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Thursday, January 22, 2009

CANADIAN JUDICIAL COUNCIL
fax (613) 288-1575

Attention: **Norman Sabourin**, Executive Director and Senior General Counsel;

Dear Sir,

Re: Investigating Federally Appointed Judge
MR. JUSTICE LANCE BERNARD Of The B.C. Supreme Court
For Violations Of The Code Of Judicial Conduct

My name is Anthony J. Jasich. I am Mr. Harold Gaffney's pro bono lawyer. I was called to the bar on May 16, 1957 and in January of 2006, I retired from the bar as a member in good standing.

I am following up in support of Ms. Zanetti's complaint dated December 12, 2008, against Justice Lance Bernard of the Supreme Court of British Columbia, of which I understand has been forwarded to the Chairperson of the CJC.

Mr. Gaffney and Mrs. Gaffney held the title to their condo unit, situated at 312-450 Bromley Street, in the city of Coquitlam, British Columbia ("The Property") as Joint Tenants. However as a result of Mr. Gaffney's wife making a false claim under the *Bankruptcy Insolvency Act*, the joint tenancy of the property was severed by trustee Kenneth A. Rowan who transferred an undivided half interest in the property to himself on June 13, 2005.

On November 27, 2006, upon having received his fees, from an illegitimate claim from *Canada Revenue Agency,* in the amount of about $13,000.00, Mr. Rowan discharged himself from the bankruptcy and soon therafter transferred his interest back to Mrs. Gaffney.

The property was then held as an undivided half interest to Mrs. Gaffney and an undivided half interest to Mr. Gaffney and as a result the lawyer for Mrs. Gaffney, Mr. Keith Oliver started an action against Mr. Gaffney under the *Partition of Property Act,* wherein in May of 2007, Mr. Justice Robert Crawford, ordered the following in particular at paras. 3, 4, 8 and 9:

> 3 Partition and Sale of the property located at #312,4 50 Bromley Street, in the City of Coquitlam, Province of British Columbia and more particularly described as: PID 015-726-339 STRATA LOT36, DISTRICT LOT113 GROUP 1, NWD, STRATA PLAN NW3I8I, together with an interest in the common property in proportion to the unit entitlement of the Strata Lot;

4. The Petitioner Shiela (sic) Frances Gaffney have exclusive conduct of sale of the above described property, such conduct to commence immediately this Order becomes effective,as set out below;

8 Any offer obtained under the Petitioner's conduct of sale of the subject property is to be approved by this Court;

9 The proceeds of sale, after payment of the registered financial charges taxes and Real Estate Commission, are to be divided, one-half to the Petitioner and one-half to the Respondent:

After Mr. Oliver inched the case to several judges, via different applications, on November 26, 2007, Mr. Justice Lance Bernard approved the sale of the property for the sum of $225,000.00, notwithstanding the fact that,

1. the property was assessed by the BC Assessment Authority at $234,000.00;

2. the Realtor Noella Neale of Re/Max All Points Realty had listed the property in August of 2007, at $249,900.00; and

3. there was a bona fide offer before the court for $242,000.00.

Further Mr. Justice Bernard singlehandedly overturned the entered Order of Crawford, J, by ordering the net purchase price after adjustments be paid to Mr. Oliver, contrary to ***Harrison v. Harrison***, 2007 BCCA paras. 28-29

As Ms. Zanetti has shown in her document, Mr. Justice Bernard and Mr. Oliver were classmates in the graduating law school of 1981 from UBC. It is my considered opinion and a basic matter of ethical principles that Mr. Justice Bernard should have disqualified himself from hearing the application of Mrs. Gaffney, to approve the sale of the property, and by proceeding with the matter, Mr. Justice Bernard has used his judicial office for the advancement of the private interests of his friend Mr. Keith Oliver, who to date has refused to provide us with a proper accounting and to date he has not provided a copy of a Certificate of Sale in Form 54, verified by affidavit by his client and filed forthwith after completion of the sale, as required under Rule 43 (6) of the Supreme Court Rules.

Finally, since the matter brought to your attention is serious and a matter also of public interest, I ask that you please forward this correspondence to the judge looking into the complaint of Ms. Zanetti.

Trusting that the whole is to your complete and entire satisfaction, I remain,

Yours Truly,

Anthony J. Jasich LL.B

Encls. Orders of Crawford J. and Bernard J.

