
CANADA / JUDGMENT

Wright v. Wright

2013 BCSC 680

COURT

Supreme Court of British Columbia

DECIDED

18 April 2013

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2013 BCSC 680 Wright v. Wright

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wright v. Wright,

2013 BCSC 680

Date: 20130418

Docket: ED61381

Registry: Nanaimo

Between:

Christopher John Wright

Claimant

And

Emily Millicent Wright aka Emily Millicent Johnson-Wright, Contessa Ann Johnson and Arnold Sirvoy Johnson

Respondents

Before: The Honourable Mr. Justice R.A.M. Baird

Reasons for Judgment

Claimant appeared on his own behalf:

Respondents appearing on their own behalf:

Place and Date of Trial:

Nanaimo, B.C.

November 20, 21,22,23, 2012 and February 05, 2013

Place and Date of Judgment:

Nanaimo, B.C.

April 18, 2013

Introduction

- [1] The principal parties to this matrimonial litigation are the claimant, Christopher John Wright, and the co-respondent Emily Millicent Johnson-Wright, who were married on December 31, 1997 and separated in late December 2008.
- [2] Each of these parties seeks a divorce which is hereby granted.
- [3] What remains to be decided is a dispute over matrimonial property, and, more specifically, over the appropriate share or interest attributable to the respective parties in a stratified townhouse at 2955 Pinetree Close, Coquitlam, British Columbia ("the matrimonial home").
- [4] Other assets of a more minor nature were referred to in the parties' pleadings and during this trial, but the parties made it clear to me during the hearing that the only real issue between them concerned the matrimonial home.
- [5] The co-respondents, Arnold Sirvoy Johnson and Contessa Ann Johnson, are the natural children of Emily Millicent Wright from a previous marriage. They are co-respondents to the claim because each of them owns a share of the matrimonial home. I will discuss this aspect of things in greater detail below.
- [6] In this judgment I will refer to the parties as Christopher, Emily, Arnold and Contessa. I do so for ease of reference and not to be informal or familiar.
- [7] A declaration in accordance with section 57 of the Family Relations Act that the parties have no reasonable prospect of reconciliation was made by this court on March 4, 2011.
- [8] Christopher, Emily and Contessa represented themselves at trial. Each of them testified. There were no other witnesses. Arnold took no part in the proceedings. His mother and sister told me that from the beginning he had left it to them to defend the case and represent his interests. With the approval of the other parties an in accordance with Rule 12-5 (76) I proceeded in his absence.

Facts

- [9] When they were married Christopher was 55 and Emily was 60 years old. They are now 69 and 75 years old respectively. Both had been married before. They lived in Saskatoon, Saskatchewan until September, 2004, when they moved to the Lower Mainland of BC and purchased the matrimonial home.

- [10] Christopher came to the marriage with no assets. Emily owned her own home in Saskatoon in which she had lived since the early 1970s.
- [11] Unbeknownst to Christopher, who thought Emily owned her house free and clear, there was a mortgage on the Saskatoon house that Emily had taken some years before meeting Christopher. The mortgage money was loaned to another of Emily's children, Victor Johnson, who had got into substantial difficulties with the federal income tax authorities. Victor was responsible for the principal and interest on this loan.
- [12] The couple began co-habiting in April 1997. While they lived in Saskatoon, Christopher paid Emily no rent and made no contribution to her annual property taxes, which were paid by Victor Johnson as part of the mortgage loan obligations.
- [13] Christopher claimed, however, to have contributed approximately \$10,000 over the years to various improvements to the house and property. These were in the nature of painting, floor replacement, lawn maintenance, and so on.
- [14] Emily disagreed with this contention and testified that she paid for most of the work done in and around the house. We spent some time during the trial going through various invoices and receipts.
- [15] In my view, little turns on this evidence. The amounts referred to were not significant and may be classified as routine upkeep and maintenance. I am satisfied that Emily paid for some things, Christopher for others.
- [16] During the Saskatoon years, Christopher was employed full-time as a teacher earning an income of approximately \$50,000 per annum. He retired before moving to the Lower Mainland and thereafter received pension income of approximately \$40,000 per annum.
- [17] I find that, throughout the marriage, Emily devoted herself mainly to managing the home. I accept her testimony that, in the early days of her marriage at least, she also looked after two elderly persons in her capacity as a home care nurse, and that between approximately 2001 and 2003, she also cared for Christopher's elderly father, for which she was paid a modest amount from the father's pension income.
- [18] On all of the evidence, however, I have concluded that during her years with Christopher, Emily was substantially retired from the work force.
- [19] In her testimony, Emily attempted to persuade me that she was financially self-sufficient and relied on Christopher for nothing. She intimated that Christopher was something of a freeloader. Contessa was more direct about this. She attempted to persuade me that Christopher was a gold-digging layabout determined to ruin them with false claims to their wealth. I reject this characterization of matters.

