

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Buchhofer v. Buchhofer*, 2015 NSSC 358

Date: 20151215

Docket: SFSND1206-006243

Registry: Sydney, N.S.

Between:

Gudrun Buchhofer

Petitioner

v.

Werner Buchhofer

Respondent

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated January 8, 2016.

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: August 24, 25 and 26, 2015, in Sydney, Nova Scotia

Written Release: December 15, 2015

Counsel: Damien Barry for the Petitioner
Adam Rodgers for the Respondent

By the Court:

BACKGROUND

[1] Moving to another country to acquire and operate a business can be risky. The parties did just that in 1998 when they left Germany to move to Canada.

[2] Werner and Gudrun Buchhofer were married on March 28, 1980. When they met, Ms. Buchhofer was an executive secretary. Mr. Buchhofer was an engineer and construction draftsman. They lived together for a short time before getting married, and then moved to Saudi Arabia for Mr. Buchhofer's work. When Ms. Buchhofer became pregnant, they moved back to Germany.

[3] Back in Germany, Mr. Buchhofer opened a fishing supply store instead of returning to work in construction. After the birth of their son, Ms. Buchhofer stayed at home. She did not return to work outside the home, but did work part-time in the business while their son was young. After he started school, she moved to full-time work in the business. During this time, Ms. Buchhofer was the primary caregiver for their son and managed the household, while Mr. Buchhofer dedicated his time to the business.

[4] Mr. Buchhofer attended trade shows and exhibitions all around Germany in order to build the business. The income from the store allowed the parties to enjoy a good lifestyle in Germany. They built a home, travelled, and eventually opened a second store.

[5] After a vacation in Cape Breton, the parties decided they wanted to move to Canada to live, work and retire. They looked at a number of options, including the Margaree Lodge, which was then a hotel, restaurant and lounge sitting on forty acres of land on the Margaree River ("the Lodge"). In order to finance the purchase, they liquidated all their assets in Germany. They sold their home and used the equity as a down payment on the Lodge. They also sold their first store, cashed their life insurance, and sold their collection of antiques to finance the purchase.

[6] Mr. Buchhofer moved to Canada first. He finalized the arrangements to purchase the Margaree Lodge, and managed the business for several months before their son and Ms. Buchhofer followed. Ms. Buchhofer managed the

remaining store while still in Germany. It was sold in 1999 and she moved to Canada after the sale.

- [7] The purchase of the Lodge was organized through the incorporation of a limited company called Margaree Lodge Limited (“the company”). Mr. Buchhofer incorporated the company when he arrived in Canada. He was issued ninety percent (90%) of the shares, while five percent (5%) were allotted to Ms. Buchhofer, and the remaining five percent (5%) to a numbered company in which Mr. Buchhofer was the sole shareholder.
- [8] Both parties worked to build and run the business. Mr. Buchhofer completed repairs, managed the business and offered fishing tours. Ms. Buchhofer helped with housekeeping, laundry, cooking for guests and waiting tables in the restaurant. She also completed some bookkeeping.
- [9] In 2006, the parties decided to sell the Lodge and retire. Through an agent, they found American buyers who agreed to pay \$1.075 million for the company and its assets. However, after the purchase price was agreed, the purchasers encountered financing difficulties. In an effort to save the deal, the Buchhofers agreed to take a mortgage back for \$770,000.00. The mortgage was repayable within two years.
- [10] Unfortunately, the mortgage repayment schedule was not met. In the spring of 2009, it became clear the purchasers were unable to repay the mortgage, so the company executed a Quit Claim Deed for the Lodge to Werner Buchhofer, Gudrun Buchhofer and the numbered company (being the three original shareholders) as joint tenants.
- [11] When the Lodge sold in 2006, the parties bought a home in Judique, Nova Scotia. They lived there together until December 1, 2008 when Mr. Buchhofer took what he initially characterized as a “break”. He left a note explaining why he was gone, but did not advise Ms. Buchhofer of his return date. He flew to the Philippines and stayed there for four (4) months.
- [12] When he learned in early 2009 the purchasers were not able to repay the mortgage, Mr. Buchhofer returned to Cape Breton and took possession of the Lodge. He renamed it the Margaree Riverview Inn, and began to operate it through the numbered company which he controlled as sole shareholder.

[13] After his return, the parties agreed to re-list the Lodge for sale. Although an offer for \$650,000.00 was received and Ms. Buchhofer was prepared to sell for that price, Mr. Buchhofer refused to do so.

[14] Meanwhile, in February, 2009, Ms. Buchhofer moved to the south shore to pursue work as a naturopathic horse hoof practitioner. Under the business name of Horses Go Natural, she trims horses' hooves and does consulting work on equine housing. She travels the province in order to ply her trade.

[15] Mr. Buchhofer repartnered and is now the father of a young child. He and his family reside in the Philippines over the winter months, and return to live and work at the Margaree Riverview Inn during the summer season.

[16] Ms. Buchhofer petitioned for divorce on August 8, 2011. Mr. Buchhofer filed an Answer on September 1, 2011. They were unable to resolve issues surrounding the division of assets and, in particular, the classification of the Margaree Riverview Inn. They also disagree on the issue of spousal support.

DIVORCE

[17] I am satisfied for purposes of the *Divorce Act* R.S.C. 1985, c. 3 (2nd Supp.) that the legislative and procedural requirements have been met, and there has been a permanent breakdown of the marriage with no prospect of reconciliation. The divorce order is granted.

ISSUES

[18] The following are the issues to be determined by the Court:

1. Division of Assets

- (a) Classification
- (b) Valuation
- (c) Occupation rent

2. Spousal Support

- (a) Entitlement
- (b) Determination of Income/Ability to Pay

(c) Quantum & Duration

ISSUE 1: DIVISION OF ASSETS

[19] Mr. Buchhofer takes the position that the Lodge is a business asset exempt from division. Ms. Buchhofer is of the view that the Lodge (or at least part of it) is a matrimonial asset subject to division.