NO. S102880
NEW WESTMINSTER REGISTRY

IN THE MATTER OF THE PARTITION OF PROPERTY ACT, AND IN THE

APPLICATION BY SHIELA GAFFNEY FOR THE SALE OF #312 - 450 BROMLEY STREET COQUITLAM, B.C.

SEAL

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SHIELA FRANCES GAFFNEY

PETITIONER

AND:

HAROLD CECIL GAFFNEY

RESPONDENT

ORDER

BEFORE THE HONOURABLE) TUESDAY, THE 22nd DAY
)
MR. JUSTICE CRAWFORD) OF MAY, 2007

THE PETITION of the Plaintiff and the Application of the Respondent to adjourn the Petition and the Application of the Respondent to Appeal the Adjournment granted by Master Keighley on the 11th day of April, 2007, setting the hearing of the Petition to the 25th day of April, 2007, having come on before me on the 25th day of April, 2007, and upon the matter coming back before the Court to settle the terms of the Order on the 22nd day of May, 2007, at the City of New Westminster, in the Province of British Columbia, AND UPON HEARING R. KEITH OLIVER, Esq. of counsel for the Petitioner and the Respondent appearing with his Spokesperson Tina Zanetti;

THIS COURT ORDERS;

1 The Respondent's motion to adjourn the hearing of the Petition is Dismissed;

2 The Respondent's Appeal of the Order of Master Keighley made april 11, 2007, adjourning the hearing of the Petition to April 25th, 2007, is dismissed;

3 Partition and Sale of the property located at #312, 450 Bromley Street, in the City of Coquitlam, Province of British Columbia, and more particularly described as:

PID 015-726-339
STRATA LOT 36, DISTRICT LOT 113 GROUP 1, NWD, STRATA PLAN NW3181,

together with an interest in the common property in proportion to the unit entitlement of the Strata Lot.;

4 The Petitioner Shiela Frances Gaffney have exclusive conduct of sale of the above described property, such conduct to commence immediately this Order becomes effective, as set out below;

5 The operation of this Order will be suspended pending the outcome of the Respondent's application to the court of Appeal, in Court of Appeal file no. CA034717, presently scheduled for hearing June 20th, 2007, and this Order becomes effective immediately upon the outcome of that Appeal being determined in the Petitioner's favour;

6 If the Respondent's Appeal is determined in the Respondent's favour, he will have liberty to apply to this Court for a further Order;

7 Once marketing of the subject property begins, the Petitioner or the sales agent shall give the Respondent 4 days notice of any showings of the subject property, and all such showings will take place between 10:00 a.m. and 5:00 p.m. Monday to Friday, but no more than three hours at any one time;

8 Any offer obtained under the Petitioner's conduct of sale of the subject property is to be approved by this Court;

9 The proceeds of sale, after payment of the registered financial charges, taxes and Real Estate Commission, are to be divided, one-half to the Petitioner and one-half to the Respondent;

10 The Petitioner shall have her costs of the above noted orders at scale B, which costs shall be deducted from the Respondent's share of the proceeds of sale;

11 There shall be no costs of the Application of May 22nd, 2007;

12 The signature of the Respondent, Harold Cecil Gaffney on this Order shall be dispensed with.

Crawford, J.
BY THE COURT

Registrar

APPROVED AS TO FORM:

R. KEITH OLIVER, ESQ.
Counsel for the Plaintiff

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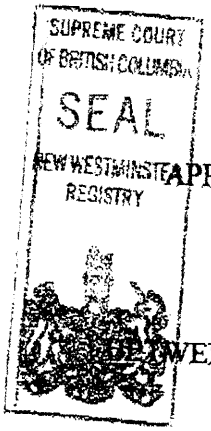

NO. S102880
NEW WESTMINSTER REGISTRY

IN THE MATTER OF THE PARTITION OF PROPERTY ACT, AND IN THE APPLICATION BY SHEILA GAFFNEY FOR THE SALE OF #312 – 450 BROMLEY STREET, COQUITLAM, BC

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SHEILA FRANCES GAFFNEY

PETITIONER

AND:

HAROLD CECIL GAFFNEY

RESPONDENT

ORDER

BEFORE THE HONOURABLE	)	MONDAY THE 26TH
MR JUSTICE BERNARD	)	DAY OF NOVEMBER, 2007

THE APPLICATION of the Petitioner having come on for hearing at New Westminster, on the day and date above, AND UPON HEARING R. Keith Oliver Esq., of Counsel for the Plaintiff and the Respondent Harold Gaffney in person;

THIS COURT ORDERS:

1. Approval of the contract of sale dated November 6th, 2007, for the sale of the lands and premises located at #312 – 450 Bromley Street, in the City of Coquitlam, and described as;

Parcel Identifier 015-726-339

NWS 3181, LOT 36, DL 113, LDNW36, GROUP 1

(the "Lands and Premises")

to Mariana Oviedo Ovando, and Brent Tremain, ("the purchasers") for the sum of $225,000.00.

