

SUPREME COURT OF YUKON

Citation: *L.M.D. v. R.J.D.*, 2011 YKSC 70

Date: 20110913
S.C. No. 11-D4322
Registry: Whitehorse

Between:

L.M.D.

Plaintiff

And

R.J.D.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

André W.L. Roothman
R.J.D.

Counsel for the Plaintiff
Appearing for himself

REASONS FOR JUDGMENT

INTRODUCTION

[1] The central issue in this divorce trial is whether there should be an unequal division of the family assets in favour of the mother, pursuant to s. 13 of the *Family Property and Support Act*, R.S.Y. 2002, c. 83. The main family asset is a multi-acre, partially developed piece of rural property about 150 kilometres from Watson Lake, on a remote rural road (the “property”). The mother has been authorized by a previous order of this Court to sell the property. She asks that any interest in the property belonging to the father be forfeited, so that she will receive 100% of any sale proceeds.

[2] Further, or in the alternative, the mother seeks general and punitive damages for alleged torts of two incidents of assault and battery by the father, as well as for repetitive false imprisonment, by way of unlawful confinement.

[3] If successful on these issues, the mother would also seek her taxable court costs for this two-day trial.

[4] In addition, the mother seeks an order for sole custody of the three female children, currently 19, 17 and 13 years old. Further, because of incest committed by the father with the eldest daughter, as well as alleged physical and emotional abuse upon all three children, the mother asks for an order prohibiting the father from having any access to the daughters.

[5] The father has been charged criminally with the incest, has entered a guilty plea, and is currently awaiting sentencing for that offence. He has not expressly denied the allegations of physical and emotional abuse towards all three daughters. As he is likely going to receive a lengthy penitentiary sentence at his upcoming sentencing, the father indicated in this trial that he does not oppose sole custody or the prohibition against access. However, he also made it known that, following his eventual release from prison, depending upon the ages of the children at that time, he may apply to vary any such orders, assuming he can establish a material change in circumstances.

[6] Finally, the mother seeks an indefinite restraining order preventing the father from having any direct or indirect contact with her or any of the three daughters. Once again, this was not opposed by the father at this time, given his present circumstances, subject to the possibility of a future application to vary.

[7] With only a few exceptions, the vast majority of the mother's testimony was uncontradicted by the father. While he denied certain alleged facts in his statement of defence, he failed to confirm these denials under oath or to give evidence to the contrary. For the most part, I found the mother to be credible and trustworthy and I have accepted her evidence as fact, unless otherwise indicated.

FACTS

Residences, Income and Assets

[8] The parties were married in July 1988 in British Columbia. They moved to Whitehorse the early 1990s, purchasing a mobile home in a local trailer court. The mother had previous training in early childhood education and obtained a related job at a local daycare. The father looked for work and obtained one or two short-term jobs. The couple later sold the trailer and moved into rental accommodation outside Whitehorse. They then moved back to British Columbia for about a year, returning to Whitehorse to reside in a couple of rental accommodations for the next two years. They purchased a home in either 2004 or 2005. The uncontradicted evidence of mother was that the down payment for this home came from a combination of her tax refund money and a loan from her parents.

[9] For the first 17 years of her working life, the mother was employed in the daycare/day home business. For a period of 10 years, she operated her own day home. However, in the fall of 2006, her day home in Whitehorse was shut down by the Yukon Government because of allegations that the father had behaved inappropriately with some of the young children attending the day home. According to the mother, the father was then in the habit of staying up late at night working on computers and he would

attempt to sleep-in during the day. He became impatient with the noise from the young children and occasionally picked some of them up by the shoulders and squeezed them to the point of discomfort. Some of the children complained to their parents about this rough treatment, which led to an investigation and a closing of the home. None of this evidence was disputed by the father in this trial.

[10] During the time the day home was operating, the father pursued a number of different types of employment. He had a wage paying job for less than a year. He also did some renovating and mushroom picking. At one point he was involved in a project attempting to invent a breathing apparatus for snowmobiles. He also attempted to establish home-based businesses constructing children's toys and log furniture.

[11] In the spring of 2007, the family sold their Whitehorse home and moved to Watson Lake. The main reason for the move was that the father wanted to acquire and develop a piece of rural property as a permanent residence for the family.