Classification

[20] There is a starting presumption under the *Matrimonial Property Act* R.S.N.S. 1989, c. 275 (“*MPA*”) that assets acquired by one or both spouses, before or during the marriage, are matrimonial assets subject to division on marriage breakdown, except as expressly excluded under the legislation. The relevant sections of the *MPA* read as follows:

"matrimonial assets" defined

4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of

- (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
- (b) an award or settlement of damages in court in favour of one spouse;
- (c) money paid or payable to one spouse under an insurance policy;
- (d) reasonable personal effects of one spouse;
- (e) business assets;
- (f) property exempted under a marriage contract or separation agreement;
- (g) real and personal property acquired after separation unless the spouses resume cohabitation.

...

Shares of corporation

(4) Where property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of that property are matrimonial assets.

[21] For purposes of this case, other relevant sections of the *MPA* include:

Interpretation

2 In this Act,

(a) "business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;

"matrimonial home" defined

3 (1) In this Act, "matrimonial home" means the dwelling and real property occupied by a person and that persons spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest.

Property only partly used as matrimonial home

(2) Where property that includes a matrimonial home is used for other than residential purposes, the matrimonial home only includes that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the family residence.

Home owned by corporation

(3) The ownership of a share or an interest in a share of a corporation entitling the owner to the occupation of a dwelling owned by the corporation is deemed to be an interest in the dwelling for the purposes of this Section.

...

Application for division of matrimonial assets

12 (1) Where

- (a) a petition for divorce is filed;
- (b) an application is filed for a declaration of nullity;
- (c) the spouses have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation; or
- (d) one of the spouses has died,

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

...

Factors considered on division

13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:

- (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
- (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
- (c) a marriage contract or separation agreement between the spouses;
- (d) the length of time that the spouses have cohabited with each other during their marriage;
- (e) the date and manner of acquisition of the assets;
- (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
- (g) the contribution by one spouse to the education or career potential of the other spouse;
- (h) the needs of a child who has not attained the age of majority;
- (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- (j) whether the value of the assets substantially appreciated during the marriage;
- (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
- (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
- (m) all taxation consequences of the division of matrimonial assets.

...

Contribution to business asset by spouse

18 Where one spouse has contributed work, money or monies worth in respect of the acquisition, management, maintenance, operation or improvement of a

business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

(a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or

(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

[22] Section 4(1) of the *MPA* presumes that matrimonial assets will be divided in equal shares on breakdown of the marriage. Sections 12 and 13 reflect the same presumption.

[23] A party who claims an asset is exempt from division under s.4(1)(e) bears the onus of proving that claim on a balance of probabilities. See *Cashin v. Cashin* 2010 NSCA 51; *Best v. Best* (1991), 102 NSR (2d) 61 (CA) and *L(JW) v M(CB)* 2008 NSSC 215 among others. In this case, Mr. Buchhofer must prove the Lodge is a business asset exempt from division.

[24] In refuting Mr. Buchhofer's claim that the Lodge is exempt from division, Ms. Buchhofer points out that:

- The parties lived at the Lodge for eight years as a family;
- They ran the business together;
- They invested their life savings in it;
- They sold it to fund their retirement;
- It was never their intention that she would be excluded from the proceeds of its sale;
- It was never her understanding that she would receive only a 5% interest in the Lodge;.

[25] In addition to the presumptive equal division under the above sections of the *MPA*, s. 21 is relevant here:

Presumption respecting ownership between spouses

21 (1) The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that

(a) the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property; and

[26] In granting the take-back mortgage in 2006, the Buchhofers placed their personal interest in the Lodge at risk. I was not provided a copy of the mortgage, but the 2009 deed conveys title jointly to the parties and the numbered company, from which I conclude they were the original mortgagors. After the sale fell through in 2009, Mr. and Ms. Buchhofer listed the Lodge for sale in their own names, with no reference to the numbered company.

[27] Under s. 21(1)(a) the joint deed means that either party could apply to sever the joint tenancy, and on the face of it, each would be entitled to one-half beneficial interest. The addition of the numbered company as joint title-holder complicates things. However, for purposes of this decision, I am guided by s. 21 and the intention of the *MPA* generally.

[28] I will therefore look to the intentions of the parties to determine if the Lodge falls within the definition of matrimonial assets for purposes of division. From the evidence, I make the following factual findings:

- the parties liquidated almost all of their German assets in order to acquire the Lodge;
- both parties subjected their life savings and assets to the risk that the Canadian business might not succeed;
- they sold the Lodge in 2006 to fund their retirement;
- the purchase of the Lodge was a cornerstone of their long term financial planning;
- they both worked to make the business a success.

[29] I find their approach to the sale of the Lodge, the mortgage, and the listing agreement in 2009 demonstrates the parties' true intentions as regards the ownership of the Lodge. It was considered their personal property, an investment made for their retirement in Canada. According to their

immigration application, the investment was funded from their joint assets and life savings in Germany. Both were required to work exclusively in the business as a term of their landed status. I conclude from this the Lodge was intended to benefit them equally.

[30] I have also considered the definition of business assets and the purpose of the *MPA* as outlined by the Supreme Court of Canada in *Clarke v. Clarke*, [1990] 2 S.C.R. 795 and cases which followed it. The Court in *Clarke* (supra) dealt with the question of whether pensions are business assets. In the words of Justice Wilson (as she was then), who wrote the decision for a unanimous court, the *MPA* is “remedial in nature” and its provisions are to be interpreted with the legislation’s purpose in mind. The *MPA* must be given a “broad and liberal construction” so as to give effect to its purpose.

