

SUPREME COURT OF YUKON

Citation: *Simon v. Poirier*, 2020 YKSC 47

Date: 20201218
S.C. No. 17-D5012
Registry: Whitehorse

BETWEEN

MIREILLE RACHELLE SIMON

PLAINTIFF

AND

MICHAEL MARTIN POIRIER

DEFENDANT

Before Madam Justice E.M. Campbell

Appearances:
Gary W. Whittle

Counsel for the plaintiff
No one appearing for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff, Ms. Simon, and the defendant, Mr. Poirier, were married on September 15, 2016. They separated for the first time on December 5, 2017. They resumed cohabitation on January 8, 2018. On April 20, 2018, they separated for a second time. They have lived separate and apart since then. There are no children of the marriage. Ms. Simon resides in Yukon. It appears that Mr. Poirier no longer resides in the territory. There is no marriage contract or separation agreement between them.

[2] Ms. Simon has filed an application for summary trial. She is seeking an unequal division of the family assets as well as sole possession of the family home. In addition, she is seeking leave to set-off or reduce the amount found to be due to Mr. Poirier in

this family proceeding by \$43,600 in damages plus pre-judgment interest, post-judgment interest and special costs that were awarded to her in *Simon v. Poirier*, 2019 YKSC 56 (assessment of damages), and *Simon v. Poirier*, 2020 YKSC 34 (assessment of interest and costs). Ms. Simon is also seeking an order of divorce from Mr. Poirier. Finally, she is asking the Court to assess the costs awarded to her by Macaulay J. on May 31, 2018, and seeking costs of this proceeding.

PROCEDURAL HISTORY AND EVIDENTIARY RULING

[3] Ms. Simon filed her Statement of Claim on December 20, 2017. She amended her Statement of Claim on November 22, 2019 to seek to set-off any amount found to be due to Mr. Poirier in this family proceeding by the amount of damages, interest and costs Mr. Poirier has been ordered to pay to her in the above-mentioned related matters.

[4] Mr. Poirier filed an appearance on May 22, 2018, in which he provided his email address as an optional address for delivery. He has not filed a Statement of Defence.

[5] Mr. Poirier did not participate in the hearing of this application for summary trial. At the hearing, I requested that counsel for Ms. Simon file a supplementary affidavit confirming that Mr. Poirier had been properly served with notice of the plaintiff's application for summary trial.

[6] On September 21, 2020, the plaintiff filed the Affidavit of T. Kennedy #1 in response to the Court's inquiry and request.

[7] In her Affidavit, Ms. Kennedy deposes that:

- (a) On January 2, 2020, the defendant was served by email with a Notice of Case Management Conference in this matter. The defendant did not acknowledge delivery of the Notice.
- (b) On March 10, 2020, the defendant was served by email with a copy of a Case Management Conference Order dated March 6, 2020 establishing a timeline for the filing of materials with respect to the plaintiff's application and setting a date for the hearing of the application. The defendant did not acknowledge delivery of the order.
- (c) On March 20, 2020, the defendant was served by email, at the same email address which appears on the court file and had been used by counsel previously, with notice of the plaintiff's application for summary trial and supporting materials.
- (d) Later the same day, the defendant responded by email indicating that he fully intended to defend himself and would forward affidavit and supporting documents within the next 21 days. He also attached to his email a photo of an incomplete financial document with handwritten annotations regarding payments the defendant allegedly made to Ms. Simon during their relationship and after it ended. A copy of the defendant's email and financial document are attached to Ms. Kennedy's affidavit.
- (e) On May 6, 2020, the defendant was served at the same email address with the plaintiff's Amended Notice of Hearing. The defendant did not acknowledge delivery of that notice.

- (f) On August 18, 2020, the defendant was served by email with the Chambers Record and Index of this application. The defendant did not acknowledge delivery of those documents.

[8] On that basis, I am of the view that Mr. Poirier was properly served with notice of the plaintiff's application for summary trial and supporting materials. Mr. Poirier did not appear either in person, by phone or by video-conference at the hearing of this application. In addition, he has not filed any documents or affidavit materials in response to the plaintiff's application. As such, I am of the view that the photo of the incomplete financial statement with handwritten annotations Mr. Poirier sent to Ms. Simon's counsel on March 20, 2020, is not admissible in evidence in this matter and will not be considered in this application.

[9] In addition, at the hearing of the application, I indicated to Ms. Simon's counsel that further information on certain aspects of Ms. Simon's claim were required, such as the appraisal of the home at the time of separation. As a result, on September 21, 2020, Ms. Simon filed a supplementary affidavit.

FACTS

[10] The facts in this matter are uncontested.

[11] Ms. Simon and Mr. Poirier commenced living together in June of 2015.

[12] In December of 2015, Ms. Simon bought the property located at 90 Aksala Drive in Whitehorse, Yukon. She is the sole register owner of that house.

[13] Shortly thereafter, Ms. Simon and Mr. Poirier moved into 90 Aksala Drive, which became the family home.

[14] Ms. Simon and Mr. Poirier were married on September 15, 2016, in Tofino, British Columbia.

[15] At the time, Ms. Simon was not aware that Mr. Poirier had an addiction to cocaine.