2. Upon lodging a Court Certified copy of this Order in the New Westminster Land Title Office together with a letter from the solicitor for the Petitioner authorizing such registration and subject to the terms of the said Order, the Lands and Premises be conveyed to and vest in the Purchasers, in fee simple, free and clear of any estate, right, title, interest, equity of redemption and other claims of the parties, subject only to the reservations, provisos, exceptions and conditions expressed in the original grant or grants thereof from the Crown.

3. Upon lodging a Court Certified copy of this Order for registration in the manner set out above and upon payment of the purchase price, the Respondent, and all persons claiming through him or any person in possession on his behalf shall deliver up vacant possession of the Lands and Premises to the Purchasers by 12:00 p.m. on December 15th, 2007.

4. The net purchase price after adjustments shall be paid to R. KEITH OLIVER, solicitor for the Petitioner in trust.

5. The Petitioner shall have her costs at scale B.

6. The solicitor for the Petitioner shall disburse the net sale proceeds as follows:

a) firstly, to clear all financial charges registered against the title.
b) secondly, to pay one half of the remaining net proceeds to the Petitioner.
c) thirdly, to pay the Petitioner's costs, both here and in the Court of Appeal, after Assessment or agreement of the Respondent.
d) Fourthly, to pay the balance remaining, if any, to the Respondent.

7. Approval of this Order by the Respondent is dispensed with.

BY THE COURT

Registrar

APPROVED AS TO FORM:

R. Keith Oliver, Esq.
Counsel for the Petitioner

CHECKED

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ENTERED

NOV 26 2007

NEW WESTMINSTER
REGISTRY

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Harrison v. Harrison,***
2007 BCCA 120

Date: 20070226
Docket: CA33330

Between:

Dianne Mary Harrison

Respondent
(Plaintiff)

And

Arthur Lewis Harrison

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Chiasson

J.G. Dubas — Counsel for the Appellant

J.M. Dreyer — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
January 8, 2007

Place and Date of Judgment: Vancouver, British Columbia
February 26, 2007

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION AND ISSUES

[1] On 13 October 2004, at a family law Judicial Case Conference, the Case Conference Judge made a "section 57 order", without consent, under the provisions of the ***Family Relations Act***. Although not expressed in terms by the judge when making the order, s. 57 gives the Court a discretion to declare " ... that the spouses have no reasonable prospect of reconciliation with each other." A s. 57 declaration is a "triggering event" for the purposes of determining and dividing family assets under the legislation.

[2] No formal order containing the s. 57 declaration was entered. Rather, a notation was made on the last page of the "Case Management Plan":

> PART V. OTHER ORDERS/DIRECTIONS GIVEN AT JCC
>
> ORDERS: Section 57

[3] The Case Management Plan was signed by the judge and by both counsel. The original of the Case Management Plan was stamped and filed in the Court Registry at New Westminster where the case conference was held.

[4] On 12 November 2004, the last day of the appeal period from the order of 13 October, Mr. Harrison died unexpectedly. In the interim Mrs. Harrison had taken no steps indicating an intention to appeal from the order.

[5] On 8 February 2005 counsel for Mrs. Harrison filed an application under Rule 41(24) (the "Slip Rule") and pursuant to the inherent jurisdiction of the Supreme Court to vacate the s. 57 order. On 18 August 2005 the Slip Rule application was heard by the Case Management judge who had made the s. 57 declaration. He "vacated" the earlier order. In his reasons for doing so he said:

> [2] When I made the order, however, I did not consider the effect of making that order was to sever the joint tenancy. In the interests of justice, therefore, I am satisfied that this is a case where the order that was made by me should be vacated. This is without prejudice to any further action that may be taken by either side in this matter.

[6] The estate of Mr. Harrison, now represented by his former common law wife, Patricia Wilton, appeals from the order of 18 August. Ms. Wilton was appointed Mr. Harrison's legal representative by court order on 5 August 2005. She is the mother of three children, of whom Mr. Harrison was the father.