- [20] On my evaluation of the available financial information, Emily earned only modest sums during the marriage while Christopher earned a solid, reliable income. I find that Christopher made a substantial financial contribution to this medium-length marriage, and provided Emily with a lifestyle that she would not have been able to afford on her own, a fact made clear by her application for spousal maintenance after the marriage broke down, and the reasons she gave for making it. I will refer to this again later.
- [21] In 2004 Contessa moved to the Lower Mainland. She persuaded Emily to move there, too. Christopher was reluctant about this, mostly because of the high price of real estate in the area, but eventually he acquiesced.
- [22] The sale price of the Saskatoon house was \$130,000 with net proceeds of \$65,000 after the mortgage taken to bail out Victor Johnson was paid off. I was not told if he ever repaid his mother. I suspect not. There was nothing in the testimonial or documentary evidence to suggest that he did.
- [23] The Saskatoon house was clearly "family property" within the meaning of sections 2 and 21 of the Saskatchewan Family Property Act and, in a manner analogous to the operation of section 65 (2) of the Family Relations Act, would have been subject to a presumption of equal distribution between the spouses had marriage dissolution occurred in Saskatchewan. Christopher had an interest in this family property that was converted to cash and used, in short order, to purchase the matrimonial home.
- [24] The matrimonial home was purchased in October 2004 for just over \$500,000. The down payment was approximately \$105,000, comprised of the \$65,000 from the Saskatoon house sale, \$20,000 from the proceeds of a car accident claim paid to Emily, and \$20,000 contributed by Arnold.
- [25] Contessa testified that she put \$20,000 towards the down payment, but this claim was not borne out by the documentation presented to the court. Having listened carefully to the testimony of both Contessa and Emily, I am prepared to accept that Emily owed to Contessa \$20,000 from previous financial dealings between them, and I will approach the matter on the footing that Emily's \$20,000 from the car accident claim, which I would find is not a family asset (*Drean v. Drean*, [1997] BCJ 737), was transferred to Contessa as her contribution to the down payment.
- [26] I find as a fact, therefore, that Christopher and Emily jointly supplied 62 per cent of the down payment for the matrimonial home, while Contessa and Arnold each contributed 19 per cent.
- [27] Immediately before the transfer of the matrimonial home completed, Emily arranged a meeting at a solicitor's office attended by all the prospective owners -- that is Christopher, Emily, Contessa and Arnold. For the reasons that follow, this meeting was not of central importance to the disposition of the case, but as it influenced the parties significantly in their interrelationships and their pursuit of this litigation, I shall attempt to explain it.

- [28] Emily had determined in advance of the meeting that title to the property was to be divided into shares: Contessa, Arnold and she were to be registered owners of a 33 per cent share each while Christopher's interest was to be limited to 1 per cent ("the 33-33-33-1 proposal"). It bears emphasis and repetition that this proposal bore no relationship to the actual contribution by the respective parties to the down payment.
- [29] At trial, Emily testified that she wanted to restrict Christopher's interest in the property because he had contributed no money of his own towards the purchase, and she was worried about Christopher's maintenance obligations to a former spouse. Although she did not say so specifically, I inferred that she was worried that circumstances might arise in which the former spouse could claim against property owned by Christopher.
- [30] On all of the evidence, it seems clear that Emily, Contessa and Arnold had agreed to the 33-33-33-1 proposal in advance of the solicitor's meeting. It had certainly not been discussed with Christopher, to whom it was presented as a *fait accompli* when he arrived at the solicitor's office.
- [31] Christopher was more than a little put out when he realized what was afoot. To him, this was an ambush. His view of things was that, as a married couple, he and Emily had owned the Saskatoon house jointly, and from the proceeds of its sale they would make a joint contribution to the purchase of the matrimonial home.
- [32] There was a heated argument at the lawyer's office that resulted in a physical altercation between Christopher and Arnold. Harsh words and accusations were exchanged. The incident gave rise to sour feelings that the parties never overcame. It precipitated, I believe, the decline of the marriage.
- [33] Christopher testified that over the next couple of days, Emily soothed his hurt feelings. She told him that it would not matter what was written on paper. She implored him to "end this foolishness". They were a married couple, she said, and would jointly own their share of the matrimonial home. Christopher testified that he was mollified and reassured by Emily's promises, on the strength of which he agreed to the 33-33-33-1 proposal.
- [34] Emily denied that she had offered any assurances or made any promises. She testified that Christopher signed the documents required for the house transfer on the same day as the lawyer's meeting without further discussion. She said that Christopher was sent down the hall to seek the independent advice of another lawyer, and he signed immediately after this consultation.
- [35] The documentary evidence makes it clear that Christopher attended upon solicitors on more than one occasion concerning the transfer of the matrimonial home. On October 22, 2004, he signed a Certificate of Legal Advice referable to a Bare Trust Declaration which he signed on October 25, 2004, the same day that the purchase of the matrimonial home was completed. The latter document declared that Christopher was the registered owner of an undivided 1 per cent interest in the matrimonial home, but that he held this interest in trust