[16] On two occasions, in February of 2017 and in July of 2017, while he was out of the territory, Mr. Poirier contacted Ms. Simon to tell her that he was struggling with his mental health, that he had turned to cocaine to cope, and that he had been admitted to the hospital for suicidal ideations. In February of 2017, Ms. Simon drove to British Columbia to bring Mr. Poirier back from the hospital to the Yukon. In July of 2017, she paid for his flight back from Alberta.

[17] In October of 2017, while Mr. Poirier was working out of the territory, he indicated to Ms. Simon that he had relapsed and had started using cocaine again.

[18] In November of 2017, the parties attended the office of Mental Wellness and Substance Use Services in Whitehorse for the purpose of obtaining information regarding services for mental health and addictions problems.

[19] On December 5, 2017, Ms. Simon separated from Mr. Poirier for the first time. She did so out of concerns for her personal safety and economic security.

[20] On December 7, 2017, Ms. Simon obtained an Emergency Intervention Order (“EIO”) on the basis of her safety concerns. Pursuant to the order, Ms. Simon was granted exclusive occupation of the family home. Mr. Poirier was ordered to have no contact directly or indirectly with Ms. Simon. Also, Mr. Poirier was prohibited from attending within 50 metres of the family home. The order was granted for a period of a three months.

[21] On December 20, 2017, Ms. Simon commenced divorce proceedings against Mr. Poirier. The Statement of Claim filed on that date reveals that, at the time, Ms. Simon was also seeking a civil restraining order against Mr. Poirier, interim sole possession of the family home, unequal division of the family assets, and costs.

[22] On January 8, 2018, the EIO was varied by a judge of the Territorial Court of Yukon with the consent of Ms. Simon. The recording of the January 8, 2018 proceeding reveals that both Mr. Poirier and Ms. Simon attended court that day. Mr. Poirier indicated to the presiding judge that he felt sorry and ashamed for what had happened, that he wanted to have contact with Ms. Simon again and was hoping to discuss the possibility of returning to the family home. Mr. Poirier acknowledged that he had trauma related issues, which he had never dealt with, and that he had used cocaine at times to cope with his trauma. In addition, Mr. Poirier stated that he wanted to deal with his issues, that he had started counselling and that he had completed the intake process of a treatment program he was to start soon. Mr. Poirier also indicated that he was on disability for the second time that year because of depression and post traumatic stress disorder, with which he had been diagnosed. Ms. Simon indicated that she had been in contact with Mr. Poirier's family over the holidays, that they had informed her that Mr. Poirier was seeking help and taking steps to set up treatment. She recognized that Mr. Poirier was someone who had been struggling and suffering, and that she was encouraged by the fact that he was seeking help for himself. Ms. Simon indicated to the court that aside from the events that led her to seek an EIO in December of 2017, she had not felt unsafe in their relationship. She also stated that she was willing to allow Mr. Poirier to come back home as long as he was not allowed to be in the home under the

influence of drugs. As such, the presiding judge amended the EIO to allow Mr. Poirier to have contact with Ms. Simon and to return to the family home. The judge also imposed the following conditions on Mr. Poirier: that he abstain from the consumption of drugs, that he not attend or be in the family home while under the influence of drugs, and that he leave the family home as soon as requested to do so by Ms. Simon. Furthermore, for the duration of the EIO, Ms. Simon retained the right to withdraw her consent to Mr. Poirier having contact with her or attending the family home.

[23] On or about January 8, 2018, Ms. Simon and Mr. Poirier resumed cohabitation in the family home.

[24] Unfortunately, Mr. Poirier relapsed and began using drugs again. Ms. Simon became afraid for his safety as well as hers.

[25] On April 20, 2018, Ms. Simon told Mr. Poirier that she no longer wanted to be with him and that their marriage was over. Mr. Poirier moved out of the family home. The parties have lived separate and apart since then.

[26] On April 23, 2018, Ms. Simon was arrested by the RCMP and removed from the family home following a complaint made by Mr. Poirier that Ms. Simon had assaulted him.

[27] The same day, Ms. Simon was released on an undertaking to a peace officer that she have no contact directly or indirectly with Mr. Poirier and that she not attend Mr. Poirier's residence, which was identified as the family home.

[28] On April 30, 2018, Ms. Simon was formally charged with an assault against Mr. Poirier pursuant to s. 266 of the *Criminal Code*.

[29] On May 10, 2018, Ms. Simon unsuccessfully applied to the Territorial Court to have the conditions of her undertaking varied to allow her to reside at the family home. The presiding judge noted that only the Supreme Court of Yukon had jurisdiction to determine the issue of possession of the family home.

[30] On May 10, 2018, Ms. Simon was allowed to attend the family home for two hours to retrieve her personal effects. It is at that time that she realized that her wedding band and engagement ring had disappeared. She later received information that Mr. Poirier had pawned her rings for \$500. Ms. Simon was given the opportunity to buy her rings back for \$600. She declined to do so. Ultimately, the rings were sold to a third party.

[31] During that period of time, Mr. Poirier continued to struggle with his mental health and addiction issues.

[32] On May 22, 2018, Gower J. ordered that: Ms. Simon be granted interim sole possession of the family home; Mr. Poirier be restrained from entering the family home; and that Mr. Poirier be restrained from having any contact with Ms. Simon. Ms. Simon and Mr. Poirier both attended court that day.

[33] The same day, Mr. Poirier posted and allowed to be posted defamatory comments about Ms. Simon on his Facebook account.

[34] The Crown later stayed the assault charge against Ms. Simon after she agreed to enter into a six-month peace bond with a condition to have no contact with Mr. Poirier.

[35] Ms. Simon denies ever assaulting Mr. Poirier.

[36] On May, 29, 2018, Ms. Simon filed a Statement of Claim against Mr. Poirier (*Simon v. Poirier*, S.C. No. 18-A0029), seeking, among other things, damages for the

torts of conversion (for the pawning of her wedding band and engagement ring), and defamation (for the defamatory comments he posted and allowed to be posted on his Facebook account on or about May 22, 2018).

[37] Default judgment was granted to Ms. Simon against Mr. Poirier. On October 29, 2019, I ordered Mr. Poirier to pay damages to Ms. Simon in the amount of \$43,600 for the torts of conversion and defamation. I also awarded pre-judgment and post judgment interest as well as special costs to Ms. Simon (*Simon v. Poirier*, 2019 YKSC 56).

ANALYSIS

A. Division of Assets

[38] Ms. Simon seeks an unequal division of the family assets. Counsel for Ms. Simon submits that she is the one who made the down payment on the family home, and that it was acquired exclusively through her efforts.

[39] In addition, counsel submits that Mr. Poirier made a negligible contribution to the family expenses including the costs related to the family home (mortgage, insurance, property taxes, etc.). Counsel submits that Ms. Simon has incurred considerable debt because of the parties' unequal contribution to the family expenses, particularly the family home, and, as such, both assets and debts need to be considered in order to ensure a fair distribution between the parties. Counsel also submits that Ms. Simon contributed more to the household and performed more family chores than Mr. Poirier, who was often away from the territory.

[40] Counsel for Ms. Simon submits that the defendant was unable to fully contribute financially to the marriage and the family home because he did not work during part of

the marriage, and most of the money he earned or acquired was used to purchase cocaine.

[41] Counsel also points out that the short duration of the marriage is a factor that supports an unequal division of the family assets.

[42] Counsel for Ms. Simon submits that, as a result, an equal division would be inequitable. Ms. Simon seeks an unequal division of assets which would result in her owing \$23,430.65 in an equalization payment to Mr. Poirier before the requested set-off is applied, if such a set-off is granted.

[43] The general rule in Yukon, regarding the division of assets of married couples, is that each spouse is entitled to equal division or 50% of the family assets owned at the time of the marriage breakdown by one or both spouses. (s. 6 of the *Family Property and Support Act*, R.S.Y. 2002, c. 83, as amended (the “Act”).)

[44] The notion of family assets is defined at s. 4 of the *Act*. It includes the family home as well as property owned by one or both spouses and ordinarily used or enjoyed by both spouses, or one or more of their children, if any, while they are residing together for shelter, transportation, household, educational, recreational, social or aesthetic purposes.

[45] It is clear that the property located at 90 Aksala Drive in Whitehorse constitutes the family home (s. 21 of the *Act*), and is a family asset subject to division.

[46] In addition, as acknowledged by Ms. Simon, the following assets qualify as family assets for the purpose of division:

1. The 2016 Jeep Cherokee;

2. The portion of Ms. Simon's pension plan and RRSP that accumulated during the parties' marriage; and,
3. Ms. Simon's bank accounts, which were ordinarily used for family purposes at the time of the marriage breakdown.

[47] The notion of marriage breakdown is defined at s. 6(2) of the *Act* as follows:

6(2) A marriage break down shall be deemed to occur on

- (a) the pronouncement of a *decree nisi* of divorce in respect of the marriage;
- (b) the pronouncement of a declaration that the marriage is a nullity;
- (c) the beginning of the parties to live separate and apart without reasonable prospect of the resumption of cohabitation; or
- (d) the making of an application by one of the spouses under this *Act* for a division of Assets.

[48] In addition, s. 15(3) of the *Act* provides that: "family assets shall be valued as of the earliest date on which the marriage breakdown is deemed under subsection 6(2) to have occurred."

[49] First, I note that ss. 6(2)(a) and (b) do not apply in this case. Second, Ms. Simon's application for an unequal division of assets was filed on March 20, 2020 (ss. 6(2)(d)). Third, the parties separated on April 20, 2018. They have lived separate and apart since then. As such, I find that April 20, 2018 is the earliest date on which the marriage breakdown is deemed to have occurred for valuation purposes.

[50] As stated by Veale C.J., as he then was, in *JAC v. VRC*, 2015 YKSC 15, ("*JAC*"), at para. 224 "in the vast majority of cases for married persons dividing their assets, the equal division contemplated by the *Act* is fair and just. See *McNamee v. McNamee*,

2011 ONCA 533 (Ont. C.A.), at para. 66, and *Symmons v. Symmons*, 2012 ONCA 747 (Ont. C.A.)”.

[51] In *LeBlanc v. LeBlanc*, [1998] 1 S.C.R. 217, a case out of New Brunswick, the Supreme Court of Canada commented on the application of the principle of equal division as follows:

... The principle [of equal division] must be respected. In applying that principle, courts are not permitted to engage in measurements of the relative contributions of spouses to a marriage. Nevertheless, it should not be overlooked that the principle is expressly made subject to equitable considerations recognized elsewhere in the Act. ...
(para. 10)

[52] In Yukon, an unequal division of the family assets may be ordered if “a division of the family assets in equal shares would be inequitable” (s. 13 of the *Act*).

