

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TRINH NGOC TRAN

Petitioner

- and -

PHUC VAN MA

Respondent

Application for the division of property.

Heard at Yellowknife, NT on March 13 and 14, 2007.

Reasons filed: May 18, 2007

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Petitioner:

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REASONS FOR JUDGMENT

A) INTRODUCTION

[1] This case is about the division of the property between the Petitioner, Trinh Hgoc Tran, and the Respondent, Phuc Van Ma. Ms. Tran and Mr. Ma were married in Viet Nam in 1994. They moved to Canada in 1996. They started a sewing and embroidery business called P & T Alterations. They initially lived in a trailer owned by Mr. Ma. In 1999 they purchased a house. Both their names are on the title of that property.

[2] Ms. Tran and Mr. Ma separated in 2001. At the time of separation, Ms. Tran wrote two documents stating how their property would be divided. One of the issues in this case is whether these documents have any legal effect. Another issue is the relevance of the increase in the value of the matrimonial home since the separation. Ms. Tran seeks an equalization payment pursuant to the *Family Act*, S.N.W.T, c. 18 (“the *Act*”). Mr. Ma’s position is that the property issues were fully and fairly resolved in 2001 and that Ms. Tran is not entitled to any monetary order. He asks that her name be removed from the title of the matrimonial home.

B) OVERVIEW OF THE EVIDENCE

1. Matrimonial property

[3] The parties have different versions and perspectives about events that led to their separation, but certain things are not in issue. It seems clear that tensions emerged between Ms. Tran and Mr. Ma having to do with the handling of some of the funds generated by P & T Alterations. When the business was created, both Ms. Tran and Mr. Ma had signing authority on its checking account. Ms. Tran testified that Mr. Ma took money from this account and put it in his own account without her consent. She said that around the time of separation she discovered that the business' account was overdraft by \$1,500.00. Mr. Ma denied ever taking any funds out of the business' account except to pay business or family expenses. He testified that it was Ms. Tran who took money from the business and gave it to her parents. Ms. Tran denied ever doing this. Whatever in fact happened, it seems clear that these disagreements about the use of monies generated by P & T Alterations escalated and eventually caused the parties to separate.

[4] It is not contested that at the time of separation, Ms. Tran wrote two documents stating that she would keep P & T Alterations and Mr. Ma would keep the house. One of the notes also said that Ms. Tran would give Mr. Ma \$6,000.00. Copies of the notes were filed as Exhibit #4.

[5] The parties have very different accounts of how these notes came to be written. Ms. Tran's version is that Mr. Ma decided how the property would be divided and he told her what to write in the notes. She did not agree with what was in the notes but did what he told her to do because he was very angry and she was afraid of him. Mr. Ma testified that Ms. Tran was the one who decided what would be in the notes, and that he had no input into them. He did not feel he had a choice about agreeing with the division of assets set out in the notes. He did not sign the notes because he wanted to speak to a lawyer before doing so. What the parties do agree about is that neither of them had received legal advice at the time the notes were written.

[6] However these notes came to be written, the parties, for the most part, acted in accordance with what was set out in them. Ms. Tran moved out of the house, taking none of its contents, with the exception of a few personal belongings. She assumed sole control of P & T Alterations. Mr. Ma did not make any contribution to the

business nor did he share in any of its earnings after separation. Similarly, Mr. Ma took sole control and use of the matrimonial home and its contents. He paid the mortgage and all other costs associated with the home. He collected rental income from the property until July of 2004 and did not share any of it with Ms. Tran.

[7] The value of the matrimonial home has increased since it was purchased. The parties paid \$310,000.00 for the house in 1999. An appraisal filed as Exhibit#7 shows that its market value in October of 2001 was \$315,000.00. A further appraisal filed as Exhibit #8 states the property was worth \$350,000.00 as of March of 2006. None of those figures are in issue. Ms. Tran adduced evidence suggesting that the value of the home at the time of trial, March of 2007, had risen to \$415,000.00. Mr. Ma does not accept that this figure is an accurate assessment of the present day value of the property.