for Emily. Both documents were witnessed by solicitors, and the second, of course, was co-signed by Emily.

- [36] I think it probable that the first lawyer's meeting, when the argument occurred, was on October 22, 2004, and that Christopher received independent legal advice about the Bare Trust Declaration from another lawyer in the same building on that date. The fight with Arnold probably happened shortly after he received this advice.
- [37] I do not accept, as Emily claimed, that Christopher signed other documents relating to the transfer of the matrimonial home on October 22, 2004. After the upset and hostility of the lawyer's meeting, followed by the fisticuffs with Arnold, there is no way that Christopher would have immediately signed a deal ratifying the 33-33-33-1 proposal. In any event it is clear that the Bare Trust Declaration and other transfer documents were executed on October 25, 2004, giving credence to Christopher's claim that there was an interval during which he mulled matters over with Emily.
- [38] I find as a fact that during this interval Emily talked to Christopher and calmed him down. Given his initial emphatic negative reaction to the 33-33-33-1 proposal, it is unrealistic to suppose, as Emily claimed, that Christopher would later agree to it without the sort of behind-the-scenes assurances and promises that he said he received from Emily.
- [39] I am satisfied that such assurances were made, and, if it is necessary, that Christopher relied on them when he signed the Bare Trust Declaration and other documents related to the purchase of the matrimonial home.
- [40] The purchase duly completed. The parties were registered on title in accordance with the 33-33-33-1 proposal. Christopher, Emily, Contessa and Arnold moved into the matrimonial home, and life went on in a communal style.
- [41] It was agreed that Christopher would pay the sum of \$1,100 per month on behalf of Emily and himself as their joint contribution to payment of the mortgage and other household expenses. There is no doubt that this money was paid faithfully every month, not just during the time that Christopher lived in the matrimonial home, but for a full year after separation, as well. The money came entirely from Christopher's pension income and was paid directly to Contessa, who was in charge of the household finances. Emily paid no money of her own to these monthly amounts.
- [42] Contessa testified that \$500 of Christopher's monthly allotment went to the mortgage payment of around \$2,500 per month, and the balance went to household bills including food. Between them Contessa and Arnold divided equally the balance of the monthly mortgage payments. Contessa's evidence concerning these matters was uncontradicted. Christopher testified that he never inquired how the money was used. He simply cut a monthly cheque and asked no questions. He was happy to leave the details to the others.

- [43] Over the next few years the marriage deteriorated. Christopher testified that he felt less and less welcome in the matrimonial home. He said that Emily, Contessa and Arnold formed a clique from which he was ostracized. He had a brother in Richmond who was terminally ill, and he spent more and more time over at his place. Eventually the parties separated in December 2008.
- [44] In October of 2009, Emily, Contessa and Arnold decided that they wanted to refinance the matrimonial home to pay off their personal debts. These debts were substantial and amounted to approximately \$90,000, the lion's share of which, just over \$60,000, was owed by Contessa alone in consumer debt.
- [45] As Christopher remained on title, he had to be consulted about this refinancing. He would not agree to it. He wanted no part of increased mortgage debt and felt no obligation to assist the others in paying debts that had nothing to do with him.
- [46] Christopher and Emily engaged in a brief negotiation, the result of which was that Emily offered and Christopher agreed to accept the sum of \$10,000 in return for having his name removed from the title to the matrimonial home. He signed the documents required to transfer his 1 per cent interest to Emily and this transfer was accepted for registration on October 21, 2009. The new financing arrangements took effect immediately and the debts referred to above were paid from the proceeds.
- [47] A couple of days later Christopher received the agreed \$10,000 by means of a letter and enclosed trust cheque from Emily's solicitor. The letter, a copy of which Christopher signed and returned to the solicitor confirming receipt and indicating his understanding of its contents, referred to the Bare Trust Agreement, and indicated that the enclosed cheque was being given to him ex gratia and that Emily was under no legal obligation to pay it. The salient portion of the letter is as follows:

Upon further review of our file from when the property was originally purchased, we determined that you were in fact holding your interest in the property in trust for Emily. Accordingly, legally, the payment of Ten Thousand Dollars (\$10,000.00) made to you should not be considered as payment for your interest in the property as you were holding your interest for Emily on the condition that you would not deal with it as Emily directed. Therefore, even though Emily still agrees to have me pay the enclosed funds to you, these funds are paid to you on the understanding that Emily had no legal obligation to do so.

- [48] Notwithstanding this letter, Emily's testimony at trial made it quite clear that she considered herself to be legally obliged to pay Christopher in return for his agreement to transfer this share to her. She testified directly that she offered the \$10,000 amount because it represented 1 per cent of the assessed value of the matrimonial home, which at that time was just over \$600,000, plus a top up for an air conditioning unit that Christopher had bought and installed in the house.

- [49] Christopher testified that he was satisfied with the \$10,000 offer, but only on the clear understanding, discussed and agreed with Emily, that it would constitute a full and final settlement of all matters between them. The condition upon which he accepted this amount of money, in other words, was that he and Emily would go their separate ways and make no further claims against each other.
- [50] At trial, Emily denied this. She said that their discussions were restricted to re-financing the matrimonial home. No other issues were discussed. In particular, there was no discussion about spousal support.
- [51] However, at her examination for discovery on July 13, 2012, Emily confirmed under oath, in the following exchange with Christopher's then counsel, that there had, in fact, been such an agreement:

Q My under -- my understanding is that at that -- at that point the agreement between the two of you was that if he got the 10,000 you two would go your own way?

A Yeah.

Q Yeah? And there would be no further obligation between the two of you?

A That's what -- yeah, that's what happened. We didn't have any problem. We had no fuss, no nothing. And he say if you get the 10,000 he'll go away and don't put him on the new mortgage.

- [52] For what it is worth, I am utterly convinced that if matters had been left as they stood on October 21, 2009, Christopher would have taken his \$10,000 and departed the scene for good and all.
- [53] However, as the months passed, Emily started feeling the financial pinch of Christopher's absence. She was having trouble making ends meet. She was taking medications that she found it burdensome to pay for. She began to think that it was unfair that she should live in straitened circumstances while Christopher enjoyed his full pension.
- [54] In the end, Emily attended the Port Coquitlam courthouse and consulted with a duty lawyer, who advised her that she had a good claim against Christopher for spousal maintenance. In October 2010, Emily sought and received a spousal support order in Provincial Court.
- [55] Ever since, Christopher has been obliged to pay Emily \$650 per month, some of which goes to arrears. This obligation is ongoing and indefinite. By the time of trial, Christopher had paid a cumulative total of approximately \$17,000 in spousal maintenance and had outstanding arrears of some \$6,000.

Position of the Parties

- [56] On November 3, 2010, Christopher filed this Family Law Claim. His position is that the arrangements as they stand are unfair. He seeks a more just and equitable matrimonial property settlement.

- [57] Christopher relies on section 56 (2) of the Family Relations Act by which he claims to be entitled to an undivided half interest in Emily's share of the matrimonial home as a tenant in common, and he seeks compensation for that interest.
- [58] In the alternative, if the court determines that such a disposition would be unfair to Emily, he seeks compensation in an amount larger than the \$10,000 he has so far received, which settlement he submits is inadequate and unfair, especially given his obligation to pay indefinite spousal maintenance to Emily.
- [59] Emily and Contessa (and through them, Arnold) take the position that Christopher has been paid all that he is entitled to. They say that Christopher's action should be dismissed.

In the alternative, Emily argues that the matrimonial home should be re-apportioned in her favour, largely on the basis that Christopher came to the marriage with no assets and contributed little or nothing to the acquisition, preservation and maintenance of the property.

Statutory Provisions

[60] Section 56 of the Family Relations Act provides:

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
- (3) An interest under subsection (1) is subject to
 - (a) an order under this Part or Part 6, or
 - (b) a marriage agreement or a separation agreement.
- (4) This section applies to a marriage entered into before or after March 31, 1979.