[12] Since 2000, the mother has been the principal breadwinner in the family. In the period between 2000 and 2006, she earned:

	2000 - \$ 32,456
	2001 - \$ 34,200
	2003 - \$ 50,471
	2004 - \$ 44,249
	2005 - \$ 50,189
	2006 - <u>\$ 33,817</u>
Subtotal	\$245,382

There was no income information available for 2002.

[13] In comparison, the income information for the father over roughly the same period is as follows:

	2002 - \$8,810.87
	2003 - \$2,684.60
	2004 - (\$1,381.00)
	2005 - (\$ 256.00)
	2006 - \$ <u>0.00</u>
Subtotal	\$ 9,858.47

[14] It is undisputed that the mother was responsible for all of the household expenses while the couple were residing in Whitehorse. What profit was obtained from selling their home was used in part to defray the mother's loss of income from the closure of her day home, approximately \$14,000 in credit card debt, approximately \$12,000 in back taxes, and expenses associated with the family's move to Watson Lake.

[15] The father applied for some form of a grant of Crown land to acquire the property. On his third such application, he successfully obtained a multi-acre piece of land about 150 kilometres from Watson Lake. The stated purchase price for the property was \$5,200, which I am told was the cost incurred by the parties to have the property surveyed. This cost was paid for by the mother. Title to the property is in the joint names of the parties.

[16] When the family moved, the property was completely undeveloped. Initially, some of them resided in a wall tent on the site and commuted back and forth from Watson Lake. For a brief period, the mother resided at a motel in Watson Lake with their three children, who were then 15, 13 and 8 years of age.

[17] The mother gave uncontradicted evidence that the father felt that God would provide for them in relation to the purchase and development of the property. In particular, he believed that a certain individual in Vancouver was going to give them millions of dollars. When that failed to materialize, the mother obtained employment at a hotel in Watson Lake in May or June of 2007. She continued to work at this hotel until June of 2011.

[18] For about a year or two prior to the move, the three girls had been home-schooled by the parties. The decision to do so was made by the father. After the move, the children frequently lived with the mother in a hotel room provided for her in connection with her employment. She would home-school the girls during her off-work hours. The eldest and middle daughters also obtained jobs at the hotel where the mother worked. From 2007 to 2010, the mother and the two eldest daughters earned the following total incomes from their employment at the hotel, including occasional unemployment insurance benefits:

Mother	2007 - \$ 20,929
	2008 - \$ 33,391
	2009 - \$ 31,451
	2010 - <u>\$ 33,447</u>
Sub-total	\$119,218
Eldest daughter	2007 - \$ 9,524
	2008 - \$ 16,508
	2009 - \$ 9,957
	2010 - <u>\$ 2,319</u>
Sub-total	\$ 38,308

Middle daughter	2007 - \$ 14,281	
	2008 - \$ 27,097	
	2009 - \$ 18,839	
	2010 - <u>\$ 13,282</u>	
Sub-total	\$ 73,499	
Grand Total (for this period)		\$231,025

[19] The mother's uncontradicted evidence was that the money earned by the daughters was not considered their own, but was entirely deposited into the family's joint account.

[20] In comparison, the father's income over the same period was as follows:

2007 - \$	0
2008 - \$	4,861
2009 - \$	0
2010 - \$	0

[21] The uncontested evidence of the mother was that all of the monies she and her daughters earned were deposited into a joint account at the couple's bank in Watson Lake and that this account was used for all of the family's living expenses, including the development of the rural property. In particular, the money was used initially to fund the construction of a 20' x 30' open concept home (the "cabin") on the property. The father designed and constructed this building. While it was under construction, the father lived in a wall tent on the property for about five months. The mother never resided on the property, but would periodically visit there. The eldest daughter lived on the property for

the greatest amount of time; the middle child lived with her mother in Watson Lake most of the time; and the youngest child lived on the property at various times.

[22] The cabin was finished in late 2007 or early 2008. The mother's uncontested evidence is that the total cost of the construction materials was \$21,556.26. In addition, the father testified that he arranged for a contractor to pour a concrete slab to begin the construction of the building at a cost of \$3,000. Therefore, the total related costs for the building was \$24,556.26.