[8] The trailer where the parties lived before the house was purchased was sold to Ms. Tran's brother in law for \$36,000.00. The evidence was not entirely clear as to when this occurred. It appears to have been some time after the parties purchased the house, and before their separation. It also appears that Ms. Tran's brother in law did not pay for the trailer right away. Mr. Ma said he never got any money from him. Ms. Tran acknowledged that she received the money and said that she put it in P & T Alterations' account. She did this because she believed Mr. Ma had taken a comparable amount of money out of the business' account, to use for his own benefit. I infer from this evidence that the money for the trailer was received by Ms. Tran very close to the time of separation and possibly after separation.

2. Assessment of credibility

[9] This is not a case that turns entirely on findings of credibility, but to the extent that it does, I have concluded that Ms. Tran's testimony is more credible and for the most part more reliable than Mr. Ma's evidence. I found Mr. Ma's testimony problematic in a number of respects.

[10] One example is Mr. Ma's evidence about the timing of the parties' separation. Ms. Tran testified that she and Mr. Ma had a big argument in July of 2001. It was during this argument that she wrote the first note about how their property would be divided. She remained in the matrimonial home for some time after this argument, as she and Mr. Ma were making an attempt at reconciliation. A further incident happened

in October 2001 that triggered the final separation. Mr. Ma's evidence was that both notes were written in July 2001 within a few days from one another, and that was the point when the parties separated. During cross-examination, Mr. Ma was confronted with the pleadings filed on his behalf, which state that the parties ceased cohabiting on or about October 9, 2001. He was asked about the discrepancy between his testimony and those pleadings. In his answer, Mr. Ma referred to conversations he had had with some lawyers and said he did not pay attention to what was written in the pleadings. He maintained the separation occurred in July 2001. Eventually his counsel made an admission on the record that the pleadings were accurate.

[11] Nothing significant turns on the separation date in this case. Mr. Ma's counsel argued that Mr. Ma could have been confused between the date of actual separation and the date of formal separation, but that argument is not persuasive in the circumstances of this case. There is a significant difference between having an argument that causes final separation within a few days, and a scenario where arguments happen and cohabitation continues for several months before the final separation takes place. This aspect of Mr. Ma's testimony calls into question his ability to recall events accurately.

[12] Mr. Ma was asked when the tenant who was renting office space in the back of the matrimonial home left. His answer was that he did not remember. He was shown an affidavit he swore in June of 2006, where he deposed that the tenant left in July 2006. Mr. Ma was reluctant to acknowledge his signature on the affidavit. At one point he denied signing anything. He later appeared to suggest that he did not have knowledge of that affidavit because it was prepared by his lawyers. As part of his explanations, he mentioned the names of two lawyers who were not acting for him at the time the affidavit was sworn. His counsel eventually made the concession on the record that the signature on the affidavit was in fact Mr. Ma's.

[13] Again, the significance of this aspect of the evidence is not so much the date on which this tenant left, but the manner in which Mr. Ma testified about those issues and how he reacted when confronted with his affidavit.

[14] I have some difficulty with other aspects of Mr. Ma's testimony. He appeared to minimize the extent to which he was angry when he and Ms. Tran talked about separating and dividing their matrimonial property. He denied raising his voice. He acknowledged that Ms. Tran was upset during those discussions but denied that she

was crying at any point during them. He admitted that he pounded a table with his fist but denied that this happened in Ms. Tran's presence. He said he was by himself when he did this. I find this improbable. It is far more probable and believable that, as Ms. Tran testified, emotions were running high during these discussions, that Mr. Ma was angry, and that in the heat of one of those arguments he pounded a table with his fist. Ms. Tran would have no way of knowing that Mr. Ma pounded a table with his fist when she was not there. It would be an incredible coincidence for her to make up a fact that just happens to correspond to something that Mr. Ma did when she was not there.

[15] Mr. Ma acknowledged in cross-examination that he was asked to provide information about the value of his employment RRSP. He was asked if he provided the information and answered that he had. He was pressed on the issue and retrieved a document written by his employer. That document apparently states that the company offers its employees a group RRSP and that Mr. Ma is enrolled in that plan. He was asked whether he acknowledged that this letter did not in fact provide any information about the value of the plan. At this point Mr. Ma's counsel conceded that Mr. Ma had not provided information about the value of his employment RRSP.