[61] As previously mentioned, a section 57 Family Relations Act declaration was made in this case on March 11, 2011.

[62] A family asset is defined in Section 58 (2) of the Family Relations Act as follows:

58 (1) Subject to section 59, this section defines family asset for the purposes of this Act.

- (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.

[63] Section 65 (1) of the Family Relations Act provides:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

Discussion

[64] The matrimonial home, or, more specifically, whatever may be determined to be Emily's share in it, is most definitely a family asset.

[65] Christopher is statutorily presumed to have an undivided half interest in that asset, subject to Emily's claim under section 65 that, in the circumstances, an equal division would be unfair.

[66] What is Emily's share of this asset?

[67] As previously stated, the 33-33-33-1 proposal was by no means an accurate reflection of the true nature of the transaction resulting in the acquisition of the matrimonial home. Contessa and Arnold each contributed only 19 per cent of the down payment for the property while Emily contributed 62 per cent.

[68] As both Contessa and Arnold are independent adult children, the presumption of advancement does not apply: *Pecore v. Pecore* 2007 SCC 17. In my view there is nothing in the evidence to rebut the presumption of a resulting trust. Such reasons as were given by Emily for making the 33-33-33-1 proposal had nothing to do with bestowing gifts on her children. She was motivated, she said, by the erroneous conviction that Christopher was entitled to no more, as well as concerns about his obligations to a previous spouse.

- [69] Furthermore, in my view the Bare Trust Declaration has no impact on this litigation. The matrimonial home is a family asset subject to Part V of the Family Relations Act irrespective of legal ownership or registration on title. I have already found, after the fracas at the solicitor's office, that Emily must have assured Christopher that they would own jointly her share of this. But such an assurance was by no means necessary. Section 58 of the Family Relations Act is concerned with the use of an asset for a family purpose, not ownership. It would not matter if Christopher had never been registered on title at all.
- [70] As far as concerns the October 2009 payment to Christopher of \$10,000, the evidence strongly suggests that this was intended to be a final settlement of all outstanding claims between the parties which Emily later abrogated by securing the order for spousal maintenance. In the alternative, on Emily's evidence, there was such a lack of certainty and finality about this arrangement that it could never be considered as a valid oral separation agreement.
- [71] In the result, I would hold that Emily is entitled to a 62 per cent share of the equity in matrimonial home, a family asset in which Christopher acquired an undivided half interest as a tenant in common on March 4, 2011, when the section 57 declaration was made ("the triggering event"), minus the \$10,000 that he has already received.

Value of the Equity in the Matrimonial Home

- [72] Just before this trial began the fair market value of the matrimonial home was appraised at between \$680,000 and \$715,000, or an average of \$697,500. The outstanding mortgage amount was \$426,903.46.
- [73] The equity in the matrimonial home taken from the average fair market value was therefore \$270,596.54. Emily's 62 per cent interest in that equity to which Christopher is presumptively entitled to a 50 per cent share amounts to \$167,769.85.
- [74] The date of entitlement to an equal division of family assets is the date of the triggering event. Although for the purposes of deciding whether an equal division would be unfair, the value at the triggering date is relevant, it is the trial date that is to be used as the date of valuation: *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.).

Re-apportionment

- [75] The only thing left to be determined is Emily's claim for reapportionment under section 65 of the Act on the basis that an equal division would be unfair to her.
- [76] In evaluating this claim, I may only consider the criteria set out in section 65: *Girard v. Girard* (1983), 33 RFL (2d) 79 (BCCA). The onus is on the person seeking a reapportionment to establish that an equal division of the family assets would be unfair: *Toth v. Toth* (1995), 17 RFL (4th) 55 (BCCA); *Samson v. Samson*, [1996] BCJ No. 2311 (CA).