[53] The factors to consider in making that determination are as follows:

- (a) any agreement other than a marriage contract or a separation agreement;
- (b) the duration of the period of cohabitation under the marriage;
- (c) the duration of the period during which the spouses have lived separate and apart;
- (d) the date when the property was acquired;
- (e) the extent to which property was acquired by one spouse by inheritance or gift;
- (f) any other circumstances 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; and
- (g) the date of valuation of family assets.

[54] In *JAC*, Veale C.J. also considered the approach to an analysis under s. 13 of the *Act*:

[245] In *S.B.M. v. N.M.*, 2003 BCCA 300, Donald J.A. discussed the procedure under the *FRA*'s s. 65, which,

again, with the exception of s. 13(g), makes similar considerations to s. 13 of the *Yukon Act*.

...The question is not whether an unequal division would be fair; that is not the obverse of the test in s. 65(1). The legislature created a presumption of equality- a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends. (my emphasis)

[55] In addition, Veale C.J. stated that, although the aggregate value of the family assets will always be considered, s. 13 of the *Act* allows the court to consider each family asset individually and to make a determination as to whether an equal sharing is inequitable for each, as the circumstances and applicable factors may differ for each family asset (para. 237).

[56] Veale C.J. also commented on the factors to consider under s. 13. More specifically, with respect to the length of the marriage, he noted that:

Section 13(b), the duration of cohabitation under the marriage, is generally interpreted so that the longer the marriage, the less significance there is to any unequal contributions in acquiring a family asset. In *Wilson v. Fotsch*, 2010 BCCA 226, at para. 64, Huddart J., after reviewing the case law suggested three categories of marriage: long (12 years or more); medium (6-11 years); and short (5 or fewer years). (para. 239)

[57] I will now turn to the specific circumstances of this case.

[58] First, I note that the parties did not enter into any agreement, as contemplated in s. 13(a) of the *Act*.

[59] Second, pursuant to s. 13(b) of the *Act*, the parties' marriage was short. Ms. Simon and Mr. Poirier were only married for 19 months (from September 15, 2016 to April 20, 2018).

[60] In addition, in light of the short duration of the parties' marriage, I find that the fact that Ms. Simon was unaware of Mr. Poirier's addiction to cocaine at the time of their marriage, as well as the impact that Mr. Poirier's mental health and addiction had on their marriage and on his ability to contribute to the marriage, are factors to consider.

[61] The parties have lived separate and apart since April 20, 2018. As such, they have now been separated for longer than they lived together while married (s. 13(c) of the *Act*).

[62] According to s. 13(f) of the *Act*, the respective contributions of the parties regarding the acquisition, disposition, preservation, maintenance, improvement, or use of property is another factor to consider when determining whether an equal division of assets would be unfair.

[63] Throughout the marriage, the payments for the family recurring expenses were made by Ms. Simon. Ms. Simon estimates that the parties' monthly household expenses during the marriage (including mortgage payments, utilities, taxes, heat, groceries, internet/cable, etc.) were sometimes up to \$7,214.

[64] However, Mr. Poirier assisted with those payments. Ms. Simon acknowledges that from September of 2016 to April 2018, she received a total of \$54,821 from Mr. Poirier.

[65] Those numbers reveal that Ms. Simon bore more than half of the family expenses. I do not have information about Mr. Poirier's annual income at the time. However, considering Ms. Simon's estimated monthly family expenses, I am unable to conclude that Mr. Poirier's monetary contributions were negligible, as submitted by Ms. Simon's counsel. I note that Mr. Poirier also contributed to the couple's expenses prior to their marriage, before and after they moved into the family home. Ms. Simon acknowledges that she received \$23,236 from Mr. Poirier, from June 2015 until the end of August 2016.

[66] On the other hand, after the parties' separation, and to date, Ms. Simon has continued to pay for the mortgage. She has also made all the other payments related to the preservation and maintenance of the family home. She did so, even when she was bound by a condition not to attend Mr. Poirier's home, which was deemed to be the family home. This situation lasted for a period of approximately one month, from April 23, 2018 to May 22, 2018, until Gower J. granted interim sole possession of the family home to Ms. Simon.

[67] Mr. Poirier has not made any payments towards the family home or other related costs since April 16, 2018.

[68] During the marriage, Mr. Poirier worked sporadically and inconsistently in camps in Northern Alberta and Northern British Columbia. When not working at camp, Mr. Poirier was residing in Whitehorse at the family home with Ms. Simon. Even though she was employed full time, Ms. Simon did most of the household chores.

Family Home

[69] The family home was the parties' main family asset.

[70] In December of 2015, Ms. Simon purchased the family home located at 90 Aksala Drive in Whitehorse for \$439,000. Ms. Simon provided the down payment on the house in the amount of \$21,950. The money came from the proceeds of the sale of Ms. Simon's previous house. Ms. Simon is the sole registered owner in fee simple of the family home. The mortgage has been in her name only since she purchased the house in 2015.

[71] Ms. Simon and Mr. Poirier were already living together when Ms. Simon bought the family home. The parties moved into the family home on or about December 21, 2015.

[72] The mortgage payments on the home have been taken out of Ms. Simon's bank account bi-weekly since she purchased it. The bi-weekly mortgage payments amount to \$1,140 (this includes a bi-weekly payment of \$151.88 towards property taxes).

[73] The outstanding balance of the mortgage, on the date closest to the date of separation (April 27, 2018) was \$397,443.02.

[74] I note that Gower J.'s order, granting interim sole possession of the family home to Ms. Simon in May of 2018, did not contain any directions regarding the home contents or the payments of mortgage, taxes and other expenses, nor did it direct Ms. Simon to make any periodic payments to Mr. Poirier, as per s. 27(2) of the *Act*.

[75] On May, 30, 2018, the house was appraised at \$510,000. I see no reason to depart from that number for the purpose of valuation. As such, I value the family home at \$510,000, at the date of separation.

[76] As a result, the equity in the house at the date of separation was in the amount of \$112,556.98.

[77] Considering Ms. Simon's initial down payment towards the purchase of the family home, which came from the proceeds of the sale of the house she owned before the marriage; the fact that she paid more than her share of the family costs during the marriage; that she was the one ensuring that the bills were paid; that she accomplished the majority of the household chores; and that she continued to make the payments on the family home and to maintain the family home after the date of separation, even when she was not allowed back in the home; I find that it would be inequitable or unfair to divide the equity in the family home, at the date of separation, equally between the parties. In coming to that conclusion, I have also considered the short duration of the marriage and the added financial and emotional insecurity caused by Mr. Poirier's mental health issues and his drug addiction, which he had not disclosed to Ms. Simon prior to their marriage, and which impacted his ability to contribute to all aspects of the marriage.

[78] As a result, I find that Ms. Simon is entitled to recoup her down payment on the family home in the amount of \$21,500. The remaining equity on the family home at the date of separation (\$91,056.98) shall be divided as follows: 65% for Ms. Simon (\$59,187.04) and 35% for Mr. Poirier (\$31,869.94).

[79] In addition, based on the above-mentioned considerations, I am of the view that Ms. Simon is entitled to any increase in value of the family home (equity) since the date of separation.

Household contents

[80] Ms. Simon values the household contents (including, furniture, art, cooking utensils, and appliances) at \$10,000 at the date of separation.

[81] Mr. Poirier and Ms. Simon purchased what appears to be the bulk of their furniture (bedroom, dining room and living room) for the family home in November of 2015 at a total cost of \$12,667.20. The documentary evidence reveals that they financed their purchase through a five year loan, which was taken under Ms. Simon's name, with minimum monthly payments of \$424.32 (my emphasis).

[82] In addition, the documentary evidence shows that most of the major appliances were included in the purchase price of the family home.

[83] As such, I find that Ms. Simon's estimate of the household contents' value is reasonable.

[84] However, the evidence does not reveal, what amount, if any, was left to be paid on the furniture loan as of the date of separation, nor if there is any outstanding amount left to be paid. As I am not prepared to speculate, I will not consider any amount of that loan as being part of the family debt at the date of separation.

[85] As a result, the value of the household contents' shall be divided equally between the parties (\$5,000 each).

Vehicle (Jeep)

[86] On March 30, 2016, Ms. Simon purchased a 2016 Jeep Cherokee ("Jeep") for \$53,205.88. Ms. Simon took a 7 year-loan in her name to pay for the Jeep. Since then, payments have been made bi-weekly from Ms. Simon's chequing account in the amount \$292.34. At the date of separation, Ms. Simon owed \$39,091.44 on that loan.

[87] There is no evidence that the parties owned another vehicle during their marriage. The Jeep was used for the parties' transportation during their marriage.

[88] Ms. Simon deposes that Mr. Poirier told her he had a valid driver's licence and that his father was covering his insurance costs through his policy. Ms. Simon deposes that Mr. Poirier did not obtain a Yukon driver's licence during their relationship. Mr. Poirier was not included on her vehicle's insurance policy. However, he drove the Jeep on occasions during the marriage.

[89] The black book value of the Jeep in April of 2018 was \$28,710.

[90] At or around the date of separation, Ms. Simon still owed \$39,091.44 on the Jeep. As such, there was no equity in the Jeep at the time of separation.

[91] I note that Ms. Simon has kept the Jeep and has continued to pay for it since the date of separation. The value of the Jeep as of August 27, 2020, is between \$22,298 and \$26,995. As of August 26, 2020, Ms. Simon still owed \$21,315.48 on the Jeep.

[92] Considering the fact that Ms. Simon has continued to use the Jeep and to make all the payments on it since the parties' separation, as well as the absence of equity in the Jeep at the time of separation, I am of the view that it would be inequitable to include the value of the Jeep and the outstanding amount of the loan, as of the time of separation, for equalization purposes.

[93] Instead, as the sole registered owner of the Jeep, Ms. Simon will retain possession of the vehicle and will be solely responsible for the remaining loan.

[94] Ms. Simon deposes that, during the marriage, Mr. Poirier had an accident while driving the Jeep. She further deposes that Mr. Poirier did not attempt to fix the vehicle nor did he pay for the repairs, which were estimated at \$1,555.37. She is seeking to have this amount added to the family debt. The evidence does not reveal whether Ms. Simon paid to have the Jeep repaired, and, if so, how much the repairs cost. As such, I

am of the view that the estimated amount of repairs should not be included in the family's debt or as part of any amount due by Mr. Poirier to Ms. Simon in this proceeding.

Ms. Simon's pension

[95] During the marriage, Ms. Simon worked for the Government of Yukon and accumulated years of pensionable service.

[96] Correspondence from the Government of Canada, Public Works and Government Services, dated May 22, 2018, indicates that, in light of the length of the parties' relationship, the maximum transferable amount from Ms. Simon's pension to Mr. Poirier (i.e. 50% of the value of Ms. Simon's pension entitlement for the period subject to division) is \$22,109.52.

[97] In light of the applicable principles and specific circumstances of this case, as well as the unequal division order I made with respect to the family home, I find that Mr. Poirier is entitled to the maximum transferable amount from Ms. Simon's pension as calculated by Public Works and Government Services Canada.

Ms. Simon's Registered Retirement Savings Plan (RRSP)

[98] Ms. Simon had \$60,719.74 in her RRSP account at the time of the marriage.

[99] Ms. Simon made bi-weekly contributions of \$100 to her RRSP throughout her marriage with Mr. Poirier. Despite her bi-weekly contributions, the total value of Ms. Simon's RRSP decreased during the marriage. Ms. Simon had \$51,827.13 in her RRSP account at the date closest to the separation date, April 30, 2018.

[100] The decrease in value is partly explained by the fact that, in February of 2018, Ms. Simon withdrew \$5,000 from her RRSP account to help cover the family's expenses

related to and resulting from Mr. Poirier's hospitalization in Northern British Columbia for depression, suicidal ideations and accompanied use of cocaine.

[101] Considering the fact that the value of Ms. Simon's RRSP did not accrue during the marriage and that some of her savings were used to cover family related expenses, I am of the view that Ms. Simon's contributions to her RRSP and the remaining value of Ms. Simon's RRSP, as of the date of separation, are not subject to division.

Ms. Simon's other accounts

[102] As of April 30, 2018, the balance in Ms. Simon's personal savings account was \$1,804.60.

[103] As of April 20, 2018, Ms. Simon's personal chequing account, which was used to pay for family and property related costs, had a negative balance of \$1,234.21.

[104] As both accounts were used by Ms. Simon to pay for recurring family related costs, I am of the view that the negative balance of Ms. Simon's personal chequing account should be considered a family debt and factored into the division of assets.

[105] However, considering the fact that I have no information regarding the balance in Mr. Poirier's savings and/or chequing accounts, considering as well the other relevant factors under s. 13 of the *Act*, which I have already mentioned in this decision, I am of the view that Ms. Simon is entitled to keep the difference between the respective balances of her personal savings and chequing accounts in the amount of \$570.39.

DEBTS

[106] Unlike family assets, the general rule is that personal debts are not shared between the spouses upon separation.

[107] However, family debts are typically shared between the parties.

[108] Ms. Simon is seeking to have debt, she incurred under her name, considered as family debt and taken into consideration for the purpose of equalization. Included in that debt are Ms. Simon's personal line of credit and two credit cards.

[109] Ms. Simon's line of credit had a negative balance of \$23,005.89 at the date closest to separation, April 28, 2018.

[110] For the period of April 5, 2018 to May 4, 2018, Ms. Simon's RBC credit card statement had a negative balance of \$14,822.39.

[111] For the period of March 20, 2018 to April 17, 2018, Ms. Simon's MBNA credit card had a negative balance of \$3,971.77.

[112] As for Mr. Poirier, Ms. Simon deposes that he had children from a previous relationship, and that he had an amount of \$8,995.30 in child support arrears, at the time of separation. Ms. Simon deposes that she is aware that Mr. Poirier was in arrears of his child support payments as she paid \$928 in child support for him on April 3, 2018. Ms. Simon has filed documentary evidence to that effect. Mr. Poirier's arrears in child support do not constitute a family debt.

[113] The financial statements filed by Ms. Simon in support of her application reveal that while Ms. Simon used her credit cards and line of credit to pay for family related costs, she also used them for personal expenses, such as for the trip she took to Punta Cana on her own in April 2018, prior to the couple's separation. As such, the documentary evidence filed by Ms. Simon does not allow me to determine what portion of her personal debt was incurred for family related expenses.

[114] In addition, while it is obvious, considering the evidence before me, that Mr. Poirier used part of his income to finance his cocaine addiction, he did make some

financial contributions to the family expenses during the marriage. As a result, I see no reasons to depart from the rule that personal debts are not shared. I also note that I considered, among other factors, the parties unequal financial contributions to the marriage in coming to a decision with respect to the division of assets.

[115] Consequently, Ms. Simon and Mr. Poirier will each remain solely responsible for their personal debts.

Loans to Mr. Poirier (pre-marital debt)

[116] Mr. Poirier has children from a previous relationship and is required to pay child support. On August 24, 2016, the plaintiff loaned \$4,000 to Mr. Poirier to help him make his child support payments. Documentary evidence reveals that, on that date, Ms. Simon transferred \$4,000 directly from one of her bank accounts to the Newfoundland Support Enforcement program.

[117] In addition, Ms. Simon filed a copy of her bank statement showing that on the same date, she lent \$1,000 to Mr. Poirier.

[118] Mr. Poirier has not repaid these two loans. There is no evidence before me to the effect that Ms. Simon has forgiven the two loans.

[119] Ms. Simon requested that this amount be considered as part of the division of the family assets. However, while Ms. Simon and Mr. Poirier were in a relationship and living together at the time Ms. Simon loaned him money, they were not yet married. As such, while I am of the view that Mr. Poirier is indebted to Ms. Simon in the amount of \$5,000, I am not prepared to consider this debt as part of the division of assets.

[120] Also, as the Statement of Claim does not contain any specific claim with respect to these two loans (including the plaintiff's claim for a set-off), I decline to make an order with respect to these loans.

Equalization Payment

[121] As a result, I find that Mr. Poirier is entitled to an equalization payment in the amount of \$58,979.46 (\$31,869.94 equity in the family home; \$5,000 equity from the household contents' and \$22,109.52, the maximum transferable amount from Ms. Simon's pension).

C. POSSESSION OF THE FAMILY HOME

[122] The plaintiff seeks sole possession of the family home.

[123] The general rule is that both spouses are equally entitled to possession of the family home before and after separation. (s. 22 of the *Act*)

[124] However, s. 27(2) of the *Act* provides that the Supreme Court of Yukon may make an order granting sole possession of the family home to one spouse for life or any lesser period of time.

[125] The Court may also direct a spouse to:

s. 27(2) ...

(b) direct a spouse to whom exclusive possession of a family home is given to pay periodic payments to the other spouse;

c) direct that any or all of the contents of the family home remain in the family home for the use of the person given possession of the family home.

[126] Considering:

- 1) Gower J.'s order of May 22, 2018 granting interim sole possession of the family home to Ms. Simon;

- 2) that Ms. Simon has resided in the family home since Gower J.'s order and has paid all the costs related to the family home since April 16, 2018; and
- 3) my decision granting an unequal division of the family assets, and most specifically an unequal division of the equity in the family home, in favour of Ms. Simon;

I grant exclusive possession of the family home to Ms. Simon. I also find that Ms. Simon is entitled to keep all the family home contents.

[127] This order is subject to Ms. Simon being in a position to make the equalization payment of \$58,979.46 to Mr. Poirier.

[128] However, considering my decision to grant leave to Ms. Simon to set-off the equalization payment of \$58,979.46 due to Mr. Poirier by the amount of \$43,600 in damages, plus \$1,673.25 in pre-judgment interest, plus \$13,995.16 in special costs and post-judgment interest, which I explain below, I find that no amount is due to Mr. Poirier.

SET-OFF

***Simon v. Poirier*, S.C. No. 18-A0029**

[129] In *Simon v. Poirier*, 2019 YKSC 56, I ordered Mr. Poirier to pay \$43,600 in damages for the torts of conversion and defamation, as well as pre-judgment and post-judgment interest, and costs to Ms. Simon as a result of his tortious actions during the couple's acrimonious separation.

[130] Mr. Poirier committed the tort of conversion during the parties' separation, while Ms. Simon was bound by an undertaking not to attend the family home in April to May of 2018. During that time, Mr. Poirier pawned Ms. Simon's engagement ring and wedding band at a local pawnshop for \$500, without Ms. Simon's knowledge and consent. The

rings had a combined replacement value of approximately \$15,124 (*Poirier v. Simon*, at paras. 4 to 12).

[131] Mr. Poirier committed the tort of defamation when he posted and allowed to be posted defamatory comments regarding Ms. Simon on his Facebook page the same day Gower J. ruled in favour of Ms. Simon in this matter.

[132] As such, I am of the view that the civil action is directly linked to the parties' marital relationship, their separation and this divorce proceeding.

[133] In addition, the amount of Mr. Poirier's debt has been determined. In *Simon v. Poirier*, 2020 YKSC 34, I assessed pre-judgment interest at \$1,673.25 and special costs at \$13,995.16. I found that special costs awarded to the plaintiff are subject to post-judgment interest. In addition, I awarded to Ms. Simon a lump sum amount of \$1,500, as costs for that application.

[134] To date, Mr. Poirier has not made any payments towards the amount due to Ms. Simon.

[135] Mr. Poirier chose not to participate in this proceeding. He did not participate in the civil proceeding either. Mr. Poirier no longer resides in the Yukon. It is unclear whether Mr. Poirier has any income or assets that Ms. Simon could access to enforce the judgments she obtained in *Simon v. Poirier*, S.C. No. 18-A0029.

[136] A court may order a set-off in equity if it would be manifestly unjust for a claim to be enforced without taking into account the other party's claim.

[137] In *Holt v. Telford*, [1987] 2 S.C.R. 193, the Supreme Court of Canada stated that the five following principles apply to a claim of equitable set-off:

1. The party relying on a set-off must show equitable ground for being protected from his adversary's demands;
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed;
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim;
4. The plaintiff's claim and the cross-claim need not arise out of the same-contract; and
5. Unliquidated claims are on the same footing as liquidated claims. [citations omitted]

[138] An equitable set-off is a remedy subject to the discretion of the court.

[139] Taking into account the family context and circumstances surrounding the family action, and the civil action in which the above mentioned debts arose, I am of the view that it would be inequitable to order Ms. Simon to make an equalization payment to Mr. Poirier that would ignore the amount Mr. Poirier owes to her as damages, interest and costs pursuant to the civil action.

[140] Ms. Simon specifically amended her Statement of Claim in this matter to seek that any amount due as a result of the division of the family assets be set-off by the amount of damages, plus pre-judgment interest, post-judgment interest and special costs as assessed in the civil action.

[141] As such, I am of the view that the conditions for an equitable set-off are met in this case, and I order that the equalization payment of \$58,979.46 due by Ms. Simon to Mr. Poirier, be set-off by the amount of damages, plus pre-judgment and post-judgment interest, and special costs, as assessed in *Simon v. Poirier*, S.C. No. 18-A0029.

[142] In coming to the conclusion that a set-off is appropriate in this case, I also considered the decision of *Auger v. Chartrand*, 2012 SKQB, 363, a family proceeding in

which Dawson J. reduced the defendant's share of the division of the family property by the amount of damages he awarded, in the same file, to the plaintiff against the defendant for the tort of assault and battery.

DIVORCE

[143] Ms. Simon and Mr. Poirier were married on September 15, 2016, in Tofino, British Columbia, as confirmed by the original certificate of marriage filed in this proceeding.

[144] Ms. Simon and Mr. Poirier have been separated for more than one year. They separated on April 20, 2018. They have lived separate and apart since then. There is no possibility of reconciliation between them.

[145] There are no children of the marriage.

[146] In addition, based on the evidence, I am satisfied that there is no collusion in relation to Ms. Simon's application for a divorce.

[147] I note that a clearance certificate issued by the Department of Justice Canada, with a clearance date of December 22, 2017, and valid until December 22, 2023, reveals that there is no pending divorce proceeding between the parties in another Canadian jurisdiction and that no recorded information indicates that a divorce has been granted in Canada in respect of the same marriage.

[148] As I am satisfied that all the conditions for granting a divorce under the *Divorce Act* have been met, I hereby order that, subject to s. 12 of the *Divorce Act*, the plaintiff, Mireille Rachelle Simon, and the defendant, Michael Martin Poirier, are divorced from each other, the divorce to take effect on the 31st day after the date of this Order.

D. COSTS

[149] On May 31, 2018, Macaulay J. awarded to Ms. Simon costs, in any event of the cause, for the application that proceeded before Gower J. on May of 2018.

[150] Rule 60(1) of the Supreme Court of Yukon *Rules of Court* provides that when costs are payable to a party by order “they shall be assessed as party and party costs under Appendix B, unless the court orders that they be assessed as special costs.”

[151] Therefore, Ms. Simon’s costs will be assessed as party and party costs under Appendix B.

[152] Counsel for Ms. Simon provided to her a detailed draft bill of costs in the amount of \$363.90 for that application (attached as Exhibit 3 to Ms. Simon’s Affidavit #4).

[153] After review, I am satisfied that, as submitted in the draft bill of costs, costs of the May 2018 application shall be assessed under Scale A, which is for matters of less than ordinary difficulty.

[154] I am also satisfied that the total amount of costs sought by Ms. Simon for that application are proper or were reasonably necessary to conduct the proceeding.

[155] As a result, costs of the application that proceeded before Gower J. on May 22, 2018 are assessed at \$363.90.

[156] In addition, Ms. Simon is the successful party in this family proceeding, as I granted her application for an unequal division of assets, leave to set-off, sole possession of the family home, and divorce.

[157] As such, costs of this proceeding is awarded to Ms. Simon.

CONCLUSION

[158] In summary:

- a) I order an unequal division of the family assets in favour of Ms. Simon. Nonetheless, Mr. Poirier is entitled to an equalization payment of \$58,979.46.
- b) The equalization payment due to Mr. Poirier is set-off in full by the amount of damages, pre-judgment and post-judgment interest, and special costs Mr. Poirier was ordered to pay to Ms. Simon in Supreme Court file No.18-A0029, as the amount owed by Mr. Poirier to Ms. Simon in the civil action is greater than the equalization payment Ms. Simon has been ordered to make to him in this family proceeding. The set-off should be applied first to interest owed by Mr. Poirier on the civil judgment as per s. 36(7) of the *Judicature Act*, R.S.Y. 2002, c. 128.
- c) Sole possession of the family home is granted to Ms. Simon. Ms. Simon is also entitled to sole possession of the contents of the family home.
- d) The divorce sought by Ms. Simon is granted. The divorce is to take effect on the 31st day after the date of this Order.
- e) Costs of the proceeding before Gower J. on May 22, 2018, are assessed at \$363.90.
- f) Costs in this proceeding are awarded to Ms. Simon.

CAMPBELL J.