The respondent first considered immigrating to Canada in about 1999. She applied at that time but did not have enough language points. She did not pursue the matter as, not long after applying, she received a significant promotion at work. According to her, she never re-applied.
- [11] Opposing counsel challenged the respondent in cross-examination by suggesting that she engaged an immigration consultant to apply for a Manitoba skilled worker program. I accept the respondent's explanation that a friend in Manitoba found a potential job for her and arranged for the immigration consultant but the respondent never followed through on it.
- [12] I also accept that the respondent's main reason for coming to Canada in 2007 was her desire to marry the claimant. The respondent was a single mother during most of her son's life. By 2006, her son was a young adult and close to finishing university. Under cross-examination, the respondent was passionate and believable in explaining her reasons for coming to Canada. I am satisfied that she was committed to making a new life, or "family", with the claimant consistent with their marriage shortly after his return to and her arrival in Canada.

- [13] The claimant travelled to Kiev in February 2007, met with the respondent and returned home. The respondent flew to Canada the next day and brought \$6,000 USD with her, the maximum permitted for a visitor from Ukraine. A portion of that amount was used to repay the claimant for the cost of her airline ticket that the claimant had purchased for her and the balance to pay down his credit card debt.
- [14] From the balance of her savings in Ukraine, the respondent advanced some monies to and on behalf of her son and then transferred a total of \$40,000 USD from Ukraine to a joint savings account with the claimant in Victoria on March 14 and 21, 2007, respectively. The account was at a nil balance immediately before the transfers and the new balance upon conversion to Canadian currency was \$45,762.98.

FAMILY ASSETS

- [15] The circumstances surrounding the use of this money were in issue at trial. The evidence of the parties can only be partially reconciled, although the bank records and other evidence, to which I refer below, support the respondent's account of events where it conflicts with that of the claimant. I also found the respondent to be more credible than the claimant. There were significant gaps and contradictions in his evidence that rendered it less reliable.
- [16] At the time of the marriage, the claimant owned a condominium that he had purchased in late 2005 for \$160,000. He made a down payment of \$5,000 and financed the balance by taking out a mortgage. The parties lived together in the condominium for about eight months until September 2007.
- [17] According to the claimant, he made all the mortgage payments and paid all household expenses. He also finished renovations to the condominium that he commenced before the marriage, although he acknowledged that the claimant assisted with some minor painting. He eventually sold the condominium in April 2008 for \$249,400. The net sale proceeds were \$92,300.
- [18] The parties started looking for a new home shortly after their marriage. On April 30, 2007, the claimant completed the purchase of a house on Lockley Road, Victoria. The purchase price was \$279,900. The deposit was \$5,000 and the claimant took out a mortgage for \$209,900. The balance required to complete the closing was \$68,928.
- [19] The parties eventually moved into the house in September 2007 and lived there together until they separated in June 2008. There is no question, in the circumstances, that both the condominium and the house were family assets as defined in s. 58(2) of the FRA.
- [20] According to the claimant, during his evidence in chief, he borrowed \$35,000 from the Royal Bank so that he could make the down payment on the Lockley property and later paid off the bank loan when he sold the condominium. He did not volunteer that the respondent contributed financially in any way to the purchase of the property.

- [21] Instead, the claimant produced a handwritten undated document that the respondent created when they were separating. The document refers at the top to \$45,762.98, an apparent reference to the amount that the respondent transferred into the parties' joint bank account. The document goes on to itemize apparent expenses relating to a car (\$3,786.63); furniture (\$887) and an unidentified expense of \$15,000 "to Nastya".
- [22] According to the claimant's evidence in chief, the respondent prepared the document to calculate the amount he was to return to her upon separating. The reference to Nastya appears to be to the claimant's adult daughter, although there is no evidence that the parties, or either of them, borrowed money from her or otherwise agreed that any money should be paid to her. At one point, the document referred to \$17,100 rather than \$15,000 but was changed to the latter. The claimant offered no explanation for this entry although it significantly reduced the amount payable to the respondent, noted as "Total to be returned to me." In the end result, the total was \$23,989.35. Ultimately, on May 7, 2008, the claimant wrote a cheque to the respondent for \$24,000.
- [23] In cross-examination, a different picture emerged respecting the use of the money that the respondent transferred into the joint account and casts significant doubt on the claimant's evidence in chief respecting the house transaction. The claimant conceded that he did not have any savings at the time of the transaction and needed to borrow the down payment. He suggested, in cross-examination, that he asked the respondent if he could borrow part of the down payment from her and that, if so, he would repay her when he sold the condominium. He testified that he borrowed about \$40,000 from the respondent as a result.
- [24] The claimant's evidence in cross-examination was curious because he agreed that the respondent asked that the house be registered in joint names. When it was put to him that he told her that could not happen because of her immigration status, he denied it and stated that the lawyer who handled the real estate transaction told her that. He agreed that the respondent attended meetings with the realtor and the lawyer. He also agreed that the respondent accompanied him when he applied for a line of credit respecting the house transaction.
- [25] The various bank records and transaction records respecting the purchase of the house demonstrate to my satisfaction that the deposit of \$5,000 came from the monies that the respondent had deposited to the joint account as did another \$40,000 paid by means of a bank draft to the lawyer to complete the transaction. I reject the claimant's evidence that he provided the deposit. I find that the claimant only provided \$28,866.42 towards the purchase. He obtained that amount as an advance on a personal line of credit that he arranged.
- [26] In spite of the claimant's evasions during his testimony, I am satisfied that the respondent contributed \$45,000 out of the funds that she brought from Ukraine so that the purchase of the house could complete. It defies credulity that she would not insist on sharing title unless someone persuaded her that it was not possible for her to do so.