[23] In 2009, the father constructed a shop on the property. The uncontradicted evidence of the mother is that the total cost of materials for the shop was \$8,396.85. The father did not cross-examine the mother about that evidence. Nor did he provide evidence on the witness stand to the contrary. In his closing argument, the father made a submission that the shop costs should not be considered "in addition to" the total cost of materials for the cabin, but provided no rationale for this submission. Thus, the mother's evidence about this remains uncontradicted and I accept that it was \$8,396.85.

[24] The mother also acknowledged that the father built sheds and other structures on the property, cleared trails and cut firewood.

[25] According to the mother, when the daughters were residing with the father they would come into Watson Lake every 10 or 12 days to purchase groceries and other supplies. Those purchases were paid for from the money in the family's joint bank account, into which the wages of the mother and the eldest two daughters were deposited.

[26] The mother's evidence also included reference to a three-page document, typed by the father, listing numerous items which he claimed to be his "personal property". The

mother explained that some of these items have been seized by the R.C.M.P. in connection with the father's arrest on the incest charge, some remain in storage on the property and will be sold or disposed of when the property is sold. The remainder of the items have already been sold by the mother in two yard sales. The mother's copy of this three-page document contains the mother's notes detailing the status of these various items and records that the total value of all the goods sold to-date is \$13,007. The mother testified that she used part of that money to pay down a consolidated loan obtained to pay off credit card debts. She also used a portion to pay for her legal fees. In any event, the mother gave uncontradicted testimony that 90% of the things listed by the father as his personal property were items paid for by the mother.

[27] The mother gave evidence about a family vehicle, specifically a 2008 Chevrolet Silverado pickup truck, which the family purchased in March 2009. Following the father's arrest and the couple's separation, the father agreed that the mother could retain the truck in her own name to use or sell, as she saw fit. On that basis, in an earlier order of this Court, the mother was authorized to prepare and sign all necessary documents in order to sell the truck and to retain 100% of the proceeds from the sale in due course. However, it appears that the truck will ultimately sell at a loss because of some minor damage to it caused by the father as a result of an accident. According to the mother's uncontradicted evidence, the father had been drinking and driving, with the girls in the truck, when he went off the road on which their property was located. The balance owing on the loan for the truck is \$25,700. The mother has had the truck listed for some time at \$26,000, but has received no expressions of interest. Therefore, she expects she may have to reduce the asking price below the outstanding amount of the loan in order to sell

it. In the meantime, the mother continues to pay the bank loan as well as the insurance and registration for the truck.

[28] As I mentioned earlier, and pursuant to an earlier order of this Court, the mother has been authorized to list the property for sale, subject to court approval of any offer, with notice to the father. The distribution of any sale proceeds was to await the completion of this trial. The mother gave evidence that she initially listed the property for sale at \$300,000. There was no evidence where that figure came from. The father testified that it was an "appraised" value, but there is no evidence of any appraisal having been done. It may have been a figure suggested by the mother's real estate agent. In any event, the mother said that she received no expressions of interest based upon the initial asking price of \$300,000. Accordingly, she has since reduced the price to \$275,000, and later to \$250,000, and yet has received no expressions of interest at those prices either. The mother's evidence is that, to date, her realtor has only received a verbal offer to purchase at \$125,000.

[29] It is the father's submission that this type of rural property often takes about a year to sell in order to obtain the maximum market price. He has also suggested that the mother change real estate agents and retain someone suggested by the father who has better knowledge of these types of rural properties in the Watson Lake area. The mother may want to consider that suggestion, as it is also in her best interest to obtain the maximum possible market price, subject of course to her immediate need for some capital.

The Father's Relationship with the Family

[30] The mother also gave uncontradicted evidence about the nature of her relationship with the father, both as a husband and as the father of their children. She testified that their entire relationship has been one of control and manipulation by the father. She referred to him as a "one man cult", because everything he said was "right" and no one in the family could question him. The mother testified that the father always said it was God telling him what to do.

[31] In describing his relationship with the daughters, the mother relayed incidents which the girls presumably told her about, as the mother did not witness them for herself. One involved the eldest child being buried in snow by the father to the point where she could not breathe. On another occasion, one of the daughters was handcuffed to a tree for a lengthy period of time, in mosquito-infested conditions. On another occasion, the mother said the eldest daughter was forced to walk from the property towards Watson Lake, beginning at about 11 P.M., and that the daughter was only picked up by a passing vehicle after walking approximately 60 kilometres. None of this evidence was denied or contradicted by the father.