[31] Justice Darryl Wilson in *Eyking v. Eyking*, 2012 NSSC 409 considered the Nova Scotia cases which have been decided since *Clarke* (supra) and stated:

106 In *Tibbetts v. Tibbetts* (1992), 119 N.S.R. (2d) 26 (C.A.), the Nova Scotia Court of Appeal noted that as a result of the Supreme Court of Canada decision of *Clarke*, supra, earlier restrictive decisions respecting the classification of assets as business exemptions must be re-examined. Hallet J.A. states at page 33:

[18] The earlier decisions in this Province, such as *Lawrence v. Lawrence*, supra, must be read in light of this binding statement of the Supreme Court of Canada in *Clarke v. Clarke*, supra, with respect to the interpretation of the term “business assets” as defined in the Act. **Considering that the definition of matrimonial assets includes all property of the spouses, unless exempted from the definition, the term “business assets” has been fairly confined by the Supreme Court of Canada to assets that are truly of a business character. An investment portfolio is not a business asset in the true sense of that word as interpreted by the Supreme Court of Canada notwithstanding its purpose is to earn income.** The husband’s investment portfolio was accumulated from earnings surplus to his family’s needs and **although one of the purposes of investing was to earn money, the primary purpose was to secure a reasonable level of retirement income for the family therefore these funds were properly classified as matrimonial assets by the trial judge**; he applied the decision of the Supreme Court of Canada in *Clarke v. Clarke*, supra.

107 Hallett, J.A., also noted in *Tibbetts*, that to be a true business asset within the meaning of the Act, the asset must be working in the entrepreneurial sense at page 33:

[17] Notwithstanding the broad scope of the words used in the definition of business assets in the Act and the decision of Mr. Justice Hart in *Lawrence v. Lawrence*, supra, generally speaking, an investment portfolio of stocks, bonds,

GICs, mutual funds or the like does not involve the employment of capital for the purpose of generating income in an “entrepreneurial sense”.

...

109 The Nova Scotia Court of Appeal has held that it is the intention of the parties that determines the classification of the assets. In *Hebb v. Hebb* (1991), 103 N.S.R. (2d) 147 (C.A.), the Court held that a holding company which operated the Bridgewater Professional Building was a matrimonial asset as it was the vehicle upon which the parties had provided for their future security. Hart J. Stated at page 153:

[17] It is quite obvious that this holding company which operated the Bridgewater Professional Building on a rental basis would normally fall into the classification of a business in the ordinary sense of the meaning of that word. Whether it should be classified as a business or matrimonial asset, however, under the *Matrimonial Property Act* is, in my opinion, controlled by the intention of the parties. There are many ways in which married persons can provide for their old age and retirement. Depending upon the financial circumstances of the parties, future security may be accomplished by pensions, insurance, annuities, RRSP's, coin collections, or the accumulation of assets which will produce future income when it is necessary for the maintenance of the parties after their incoming-producing years. If it is intended by the parties to use these techniques to provide a future nest egg or security in retirement then it cannot, in my opinion, be said that the asset chosen was primarily used or held for or in connection with a commercial, business, investment or other incoming-producing or profit-producing purpose. A business asset, in my opinion, is one which is used for relatively immediate gain and not one that is merely held for the purpose of future security. *Many investments are primarily used to obtain income from surplus capital and fall into the category of business assets under the Act but the parties may be holding them for other purposes which may take them out of the business classification and allow them to fall back into the category of matrimonial assets.*

[18] This Court has already held that it is the intention of the parties that governs the classification of an asset which could be either business or matrimonial. See *Herritt v. King* (1990), 25 R.F.L. (3d) 273, where it was found by the trial judge and approved on appeal that an asset in the name of a husband was really being kept for the future and retirement of the family and, therefore, not a business asset.

110 In *Johnson v. Johnson* (1998), 167 N.S.R. (2d) 201 (S.C.) Davison, J. stated at page 215:

[62] With respect to the scheme and object of the Matrimonial Property Act and the intention of the legislature, we get great assistance from the recitals set forth at the beginning of the legislation. The Act was intended to strengthen the role of family in society and recognize the contribution of each spouse to the marriage and the Act recognized that joint contribution in dividing assets. Under the Act, all property was

matrimonial unless there was proof an exception in s. 4(1) applied. I have not changed from the view I expressed in *Curren v. Curren*, [1987] N.S.J. No. 213 (supra), at p. 123:

...

To find assets are business assets simply because they are connected with a business is contrary to the intention of the legislation and contrary to rules of statutory interpretation as most recently expressed in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 (supra).

[emphasis added]

- [32] In the case before me, the evidence is clear that the Lodge was acquired as both a going concern (immediate income to support the family) and a retirement plan (to sell and create a retirement fund). In keeping with this, the parties operated the business for eight years before selling in 2006 to finance their retirement.
- [33] Where there is a blended purpose, the court is not precluded from classifying the asset as a matrimonial asset. In *Hebb* (supra) the Court of Appeal specifically addressed assets which are acquired for purposes of creating income and which, at first blush, meet the definition of business assets under the *MPA*, but which fall back into the broader category of matrimonial assets because the acquisition was made for future security.
- [34] Again, the primary consideration is the intention of the parties. The Buchhofers liquidated all their German assets to acquire the Lodge, and they have no other significant assets. It is clear the Lodge was their nest egg. I accept Ms. Buchhofer's evidence that they planned to retire and live off the sale proceeds from the Lodge after 2006. By then, Mr. Buchhofer was 61 years old and Ms. Buchhofer was 54. They had raised their son and acquired a smaller home in Judique. Their retirement plan was complete.
- [35] The Lodge is therefore classified as a matrimonial asset subject to an equal division under s. 12 of the *MPA*. If I am wrong in this classification, I would order a division of the Lodge under s. 13 and/or s. 18 of the *MPA*.
- [36] The onus under s. 13 of the *MPA* rests with Ms. Buchhofer to show that an equal division of matrimonial assets would be unfair or unconscionable in the circumstances. I find she has met that onus.