- [27] According to the respondent, she wanted to buy a house from the beginning and first discussed doing so with the claimant during the time that he was in Kiev. She confirmed her involvement in the transactions leading up to the purchase but stated that when she asked the claimant whose name would go on title, he told her that her name could not go on title because she was not a Canadian citizen. According to her, the lawyer inquired why she was not going on title and she explained that the claimant told her that she could not. The lawyer, again according to the respondent, told her that she would have an interest in the house whether or not she was on title.
- [28] The real estate lawyer who handled the transaction also testified. She stated that she does not know of any legal impediment to non-residents owning real estate in the province and she has been involved, in the past, in such transactions. According to her, the claimant asked her about the property tax exemption available to first time buyers. She noted "spouse not going on title" on the file as a result of her discussion with the claimant. According to her, the claimant, who was already a property owner, would not be eligible for the exemption, nor was the respondent eligible as she had not resided in the province long enough for that purpose.
- [29] I consider it likely that the claimant seized on the information respecting the ineligibility for exemption and find that he informed the respondent that she would not be on title due to her immigration status. The Lockley Road property is a family asset because the parties moved into the house in September 2007 and lived there together until they separated in June 2008. The parties' initial financial contributions of \$45,000 by the respondent and \$28,866 by the claimant amount to about 61% and 39% respectively of the cost to acquire the property.
- [30] The above does not take into account the ongoing contributions for the mortgage, property taxes and maintenance. Any contributions by the respondent before separation were minimal and she has made none since. I find that the claimant has paid virtually all these expenses.
- [31] The claimant paid off the line of credit that he used to finance 39% of the acquisition cost of the house after he sold the condominium that the parties lived in. The claimant purchased the condominium before he married the respondent. It is important to set out the chronology of events relating to the acquisition and eventual sale of the condominium in order to trace the net proceeds from the eventual sale of that family asset.
- [32] The claimant purchased the condominium in November 2005 for \$160,000. The down payment was \$5,000 and he financed the balance by obtaining a mortgage of \$156,180. By 2007, the year of the marriage, the assessed value of the property for tax purposes increased to \$170,000. The eventual selling price in April 2008, not long before the couple separated, was \$249,400. Accordingly, most of the increase in value occurred during the course of the marriage after the property became a family asset.

- [33] As set out above, the claimant used part of the sale proceeds to pay off the line of credit that he used to finance his 39% of the acquisition cost of the Lockley Road property. Sometime after the separation, he increased the Lockley Road mortgage from \$209,900 to \$239,000. There is no clear evidence as to when that happened or what the claimant did with the additional \$30,000 advanced.
- [34] During cross-examination, the claimant testified that he originally deposited the funds to an account and later withdrew it in cash. He did not disclose the \$30,000 or any related debt obligation in his first Financial Statement sworn July 20, 2008. As a result, I conclude that the transactions occurred after that date.
- [35] The claimant swore a second Financial Statement on November 24, 2009. That document discloses a mortgage obligation of \$229,000 as well as unsecured debts totaling almost \$60,000. None of the unsecured debts appear to relate to the line of credit.
- [36] On July 18, 2010, the claimant swore a further Financial Statement. On this occasion, he estimated the value of the house at \$310,000. He deposed that the amount owing on the mortgage was \$197,000 and that he owed \$31,275 on the line of credit. On this occasion, he also disclosed additional unsecured debts totaling \$20,867. The content of this statement suggests that the claimant likely used the additional amount borrowed to pay down some of his unsecured personal debt.
- [37] According to the claimant, the bank cancelled the \$30,000 increase in the mortgage and instead reactivated the balance owing on his line of credit. This appears correct. As at July 2010, bank records disclose that the claimant owed \$30,000 on the line of credit and \$187,430 on the mortgage for a total of \$217,430. The claimant is solely liable for those debts.
- [38] I conclude that the amount owing on the line of credit is not related to the acquisition of the Lockley Road property and, as a result, only attribute the amount owing on the mortgage, namely \$187,430, to the acquisition of the property. In this regard, I take into account that the claimant deposed to limited unsecured debt totaling \$5,850 at the time of his first Financial Statement in July 2008, an amount that has since increased to more than \$50,000.
- [39] There are two appraisals in evidence respecting the market value of the Lockley Road property. The first, obtained by the claimant, values the house and property at \$275,000 as at August 21, 2009. The second appraisal, obtained by the respondent, values the house and property at \$310,000 as at March 22, 2010. The claimant criticized the second appraisal.
- [40] According to the claimant, he made a number of alterations to the house that the appraiser failed to take into account. These included removing the oil heater and tank, replacing them with electric baseboard heating, adding new flooring, upgrading the bathroom and installing ventilation. I infer from that evidence that the claimant views the 2010 appraisal as too conservative because it fails to take into account the added value that he associates with the changes to the house.