[32] The mother testified that all of them felt isolated while on the property. At times, they would get into "trouble", because they were not humble and obedient enough towards the father. As punishment, they were ordered to remain inside the wall tent for lengthy periods of time, sometimes in extremely cold sub-zero conditions. They were only allowed to periodically leave the tent to use the outhouse or obtain firewood to stay warm. They would often be denied food while in this state of confinement in the wall tent, and

would only be fed as the father deemed necessary. None of this was denied or contradicted by the father at trial.

[33] In addition, the mother gave uncontradicted evidence that children were turned completely against her by the father, and that at one point they did not want anything to do with her. Fortunately, that has changed as a result of the children obtaining counselling, which I will come to again shortly.

[34] The most notorious example of the father's abuse, as relayed by the mother, was his decision to have an incestuous relationship with the eldest child. This relationship began in approximately October 2007 and continued until the father's arrest in December 2010.

[35] Consistent with the mother's allegations of the father's controlling behaviour towards the family, soon after he commenced the incestuous relationship with the eldest child, he drove the mother from the hotel where she was working to a location called Lucky Lake, a few kilometres south of Watson Lake. There, he announced that the mother was no longer his wife, because he and the eldest daughter were in love and had become sexually involved. Accordingly, the father was considering the eldest daughter as his new "wife". When the mother reacted by getting out of the truck and attempting to walk away, she said that the father grabbed her by her neck and slammed her to the ground, telling her that she was going to stay in the family because the kids needed a mother. The mother described being "scared to death" by this incident, and said that afterwards she was constantly afraid of how far the father might go if she disagreed with him or attempted to interfere with his unlawful conduct.

[36] The mother also referred to another occasion of physical assault. The time and place were not specified, but the mother recalled the incident as one where she was crying and the father put a machete to her neck in a threatening manner. She said she learned then that she could not “push limits” with the father or stand up to him without risking physical harm.

[37] Finally, the mother referred to an event which occurred during their engagement, when the father said that he would not marry her if she became a teacher. Despite her desire to teach, the mother said that she agreed because she really wanted to marry him at that time.

[38] The mother gave uncontradicted evidence that she obtained a new credit card sometime in early 2008 and that the father and the eldest daughter used that credit card to go on a “honeymoon” to the Queen Charlotte Islands in March 2008. The mother said that when the father and daughter returned from that trip, credit card was “maxed out” to its limit of about \$4,000.

[39] The mother conceded at various points in her testimony that she has difficulty remembering certain dates and details. It would appear that her evidence about the timing of this “honeymoon” is one area where she may have erred. I say that because she provided a series of receipts for hotel and motel accommodations, as well as other expenses incurred in the Queen Charlotte Islands and elsewhere in western British Columbia. However, these receipts all appear to be from the months of April and May 2009. Therefore, I find that the trip was taken at that time and not in 2008.

Events Since the Arrest

[40] The mother apparently reported the father's incestuous conduct to the police in December 2010, leading to his arrest. The children were then moved to the Lower Mainland in British Columbia, to reside with their maternal aunt and uncle. They have since been moved into the home of the maternal grandparents.

[41] The mother was also charged with three counts of criminal negligence and one count of permitting sexual activity by the father, presumably based upon her passive acquiescence to the father's unlawful conduct. Initially, she was placed on release conditions which prevented her from having unsupervised access with her daughters.

[42] I gather that the mother continued to reside in Watson Lake until June 2011, as she testified that she remained employed at the hotel until that time. She also testified she began weekly counselling sessions in January 2011, which continue to this day. It seems as though the mother moved to the Lower Mainland herself this past summer, as her counsel informed me that she is currently residing with friends there. She testified that she is unemployed but has been actively looking for work. She said that she is disadvantaged by the fact that she has not worked in her field of early childhood development for the last four years, and consequently has to obtain some upgrading in order to become recertified as a licensed day home operator.

[43] The Crown prosecutor has indicated that, assuming the mother completes a further six months of counselling, and that there are no further issues arising between her and the children, the Crown will be prepared to enter a stay of proceedings on the mother's criminal charges. In the meantime, the mother's release conditions have been

amended to allow her full contact with the daughters, subject only to the approval of the maternal grandparents.