- [37] At the time of separation, the parties owned furniture and household items, which they have already divided to their satisfaction. There were two vehicles, neither of which was new. Mr. Buchhofer's 2004 Buick was purchased in March, 2007 from the joint account for \$20,000.00. In 2011, they each valued the Buick at \$3,500.00 and Ms. Buchhofer's Ford at \$2,000.00. Each party kept their own vehicle after separation. The difference in value is \$1,500.00, so Mr. Buchhofer would owe Ms. Buchhofer \$750.00 to equalize the values.
- [38] Each party identified a German National Pension Plan in their Statement of Property, though no values were provided. It is unclear whether a division of these pensions is available. Where Ms. Buchhofer left the workforce after their child was born, her German pension is likely less valuable than Mr. Buchhofer's German pension.
- [39] There were also a number of bank accounts held primarily by Mr. Buchhofer at the time of separation. Much evidence was led with respect to funds deposited to the accounts after the 2006 sale of the Lodge. The account balances at separation are difficult to determine because of incomplete and late disclosure. By Mr. Buchhofer's calculation, the personal bank accounts had a combined balance of \$54,528.68 at separation. He also lists credit card debt of \$5,858.37, which includes his airfare to the Philippines and hotel expenses after separation. Ms. Buchhofer removed \$11,200.00 from the joint account after separation.
- [40] She says there is at least \$86,450.00 missing from the accounts, representing monies paid on the take-back mortgage after 2006. Mr. Buchhofer acknowledges that when mortgage funds were paid, he transferred monies to personal accounts in his name only. He says the intention was to earn higher interest, not to deny Ms. Buchhofer access to the funds. He says the monies were used for living expenses after 2006. He denies he planned to leave the marriage before late 2008.
- [41] Using Mr. Buchhofer's figures, an equal division of the bank accounts, less debt as of separation, would leave Ms. Buchhofer with only \$24,335.16, of which she has already received \$11,200.00. Ms. Buchhofer would therefore be entitled to an equalization payment of \$13,885.16 (including the \$750.00 for the vehicles), exclusive of the Lodge. After a marriage of 28.5 years, one son, a move to Canada and the joint operation of a successful business, I find an equal division of matrimonial assets would be unfair and unconscionable in all of the

circumstances of this case. I rely in particular on s. 13(d)(e)(f)(g)(i) of the *MPA*. I would order an equal division of the Lodge as a non-matrimonial asset under s.13 accordingly.

[42] Further, I would order an equal division of the Lodge had it been classified as a business asset under s. 18 of the *MPA*. This reflects Ms. Buchhofer's contribution to the acquisition, management and operation of the asset.

[43] Ms. Buchhofer made a significant contribution to this long-term marriage, working outside the home at first, and later in the family business. I accept that she was primarily responsible for the childcare and homemaking duties. Her contribution allowed Mr. Buchhofer to acquire, expand and eventually sell two successful fishing supply stores in Germany, the proceeds of which were used to acquire the Lodge. She left her career to support his business aspirations and the family. She has no retirement savings other than the German National Plan, and with their separation, she has lost the opportunity to benefit from the Canadian business. She also lost the opportunity to accumulate a larger pension in Germany by leaving the workforce when pregnant, then working in the family business and moving to Canada to support Mr. Buchhofer's dream of owning a fishing lodge. She put all of her assets at risk in this venture, then worked at the Lodge in operations and management, expecting to retire with her husband on the proceeds when it was sold.

Valuation:

[44] Having determined the asset is matrimonial and subject to an equal division, the next question is what is the value to be attributed to the asset and how to effect the division?

[45] An appraisal of the subject property was tendered in evidence by agreement. It was prepared by Gregory J. Ratchford, AACI, P. App. Mr. Ratchford sets forth a couple of approaches to valuation, including the direct comparison and income approaches. The cost approach was not considered for several reasons stated in the report, which I accept as valid.

[46] Mr. Ratchford's assessment under the income approach was hindered by lack of financial disclosure from Mr. Bucchofer. However, using internally generated 2013 figures, Mr. Ratchford pieced together a picture of business revenues over the past five (5) years. Using this approach, he estimated the

value at \$218,000.00. Using the direct comparison approach, Mr. Ratchford's opinion on value is \$693,000.00.

[47] The significant difference in values between an income approach (assessing the business as a going concern) and the direct comparison approach (looking at sales of comparable properties) is explained in the report by a decline in the tourist industry, the closure of the restaurant and lounge facility on the property, and lack of comparables. After considering a number of factors, Mr. Ratchford concluded the property is reasonably valued at \$225,000.00.

[48] Ms. Buchhofer rejects Mr. Ratchford's valuation. She urges the court to place a higher value on the property, given the amount of monies invested by the parties and the blending of personal and business expenses in the financial statements. She also points to the fact that an offer of \$650,000.00 was received after the property was relisted in 2009.

[49] Mr. Buchhofer asks the court to accept the opinion of Mr. Ratchford and value the property at \$225,000.00. He also asks that only a small portion of the property be attributed to matrimonial interests. He argues that:

- The municipal tax assessment places only a 25% residential rate on the property;
- If the entire property is considered matrimonial, and Ms. Buchhofer also seeks spousal support to be paid from the proceeds of the business, she could be compensated twice for the same interest.