- [41] The second appraiser noted that the house was under renovation but also that he observed rot in some places and considered the overall condition of the house as only fair. The first appraiser viewed the house in its original condition and also described the overall condition as only fair.
- [42] There is some additional support for concluding that the house is only in fair condition. The 2010 property assessment for the house and property also shows an assessed value for 2010 of \$277,000 consisting of \$244,000 for the land and \$33,000 for the building. This represents a significant drop in the overall assessed value in 2009 of \$310,400 and likely reflects market forces.
- [43] As the second appraiser pointed out, in the time since April 2007, property values generally have gone up, down and then up again. I accept that but it demonstrates the difficulty in determining on the evidence what the market value of the house and property was at any finite time. In addition, the most recent assessment suggests that property values may have fallen again.
- [44] On all the available evidence, I conclude that the value of the Lockley Road property, at the time of the s. 57 declaration in April 2009, was more than the first appraisal but less than the second. I conclude that the value at that time was \$300,000. Since then, the value increased somewhat but, by the time of trial, was likely less than the second appraisal. I conclude that the value at the time of trial was likely very similar to the April 2009 value.
- [45] The claimant is also entitled to a pension from the Coast Guard although it is not possible at this point to precisely value it. The claimant's pension entitlement is also a family asset. The pay stubs in evidence demonstrate that the claimant made contributions into the plan of about \$2,600 per year. It is reasonable to conclude that from the time of the marriage to the time of the s. 57 declaration, the claimant contributed about \$5,200 to the plan.
- [46] There are no other family assets that I am asked to take into account although, as earlier set out, I must consider the respondent's interest in her Kiev apartment insofar as it affects her ability to achieve and maintain self-sufficiency. I will next set out the evidence relating to the value of the Kiev apartment and then turn to my findings respecting the respondent's earnings since coming to Canada as well as whether she has the necessary skills to earn a greater income in Canada than she has to date.

KIEV APARTMENT

- [47] The parties never lived together in the Kiev apartment and the claimant did not testify respecting its use. The respondent testified that her grandfather lived in the apartment before her; that she began living there in 1992, and finally, that she and her son took equal private ownership in 1995. Her son continues to live in the apartment.

- [48] A certificate issued in Ukraine in 1997 by the department apparently responsible for the privatization of government residences corroborates the respondent's evidence respecting equal ownership of the apartment with her son even though he was still a child at that time. According to the respondent, her grandfather was entitled to an interest until he died and thereafter, she and her son were solely entitled as surviving family members. She further testified that, because she has not lived in the apartment for more than two years, her son is now entitled to take full ownership although she does not expect him to do so.
- [49] There is no other evidence respecting the application of Ukrainian property law. I have no reason to disbelieve the respondent's evidence on the questions relating to ownership and accept that she continues to have a half interest in the Kiev apartment.
- [50] The evidence as to value is limited. The respondent deposed in a Financial Statement sworn in July 2010 that the value of her half interest is only \$15,000. When the claimant continued to challenge that valuation during the trial, in August 2010, the respondent commissioned an appraisal that demonstrates a market value of \$32,407 USD. According to the appraisal, the unit is in a building that was built in about the 1970s and the apartment needs to be renovated.
- [51] The claimant put in evidence two translations of Internet offerings for sale in an effort to demonstrate that property values are higher in the immediate area. The details of the offerings are identical and I conclude that they relate to a single apartment located somewhere on the same street as the respondent's apartment in Kiev. The actual street address is not disclosed in the translations.
- [52] The unit was offered for sale in July 2010 at the equivalent of \$81,000 USD. The offering describes the unit as needing renovations.
- [53] The evidence respecting the apartment described in the Internet offerings is not very helpful. There is relatively little detail although it is apparent that the size of the apartment is larger than the respondent's apartment. Further, there is no evidence as to whether the unit ever sold and, if it did, the actual selling price.
- [54] I am somewhat skeptical but accept the evidence of the respondent's appraiser and find that the value of the respondent's apartment in Kiev is \$32,407 USD. The actual value is less significant here than might otherwise have been the case. The respondent's half interest is probably only marketable if her son were to agree.