[7] The issues arising on this appeal therefore appear to be:

1. Whether the order of 13 October 2004, having been made without consent, was a "valid order";

2. If the order was valid, did the judge have a discretion pursuant to Rule 41(24), or otherwise, to vacate the s. 57 order; and

3. If the judge had a discretion to vacate the s. 57 order, was the discretion exercised judicially?

II. FACTS

[8] Acting on her own behalf, Mrs. Harrison issued a Writ and Statement of Claim on 26 October 2001. She asserted in paragraph 20 of the Statement of Claim that "there is no possibility of reconciliation." She claimed, *inter alia*, spousal support, a determination of family assets, an order for partition and sale of all assets, and payment of "not less than 50% of the net proceeds."

[9] Mr. Harrison retained a solicitor. In the Defence and Counterclaim filed on his behalf he sought a declaration under s. 57 of the ***Family Relations Act*** that "there is no possibility of reconciliation" between the parties.

[10] At the Judicial Case Conference on 13 October 2004 [the "JCC"] both parties appeared by counsel. A transcript of the proceedings, which were held in camera, has been filed. It appears that the main topics of discussion were the division of family assets, and in particular the matrimonial home, and disclosure of documents.

[11] Mr. Dubas, counsel for Mr. Harrison, asked the Court to make a declaration that there was no prospect of reconciliation under s. 57 of the ***Family Relations Act***. Ms. Dreyer, counsel for Mrs. Harrison, opposed the making of such an order. The respondent's disagreement to the making of such an order seemed to focus on the question of the date at which the matrimonial home should be valued.

[12] The following exchange occurred:

> [MR. DUBAS] Where I think this thing needs to go is I think there needs to be disclosure. I've asked my friend for three orders today, two of which I believe are going by consent, one being ---
>
> THE COURT: And what are they?
>
> MR. DUBAS: -- one being a declaration of no prospect of reconciliation --
>
> THE COURT: That's s. 57 and s. 67?
>
> MR. DUBAS: Fifty-seven.
>
> THE COURT: And 67?
>
> MR. DUBAS: And my friend's nodding, no, she's not --
>
> MS. DREYER: No, we're not agreeable. I've got an outstanding settlement proposal and these issues are very narrow and the values of these properties are very notional and my client wants there to be some serious consideration as to what she's proposed or not. She's inclined to not muddy the issue with yet a further triggering event date, in the event this matter goes to full hearing -- ...
>
> . . .
>
> MS. DREYER: My client's entitled to make her arguments at trial for reapportionment and show the contributions she made prior to the marriage and subsequent to the ending of the marriage, and the court shouldn't be confused with valuation dates. She's prejudiced significantly by the fact that she --
>
> MR. DUBAS: Well --

MS. DREYER:-- represented herself for a large part of these proceedings and didn't pursue the s. 57 declaration in the first year of separation, but albeit she didn't know where Mr. Harrison was.

MR. DUBAS: On that issue, and I – the court can't make an order today, but the court might – quite frankly, I know of no case – the only issue is whether the parties are going to reconcile. My client's now had a child with another woman, he's living in another relationship. There is no doubt that, as soon as we bring the application, there will be a s. 57 declaration. I think all we're doing, quite frankly, is wasting money for the parties if it's not agreed to today.

THE COURT: Is there a no reconciliation order?

MR. DUBAS: Yes.

THE COURT: That's – well, I don't see any problem making that order, the section – that's s. 67, is it?

MR. DUBAS: Section 57.

THE COURT: Fifty-seven, all right. I will make the s. 57 order. I do not need consent for that. ...

[Emphasis added.]

[13] The s. 57 declaration was subsequently noted on the Case Management Plan, the plan was signed by the judge and by both counsel, and the original of the plan was stamped and filed in the Court Registry.

[14] There matters rested until Mr. Harrison suddenly passed away on 12 November 2004 as the result of a blood clot. As mentioned above, no Notice of Appeal was filed within the period for appeal following the s. 57 declaration, and Mrs. Harrison took no other steps indicating an intention to appeal on her part.

[15] From the material filed on the application for Ms. Wilton's appointment as legal representative for the estate of Mr. Harrison, it appears that she and Mr. Harrison had three children together, born 7 April 2001, 15 December 2002 and one in the spring of 2005, after Mr. Harrison had passed away.