[50] There is evidence to support Ms. Buchhofer's claim that the property, though owned by a company, was treated as a personal asset owned jointly by the parties. In addition to the factual findings made above, I find:

- They personally paid the outstanding municipal taxes on the Lodge from the sale proceeds of their home in Judique in 2009;
- When the property was listed for sale in 2009, the listing agreement named the parties personally as owners;
- The 2009 listing agreement did not include the numbered company as owner.

[51] I accept Ms. Buchhofer's evidence that she only received 5% of shares in the Lodge because it allowed her to collect employment insurance benefits during the off-season. I reject Mr. Buchhofer's evidence that she only received 5% shareholdings because she was not interested in running the business. It is impossible to believe that Ms. Buchhofer would allow all of their German assets to be liquidated, and the monies used to purchase property in another country, yet accept a nominal interest because she was disinterested. Ms. Buchhofer moved her entire family to Canada to pursue a business venture in which the parties' life savings had been invested, and on which their future rested. She helped to make the business a success. I find she fully expected to be involved in, and equally own, the business in Canada.

[52] The fact she left the arrangements for the acquisition to Mr. Buchhofer does not detract from this conclusion. It makes practical sense. I accept her evidence that she stayed behind and managed the second store in Germany for several months. They needed that income in making the transition to Canada. Someone had to stay behind to run the business. But she maintained regular communication with Mr. Buchhofer and, in particular, they talked about the share structure of the new company.

[53] I accept Ms. Buchhofer's evidence that they arranged the company based on the advice of legal counsel. Ms. Buchhofer did not have independent advice with respect to ownership. The ownership arrangement was the most beneficial to them at that time, but I find it does not reflect their intentions and expectations as regards true ownership. The fact that she approved him taking 90% share ownership does not equate to a surrender of her equal interest in these circumstances.

[54] Neither party presented evidence with respect to their plans for the \$650,000.00 had the offer on the Lodge been finalized in 2009. The parties had initially planned to retire on the sale proceeds, and in fact they lived on the mortgage payments through 2007-08. In his note of December, 2008 Mr. Buchhofer told Ms. Buchhofer that "I will not cheat you". At that point, he controlled the money. I infer from his note that he recognized Ms. Buchhofer had an equal interest in those funds.

[55] At trial, Mr. Buchhofer referred a number of times to "all my hard work" at the Lodge. He testified about his efforts to renovate and improve the Lodge,

and was loathe to recognize Ms. Buchhofer's contribution to their success. His position has changed since his 2008 note was written.

[56] In any event, Ms. Buchhofer's shareholding of 5% was no longer applicable in 2009, as the company was no longer the Lodge owner. She was a joint owner of the Lodge with Mr. Buchhofer and the numbered company which he controlled (and which had no value in 2009). I conclude from all the evidence that any sale proceeds from the Lodge would have been divided equally between the parties in 2009, had the offer been accepted.

[57] I find that an appropriate value to be placed on the Lodge for purposes division is \$650,000.00 less any disposition costs the parties would have incurred. I reject the opinion on value generated by Mr. Ratchford for the following reasons:

1. His assessment under the income approach was hindered by lack of financial disclosure from Mr. Buchhofer.
2. The business revenues declined after Mr. Buchhofer closed the restaurant and lounge.
3. Mr. Ratchford provided no separate value for the land on which the Lodge sits, nor information on whether it can be subdivided and sold in parcels, for example.
4. Although direct comparisons were limited, Mr. Ratchford was aware of the 2009 offer.

[58] I find in the circumstances of this case, assessing the Lodge as a going concern is not the appropriate approach to valuation. Mr. Buchhofer has been operating the Lodge since 2009 and controls all business decisions and expenses. He closed the restaurant and lounge, which has impacted revenues. He failed to make full disclosure of his business income for purposes of the appraisal, which forced on Mr. Ratchford to piece together a picture of the business revenues over the past five years. And finally, Mr. Buchhofer writes off for tax purposes a number of expenses which could be considered to be personal in nature, such as travel and his share of utility expenses. This all impacts the bottom line and the value of the business as a "going concern".

[59] I also note the parties paid significantly more than \$225,000.00 to acquire the Lodge in 1997 and have invested money and energy in it since. Mr. Buchhofer wishes to continue operating the Inn, which suggests it is a viable

business in the long term. And he refused an offer of \$650,000.00 in 2009, so he must believe the property is worth more.

[60] Using a value of \$650,000.00 net of disposition costs (4% commission plus HST and \$2,500.00 legal fees plus HST), I find Ms. Buchhofer is entitled to an equal share of \$308,612.50. I have made no adjustment for any tax implications of the property division, as no evidence was led in this respect.

[61] Ms. Buchhofer asks the court to direct the sale of the Lodge, with the proceeds being split equally. The Lodge is the only asset of value and she sees no other way to be compensated for her share of its value. Mr. Buchhofer opposes this, primarily because he feels the Lodge is exempt from division.

[62] There are no other matrimonial assets to set-off against the value of the Lodge, so I am left with little choice but to direct its sale. However, I am prepared to give Mr. Buchhofer first option to purchase it at the price of \$308,612.50 plus any other sums owing to Ms. Buchhofer according to this decision. He must exercise that option and complete the purchase within six months of this decision, failing which the Lodge shall be listed for sale with a realtor of Ms. Buchhofer's choosing, at a price to be set in consultation with that realtor. Failing agreement on the list price or any reductions in price, Ms. Buchhofer shall have final say.

[63] Within the first six months of the listing, the parties shall accept any offer within 10% of the list price. After six months, any reasonable offer shall be accepted. The list price may be reduced at any time on the realtor's recommendation. In the event the parties cannot agree on these issues, Ms. Buchhofer shall have final say. Mr. Buchhofer and his staff shall cooperate with all viewings, inspections, and reasonable requests for information on operational costs.