THE CLAIMANT'S FINANCIAL POSITION

- [55] During the marriage, the claimant worked for the Coast Guard. His income from all sources for the period 2007 through 2009 was as follows:

2007

\$49,610

2008

47,847

2009

48,448

In his July 2010 Financial Statement, the claimant estimated that his 2010 income would be the same as in 2009. At trial, he resiled somewhat from that evidence.

[56] At trial, the claimant testified that the amount of his 2010 income was unknown because he was subject to termination effective August 13, 2010, and thereafter dependent on Employment Insurance (EI). He produced a letter of termination dated June 23, 2010, in such regard. I note that the employer expressed a hope in the letter that the claimant would be re-employed in the future. In fact, there is a past pattern of annual layoffs or terminations. The claimant also received EI in previous years that he worked for the Coast Guard including in 2008 and 2009, although the amount in the latter year was insignificant. The claimant did not produce his final pay stub to demonstrate his total 2010 earnings from the Coast Guard at the date of termination.

[57] I prefer the claimant's evidence as to his annualized 2010 earnings set out in his Financial Statement. He must have had the letter of termination in his possession and taken it into account when he swore his statement. I find that the claimant's annual pre-tax income from all sources at the time of trial was \$48,000, an amount slightly less than his average earnings over the previous three years. I did not understand counsel for the claimant to urge any different finding in her final submission.

[58] The claimant claims monthly expenses, including the mortgage and payments on personal debt without regard to his interim support obligation, of \$3,692. The monthly mortgage cost is \$1,269 and other necessary and reasonable monthly expenses directly attributable to ownership of the house total about \$500. As set out earlier, the claimant has made all those payments since separation.

[59] Some of the claimant's expenses are unreasonable or excessive in the circumstances. These include meals outside the home; furnishings and equipment; the allowance for vehicle repairs and maintenance; education; and finally, gifts. Again, excluding the interim support obligation, I find that the claimant's reasonable monthly expenses are \$3,400. About half that amount relates to the ownership of the Lockley Road property.

THE RESPONDENT'S FINANCIAL POSITION

- [60] I earlier set out that the respondent is well trained and held a well paid executive position before leaving Ukraine. She has no plan to return to Ukraine although she may have to if her application for permanent residency in Canada fails. If she returns to Ukraine, she cannot return to her previous position and, in any event, is expected to retire fully at age 55, about seven years from now.
- [61] When the respondent first came to Canada, her ability to seek work was, at first, entirely constrained because she entered the country on a visitor's visa. Since arriving, she has worked variously as a house cleaner, chambermaid, kitchen helper and in a portrait studio. She has applied unsuccessfully for other work including positions that would allow her to use her considerable computer skills.
- [62] The respondent has taken some English classes but has not achieved sufficient proficiency to expect her to obtain work in the computer field in the immediate future. Whether it is possible in the long-term will require a significant boost to her English communication skills.
- [63] The respondent's lack of success in the employment field is largely attributable to the language problem. In the result, and given the respondent's age, her long-range employment prospects in Canada will likely continue in lesser paying positions that rely more on physical effort or acquired skills such as kitchen work or photography.
- [64] Since coming to Canada, the respondent has declared income, as follows:
- 2008
- \$2,851
- 2009
- 7,348
- [65] The latter arises from employment income of \$5,447 (rounded up) and net business income of \$1,901 arising from contract kitchen work for a small local business. In 2010, the respondent anticipates earning about \$13,200 from various sources.
- [66] The respondent currently shares rented premises at a cost of \$750. Her total monthly expenses are about \$2,000. Apart from her interest in the family assets, she owns a car worth about \$2,000. Her personal debts, excluding legal fees, total about \$9,000.

INTERIM SPOUSAL SUPPORT ORDER

[67] In March 2010 Bauman C.J. ordered the claimant to pay interim spousal support to the respondent of \$1,200 per month commencing as at February 1, 2010. By the date of trial, the claimant was about \$9,800 in arrears. According to the claimant, he cannot afford the payments but, as I have already observed, he paid down his personal debt significantly during the same period. In the result, he has improved his own position at the expense of the respondent.