[16] At another point in the cross-examination, Mr. Ma was asked questions about his belief about ownership of the house. He acknowledged that the parties purchased the house together and said he considered it belonged to both of them. He was then asked whether his belief in that regard had changed. Mr. Ma appeared to hesitate before answering, and I asked whether he needed the question translated. He said he did. The question was translated. Mr. Ma's answer, given through the interpreter, was that he did not want to answer the question. There was another point in the cross-examination where, rather than answering a question put to him, Mr. Ma stated that he had already answered it.

[17] Mr. Ma's reluctance to provide information, to answer questions, and to acknowledge things pleaded on his behalf or included in a previous sworn statement are all factors that bear on his credibility.

[18] I am mindful that Mr. Ma testified in English, which is not his first language, and that some of his testimony was given with the assistance of an interpreter. Even making ample allowances for how this may have affected the delivery of that

testimony, I found that Mr. Ma's evidence was in some respects evasive and self-serving.

[19] Ms. Tran also testified in English, which is not her first language. She testified in part with the assistance of an interpreter. She was cross-examined at length and did not appear to attempt to evade any of the questions. Her testimony was far more convincing, and I am satisfied that her account of events is generally more accurate than Mr. Ma's.

[20] As already mentioned, these findings of credibility do not dispose of the issues in this case, far from it. However, the issues must be examined in the context of the evidence about circumstances leading up to the separation, and things that have transpired since then. To that extent, findings of credibility do have an impact on some aspects of my analysis of this evidence.

C) ANALYSIS

1. Effect of notes written in July 2001

[21] In approaching the question of division of property between these parties, the first issue is whether the notes written by Ms. Tran at the time of separation have any effect.

[22] Section 5 of the *Act* provides that persons who are cohabiting and intend on separating may enter into agreements dealing with ownership and division of property. Such agreements are included in the general definition of "domestic contract" set out at section 2 of the *Act*. Subsection 7(1) provides that a domestic contract is unenforceable unless it is in writing, signed by the parties and witnessed. The notes written by Ms. Tran do not meet these requirements. One of the notes is signed only by her; the other is not signed at all. Neither of them are witnessed.

[23] Mr. Ma's counsel argues that even if these notes do not meet the legal requirements of a domestic contract under the terms of the *Act*, they reflect the parties' intent at the time of separation, governed the parties' actions after separation, and should carry some weight in the disposition of this case. I disagree, for a number of reasons.

[24] One of the reasons the *Act* requires that there be witnesses when these types of agreements are signed is to ensure that there is little or no controversy about the circumstances when they were signed. This case is a good example of the level of controversy and disagreement that can arise when there are no witnesses other than the parties involved.

[25] More importantly, there is absolutely no evidence that the notes represented anything remotely resembling an agreement between the parties. The evidence is to the contrary. Ms. Tran said she was forced to write them and only did so because she was afraid. Mr. Ma said that the notes were Ms. Tran's idea and that he was not given a choice about their contents. The versions of the two parties as to the circumstances where these notes were written are completely contradictory but they both say the other party acted unilaterally. In addition, it is clear neither of them had legal advice at the time the notes were written.

[26] One of the purposes of the *Act* is to ensure a fair distribution of family assets when a marital relationship breaks down. There are important policy reasons for ensuring that parties who enter into agreements to divide their matrimonial property do so freely, voluntarily, and with a good understanding of their rights and obligations. To give any weight to the notes, given the evidence I have heard, would fly in the face of these principles.

[27] For those reasons, I find that Exhibit #4 does not assist in the disposition of the issues between the parties. It does provide context to their actions after separation, but that is the only use that I am prepared to make of them.

[28] The question that arises next is whether the division of property can be dealt with within the framework set out in the *Act*, or whether it is necessary to use equitable remedies to supplement that framework.

2. Availability of constructive trust remedy generally

[29] The *Act* provides a general framework to effect division of matrimonial property when a couple separates. The regime is sometimes referred to as a deferred sharing scheme. The *Act* creates a presumption that both spouses are entitled to share equally in the increase of value of their net worth during the marriage. The determination of whether one party is entitled to an equalization payment depends on an accounting of

each spouses' net worth at the beginning of the relationship ("the commencement date") and a comparison of that net worth with their net worth at the end of the relationship ("the valuation date"). The *Act* sets out limited circumstances where a court can depart from the presumption of equal division. The threshold is a very high one, and unequal division can only be ordered on the basis of specific factors set out in the *Act*.