- [77] In this case the question of Christopher's contribution to the matrimonial home is an issue. The Court of Appeal has said the provision for equal division is based on the presumption that there has been joint contribution to the accumulation and maintenance of family assets: *Bawtinheimer v. Bawtinheimer* (1985), 68 B.C.L.R. 234 (C.A.).
- [78] The test is not whether an unequal division would be fair, but whether an equal division would be unfair: *M.(S.B.) v. M.(N.)* (2003), 14 B.C.L.R. (4th) 90 (C.A.).
- [79] The determining factor is whether equal division is offensive to a sense of fairness and justice, having regard to the circumstances of the parties: *Lockhart v. Lockhart*, [1989] BCJ 308 (CA).
- [80] I will now turn to the section 65 criteria.
- (a) Duration of the Marriage
- [81] Generally speaking, the longer the marriage the more likely there will be an equal division of family assets. This was an eleven year marriage, which I would characterize as being neither short, nor long, but of medium length.
- [82] The parties were of "a certain age" when they walked down the aisle. Both had been married before and raised children with other people. They did not build their wealth together over many years, as happens with couples who marry younger and remain together longer.
- [83] Still, I bear in the dictum of Lambert J.A. in *Murchie v. Murchie* (1984), 53 B.C.L.R. 157 (BCCA) at paragraph 32, mildly paraphrased for use in the instant case, that persons who marry in middle age do so in contemplation of each other's assets, and when they remain together for a lengthy period (in that case, twelve years), it is not unfair that they should share equally in the assets brought into the marriage by each of them.
- (b) Period during which spouses have lived separate and apart
- [84] The parties have been separated for over four years. It has been over three years since Christopher stopped making his monthly payments towards the mortgage and other expenses relating to the matrimonial home, including upkeep and improvements. In the meantime, the value of the matrimonial home has increased, and Emily, Contessa and Arnold have been paying down the mortgage debt. Also, while Christopher lived in the house, Contessa and Arnold were each responsible for paying a larger proportion of the monthly mortgage payment.
- [85] However, the post-separation re-financing of the house to pay down the personal debts of Emily, Arnold and Contessa cannot be overlooked. Any value they may have added to the matrimonial home since the spouses separated or by the larger mortgage payments made by Contessa and Arnold has been entirely cancelled out by this factor.
- (c) Date when the property was acquired or disposed of

[86] This factor is not material here.

(d) Extent to which property was acquired by one spouse through inheritance or gift

[87] This factor is not material here.

(e) Needs of each spouse to become or remain economically independent and self-sufficient.

[88] The question of Emily's independence and self-sufficiency is a substantial concern here. She is 75 years old and in declining health. She will never work again.

[89] Christopher is paying her regular spousal maintenance in accordance with the Provincial Court order of July 2010. There is nothing in evidence to suggest that he will be unwilling or unable to continue doing so. To a significant degree this lessens the force of an argument for re-apportionment under this heading.

[90] Nevertheless, given Emily's modest financial circumstances and failing health, I consider that, notwithstanding her receipt of spousal support, an equal division might well be unfair to her.

[91] There is no doubt that an equal division would greatly assist Christopher to remain economically independent, especially given his ongoing obligation to pay support on his limited and fixed pension income. It would also assist him in discharging certain debts that he said were incurred during the marriage, although these were not particularly significant.

[92] I pause to emphasise that the issue of maintenance was not referred to in the pleadings and formed no part of the present litigation except as a factor to be considered in determining whether the presumptive equal division of family assets would be unfair.

(f) Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse

[93] The Court of Appeal in *Piskor v. Piskor* (1981), B.C.L.R. 230 (BCCA) summarized the relevant factors under section 65 (1)(f) as follows:

21] The sixth consideration is what might be called the basket clause: that is, any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property for the capacity or liabilities of the spouse. Under this heading one must consider the substance of the relationship and the respective contributions of the parties, including their respective contributions during the five year period of cohabitation prior to the marriage, put another way, what the parties respectively contributed prior to the marriage and brought into the marriage.

[94] I have already observed that Christopher was a substantial contributor throughout this marriage, both in Saskatchewan and BC.

- [95] While it might be said that he played only a modest role in the preservation, maintenance or improvement of their Saskatoon house, after moving to Coquitlam he paid \$1,100 per month towards the mortgage and common expenses for over five years, including the year 2009, during which he did not even live in the home. His contribution to mortgage payments alone over this period, at \$500 per month, exceeded \$30,000.
- [96] There can be no doubt that Christopher was an active and substantial contributor to the maintenance and preservation of the matrimonial home until approximately the end of 2009.
- [97] The fact remains, however, that Christopher brought no assets to the marriage, and Emily's interest in the matrimonial home was purchased entirely with the proceeds from the sale of an asset that she acquired long before she met Christopher.
- [98] This is a material factor when considering whether the presumptive equal division of property would be unfair to Emily. I have kept in mind the following comments of the Court of Appeal in *Bajwa v. Bajwa*, 2007 BCCA 632 at paragraph 20:

The bearing of a heavier financial burden for household expenses while parties are living together is not generally seen as a factor to be taken into account on reapportionment, any more than a myriad of good and bad decisions parties make while they live together: *Girard v. Girard* (1983), 42 B.C.L.R. 305 (C.A.), *Newson v. Newson* (1986), 3 B.C.L.R. (2d) 1 (C.A.). However, a marked disparity in the contribution to the acquisition and maintenance of the family residence is generally thought to be of a different character. Unlike household expenses, such expenditures come within the factors to be considered under s. 65(1)(f).

Authorities

- [99] Every re-apportionment case must be decided on its own facts. Previous cases are useful for guidance in establishing a consistency of approach but cases of this type are rarely identical. I have reviewed many section 65 authorities in considering this matter, and will now briefly survey a number of them that I have found to be of particular assistance.
- [100] In *Murphy v. Murphy*, 2007 BCSC 870 the wife brought the matrimonial home into the marriage, which lasted nine years. Fisher J. found that the husband had made some minor contributions to upkeep and maintenance of this home, but that the wife had paid most of the expenses related to it from a widow's pension fund. The wife was primarily responsible for the material and emotional needs of two children. The wife's ability to earn an income was limited as was the husband's ability to pay child support. The home was accordingly re-apportioned 85 per cent in the wife's favour. In the case at bar, Christopher made a far more significant contribution to the marriage generally, to the acquisition and maintenance of the matrimonial home particularly, there were no children to be considered, and he has been paying court ordered spousal maintenance on a regular and reliable basis.

- [101] In *Hellner v. Hellner*, 2007 BCSC 1509 the parties were married for 14 years. The husband was the preponderant breadwinner and made a greater contribution to the family finances during the marriage. However the matrimonial home was purchased with the proceeds from the sale of a property that the wife had acquired prior to the marriage. The husband came to the nuptial estate with only a vehicle, some furniture, and a small amount of savings. The wife paid for expensive repairs to the home after separation to which the husband made no contribution. The wife had been economically disadvantaged by the marriage breakdown, as she had been a stay at home mother in a "traditional" relationship. Because her income was smaller than the husband's, and she would be unable to work full-time for a number of years because her children were still young, a 70 per cent re-apportionment of the matrimonial home in the wife's favour was ordered. Given this re-apportionment, there was a modest award of lump sum spousal support. As it relates to the case at bar, there are similarities in that Emily owned her home and Christopher came to the marriage with precious little in the way of assets, but like Mr. Hellner, he made a substantial contribution to the family partnership by devoting to it substantially all of his employment and pension income, including to the preservation and maintenance of the matrimonial home after it was acquired. As for distinguishing features, while it is undeniable that Emily has been economically compromised by the marriage breakdown, Christopher is paying ongoing and indeterminate spousal support to remediate this. I note that Christopher has already paid more under this heading than the lump sum Mr. Hellner was ordered to pay.
- [102] *Wolowidnyk v. Wolowidnyk*, 2008 BCCA 135 was an appeal of a trial judge's decision not to re-apportion the matrimonial home in favour of the husband. The parties had married later in life -- the husband was 62 and the wife 53 years of age -- and the marriage lasted only five years, and the husband had brought the matrimonial home into the marriage. Both parties had made major capital contributions to the maintenance of the property and the paying down of mortgage debt, but the husband's contribution had been far greater. As well, the husband was 68 years old by the time of trial and argued that he required a re-apportionment to become economically self-sufficient. After deciding that the trial judge had erred in failing to consider the unequal contribution of the spouses to the acquisition and maintenance of the matrimonial home, the Court of Appeal re-apportioned it 60 per cent in favour of the husband, in light of which a modest lump sum spousal support award was made in favour of the wife. As it compares to the case at bar, an obvious distinction is that the marriage in *Wolowidnyk* was significantly shorter than in the case at bar. As previously stated, the longer the marriage, the likelier that equal division will not be unfair. On the one hand, I would observe that in the present case, Christopher did not make as significant a capital contribution to the matrimonial home as the wife in *Wolowidnyk*. On the other hand, at the risk of repetition, Christopher is obliged to pay ongoing spousal support, and has already paid a sum roughly equivalent to that which the husband in *Wolowidnyk* was ordered to pay in a lump sum.