THE PARTIES' CONTRIBUTIONS TO THE CONDOMINIUM

AND THE LOCKLEY ROAD PROPERTY

[68] The claimant testified that while he and the respondent lived in the condominium, he continued paying the mortgage and all expenses as he had before their relationship began. He also completed the bulk of renovations to the unit. According to him, those were half complete before the respondent arrived. He further testified that the respondent contributed to painting trim but nothing else.

[69] The claimant's evidence respecting the Lockley Road property was similar to the above. He testified that he paid the mortgage as well as household expenses such as the utilities. Some of his personal credit card debt related to household expenses and the cost of renovations. He agreed that the respondent helped with painting and cleaning the house before they moved in. Using credit, the parties also purchased new appliances and some new furniture for the house.

[70] By the time of separation, the claimant's additional debt load, apart from the mortgage and line of credit, approximated \$30,000. With the exception of bedroom furniture that the respondent took with her at the time of separation, the claimant retained all the appliances and furnishings. He also deducted the cost of the bedroom furniture from the amount that he paid to the respondent upon separation.

[71] According to the respondent, she contributed more financially and in labour respecting the condominium than the claimant credits her for. She testified that she was involved in extensive trim painting throughout as well as extensive cleaning of the unit and appliances. As earlier set out, after her arrival in Canada, she paid \$5,000 of the claimant's existing credit card debt. The respondent also testified that before they moved into the house on Lockley Road, she painted the master bedroom walls, all the trim, windows and doors. She also cleaned all cabinets, floors and appliances.

[72] Generally, I prefer the evidence of the respondent respecting her contributions where it conflicts with that of the claimant. The claimant was not candid at trial about important matters, particularly in relation to the purchase of the Lockley Road house and property. I find that his treatment of the respondent at the time of separation was intended to enhance his own financial position at the expense of hers. Since the end of the relationship, the

claimant has also improperly hounded the respondent by reporting her to the police for non-existent illegal activity and by complaining to the financial institutions from which she has obtained personal credit cards. I have little doubt that the claimant is willing to lie about the respondent to advance his own agenda.

REAPPORTIONMENT: POSITIONS OF THE PARTIES

- [73] In final submissions, the claimant sought reapportionment pursuant to s. 65 of the FRA with respect to both the proceeds from the sale of the condominium that the parties first lived in during their marriage and the Lockley Road property. He conceded that his pension contributions are a family asset and agreed with the respondent's contention that her interest be addressed by making a compensation order with respect to half the contributions that the claimant made from the time of the marriage to the triggering event. The claimant contends that the first two assets should be reapportioned 80:20 in his favour.
- [74] Given the two years between the marriage and the s. 59 declaration, the respondent contends that the claimant should pay a lump sum of \$2,800 representing half his employee contributions for the period. He would then be entitled to retain the full benefit of his pension when it vests.
- [75] As to the net proceeds of about \$92,000 generated by the sale of the condominium, the respondent contends that a fair reapportionment would leave her with 20% to 25%, or \$18,400 to \$23,000. As to the Lockley Road property, the respondent says that it should be reapportioned 65% to 75% in her favour.

SPOUSAL SUPPORT: POSITION OF THE PARTIES

- [76] As to spousal support, the claimant emphasizes that the marriage was short-term and that the respondent has an asset in Ukraine. He submits that the interim spousal support arrears should be cancelled, although there is no formal application to that effect before the court.
- [77] As to permanent spousal support, using \$48,000 as his income and \$13,000 as the respondent's income, the claimant contends that the range of award at the high end under the Spousal Support Advisory Guidelines (SSAGs) ought to be \$58 to \$60 per month for one year.
- [78] The respondent says that the SSAGs do not apply in the present circumstances and that it is evident that the court did not apply them when ordering interim spousal support. Counsel points out that the claimant could have paid interim support from the \$30,000 that he has never directly accounted for. Counsel further asserts that the claimant can afford to continue paying \$1,200 per month so long as he does not give preference to his other debt obligations. Counsel submits that support should continue at that level until the respondent receives her share of the assets and, only at that point, be reduced to \$600 per month reviewable two years thereafter unless there is an earlier material change of circumstances.

FAMILY ASSETS

- [79] Each spouse is entitled to an undivided half interest in family assets as a tenant in common when a triggering event occurs (FRA, s. 56). In this case, the triggering event is the s. 57 declaration made on April 20, 2009. A family asset is defined in s. 58(2): "Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset." The claimant did not challenge the assertion that the condominium in which the parties lived after their marriage and the eventual net proceeds of sale were potential family assets. Nor did he challenge the assertion that the Lockley Road property was also a family asset. Finally, as his income was ordinarily used for family purposes, he did not challenge the assertion that his pension contributions between the date of marriage and the triggering event were also family assets.
- [80] The only other real property owned by either party is the respondent's half interest in the Kiev apartment. The claimant does not contend that the Kiev apartment was ordinarily used for a family purpose and there was no evidence to suggest that it was.
- [81] The only other potential family assets are the furniture, furnishings and appliances that the claimant purchased for the Lockley Road property. On the evidence, the claimant incurred significant personal debt in making those acquisitions. Except for the bedroom furniture discussed above, the claimant retains all those items. Presumably, because of the related debt obligation, the respondent did not advance any claim against them at the conclusion of the trial and I need not address them any further.
- [82] In the result, my analysis will be limited to the following family assets:
1. Net proceeds of \$92,300 from the sale of the condominium registered in the name of the claimant;
 2. Lockley Road property registered in the name of the claimant valued at \$300,000 as at the triggering event and trial; and
 3. Claimant's pension contributions from the date of marriage to the triggering event (two years) totaling \$5,200.
- [83] As earlier set out, each party seeks some reapportionment in their favour. Section 65 of the FRA provides that, if the division of property under s. 56 would be unfair, having regard to the enumerated factors, the court may divide the property into shares fixed by the court. The factors to be considered are:
1. The duration of the marriage;
 2. The duration of the period during which the parties have lived separate and apart;
 3. The date when the property was acquired or disposed of;
 4. The extent to which property was acquired by one spouse through inheritance or gift;

5. The needs of each spouse to become or remain economically independent and self-sufficient; or
6. Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse. See s. 65(1)(a) to (f).

Of the factors listed, only the fourth is inapplicable here.

- [84] The duration of the marriage was short, only about 14 months. By the commencement of trial, the parties had lived apart for about 25 months.
- [85] The claimant owned the condominium from late 2005 until April 2008. He received the net sale proceeds referred to above in late April or early May 2008. He purchased the Lockley Road property in May 2007, continues to own it and still resides there. As set out earlier, between the date of the marriage and the triggering date, he contributed about \$5,200 to his pension plan.
- [86] Both parties need to be economically independent and self-sufficient; however, the claimant's current financial circumstances are better than those of the respondent. The claimant earns a significantly greater income than the respondent and has reasonable prospects for the future. The respondent earns little income and has very limited future employment opportunities.
- [87] The claimant lives in the Lockley Road house and enjoys all the associated comforts. The respondent shares rental space with another woman and has little prospect of improving her living arrangements except through her share of family assets.
- [88] The respondent owns a one-half interest in the Kiev apartment but it is unlikely that she will return to live in Ukraine unless she is denied permanent residence in Canada. As earlier set out, I doubt that she can easily sell her interest in the Kiev apartment on the open market although her son might agree to buy out her interest. In the circumstances, the respondent's interest in the Kiev apartment does not assist her very much in achieving economic independence or self-sufficiency. Finally, I take into account the possibility, although I consider it remote, that the respondent might decide to move back to Ukraine voluntarily once the litigation ends.
- [89] Both parties have personal debts but the claimant has significantly more than the respondent. Largely, that is because the claimant borrowed heavily to purchase Lockley Road. He also incurred significant debt purchasing furniture, furnishings and appliances for the home. If the claimant's debt load is unmanageable, it is because the parties lived beyond their means before the separation and he has continued to do so since.

- [90] The claimant owned the condominium for about 14 months before the marriage. During that time, he paid the mortgage and all other costs related to the ownership. He also did most of the work improving the condominium. He continued paying most of the mortgage and other expenses relating to the condominium for the additional 13 month period from the marriage in March 2007 to the sale in April 2008.
- [91] The respondent's contributions towards the expenses associated with the condominium and its improvements, both financially and by way of labour, were relatively minimal. Instead, she invested a significant amount towards the purchase of the Lockley Road property. The claimant, on the other hand, personally borrowed all the funds that he contributed towards the purchase and he still effectively carries that debt in addition to paying the mortgage.
- [92] After the parties moved to the Lockley Road house, the respondent made further financial contributions towards ongoing expenses relating to the property but those were significantly less than the claimant's. At the time of separation, the claimant paid the respondent \$24,000. Although I reject the form of accounting, there is no doubt that the respondent received that amount. It is likely that the claimant was able to pay that amount because he had recently received the net proceeds generated by the sale of the condominium.
- [93] The respondent also contributed some labour towards improving the house on Lockley Road but not as much as the claimant did. The claimant has paid all expenses and made all the improvements since the time of separation.
- [94] Dealing first with the net sale proceeds from the condominium, I agree with the claimant that it would be unfair for the respondent to receive half the net sale proceeds having regard to the enumerated factors in s. 65(1). The respondent conceded that an appropriate reapportionment would leave her with only 20%-25%. The claimant seeks 80% in his favour.
- [95] In my view, a reapportionment of 75% of the net proceeds of the sale of the condominium in favour of the claimant is justified. The respondent's entitlement is slightly over \$23,000 but she already received \$24,000 at the time of separation.
- [96] The claimant would not have been able to purchase the Lockley Road property when he did if the respondent had not provided \$45,000. In spite of that contribution, the claimant still had to borrow against his line of credit in addition to taking out a mortgage. He paid most of the mortgage and other expenses before separation and all of them since.
- [97] As a result of market forces, the Lockley Road property modestly increased in value by about \$20,000 between the time of purchase and the s. 57 declaration. The original amount owing on the mortgage was about \$210,000. As at July 2010, the amount owing on the mortgage was \$187,400. There is no evidence as to the amount owing on the mortgage as at the date of the s. 57 declaration. Nonetheless it is apparent that the claimant has paid down the mortgage significantly in a little over three years. As the value of the property in 2010 is the same as in 2009, I consider it unnecessary to make any further adjustments.

- [98] I decline to take directly into account the additional \$30,000 that the claimant borrowed to complete the purchase and later paid off after he received the net proceeds from the sale of the condominium. Nor do I take directly into account the further \$30,000 that the claimant borrowed after separation. It would be unfair for the respondent to bear any of the costs associated with those borrowings.
- [99] In the result, I conclude that deducting the amount currently owing on the mortgage from the value of \$300,000 leaves equity of about \$113,000.
- [100] Both parties seek to have the Lockley Road property reapportioned in their favour. The claimant seeks 80% and the respondent seeks 65% to 75%. In all the circumstances, I find nothing unfair in a 50:50 division and decline to reapportion in favour of either party. The interest of each party as a tenant in common is worth about \$56,500.
- [101] Either the Lockley Road property must be listed and sold as soon as possible or one party will have to buy out the interest of the other. I do not know if the latter is a realistic alternative. I see no prospect of the respondent buying out the claimant's interest. There may be some possibility of the claimant buying out the respondent's interest but that likely depends on his ability to further borrow. In the circumstances, the claimant shall have the option of purchasing the respondent's interest in the Lockley Road property for \$56,500 provided the transaction completes no later than February 25, 2011, unless the parties otherwise agree.
- [102] If the claimant elects to buy out the respondent's interest, he is entitled to a credit of \$1,000 arising out of his payment to the respondent after the sale of the condominium. Alternatively, the credit may be applied towards the claimant's other obligations to pay later referred to in my reasons.
- [103] Unless the claimant purchases the respondent's interest in the Lockley Road property as set out above, as at February 25, 2011, the parties shall have joint conduct of sale and list the property for sale. Absent agreement as to the listing realtor and listing price, either party may apply for directions.
- [104] The parties may agree to any final sale of the property and the equal division of any net sale proceeds subject to the proviso set out immediately below. Failing agreement, either party may seek court approval.
- [105] The Certificate of Title for the Lockley Road property shows a charge under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 (FMEA). Any monies payable to extinguish that charge shall reduce the one-half share of the net proceeds otherwise payable to the claimant. In other words, the obligation to pay interim support is effectively a charge upon the claimant's one-half interest. Either party may apply for directions respecting approval of any final sale or otherwise arising out of the above. I will set out my reasons for denying the application to cancel or reduce the arrears in the next section of the judgment.

[106] Turning to the pension issue, the parties effectively agreed to an equal division of the claimant's pension contributions over the two year period from the date of marriage to the triggering event totaling \$5,200. Half that amount, \$2,600, is payable by the claimant to the respondent immediately.

CANCELLATION OR REDUCTION OF INTERIM SPOUSAL SUPPORT ARREARS

[107] Even if it is open to me to cancel or reduce arrears absent a proper application, I would decline to do so in the present circumstances. The courts are generally reluctant to reduce or cancel arrears unless it would be grossly unfair not to do so (*Ghislieri v. Ghislieri*, 2007 BCCA 512).

[108] The claimant made no real effort to comply with the order, nor did he offer any explanation for his delay in raising the issue. Instead, throughout the proceeding, he has chosen to pay down personal debt at the expense of the respondent. He also had undisclosed assets of about \$30,000 from the line of credit. I cannot find any special circumstances that would render it grossly unfair to require him to pay the arrears. See *Longstaff v. Longstaff* (1993), 86 B.C.L.R. (2d) 1 (B.C.C.A.) and *Ghislieri*.