[64] Pending sale, Ms. Buchhofer's interest in the Lodge will be secured by way of a promissory note and collateral mortgage in the amount of \$308,612.50 plus any other sums owing under this order. The mortgage will be repayable in the principal amount of \$2,000.00 per month, plus simple interest on the balance accumulating at the rate of 9.5% from December 15, 2015, until paid in full. Should Mr. Buchhofer opt to purchase the Lodge himself, he will be entitled to pay the debt without any penalty. Mortgage payments will commence on January 15, 2016 and continue monthly until the balance is paid in full.

[65] Mr. Buchhofer shall be entitled to operate the Inn pending sale. In the event he chooses to do so, he shall be responsible to pay all protective disbursements, including municipal taxes, insurance and routine maintenance costs as a cost of doing business. In the event such expenses are in arrears when the Lodge is sold, they shall be adjusted on closing from his share of the proceeds.

[66] The mortgage will be executed by both Mr. Buchhofer and the numbered company within sixty days, failing which the Sheriff shall be authorized as Trustee to execute the same on their behalf. The entire property shall form the security. The Sheriff shall also be empowered as Trustee to execute all documents in relation to the sale of the Lodge, should Mr. Buchhofer fail or refuse to sign all necessary documents.

[67] Mr. Buchhofer shall also pay Ms. Buchhofer half the value of the bank accounts at separation, less her share of the debts (excluding Mr. Buchhofer's airfare and hotel expenses of \$4,246.20) and the amount she removed from the joint account after separation. The net payment owing to her is \$15,258.26.

[68] I decline to make any further order for division of the bank accounts. Ms. Buchhofer urges me to draw a negative inference from Mr. Buchhofer's failure to disclose all his banking information in advance of trial. She claims he set money aside and hid it from her and the court. She calculates the missing money at \$86,450.00, based on her calculation of monies paid on the mortgage and expenses incurred after 2006. She seeks an order for half that sum to be paid to her.

[69] Mr. Buchhofer testified about the monies paid on the take-back mortgage. His records show that they received \$137,677.85 as of the date of separation. From those monies, the parties bought their son a car, paid for the 2004 Buick, completed renovations in Judique and paid their living expenses after the sale (all of which Ms. Buchhofer estimates at \$103,000.00). The balance from the sale proceeds would therefore be \$34,677.85 as of December, 2008. Mr. Buchhofer's accounts show a balance of \$54,528.68, so no monies appear to be missing.

[70] There shall be no order with respect to furniture and household items, the vehicles, or the German National Pension Plan.

[71] Mr. Buchhofer shall be solely responsible for the debts which include the CIBC Visa, the Hudson Bay credit card and Home Depot accounts, as their values have been offset against Ms. Buchhofer's interest in the bank accounts.

[72] There was much evidence about ownership of the horses, but in the circumstances, I conclude they were the personal assets of Ms. Buchhofer. Her choice to maintain the dog and horses after separation was an honourable one, but the evidence is clear that she could not afford it. She incurred costs for pet-sitting when she travelled for work, as well as veterinarian bills.

[73] She claims these are matrimonial debts which should be divided, but I reject that claim. These debts were incurred after separation and as a result of her choice to keep the dog and horses. While I accept that she was dealing with a very stressful situation, and was left to decide these issues on her own, she chose to keep the animals. I am sure they provided her with companionship and the choice was ultimately worth it, but she must bear the cost herself.

[74] Mr. Buchhofer claims that his mother financed the acquisition of the Lodge through a personal loan. Ms. Buchhofer denies this. Evidence was lead with respect to monies Mrs. Buchhofer advanced to her son, but the documentation to support the claim is unsatisfactory. Mr. Buchhofer provided a bank deposit slip which predates the acquisition, and a document purporting to be a loan agreement which Ms. Buchhofer did not sign. I reject Mr. Buchhofer's claim for setoff of any sums owing to Ms. Buchhofer to account for these monies.

Occupation Rent

[75] Ms. Buchhofer claims occupation rent since 2009 when Mr. Buchhofer took possession of the Lodge (now operated as the Inn). Occupation rent is typically awarded where one party moves out and secures alternative housing, while the other occupies the matrimonial home. Evidence about the reasons why the departing spouse left, the cost to acquire alternative housing and any costs paid by the occupying spouse in order to maintain the home is necessary to determine whether such a claim is appropriate.

[76] In 2009 when Mr. Buchhofer took possession, the Lodge was no longer the matrimonial home. The Buchhofers moved from the Lodge to a home in Judique in 2006. They occupied the Judique home together until December, 2008 when Mr. Buchhofer left. Ms. Buchhofer vacated the matrimonial home in Judique in February, 2009. When it was sold they split the net proceeds.

[77] Mr. Buchhofer resides at the Lodge during the tourist season, and returns to the Philippines every winter with his new partner and child. In effect, he has exercised exclusive possession of this asset since the spring of 2009. He operates the Inn under the numbered company, through which revenues and expenses flow.

[78] In 2009, the Lodge was an investment, a mortgaged property whose proceeds were supposed to fund the parties' retirement. Mr. Buchhofer's occupation and operation of the Inn is akin to taking control of a joint investment from which one owner solely reaps the rewards. He did not share any of the Inn's post-2009 profits with Ms. Buchhofer, even though she was a joint owner. She had no control over the business and no input on the changes he implemented.

[79] Nor did Mr. Buchhofer pay the company or Ms. Buchhofer rent. The Lodge was not mortgaged, so he was not paying down a mortgage balance which would benefit both parties. He was effectively living rent free, while Ms. Buchhofer was paying rent in her new home.