[16] It also appears from affidavit material that the Harrison matrimonial home was the parties' main family asset, that it had, according to one appraisal, a market value of $160,000 as at 1 April 2001, that there was a mortgage against the property of approximately $150,000, that the mortgage was "life insured", and that the mortgage was subsequently discharged upon the death of Mr. Harrison.

III. DISCUSSION

1. Was the order of 13 October 2004 valid?

insufficient to show that the consent of Mrs. Harrison might be inferred from the circumstances.

[21] In any event, none of these circumstances can outweigh the clear position taken by counsel for Mrs. Harrison at the JCC that she opposed the making of a s. 57 declaration. Counsel for Mr. Harrison acknowledged that, in the absence of consent, " ... the Court can't make an order today."

[22] I am therefore of the view that there was no mutual consent to a s. 57 declaration being made at the Judicial Case Conference, and that the case conference judge erred when he said that he did "not need consent" to make the order. It is clear that in the absence of consent, the s. 57 declaration was an order not contemplated by Rule 60E(12), and ought not to have been made at the Judicial Case Conference.

[23] It does not, however, follow that the s. 57 declaration made on 13 October 2004 was not a valid order. Rule 2(1) of the Supreme Court Rules provides:

> 2(1) Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.

[24] In ***Canada Transport v. Alsbury***, [1953] 1 D.L.R. 385 (B.C.C.A.), Mr. Justice Bird described the general effect of an order made by a Superior Court judge:

> The order under review is that of a superior court of record, and is binding and conclusive on all the world until it is set aside or varied on appeal. No such order may be treated as a nullity.

[25] Mr. Justice Sidney Smith said:

> ... the order of a superior court is never a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. (Authorities omitted.)

[26] In ***Wilson v. The Queen***, [1983] 2 S.C.R. 594 the majority of the Supreme Court of Canada approved of this statement made by Mr. Justice Monnin (as he then was):

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

[27] In my view therefore, the making of a s. 57 declaration at a Judicial Case Conference without the consent of both parties did not comply with Rule 60E. Although irregular, the order was not a nullity. It was valid when made, and remained so unless or until it was reversed on appeal, or otherwise set aside.

2. Did the judge have a discretionary power pursuant to Rule 41(24) or otherwise to vacate the s. 57 order?

[28] The scope of a trial judge's discretion to vary an order after pronouncement depends on whether a formal order has been entered. So long as the order remains unentered, the judge retains "an unfettered discretion" to re-open the matter. That discretion should be used sparingly: ***Sykes v. Sykes*** (1995), 6 B.C.L.R. (3d) 296 (C.A.). Although this discretion is sometimes treated as part of the discretion granted by Rule 41(24), the "Slip Rule", it is in fact a common law discretion recognized by this Court in ***Clayton v. British American Securities Ltd.***, [1934] 3 W.W.R. 257, [1935] 1 D.L.R. 432.

[29] Once an order has been entered, however, the court which made the order is *functus officio* with respect to the issues therein: ***Piyaratana Unnanse et al v. Wahareke Sonuttara Unnanse et al***, [1950] 2 W.W.R. 796 (P.C.). Once the judge is *functus*, the power to re-visit an order is much narrower. Generally speaking, that power is confined to making corrections or amendments in two situations: first, under Rule 41(24) of the ***Supreme Court Rules*** where there has been a 'slip' in drawing up the order or where a matter should have been but was not adjudicated upon; and second, where there has been an error in expressing the manifest intention of the court: ***Buschau v. Rogers Communications Inc.***, 2004 BCCA 142; see also ***Chandler v. Alberta Association of Architects***, [1989] 2 S.C.R. 848.

[30] Thus, the source and scope of the discretion in this case depends on whether the Case Conference judge was *functus officio* with respect to the s. 57 declaration. In most cases, this would be a simple question, determined by whether a formal order had been entered, or not. This is not such a case.

[31] No formal order was ever drawn and entered prior to Mrs. Harrison's Slip Rule application. However, counsel for Mr. Harrison's estate argues that the endorsed Case Management Plan effectively takes the place of a formal entered order, and he takes the position that the judge was thereafter *functus officio*. Counsel points to Rule 41(10) and argues that the Case Management Plan, with the notation "ORDERS: Section 57", is an "other document" within the meaning of that Rule:

> 41(10) If an order has been made substantially in the same terms as requested, if the court endorses the notice of motion, petition or other document to show that the order has been made or made with any variations or additional terms shown in the endorsement, it is not necessary to draw up the order, but the endorsed document must be filed.

[32] In this case there was no notice of motion or petition presented on the JCC, and counsel for Mrs. Harrison says it is therefore unclear what order was made. She says the Case Management Plan does not refer to the ***Family Relations Act***, and there is nothing to link the reference to s. 57 in the plan opposite the word "ORDERS" to that enactment, to make it clear what was being ordered. Counsel for Mrs. Harrison maintains that the notation on the JCC Plan could never be enforced as an order of the Court, and that for example, the Land Title Office would never accept that plan as sufficient to show the transfer or vesting of an interest in land from one spouse to another. She says the notation on the plan is not "the Order" but rather a summary of the directions made at the Case Conference, in much the same way a clerk's notes are a summary of orders and directions made in chambers. She argues that the signature on the plan does not signify or imply counsel's consent to the making of the orders and she says the tapes or transcripts of a JCC are not available to parties, for the purpose of clarifying the orders made, unless the court so orders. So she

says the notation on the Case Management Plan does not bring the document within the ambit of Rule 41(10).

[33] There is no doubt the judge made a declaration under s. 57 of the ***Family Relations Act***. It is clear from the context of the discussions during the case conference that "s. 57" could only be a reference to s. 57 of the ***Family Relations Act***. Both counsel and the judge were fully aware of what legislation was under discussion, and the nature of the order Mr. Dubas sought. Section 57 contemplates the making of only one order, namely, " ... a declaratory judgment that the spouses have no reasonable prospect of reconciliation." The entry of "Section 57" is made on the Case Management Plan on page 7 under "Part V":

> PART V. OTHER ORDERS/DIRECTIONS GIVEN AT JCC
>
> ORDERS: Section 57

[34] Noted in that way, it is evident that a s. 57 order was "given" and not refused.

[35] It is admitted by counsel that the judge's signature appears immediately below that notation, and that adjacent to the judge's signature are the initials or signatures of both counsel. It is also admitted that the original of the Case Management Plan was filed in the Court Registry at New Westminster, and stamped.

[36] However, these facts establish only that the order was made, that the parties were certain as to its terms, and that the Case Management Plan was filed with the Court Registry. To determine whether this is sufficient to satisfy Rule 41(10), however, one must consider the purpose behind drawing and entering an order.

[37] In *Conduct of Civil Litigation in British Columbia*, looseleaf (Markham: LexisNexis Canada, 2978), Fraser and Horn describe that purpose as threefold:

> (a) the successful party may show his authority for proceeding under its terms;
>
> (b) the unsuccessful party may have proper material upon which to base an appeal; and
>
> (c) what is then *res judicata* between the parties is defined with some precision.

[38] There is nothing before us to show that an endorsed Case Management Plan has ever been treated for any purpose as an "other document" within the meaning of Rule 41(10), or as the equivalent of a formal order signed and entered. Unlike a formal order, there is nothing on the face of the Case Management Plan to show the affidavit or other evidence on which the order was made, and hence the basis on which the judge exercised his discretionary power. In this case there is a transcript of what counsel said, but that is not part of the order.

[39] In my opinion a Case Management Plan is not an "other document" similar to a notice of motion or a petition, which Rule 41(10) gives as examples of documents which when endorsed render a formal order unnecessary. In *Conduct of Litigation in British Columbia, supra,* the authors suggest that a draft order might constitute an "other

document". Notices of motion, petitions and draft orders have common features not shared by a Case Management Plan, such as a standard appearance based on Court Forms, and a recitation of the evidence heard or referred to when the order was made.

[40] I agree with counsel for the respondent that the Plan is more like a summary of the orders and directions made at the JCC in much the same way that a clerk's notes are a summary of orders and directions made in chambers. The signatures of counsel are evidence that the Plan notation accurately represents those orders and directions, as the proceedings on a JCC are confidential and will not be transcribed without an order of the Court, pursuant to Supreme Court Practice Directive, 18 October 2002.

[41] In my opinion Rule 41(10) does not apply and there was no equivalent to an entered order. It follows that the case conference judge was not *functus officio* and, he had a broader discretion to re-consider the order dated 13 October 2004 than if the order had been entered. The scope of that broader discretion was described in ***Clayton v. British American Securities Ltd., (supra).***

3. Was the reversal of the earlier order a proper exercise of discretion?

[42] The primary consideration in whether to re-open a case, or set aside an earlier unentered order, is whether a miscarriage of justice would otherwise occur: see ***Kemp v. Wittenberg,*** [1999] B.C.J. No. 810 (S.C.); ***Dudas (Guardian ad litem of) v. Munro***, [1993] B.C.J. No. 2035 (S.C.) and ***Bell v. Bell***, 2001 BCCA 148.

[43] Circumstances in which an earlier order will be revisited include fresh evidence not available when the earlier order was made, or a change in circumstances between the date of that order and the application to re-open: see ***Foster v. Kockums Cancar Division Hawker Siddeley Canada Inc.*** (1993), 83 B.C.L.R. (2d) 207 (C.A.); ***Grigg v. Berg Estate***, [2000] B.C.J. No. 1080 (S.C.). Here, the death of Mr. Harrison after the s. 57 declaration was made was an important new circumstance that might reasonably cause the judge to reconsider the way he exercised his discretion. It was, in my opinion, open to him to hear Mrs. Harrison's application, and to set aside the earlier order, if that was necessary to avoid a miscarriage of justice. The discretionary power to set aside or vary an earlier order must of course be exercised judicially: ***Federal Business Development Bank v. Mission Creek Farm Inc.*** (1988), 25 B.C.L.R. (2d) 188 (C.A.); and ***Galiano Conservancy Association v. British Columbia (Ministry of Transportation and Highways)*** (1996), 17 B.C.L.R. (3d) 392 (S.C.).

[44] The only statement in the chambers judge's oral reasons for judgment on 18 August 2005 to indicate the basis for his order is this:

> [2] When I made the order, however, I did not consider the effect of making that order was to sever the joint tenancy. In the interests of justice, therefore, I am satisfied that this is a case where the order that was made by me should be vacated. This is without prejudice to any further action that may be taken by either side in this matter.

[45] It is evident that the judge did not have before him a transcript of the discussion at the Judicial Case Conference on 13 October 2004, and apparently did not have his mind directed to Mrs. Harrison's opposition to a s. 57 declaration, namely that it would be a "triggering event" with respect to family assets and their division. If the judge had had his

attention drawn to that earlier discussion he could not, I think, have made the statement that he "did not consider the effect of the order would be to sever the joint tenancy" in the matrimonial home.

[46] What the judge did have before him on 18 August 2005 was evidence that Mr. Harrison died on 12 November 2004, and that prior to his death the matrimonial home was registered in the parties' names as joint tenants.

[47] The judge also had before him Ms. Wilton's affidavit deposing to the fact that she and Mr. Harrison had three children, her personal circumstances and limited financial means, and the children's need for financial support from Mr. Harrison's estate.

[48] There is nothing in the chambers judge's reasons to show that he took these conflicting interests into account, before setting aside the s. 57 declaration. In particular, there is nothing to show that he considered the needs of the children, and the fact that vacating the earlier order would deprive them of any opportunity to benefit from their father's interest in the family assets affected by the s. 57 declaration.

[49] Remembering that the principal reason for setting aside an earlier order is to prevent a miscarriage of justice, the question is whether the order of 18 August 2005 can be said to have been a judicial exercise of the judge's discretion. I do not think it can. It appears to me that the judge considered only Mrs. Harrison's interests with respect to the severed joint tenancy, to the exclusion of the interests of Mr. Harrison's children with Ms. Wilton.

[50] I can see no basis for saying that to leave the s. 57 order of 13 October 2004 in place would result in a miscarriage of justice. Indeed, the order setting it aside is more apt to lead to such a result in my view.

[51] I would set aside the order of 18 August 2005.

[52] I have considered whether in these circumstances the Court should remit the case to the B.C. Supreme Court for a reconsideration of Mrs. Harrison's application to set the order of 13 October 2004 aside. I do not think that would be in the interests of justice. These proceedings have already been far too long and expensive. The modest assets of the Harrisons' marriage cannot withstand much further depletion in the litigation process.

[53] I would allow the appeal and set aside the order of 18 August 2005. The order of 13 October 2004 will remain in effect. If the parties remain unable to resolve their differences, any unfairness to Mrs. Harrison in the restoration of the s. 57 declaration might be addressed on an application to reapportion the family assets.

[54] In the circumstances described, I would order that each party bear its own costs of the appeal.

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Chiasson"