[44] Following the father's arrest and the couple's separation, the mother was left with the responsibility of the family debts. She gave uncontradicted evidence that she obtained a consolidation loan in February 2011 to in order to pay those debts. That loan is now in the mother's name alone and there is about \$14,500 owing.

[45] The mother testified that the children have been undergoing weekly counselling sessions in the Lower Mainland area since February 2011. The mother's own counselling has continued since her move to the Lower Mainland. Therefore, she and the children each currently attend one session per week at a cost of \$60 per session. That results in a total cost for the four of them of approximately \$1,000 per month. The mother is paying for her portion of the counselling and the maternal grandparents are paying for the children's counselling. The mother testified that no government assistance is available for this counselling. She expects that the four of them will continue for at least one additional year, although the eldest child may require counselling for a longer period of time.

[46] The mother gave uncontradicted evidence that she has discussed the issue of access with each of the three daughters and that they have all told her individually that they do not want to have anything to do with the father, or to see him again.

[47] There was evidence that, following the separation of the parties, the mother offered to settle with the father by paying him 20% of the sale proceeds from the property. The father refused that offer, but counter-offered with a 45/55 percent split in the mother's favour, plus sole custody of the children and the Silverado truck. The mother refused that counteroffer. The mother's evidence was that her offer of 20% to the father

and 80% to her was made to acknowledge the father's contribution to the marriage over the 22 years they were together, but also in anticipation of the fact that she will likely be the sole source of support for the children over the next several years until they are no longer dependent. The mother also testified that the reason she now is seeking 100% of the sale proceeds from the property is to reflect the fact that she supported the father as the primary breadwinner for the majority of the marriage and that notwithstanding his contributions, she and all three of the children suffered from his ongoing physical and emotional abuse over those years.

The Father's Evidence

[48] The father also testified, but most of his testimony was irrelevant to the central issue of the division of family assets. At times he seemed apologetic to the mother for the harm he has inflicted upon her and the children, and at other times he seemed defensive about the mother's desire for 100% of the property's sale proceeds, calling her "selfish", "cold-hearted", "blind" and "greedy". In a letter penned by the father only a few days before the trial, on August 28, 2011, he made the following statement:

“...[the mother] may surely be responsible for being a proud and selfish person which ultimately led to my illegal “marriage” in the first place, but I now have come to believe that she may have had good reason to be intimidated and afraid to take any action against me....”

In his submissions, the father attempted to downplay this statement by explaining that it was written in haste and was not carefully thought out. I find that explanation rings hollow, given that the father has been in custody since December 2010 and has had a great deal of time to reflect upon the dynamic of their relationship as it relates to the tragic matter of the incest. Thus, this statement leads me to question whether the father

continues to deflect responsibility for his intentional criminal conduct in committing the incest, by blaming the mother for her role in allowing it to happen.

[49] The father's position is that he should be entitled to 50% of the property's sale proceeds to reflect his contribution to the development of it. Indeed, at one point he suggested that he should be paid an unequal amount in his favour to compensate him for not being paid wages while developing the property. (This latter suggestion did not appear to be a serious one, as it completely ignores the fact that the purchase and development of the property was almost entirely financed by the mother and the two eldest daughters.)

[50] The father testified that from his share of the property's sale proceeds he intended to make payments to each of the three daughters to reflect the time that they put into the development of the property, as follows:

the eldest daughter - \$3,900

the middle daughter - \$2,500

the youngest daughter - \$1,700

He intends that these amounts would be paid by December 25, 2011 if the property is sold by then. If it is not, then by June 3, 2012.

ANALYSIS

Division of Family Assets

[51] I conclude that the mother should receive an unequal division from the proceeds of the sale of the property. For the following reasons, I have determined that the mother shall receive 100% of those proceeds, which will effectively result in a forfeiture of any

interest the father may have acquired in the property by virtue of his contribution to its development.

[52] First, I have considered the application of s. 13(f) of the *Family Property and Support Act*, cited above, which states as follows:

“The Supreme Court may make a division of family assets resulting in shares that are not equal if the Supreme Court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to:

...

(f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, or use of property rendering it inequitable for the division of family assets to be in equal shares...”

[53] A nearly identical provision was considered by the Supreme Court of Canada in *LeBlanc v LeBlanc*, [1988] 1 S.C.R. 217. In that case, the parties divorced after 26 years of marriage. The mother had acquired a restaurant and, with the help of her children, successfully expanded the business which, for some years, provided the major part of the family income. She was later able to purchase a house, summer cottage and a car for the family. The father worked in the earlier years of the marriage, but only had occasional odd jobs. He was an alcoholic and drank heavily on a daily basis. He contributed \$1,000 towards the purchase of the house and occasionally assisted the mother in the operation of the business. He contributed virtually nothing by way of child care, household management or financial provision during the marriage. The trial judge limited the father’s share of the family assets to a fixed sum of \$6,000.

[54] In considering s. 7(f) of the New Brunswick *Marital Property Act*, which as I said is worded almost identically to s. 13(f) of the Yukon *Family Property and Support Act*,

LaForest J., delivering the judgment of the Court, said at para. 11:

“While a court should, in the words of Galligan J. in *Silverstein v. Silverstein* (1978), 20 O.R. (2d) 185 (H.C.), at p. 200, “be loath to depart from [the] basic rule [of equal division]”, it should nonetheless, as he indicates, exercise its power to do so “in clear cases where inequity would result, having regard to one or more of the statutory criteria set out in cls. (a) to (f).” This does not, as previously indicated, mean that a court should put itself in the position of making fine distinctions regarding the respective contributions of the spouses during a marriage. Nonetheless, where the property has been acquired exclusively or almost wholly through the efforts of one spouse and there has been no, or a negligible contribution to child care, household management or financial provision by the other, then, in my view, there are circumstances relating to the acquisition, maintenance and improvement of property that entitle a court to exercise its discretion under s. 7(f).”

[55] Later, at paras. 13, 14 and 15, LaForest J. concluded:

“...The question here is whether, on facts such as those in this case, the circumstances are such as to permit a court to exercise its discretion under s. 7(f) to depart from the general rule.

...

I have no difficulty concluding that the wife in this case is entitled to the lion's share of the marital property.

...

[The trial judge] clearly found, as a matter of fact, that the acquisition, preservation and improvement of the marital property resulted almost exclusively from the wife's efforts and that there was no significant contribution by the husband in child care, household management or financial provision. This, in his view, constituted sufficient grounds for the exercise of his discretion to depart from the usual rule of equal division... What the trial judge in fact did, correctly in my view, was to make a division of the marital property so as to avoid the

inequity that would have resulted from an equal division...
(my emphasis)

[56] *LeBlanc* is, in some respects, arguably comparable with the facts in the case at bar. However, I do not say that the father's contribution to the development of the property was negligible. Nor does the mother. I recognize and credit the father with having designed and primarily constructed all the buildings and other structures on the property, as well as having cleared the building sites from what appeared to be a virgin forest. He has also cut trails on the property and cut firewood for fuel. The simple fact that the property was purchased for \$5,200, and is now apparently subject to a verbal offer to purchase of \$125,000, is testament to the extent to which the property has been improved by the father.

[57] On the other hand, the mother's monetary contribution to the cost of building materials, including the concrete slab for the main cabin, was close to \$33,000. Also, the family's expenses relating to the preservation, maintenance and use of the property were almost entirely borne by the mother and the two eldest daughters. Therefore, while I cannot ignore the father's contribution to the improvement of the property, that is not my only consideration. I must also balance that against the fact that the property was almost solely financed by the mother and the eldest two daughters. I must also take into account that the daughters all apparently assisted the father in constructing the various structures on the property from time to time. (I pause here to note that the father's offer to compensate the two eldest daughters a total of \$6,400 for their contribution seems paltry, when they earned a total of \$111,807 between them for the family's benefit and worked on the development of the property.) Finally, I must balance any potential interest that the father might have in the property with the other factors below, being the father's

obligation to support the children, the father's physical and emotional abuse of the mother and the children, and the fact that the property is likely the sole remaining family asset with any value.