[30] Generally speaking this legislative scheme assumes that spouses are entitled to share equally in the increase in value of matrimonial property during the relationship, irrespective of financial contribution. It provides some predictability and consistency to the process of dividing matrimonial property. Courts have very limited discretion under this regime. As a result, cases are less likely to be decided on the basis of individual judges' notions or perceptions of fairness.

[31] Courts cannot ignore that the *Act* demonstrates a legislative intent to have cases decided on the basis of this framework, with a very narrow window for the exercise of discretion. It follows, in my view, that most situations should be dealt with on the basis of that framework. Cases from this jurisdiction demonstrate this Court's reluctance in departing from the presumption of equal division, and from the framework set out in the *Act*. *Fair v. Jones* [1999] N.W.T.J. No.99, at paras 74-81; *Lay v. Lay* [2003] N.W.T.J. No.13, at paras 38-52; *Gross v. Gross* [2006] N.W.T.J. No.78 (Notice of Appeal filed December 22, 2001) at paras 37-41.

[32] Notwithstanding this cautious approach, it cannot be ignored that the Supreme Court of Canada decided over a decade ago that the existence of a legislated framework to effect property division does not preclude the use of equitable remedies, such as constructive trust, to achieve fairness in appropriate cases. *Rawluk v. Rawluk* [1990] 1 S.C.R. 70, at para. 55. That case arose in Ontario, where, as noted by Vertes J. in *Fair v. Jones*, *supra*, at para.31, the relevant legislation is very similar to the *Act*.

[33] In *Rawluk*, the value of certain properties owned by the husband had increased in value during the marriage, and had continued to increase after the parties separated. The legislative framework clearly entitled the wife to share in the increase in value of the properties during the time of the marriage. She relied on the doctrine of constructive trust to claim a share of the increase in value of the property after the separation. The applicable legislation provided that the valuation date is the date of separation. A majority of the Supreme Court found that the legislation did not

preclude the use of equitable remedies to achieve fairness in appropriate cases. The Court ruled that the wife was entitled to share in the increase of value of the properties after the date of separation.

[34] The *Rawluk* case stands for the proposition that in certain circumstances, the remedy of constructive trust is available to award a non-titled spouse a share in post-separation increases in value of property. No one argued before me that it is no longer good law. That being the case, I find that this remedy is also available to a titled spouse who is not in possession of the property. The more difficult question is whether this is a case where it is necessary to resort to that remedy.

3. Whether valuation at separation would result in inequitable result

[35] As I have already mentioned, departure from the general framework set out in the *Act* should not be the norm, and must be saved for circumstances where fairness truly demands it. The overall context of the situation must be carefully weighed. In the circumstances of this case, the analysis must take into consideration what took place at the time of separation and the impact this had over the parties over time. It goes without saying that fairness to both spouses must be considered.

a) Assets of the marriage

[36] There is limited evidence about the parties' asset position at the time of the marriage. There is no evidence about Ms. Tran's situation at that date. Mr. Ma testified that he bought the trailer before the marriage, but there is no evidence about what it was worth at that time. Ms. Tran's evidence was that the trailer was purchased after the marriage but before she moved to Canada. The only other evidence about the trailer is that it was later sold for \$36,000.00.

[37] The matrimonial home and P & T Alterations are the other two main assets to be considered in the division of matrimonial property.

[38] Ms. Tran filed a report from an accounting firm that estimates the value of P & T Alterations to have been \$10,000.00 as of the end of the year 2000 (Exhibit # 1). Ms. Tran was cross-examined about figures appearing in a Statement of Business Activities which I understand was prepared in conjunction with the business' income

tax reports (Exhibit #6). Mr. Ma argues on the basis of some of the figures in this document that the business was worth a lot more than \$10,000.00.

[39] The process whereby a value is attributed to a business requires a certain amount of expertise. The issue is not what P & T Alterations' earnings were on a given year, or what its expenses were, or what it was able to deduct under various headings for income tax purposes. I have evidence from an accounting firm, through Exhibit #1, that the value of P & T Alterations as of the end of the year 2000 was \$10,000.00. No attempt was made to challenge the process that was followed or the underlying facts leading to that conclusion. The information set out in Exhibit #6 does not constitute evidence that contradicts the opinion set out in Exhibit #1.