[103] *Southcott v. Southcott*, 2009 BCSC 760 involved a ten year marriage into which the husband brought the matrimonial home. Both parties contributed substantially to its preservation and maintenance over the years. On the husband's application for re-apportionment, the court made the following observations at paragraph 38 which are apposite to the present case:

Although the onus rests upon the [husband] to establish why equal division would not be fair in the circumstances, I find that he has done so, by the sheer fact of his inheritance of the property upon the death of his mother relatively shortly before marriage, and his long-term residence and contribution to it. In terms of the factors relevant to apportionment I regard this to be a marriage of medium duration and note that the acquisition of the property by the defendant preceded the marriage. While both spouses have the need to become or remain economically independent and self sufficient, and the plaintiff clearly needs to achieve a greater degree of economic security, in the circumstances of this case it would be in my view unfair to divide [the matrimonial home] equally between the parties because their ultimate contributions to the property are not equal, most particularly in terms of its acquisition. . . .

The matrimonial home was accordingly re-apportioned 60 per cent in favour of the husband, who was ordered to pay time limited spousal support.

[104] In *Arnold v. Arnold*, 2009 BCSC 1384, the parties were married for seven years and the husband brought substantially all of the assets to the marriage. The husband was the breadwinner and provider during the marriage and had a higher income earning potential on separation. There were no children. The court ordered 2/3 re-apportionment of the matrimonial home in favour of the husband having regard, in particular, to the circumstances relating to its acquisition, preservation, maintenance and improvement. The husband was also ordered to pay time-limited spousal support. Once again, the distinguishing features to the case at bar are the shorter length of marriage and the limited obligation to pay spousal support.

[105] *MacLellan v. MacLellan*, 2011 BCSC 644 involved a twenty-one year marriage entered into when the parties were of mature age and had raised children with other partners. The wife purchased the matrimonial home with her own funds and paid it off over the years without much assistance from the husband, who was something of a spendthrift. The court observed at paragraph 54 of the judgment that:

Where an asset is acquired through the efforts of one spouse with no significant contribution from the other spouse, this can form the basis for an unequal division: *Johnstone v. Johnstone* (1981), 26 R.F.L. (2d) 18, 33 B.C.L.R. 368 (S.C.) at 388-389 (as cited to B.C.L.R.). There can be reapportionment where an asset was preserved wholly through the efforts of one spouse, without contribution from the other spouse. For example, in *Low v. Low*, 2000 BCSC 947, aff'd in part 2001 BCCA 574, assets were reallocated 70% in favour of the wife where she was the primary income earner and took care of the household. The husband's contribution was insignificant and his actions required her to cash in savings.

[106] Part of the husband's claim for equal division was his need to pay off his debts to become financially self-sufficient. The court rejected this argument as the debts were incurred without the wife's knowledge and not for family purposes. The court determined that equal division would be "manifestly unfair". There was a 70 per cent re-apportionment in favour of the wife. In comparison to the present case, it cannot be said that Christopher made an insignificant contribution to the acquisition and maintenance of the matrimonial home. He was not claiming equal division to pay off debts he had incurred out of self-indulgence, but largely because he had made a solid contribution to the aggregation of matrimonial property and had spousal support obligations to pay to Emily.

Decision

- [107] In all of the circumstances, I have decided that equal division of the matrimonial home would be unfair to Emily, mostly because it was purchased with proceeds from an asset that she had owned for a long time before she met Christopher, combined with residual concerns about her need to remain economically independent and self-sufficient.
- [108] However, for the reasons referred to at length above, re-apportionment will not be as drastic as Emily might like or expect. I have concluded that a just and fair result in this case would be to re-apportion a 65 per cent share of Emily's equity in the matrimonial home to her, and 35 per cent to Christopher.
- [109] As set out in paragraphs 72 and 73 above, the amount of this equity is \$167,769.85. It is common ground that Emily and her children wish to remain in the matrimonial home, and that Christopher's interest should be paid out. Accordingly, I hereby order that Christopher be paid the sum of \$58,719.45, minus the \$10,000 he has already received, for a net total of \$48,719.45.
- [110] I further order that this amount should be paid by no later than 60 days from the filing of this judgment. If suitable arrangements for the settlement of this matter cannot be made within this 60 day period, Christopher will be at liberty to bring the matter back before me on two clear days notice to the other parties for any further orders that might be appropriate, up to and including an order that the matrimonial home should be sold and payment made to him from the proceeds.
- [111] The claim against the co-respondents Contessa Ann Johnson and Arnold Sirvoy Johnson is dismissed.
- [112] In the reasonably unusual circumstances of this case, I would order that the parties bear their own costs.

"Mr. Justice R.A.M. Baird"

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