[58] In *Holmes v. Matkovich*, 2007 YKSC 15, Veale J. of this Court decided a divorce case based on an 18 year relationship, five of which were within marriage. There was a 16 year old child of the marriage at the time of trial. The mother provided the funds to purchase a rural farm property, used as the family home. While both parties contributed to the establishment of the farm in terms of personal labour, Veale J. found that the mother "contributed her equal share and more" to the preservation and maintenance of the farm, prior to her departure in 2005 for health reasons. After the subsequent separation, the father allowed the property to go into a state of disrepair. Veale J. imputed the father's income for the year prior to trial at over \$200,000 and ordered him to pay both child support and spousal support. In addition, at paras. 45 and 46, he found it significant that the "only major asset" which the mother could benefit from was the family farm, and accordingly granted the mother a 100% interest in the asset, which was valued by the mother at \$225,000.

[59] I am also of the view that, in considering the application of s. 13(f) of the *Family Property and Support Act*, it is appropriate to take into account the context of the family's move to Watson Lake. The mother had been successfully employed in the field of home child care for 17 years, and had earned substantial annual incomes from that employment, particularly over the period from 2000 to 2006. Indeed, she operated her own day home for the last 10 years of that employment, which only came to an end as result the father's misconduct in his rough physical treatment of the attending children.

[60] It was also the father's unilateral decision to move the family to Watson Lake, following the closure of the mother's business, and to select a particularly remote piece of property some 150 kilometres from the nearest town of Watson Lake. That remoteness itself would likely have caused the family a significant degree of stress and complication. It likely also allowed the father to pursue with greater impunity his physical and emotional abuse of all the family members and ultimately his incestuous relationship with his eldest daughter. Therefore, to the extent that I am to consider the respective equities of the positions of each of the parties under s. 13(f), the father stands in a very unsympathetic light, to say the least.

[61] Another reason for forfeiting any of the father's share of the family assets to the benefit of the mother is in consideration of his likely inability to provide any meaningful child support for the children while they remain dependent "children of the marriage", as defined in the *Divorce Act*. Had the father not been incarcerated as a result of his criminal acts, he may well have been liable to pay child support for the children going forward. Regardless of his relative lack of income immediately prior to his arrest, had the mother applied for child support under the *Divorce Act*, an income may well have been imputed to the father under the *Child Support Guidelines*.

[62] In *Palmer v. Gutsche*, [1998] B.C.J. 1269 (S.C.), Romilly J. addressed paras. 65 (1)(e) and (f) of the British Columbia *Family Relations Act*, which, similar to s. 13 of the Yukon *Family Property and Support Act*, allows for an unequal division of family assets, if an equal division:

“... would be unfair having regard to...

(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 the property or the capacity or liabilities of a spouse ..." (my emphasis)

The emphasized phrases in the British Columbia legislation clearly differ from the Yukon provision. However, with that caveat in mind, Romilly J. made comments at para. 55 which would nevertheless seem to have general application to the child support issue in the case at bar:

"There are a number of cases in which the matrimonial home has been reappportioned in favour of the custodial parent where the non-custodial parent is not able to make a substantial contribution to the support of the children. I do not suggest that reappportionment of family assets should replace a non-custodial parent's obligation to pay child support but where that parent is unable to provide any significant child support, courts have reappportioned the home in favour of the custodial parent to reflect, *inter alia*, that parent's burden of child-care." (my emphasis)

[63] I find that it would be inequitable to award the father any portion of the value of the rural property because: (1) he will very likely be unable to provide any significant child support for the children over the next few years, while they remain dependent; and (2) the mother will probably bear the entire responsibility for raising the children into their adulthood, without any financial contribution from the father.

[64] My final reason for forfeiting any share of the property owing to the father is that I would have been prepared to award the mother compensatory damages for assault and battery and false imprisonment. However, having awarded the mother 100% of the only remaining family asset of any value, the father will likely be "judgment proof" against any additional damage award for several years to come, which makes the tort claims

effectively moot. I also want to avoid creating a situation where there is a possibility of future interaction between the parties through judgment enforcement proceedings. In the present circumstances, it would seem preferable that there be a clean break between the father and the mother and children. I also want to allow an opportunity for the father, upon his release from prison, to begin his life anew without a financial encumbrance from the past.

[65] The first occasion of assault and battery involved the use of a deadly weapon, namely a machete and is aggravated by that circumstance. The second occasion in October 2007 involved the aggravating circumstance of an element of unlawful confinement, which caused the mother to fear for her life.

[66] *Kiesel V. Noormohamed*, [1999] Y.J. No. 74 (S.C.) is a case in this Court similarly involving family assets, but notably, also a claim of damages for assault and battery. The trial judge found that there were two instances of this tort. The first, in June 1996, involved the common-law husband slapping the common-law wife, pushing her around, holding her by her arms and retraining her. He also pushed her against a counter and hurt her back, causing her continuing discomfort, and some time away from work on stress leave. The second occasion was in March 1998, when the husband confronted the wife, raised his fist and jabbed his finger in her face. The trial judge awarded the common-law wife \$10,000 in general compensatory damages for those assaults.

[67] I would have been prepared to find that the two instances of assault and battery against the mother in the case at bar were relatively more serious than those in *Kiesel* and would have justified an award of compensatory damages of \$15,000.

[68] With respect to the claimed false imprisonment, the case of *Kovacs v. Ontario Jockey Club*, [1995] O.J. No. 2181, sets out the elements of the cause of action at paras. 44-46. There, the Court talked about the serious nature and impact of the tort on an individual because it trenches not only on one's liberty, but also on one's "dignity and reputation". The three elements which must be proved are:

- (1) a deprivation of liberty;
- (2) a deprivation against the detainee's will; and
- (3) a deprivation caused by the defendant.

The onus then shifts to the defendant to justify the detention. It is not necessary that there be actual physical force in obliging the detained person to remain in one place. All that is required is that there be a reasonable belief that an attempt to leave could result in force being used against the detainee.

[69] In my view, the circumstances described by the mother are sufficient to make out the tort of false imprisonment. Those circumstances were:

- being detained by the father in a wall tent on the property during the winter, in subzero temperatures;
- the remote location;
- liberty only to use the outhouse and obtaining enough firewood to remain warm;
- being deprived of food;
- being detained because the mother was not sufficiently humble or obedient to the father's will.

[70] No cases were provided by the mother's counsel in support of the claim for damages for false imprisonment. In the *Kovacs* case, the plaintiff was detained for 20 to

30 min. by two security officers at a racetrack security office, while they asked him for his identification and confirmed that he was not a fraud suspect. In that case, compensatory damages \$1,500 were awarded.

[71] In the case at bar, given the apparent repetition of the false imprisonment over time, the physical and psychological discomfort inflicted by the father upon the mother as a result, and the overall context of the father's apparent need to dominate and control all the members of his family, I would have been prepared to award compensatory damages of \$10,000.

[72] I would have dismissed the mother's claim for punitive damages in relation to these torts, as there was insufficient evidence presented by her to support such a claim.

The Uncontested issues

[73] As I have noted above, given the father's present and likely ongoing custodial status, he does not object to an order granting sole custody of the children in favour of the mother. However, I hasten to add that I would have made such an order in any event.

[74] For the same reason, the father does not oppose an order prohibiting him from having access to the children. Once again, I would have made such an order in any event.

[75] Lastly, the father did not indicate in this trial any opposition to the restraining order sought by the mother. He provided no evidence and made no submissions on the point. Therefore, it is appropriate for me to order that the father be restrained from having any direct or indirect contact with the mother or any of the three children. Upon his release from imprisonment, the father will be prohibited from attending at the home of the mother, or the homes of any of the three children, if those are in different places, or their

respective schools or workplaces. Finally, the father is prohibited from coming within a 100 metre radius of any of the above locations.

The Divorce

[76] The father opposed the divorce in his statement of defence, but provided no evidence or submissions in support of the defence. The mother's grounds for divorce are under s.8 (2)(a) of the *Divorce Act*, namely separation for at least one year immediately preceding the determination of the divorce. The mother gave uncontradicted evidence that she has not resided with father, nor has she had sexual relations with him since he announced his "marriage" to the eldest daughter in October 2007. On that basis, I hereby grant the divorce.

COSTS

[77] As the mother has been substantially successful in virtually every item of relief sought in this trial, she is entitled to her costs under Rule 60 of the *Rules of Court* at scale B. If the mother experiences any difficulty in having those costs assessed because of opposition by the father, I grant leave to the mother to return before me, on notice to the father, to seek lump-sum costs under Rule 60(14).

THE ORDER

[78] I will dispense with the father's signature approving the form and content of the order resulting from these reasons. However, I direct that the draft order be sent to me for review before it is issued.

Gower J.