[40] The other evidence adduced about the value of P & T Alterations is that it sold for \$30,000.00 at the beginning of the year 2007. The Bill of Sale was filed as Exhibit #2. Clearly, the business increased in value after separation.

[41] The matrimonial home is a four bedroom house with rental space in the back. It was purchased by the parties for \$315,000.00 in 1999. Most of it was financed through a bank loan. The parties borrowed \$20,000.00 from Ms. Tran's parents and contributed some of their own money for the down payment.

[42] No evidence was adduced at trial about the balance of the mortgage at the time of separation in 2001. In her brief, Ms. Tran refers to an amount of \$283,364.00. This figure comes from an affidavit sworn by Mr. Ma on June 21, 2006, where he deposed that this was the balance of the mortgage as of November 1, 2001. Exhibit #7 establishes that the market value of the house as of October 2001 was \$315,000.00. Based on those figures, the net value of the matrimonial home at the time of separation was approximately \$31,636.00.

[43] There was no evidence at trial about the present balance of the mortgage. In her brief, Ms. Tran estimates that the present balance of the mortgage is \$200,000.00. There is no indication of how that estimate was arrived at. Ms. Tran may not have access to information about the mortgage balance. Mr. Ma was not asked about it.

[44] What is clear is that the market value of the matrimonial home has increased since it was purchased. The parties are in agreement that as of March 2006, the value

of the home had risen to \$350,000.00. The parties are not agreed as to what the value of the home was at the time of trial.

[45] There was conflicting evidence about the value of the contents of the matrimonial home. Ms. Tran testified that she purchased approximately \$10,000.00 worth of furniture at the time the house was purchased. Mr. Ma said the furniture only cost \$2,500.00. For the reasons I have already given, I prefer Ms. Tran's evidence to that of Mr. Ma. There is no evidence as to the extent to which this value might have depreciated by the time of separation, or the time of trial.

b) Position of the parties if separation date is used as valuation date

[46] The application of the framework set out in the *Act* would entail adding up the values of the various assets of the marriage as of the date of separation. These would include the matrimonial home, its contents, P & T Alterations, Mr. Ma's pension plan, and possibly the trailer, depending on findings I make about when it was purchased and when its sale was completed. P & T Alterations was valued at \$10,000.00 as of the end of 2000. There is no evidence showing that the value was different as of October 2001. The net value of the matrimonial home was approximately \$31,636.00. There is no evidence about the value of Mr. Ma's pension plan as of the date of separation. There is evidence that Mr. Ma was asked to provide that information and a concession from his counsel that he did not. On Ms. Tran's version, which I accept, the value of the furniture in the matrimonial home was approximately \$10,000.00 in 1999. Using these figures, the total net value of the matrimonial assets as of the date of separation was approximately \$51,636.00.00

[47] Apart from the difficulties in calculations that may arise from the gaps in the evidence, post-separation facts would be difficult to account for under this approach. For example, it would be difficult to account for the rental income generated by the matrimonial home from October 2001 to July 2004. At a monthly rent of \$1,900.00, the total rental income adds up to \$64,600.00. That, on its own, is more than the net value of matrimonial assets at separation. Similarly, there would be no accounting for the increase of the market value of the matrimonial home since separation. It is clear that as of March 2006, there had already been an increase in market value of \$35,000.00 since the separation date. Unlike the situation in *Gross v. Gross, supra*, there is no evidence of improvements or renovations made to the home after separation. The increase in market value appears to be attributable solely to the

fluctuations of the real estate market. When property is jointly owned and one of the owners has sole possession for a period of time, it seems unfair that only one of the joint owners should benefit from an increase in market value. This is even more so when the property is matrimonial property.

[48] In some cases, post-separation events and fluctuations in value of property can be addressed through the provisions in the *Act* dealing with unequal division of property. But that approach cannot always achieve a fair result between the parties. One of the factors to consider is the financial impact of post separation events compared to the net value of the assets at the time of separation.