[80] I reject Mr. Buchhofer's argument that to compensate Ms. Buchhofer for occupation rent and require payment of spousal support, both from income generated by the Inn, would be unfair. He is paid a management fee for his work. If a third party had been hired to operate the Inn and was paid the same management fee, the profits would go to the owner(s). In this case, though there are three legal owners, only one owner benefited. Thus Ms. Buchhofer has been deprived of her share of the profits since 2009.

[81] The evidence on income generated by the Inn since 2009 is murky. Mr. Buchhofer blends personal expenses with his business expenses. Mr. Buchhofer pays himself a management fee from the business, and pays his new spouse for housekeeping services. Included in the Inn's expenses are employee payroll, management fees and travel expenses, including airfare to the Philippines.

[82] Mr. Buchhofer should have paid rent or a share of the net profits to Ms. Buchhofer after 2009, to compensate her for his exclusive occupation of the Lodge. He paid himself a management fee and his new partner a salary. In addition, he had the benefit of living rent free, with utilities paid through the business. I conclude it is fair in all of these circumstances to direct him to pay Ms. Buchhofer the sum of \$20,718.00, being half the net income earned by the

numbered company from 2009 – 2013 according to his internal reports, and its estimated his 2014 – 2015 income.

SPOUSAL SUPPORT

(a) Entitlement –

[83] The Buchhofers were married for 28.5 years and had one child together. I accept that Ms. Buchhofer was primarily responsible for child care and homemaking duties. Mr. Buchhofer was primarily responsible for acquiring and operating the German businesses in Germany. Ms. Buchhofer quit her full time job when she became pregnant. She worked in the family business on a part-time basis after their son was born, and eventually worked full-time after Roman started school. When the parties moved to Canada, she worked in the family business here.

[84] The Divorce Act states:

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[85] I accept Ms. Buchhofer's evidence that she moved to Canada with her family to pursue a business opportunity Mr. Buchhofer had identified. She said it was his dream to own a fishing lodge. In following him to Canada, she left her home country and took a leap of faith. That faith was rewarded in a successful business which they both operated until it was sold in 2006. The sale price was \$1.075 million, significantly more than the purchase price. The increased value is a testament to the time and work invested by both parties, as well as an improved market. The parties planned to use the sale proceeds as a retirement fund and did so between 2007 - 08.

[86] After separation, Ms. Buchhofer developed a business working with horses. She did not sit back awaiting support. Indeed, she could not afford to do so. She had some money from the joint account and from the sale of the Judique home, but no other resources. Mr. Buchhofer suggests she had a Royal bank account that was not disclosed, but I reject that suggestion. I am satisfied that Ms. Buchhofer made full disclosure of her assets. In any event, Mr. Buchhofer made no arrangements with her to share in the sale proceeds, so she had to support herself. Through hard work and extensive travel, she has now built up her business to the point where it provides a basic level of self-sufficiency. I reject the suggestion she could earn more selling real estate.

[87] However, I accept her evidence that she suffers with back and shoulder pain which is currently managed through chiropractic and massage. I accept that these conditions may, in future, impede her ability to work. She is 63 years old. It is unlikely she'll be able to work as a farrier in the long-term. She will continue to face economic disadvantages from the breakdown of the marriage. She has few assets, earns minimal income, and her future is far from secure.

[88] I find in all of these circumstances, there is entitlement to spousal support on a compensatory basis.

(b) Determination of Income / Ability to Pay

[89] Mr. Buchhofer takes the position that, irrespective of whether Ms. Buchhofer is entitled to spousal support, he is not in a position to pay. He has repartnered and now supports a young child. His partner works in the business, but does not earn a significant income. In 2014 he earned \$18,884.00 and his partner earned \$16,120.00. In the same year, Ms. Buchhofer earned \$20,085.00 (net) from her business.

[90] Ms. Buchhofer argues that Mr. Buchhofer earns more than what is shown on his tax returns and has the ability to pay spousal support. She claims:

- he is pursuing a real estate business and website design work in the Philippines from which he earns income;
- his income from the Inn is underreported, as he deducts personal expenses from his business income;
- he only works half of the year and spends the other half of the year in the Philippines.

[91] I have carefully considered her claim, but am not satisfied on the evidence that Mr. Buchhofer is operating a real estate business in the Philippines. I accept his evidence that he is not licensed or qualified to sell real estate in the Philippines. I also accept his evidence that he has completed some web design work for family and a friend, but included the income in his tax return for Revenue Canada purposes. Even if he is completing web design work that is not reported for tax purposes, the market is competitive and he charges only \$500.00 per client, which does not add significantly to his income. His lifestyle does not reflect significantly more income than is reported.

[92] Further, he is required to pay Ms. Buchhofer for her interest in the Lodge or sell it, either of which will impact his ability to pay support.

[93] Based on all the evidence, I conclude that Mr. Buchhofer is not currently in a position to pay spousal support. However, in order to preserve her right to support in future should circumstances change, I order Mr. Buchhofer to pay

\$1.00 per annum in spousal support, effective January 1, 2016. The parties will be required to exchange personal (and corporate where applicable) tax returns starting June 1, 2015 for so long as spousal support is payable.

Retroactive Spousal Support

[94] Ms. Buchhofer claims retroactive spousal support from December, 2008 to present. As noted above, Mr. Buchhofer left Canada in December, 2008 for four months. Ms. Buchhofer was left to manage the home and horses in Judique. I accept her evidence that she struggled to do so. She testified that her son helped with the horses, but he had his own business and responsibilities. I accept her evidence that she moved to the south shore at her son's urging, to work and gain the support of friends there. She was overwhelmed emotionally and financially when she made the decision to move.

[95] The parties had a joint bank account from which Ms. Buchhofer paid some of her living expenses after separation. The monies paid on the take-back mortgage were originally deposited into that account, but most was subsequently transferred to accounts solely in Mr. Buchhofer's name. They used that money to live before separation, but Mr. Buchhofer made no arrangements with Ms. Buchhofer to provide financial support when he left for the Philippines. When the home in Judique was sold, the parties split the net proceeds, which provided Ms. Buchhofer some monies (her share was \$7,195.96). However, from that, Mr. Buchhofer seeks reimbursement of monies he paid on taxes and other expenses before the closing, amounting to \$14,574.00.

[96] Ms. Buchhofer was entitled to and had a need for support after separation. In 2009 she had reported income of only \$6,631.00 from self-employment. In 2010 her gross business income was \$11,070.00. By 2011 it had increased to \$23,946.00, and it has remained in the same range since.

[97] Mr. Buchhofer reported income in 2009 of \$12,957.00, and in 2010 of \$16,289.00. His source of income was the Inn. By living there, he enjoyed financial benefits not reflected in his reported income.

[98] I have considered the means, needs and circumstances of each spouse. Ms. Buchhofer filed a Statement of Expenses in 2011 in which she presented a very modest budget. It showed a deficit of almost \$2,000.00 per month. It is noteworthy that although Ms. Buchhofer testified that she was solely

responsible for the expenses of caring for the horses and a family dog after separation, she included no amounts in her budget for those costs. Mr. Buchhofer also presented a 2011 budget which included a deficit of \$242.00 per month, but his figures include child support of \$300.00 per month. In his evidence, he acknowledged that he did not pay ongoing child support for his daughter, rather he sent money before she was born.

[99] In his updated budget, Mr. Buchhofer has included holiday expenses of \$400.00 per month. He has also included \$200.00 per month for child care expenses, \$40.00 per month for post-secondary school expenses (his daughter is in grade school) and a generous budget for clothing despite his claim they shop at flea markets for used clothing. His budget deficit is estimated at \$646.00 per month. It does not account for sharing of expenses with his new partner or any tax deductions for child-care or related expenses.

[100] I find after Ms. Buchhofer moved from Judique in February, 2009 that she was in need of support and Mr. Buchhofer had the ability to pay. I order retroactive spousal support in the amount of \$500.00 per month commencing when the Judique house was sold in September, 2009 up to and including December 1, 2010 (a total of 16 months = \$8,000.00). By then, Ms. Buchhofer had successfully established her business and was earning a sufficient income to support herself in a modest lifestyle.

[101] I decline to make any order reimbursing Mr. Buchhofer for expenses paid on the Judique home before its sale. These constitute spousal support where no other payments were made in that period, and served to maintain an asset in which he had an interest, and in which he resided for a short time after his return to Canada.

COSTS

[102] Ms. Buchhofer seeks costs of the proceeding, and in particular for the time spent on motions for disclosure. Mr. Buchhofer opposes an award of costs. He argues that the documents requested were not relevant, and did not lead to a higher award for Ms. Buchhofer. He says he should be awarded costs in these circumstances.

[103] A significant amount of pre-trial court time was spent in dealing with production of documents. A written decision was released. Mr. Buchhofer was ordered to disclose financial documents after failing or refusing to do so. A

number of appearances were required to deal with the issue. Although no finding is made that monies were hidden by Mr. Buchhofer, this is only after hearing and seeing the evidence at trial. A large portion of the banking documents tendered at trial should have been disclosed well in advance by Mr. Buchhofer.

[104] Failure to make full and timely disclosure is the scourge of family law. It invites suspicion and entrenches positions. It also adds unnecessarily to the already high cost of litigation. Had Ms. Buchhofer had access to all the banking information before trial, she might have taken a different position on certain issues. In the circumstances, I award Ms. Buchhofer costs of \$15,000.00.

[105] In awarding costs and setting this figure, I take into account the following factors:

- Ms. Buchhofer was successful in her disclosure motion;
- Ms. Buchhofer was unsuccessful in arguing for a share of monies allegedly hidden by Mr. Buchhofer;
- She was successful in establishing entitlement to spousal support;
- She was successful in her claim to divide the main asset, the Lodge, which I have valued at \$650,000.00.
- The trial lasted three days and there were several pretrial hearings and appearances required.

CONCLUSION

[106] I order an equal division of matrimonial assets, including an equal division of the property known as the Margaree Lodge, located at 21045 Highway 19 in Margaree Forks, Nova Scotia by way of sale or option to purchase.

[107] I order occupation rent of \$20,718.00 payable by Mr. Buchhofer.

[108] I order payment of spousal support of \$1.00 per annum prospectively to Ms. Buchhofer.

[109] I order payment of retroactive spousal support of \$8,000.00.

[110] I order costs of \$15,000.00 to Ms. Buchhofer.

[111] Counsel for Ms. Buchhofer is requested to prepare the order.

MacLeod-Archer, J.

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Buchhofer v. Buchhofer*, 2015 NSSC 358

Date: 20151215

Docket: SFSND1206-006243

Registry: Sydney, N.S.

Between:

Gudrun Buchhofer

Petitioner

v.

Werner Buchhofer

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: August 24, 25 and 26, 2015, in Sydney, Nova Scotia

Written Release: December 15, 2015

Erratum Date: January 8, 2016

Counsel: Damien Barry for the Petitioner
Adam Rodgers for the Respondent

Erratum: Paragraph 64 is changed as follows:

Pending sale, Ms. Buchhofer's interest in the Lodge will be secured by way of a promissory note and collateral mortgage in the amount of \$308,612.50 plus any other sums owing under this order. The mortgage

will be repayable in the principal amount of \$2,000.00 per month, plus simple interest on the balance accumulating at the rate of 9.5% from December 15, 2015, until paid in full. Should Mr. Buchhofer opt to purchase the Lodge himself, he will be entitled to pay the debt without any penalty. Mortgage payments will commence on January 15, 2016 and continue monthly until the balance is paid in full.