PERMANENT SPOUSAL SUPPORT

[109] I am satisfied that the respondent is entitled to spousal support. She will eventually receive her half share of the value of the Lockley Road property but at most that amount will be \$56,500. If the property has to be listed and sold, her share will be dependent on the actual market and reduced by half the cost of selling the property including the real estate commission. She is also entitled to the immediate payment of \$2,600 referred to above. Even if all goes smoothly, the total will not be enough for the respondent to achieve self-sufficiency. More likely, it will assist her in finding reasonable rental accommodation.

[107] Section 15.2(6) of the Divorce Act sets out the objectives of a spousal support order. Of significance here, it should:

- (1) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (2) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (3) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[108] The respondent is less well off economically now than she would have been if she had remained in Ukraine. To that extent, she has been economically disadvantaged arising from the marriage. This disadvantage is perhaps tempered by the fact that she knowingly chose to come to Canada and must have anticipated some reduction in her standard of living. Since the separation, the respondent's standard of living has further declined

because the claimant was the major income earner in Canada and paid most of their expenses.

- [109] The respondent is not as well equipped to earn a reasonable living in Canada as she was in Ukraine. On the other hand, the marriage was short in duration and she hopes to have the opportunity to create a future in Canada. She has acquired some skills and hopefully will expand on those as her language skills improve.
- [110] At present, the respondent has demonstrated financial need. Her expenses are modest but her income is insufficient to meet them. She will receive her share of the family assets, as set out above, and that will assist her; however, the amount is likely insufficient to generate much, if any, revenue stream.
- [111] The SSAGs apply as a starting point to determining the appropriate quantum and duration of spousal support but the guidelines contain exceptions including the compensatory exception in shorter marriages without children. That is, if a spouse is entitled to a large compensatory claim to support that is disproportionate to the length of the marriage, the above exception may apply. Further, a significant sacrifice requiring compensation can also result in exception. These exceptions apply here.
- [112] The respondent has suffered an economic disadvantage and has demonstrated ongoing need based on her limited English language skills, age and limited employment prospects. She made an economic sacrifice in giving up secure, well-paid employment in Ukraine to join the claimant in Canada. The claimant undertook to sponsor her when she moved to Canada but has since withdrawn his commitment in that regard. In the circumstances, I am persuaded that the respondent is entitled to compensatory, non-compensatory and contractual spousal support.
- [113] Non-compensatory support takes into account that upon dissolution of marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner rather than the state (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at paras. 23 and 25). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown.
- [114] *Bracklow*, at para. 29, also discusses the foundation for contractual support:
- when the relationship ends, the parties are entitled to what they would receive in the commercial world - what the individuals contracted for and what they have lost due to the marriage, and its breakdown.
- [115] An immigration sponsorship agreement is between the government and the sponsor and does not directly affect entitlement to or quantum of spousal support. Rather, entitlement and quantum are addressed by applying the provisions of the Divorce Act. Nonetheless, the court must not ignore the agreement when it exists (see *Sarai v. Sarai*, [1999] B.C.J. No. 2786 (B.C.S.C.) at para. 21) nor, in my view, can the court ignore the financial consequences to the other spouse of the sponsor terminating the agreement, regardless whether or not he is

entitled to do so.

- [116] At most, the payment of spousal support in the present circumstances will help compensate the respondent for her economic disadvantage and help her bridge towards self-sufficiency. Permanent spousal support shall be paid in a lump sum of \$12,000.
- [117] To recap, in addition to granting the divorce, I have ordered the listing, as at February 25, 2011, and sale of the Lockley Road property with an equal division of the net sale proceeds, subject to the proviso set out in my reasons respecting the charge under the FMEA. Alternatively, the claimant will have until February 25, 2011, to purchase the respondent's half interest in the Lockley Road property for \$56,500 less the claimant's credit of \$1,000 arising out of the sale of the condominium and the claimant's subsequent cash payment to the respondent. In addition to the above, the claimant shall pay \$2,600 to the respondent respecting her entitlement to a half share of his pension. Otherwise, each party shall retain any assets in their respective possession. The claimant is solely responsible for any unpaid family debts.
- [118] As to interim spousal support, I decline to forgive or cancel the arrears or make any other order apart from the proviso referred to above. I order the claimant to pay lump sum permanent spousal support to the respondent of \$12,000.
- [119] If there are any special considerations arising out of an offer to settle under the Supreme Court Family Rules, counsel may speak to the issue. Otherwise, the respondent is entitled to her costs of the proceeding calculated on Scale B.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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