[49] I am satisfied that this is one of those rare cases where effecting the division of property between these parties on the basis of the valuation of matrimonial assets as of the date of separation would lead to an unfair result. It would create an unjust enrichment in favor of Mr. Ma to the detriment of Ms. Tran, without there being a juristic cause for that enrichment. The notes written in 2001 have no legal effect and cannot constitute a juristic cause. There is no evidence of any other juristic cause for Mr. Ma to be the only one to benefit from the increase in value of the matrimonial home, and from the rental income generated by that home.

[50] Had there not been this significant passage of time between the date of separation and the date of trial, the framework of the *Act* may well have been adequate to equalize the parties' positions. But the passage of time has resulted in a disproportionate advantage to Mr. Ma. My finding is based simply on the evidence about the impact of post-separation events on each of the parties. It is not based on an attribution of fault to either party for the delay in this matter getting to trial. It was clear during the submissions that the parties blame each other for the delays in this case. This is an issue that may well be revisited as part of submissions on costs, but it had no bearing on my decision about valuation date and I make no finding, at this time, as to which party bears responsibility for the delays.

4. Division of property taking into account post separation events

[51] I now turn to the outline of the various items that I find must be taken into consideration in calculating the parties' entitlements.

P & T Alterations

[52] P & T Alterations sold for \$30,000.00 in January 2007. Ms. Tran testified that she had not been paid at the time of trial but expected to be paid very soon. For the purposes of my calculations, I assume that she will retain these sales proceeds.

[53] Mr. Ma argued that I should also take into account income generated by P & T Alterations in the years following separation. In my view, that claim is without merit. The value of the business as an asset is an issue distinct from the income generated through the work of Ms. Tran and of her parents at that business. Just as Ms. Tran cannot claim a portion of Mr. Ma's income from his employment for the post separation period, Mr. Ma cannot claim any part of the income generated by her work and the work of others for that same period.

Proceeds from the sale of the trailer

[54] Ms. Tran received the payment of \$36,000.00 for the sale of the trailer. She put the money in P & T Alterations to make up, she said, for money Mr. Ma had taken out of the business. She argues that this amount should be left out of the calculations.

[55] If the evidence was clear that Ms. Tran received this money and put it in the business' account before the parties separated, I would be inclined to agree that the funds ought not to be traced and taken into consideration at this point. But the situation is different if property is sold during the marriage, payment is delayed, and is eventually made to one of the parties and used for that party's benefit after separation or right around the time of separation.

[56] Another reason not to include the sum in these calculations might be that it is off set by monies Mr. Ma diverted from the business to his personal use in a time frame close to the separation. The evidence, in my view, falls short of establishing that this is in fact what occurred. The five checks filed as Exhibit #9 add up to \$25,000.00. Three of those checks, adding up to \$12,000.00, were written in 2000, several months before the separation. Mr. Ma testified that the check dated July 18, 2000, for an amount of \$2,000.00, was actually signed by Ms. Tran. I have examined the exhibit and while I am not prepared to make a positive finding on this point, I note that there does seem to be a difference between the signature on that check and the signatures on the other checks. The other two checks, adding up to \$13,000.00, were written closer

to the time of separation. One is dated April 26, 2001 and is for a sum of \$10,000.00. Mr. Ma testified that he used the money to pay a VISA bill. The other check is dated July 4, 2001 and is for a sum of \$3,000.00. Mr. Ma acknowledged writing it but was unable to remember what he used the money for.

[57] In my view the evidence about how much money Mr. Ma took out of P & T Alterations and what he did with it is inconclusive. I accept that Ms. Tran believes that Mr. Ma took money from the account, but on the evidence adduced, I am unable to find that it has been established on a balance of probabilities that he diverted \$36,000.00 to his personal use.

[58] For those reasons, in my view, the money received for the sale of the trailer must be included in the calculations.

Income from rental space in matrimonial home

[59] The rental space at the back of the matrimonial home was rented for \$1,900.00 per month from October 2001 to July 2004. This adds up to \$64,600.00 in rental income. I find that the parties are entitled to share equally in this income generated by property they jointly owned.

Furniture and effects in the matrimonial home

[60] In her brief, Ms. Tran attributes a value of \$5,000.00 to the furniture that remained in the matrimonial home, both as of the date of separation and at the time of trial. There is no evidence about the present day value of those items. I accept Ms. Tran's evidence that she paid \$10,000.00 for certain items that were in the house when the parties purchased it in 1999. The figure of \$5,000.00 assumes a depreciation of those items by half. In the absence of any other evidence on this point, I accept this figure.

Matrimonial home

[61] It is not contested that the value of the matrimonial home has increased since it was purchased in 1999. In my view, the parties are entitled to benefit equally from this increase.

[62] An issue arises as to the effect of Mr. Ma having assumed sole responsibility for the mortgage and maintenance costs since October 2001. In certain circumstances, this might have to be accounted for so as to compensate him for having covered Ms. Tran's share of the expenses of maintaining the home.

[63] This fact must be examined in the broader context of the parties' respective situations. Mr. Ma has had the sole use of the property and its contents from October 2001 onwards. This provided him with a place to live. It also enabled him to provide housing to his adult son and his son's girlfriend rent free for a period of time. By contrast, Ms. Tran had to pay for other accommodations. For the first year her rent was \$1,100.00 per month. She then rented the basement of a house and paid \$1,600.00 for rent and food. She remained there until she moved to Australia in January 2007.

[64] If the mortgage responsibilities had been divided equally, Ms. Tran's monthly share would have been \$1,250.00. This amount is very close to what she paid as rent for the same period. Mr. Ma had sole use of this relatively large home and its contents. While I do not have any evidence of the market value for the rental of a four bedroom house in Yellowknife during this time frame, I infer that it would likely be more than the rent for an apartment or a basement suite. Therefore, I find that Mr. Ma's payment of the mortgage and other maintenance costs is offset by the fact he had the use of the property for all those years. I find that the parties are each entitled to half of the net value of the matrimonial home as of the time of trial.

[65] In March 2006, the matrimonial home was appraised at \$350,000.00. The evidence adduced by Ms. Tran through Exhibit #5 suggests the value of the property had reached \$415,000.00 by the time of trial. There was considerable debate about Exhibit #5 at trial. Mr. Ma's counsel said he had always clearly indicated he would not accept the accuracy of that assessment and objected to it being introduced. Ms. Tran's counsel said she was taken by surprise by this position. The possibility of an adjournment was raised, but for understandable reasons, neither party wanted this to happen. In the end Mr. Ma's position was that the document could be filed as an exhibit but that it should carry no weight because the author did not have access to the interior of the house and could not be said to have conducted a true appraisal of the property. Ms. Tran's counsel suggested that in the event that I found present day value to be a relevant factor, a further appraisal could be ordered.

[66] I understand Mr. Ma's concerns about the weight to be attributed to Exhibit #5, especially when it is compared to the two other appraisals filed. The author of Exhibit #5 did not inspect the interior of the house. He based his assessment on general knowledge about the property, from having sold it in the previous years, and on his general knowledge of the real estate market in Yellowknife. Given Mr. Ma's position, and recognizing that Exhibit #5 states that the value of the property is considerably higher than the 2006 appraisal, I am not prepared to rely on Exhibit #5, as evidence of present day value of the matrimonial home. Exhibit #5 does satisfy me, however, that there is a significant likelihood that the value of the matrimonial home has increased since the March 2006 appraisal. I cannot and will not speculate as to what the present day value is, nor will I dispose of this case on the basis of an appraisal that is over a year old and may no longer be accurate. Unless the parties are able to reach agreement on what the present day value of the home is, a further appraisal will be required.

[67] Similarly, I am not prepared to speculate or attempt to estimate the balance of the mortgage at this time. In order to make an order based on accurate information, the balance of the mortgage at the time of trial is also required.

5. Other issues

[68] Ms. Tran is claiming pre-judgment interest on whatever monetary order she receives as a result of this case. Pre-judgment interest is a discretionary matter. There are no hard and fast rules that govern whether it should be ordered in a given case.

[69] My finding that present day values should be used to calculate the monetary award Ms. Tran is entitled to receive places her application for pre-judgment interest in a different context than would be the case if I had used the separation date as a valuation date. Since I have found that Ms. Tran's entitlement is the result of the cumulative effect of ongoing events that occurred between separation and the trial, I don't find this an appropriate case to exercise my discretion to grant her pre-judgment interest dating back to the date of separation.

[70] However, she will be entitled to interest, as of today's date, on whatever the monetary award she is entitled to turns out to be. This is not post-judgment interest, because I cannot make a final order until I have the benefit of the updated appraisal and the mortgage balance on the matrimonial home, but it is a recognition that Ms. Tran's right to a monetary award calculated in a specific fashion is being decided today.

[71] Ms. Tran has made submissions about the interpreter costs for this case. Counsel acknowledges that the general rule in civil cases is that interpretation costs are litigation costs to be borne by the parties. Ms. Tran asks that the Court depart from this established practice in this case, and assume the costs of interpretation, as is done in the context of criminal cases. Ms. Tran argues that parties who are unable to resolve their differences have no choice but to turn to the courts, and that in that respect an analogy can be drawn with the situation of accused persons and witnesses who are compelled to take part in criminal proceedings.

[72] There is nothing about this case, in my view, that justifies a departure from the usual practice. The trial lasted two days. The interpreter was hired locally. There is no suggestion that the interpreter costs in this case were unusually high. I therefore decline to order that interpreter costs be borne by the Court.

D) CONCLUSION

[73] For the above reasons, I have concluded that the parties are entitled to share equally in the following:

- a) rental income from matrimonial home from October 2001 to July 2004 (\$64,600.00)
- b) proceeds from sale of the trailer (\$36,000.00)
- c) value of P & T Alterations as of January 2007 when it was sold (\$30,000.00)
- d) furniture in matrimonial home (\$5,000.00)
- e) net value of the matrimonial home as of March 31st, 2007

[74] Item (d) is to be calculated on the basis of an appraisal of the property as of March 31, 2007 and the balance of the mortgage on that date. My disposition of this case will include a direction that a new title be issued for the matrimonial home in Mr. Ma's name. It is clear that once Ms. Tran's share in the net value of that home is included in the calculations, she will be entitled to a monetary award.

[75] The revised appraisal should be done by an appraiser agreed to by both parties. If the parties are unable to agree about this, I will entertain each party's suggested appraiser on the basis of written submissions. Hopefully, this will not be necessary. After all, two non-contentious appraisals of the property were filed in this case. One was prepared in 2003 by Terry Follett, of Stewart, Weir, MacDonald Ltd, and the other was prepared in 2006 by John Soderberg, of Yellowknife Appraisal Services and Consulting. No issue was taken with the accuracy of either of these appraisals and I take it from this that the parties acknowledge the expertise of these appraisers.

[76] Assuming that the parties are able to agree on an appraiser, as Ms. Tran is the party alleging that the value of the home has increased since the March 2006, she will bear the costs of the new appraisal for now. That item can be part of more general submissions as to costs later on. If I have to entertain submissions and decide who the appraiser will be, I will address the question of costs for the appraisal as part of my ruling designating an appraiser.

[77] The parties separated several years ago and this matter has gone on for some time already. It is not desirable that proceedings be further delayed any more than is absolutely necessary. To this end, I direct that:

1. Mr. Ma file, no later than June 8, 2007, a mortgage statement from his financial institution showing the balance of the mortgage on the matrimonial home as of March 31st, 2007.
2. If counsel agree on who will do the appraisal:
 - a) they will confirm this no later than June 1, 2007 by sending correspondence to the Clerk of the Court to that effect;
 - b) they will file the appraisal as soon as possible after it has been completed; and
 - c) if they wish to present submissions arising from the appraisal, they will file those submissions in writing no later than 14 days after the appraisal has been filed.

3. If counsel are unable to agree on who will do the appraisal, they will file, no later than June 8, 2007, written submissions as to who should be appointed to conduct the appraisal.

[78] Once these materials have been filed, I will issue a Memorandum setting out the calculations and the details of my order disposing of the property issues between the parties. After this Memorandum has been filed, the parties will be given an opportunity to make submissions as to costs.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
18th day of May 2007

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|-----------------------------|-----------------------------|
| Counsel for the Petitioner: | Katherine R. Peterson, Q.C. |
| Counsel for the Respondent: | Art Tralenberg |

S-0001-DV-6101-03454

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

TRINH NGOC TRAN

Petitioner

- and -

PHUC VAN MA

Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU
