

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GAIL HERRINGTON

Applicant

- and -

IAN HARVEY and LAURENTIAN BANK OF CANADA

Respondents

FACTUM

March 13, 2019

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FACTUM

PART I – OVERVIEW

1. In this application, the Applicant, Gail Herrington (“Herrington”) is seeking to set aside the mortgage (instrument number C820125) (“the mortgage”) from title to the property municipally known as 299 Warden Avenue, Toronto, Ontario M1N 3A3 (“the property”)
2. The Respondent, Ian Harvey (“Harvey”) consents to removing the mortgage from the property.
3. Harvey however opposes all other claims made by Herrington in her application.
4. Harvey and Herrington signed the Minutes of Settlement on April 12, 1995 which allows Harvey to purchase Herrington’s interest in the property based on the 1995 value of the property subject to various deductions prescribed in the April 12, 1995 minutes of settlement and Herrington being able to give Harvey clear title to the property.
5. If the mortgage is removed, after subtracting the cost to remove the current Legal Aid Ontario lien of the property, the likely cost of realtor fees to sell the property based on the 1995 value of the property, half of the cost of CIBC mortgage on the property on April 12, 1995 and the \$36,000 advance Herrington received in 1991 for her interest in the property, Herrington is not entitled to any further payments for her interest in the property. As such Harvey is seeking an order that Herrington has no further interest in the property after the mortgage is removed. Alternatively, based on the minutes of settlement

dated April 12, 1995 and not including the \$36,000 advance to Herrington, Harvey is seeking an order to pay \$22,787.95 for Herrington's property claim.

PART II - FACTS

6. Herrington and Harvey purchased a property municipally known as 299 Warden Avenue, Toronto, Ontario M1N 3A3 ("the property") in 1981. They were involved in a contested family law proceeding that ended with the signing of Minutes of Settlement. The Minutes of Settlement were signed on April 12, 1995 and remain in force to this date.

Citation: Affidavit of Ian Harvey, sworn July 13, 2017 at para 3.

7. Herrington and Harvey were divorced on October 1, 1996.

Citation: *Ibid* at para 4.

8. The Minutes of Settlement dated April 12, 1995 comprehensively settles the issue relating to ownership of the property.

Citation: *Ibid* at para 6.

9. Paragraph 1(a) of the minutes of settlement dated April 12, 1995 provides that an appraisal of the value of property is to be obtained. The appraisal was completed on May 1, 1995 by Approved Appraisal Services Ltd. The appraiser valued the property at \$180,000.

Citation: *Ibid* at para 9.

10. Paragraph 1(a) of the minutes of settlement dated April 12, 1995 also states that the property will only be sold if Harvey is "unwilling or unable to purchase [Herrington's] half interest in the matrimonial home after the deductions set out herein".

Citation: *Ibid* at para 10.

11. In this context 'unwilling and unable' clearly means unwilling to buy at the appraised price or unable to finance the purchase. There is no other reasonable inference.

Citation: *Ibid* at para 11.

12. Paragraph 1(g) of the minutes of settlement dated April 12, 1995 however makes this payment or order for sale conditional upon meeting the following conditions:

- i. That the present holder of the second mortgage registered by the Petitioner [Herrington] is satisfied.
- ii. That all other charges, executions, liens, judgements, present or future registered against the Matrimonial Home as a result of the Petitioner's

[Herrington's] action are satisfied either in full or in partial payment and said executions are removed from the Matrimonial Home to permit clear title to be conveyed to the Respondent [Harvey].

iii. That the action commenced by Laurentian Bank et al is satisfied.

Citation: *Ibid* at para 12.

13. Since the minutes of settlement dated April 12, 1995 was signed, Harvey has been completely willing and able to purchase the Herrington's interest in the matrimonial home pursuant to paragraph 1(a) of the Minutes of Settlement.

Citation: *Ibid* at para 13.

14. However, Herrington not met any of the conditions pursuant to paragraph 1(g) of the Minutes of Settlement dated April 12, 1995 entitling her to payment from Harvey. Most notably the mortgage remains unpaid on title.

Citation: *Ibid* at para 14.

15. Without meeting all of the conditions set forth in paragraph 1(g) of the Minutes of Settlement dated April 12, 1995 and without being able to give Harvey clear title to the property, Herrington is not entitled to any payment for her interest in the property, either through payment from Harvey or from selling the property and splitting the proceeds of sale.

Citation: *Ibid* at para 15.

16. Since the Minutes of Settlement dated April 12, 1995 are binding and are still in effect, the Herrington is currently estopped from seeking payment for her interest in the property.

Citation: *Ibid* at para 16.

17. The difficulty involving discharging the mortgage is completely the fault of Herrington.

Citation: *Ibid* at para 23.

18. In 1991, Herrington wanted to raise money to purchase a nude maid business. In order to do so, Herrington took out a \$36,000 private mortgage with Richard Kernohan. The mortgage has now been assigned to the Laurentian Bank of Canada.

Citation: *Ibid* at para 24.

19. As acknowledged in her affidavit dated December 23, 1994, at the time the mortgage agreement was signed, the parties were separated and Herrington communicated to Kernohan that Harvey would not consent to the mortgage.

Citation: *Ibid* at para 25.

20. Herrington's nude maid business failed and Herrington defaulted on the mortgage.

Citation: *Ibid* at para 26.

21. This mortgage has had an annual interest rate of 49.436% interest rate since May 26, 1992. If the mortgage were enforceable, the amount owing right now would be over \$1.1 billion dollars with 49.436% annual interest continuing to accumulate.

Citation: *Ibid* at para 27.

22. Harvey never consented to this mortgage being placed on title.

Citation: *Ibid* at para 28.

23. The mortgage has caused Harvey considerable stress and anguish because he is a victim in this transaction and Herrington and Harvey cannot possibly pay off the mortgage now.

Citation: *Ibid* at para 29.

24. Herrington and Harvey tried to sell the property in 1993 but they didn't get a single offer in large part likely out of concern about this mortgage and whether they could provide clear title.

Citation: *Ibid* at para 30.

25. Harvey is unable to sell the property now with the mortgage because he would be unable to give clear title or he would get \$0 in sale proceeds.

Citation: *Ibid* at para 31.

26. Harvey has also not been able to access a home equity line of credit because of the mortgage.

Citation: *Ibid* at para 32.

27. Harvey has made a sincere effort to set aside this mortgage.

Citation: *Ibid* at para 33.

28. In 1994, Harvey filed a notice of application to have the mortgage struck. It was subsequently joined to the Laurentian Bank of Canada Trustee for RRSP 204-001-572 v Herrington and 93-CQ-45325 matter brought by the mortgagee Kernighan wife Elizabeth Smith. In 2000, Justice Dunnett set it down for trial Sine Die.

Citation: *Ibid* at para 34.

29. Having spent \$20,000 in legal fees on this matter alone above, Harvey was emotionally and financially exhausted and could not continue.

Citation: *Ibid* at para 35.

30. In 2006, Harvey brought an application in Family Court citing a material change of circumstance, asking for child support and for the mortgage to be struck under Section 23 of the *Family Law Act*, RSO 1990, c F3. In 2007, Harvey was successful in getting child support (which was never paid) but the issue of the mortgage was not resolved.

Citation: *Ibid* at para 36.

31. In 2008 after unsuccessfully trying to find a counsel who was willing to take on the matter, Harvey retained the law firm of Bastedo Smith at great cost. Unfortunately, 18 months later Harvey was told their best advice was that litigating wasn't worth it because the cost of litigation would consume all the equity in the house.

Citation: *Ibid* at para 37.

32. Since then, Harvey has repeatedly asked Herrington to sit down and work out a settlement but she refused. In 2012 her liver started failing and she was gravely ill. She had a liver transplant but her prognosis wasn't good. However, she recovered and her first action was to make this application.

Citation: *Ibid* at para 38.

33. Harvey is opposed to Herrington's claim for occupancy rent.

Citation: *Ibid* at para 39.

34. Herrington has not paid any amount for the carrying costs of the property since the date of separation of June 1991.

Citation: *Ibid* at para 40.

35. Herrington was not ousted from the property. She left voluntarily.

Citation: *Ibid* at para 41.

36. In 2006, both children started living with Harvey as they fled the emotional abuse inflicted by their step-father Rick Pinto, Herrington's husband.

Citation: *Ibid* at para 42.

37. In 2007, the court granted Harvey \$100 a month in child support for both children. Herrington did not pay child support despite the order.

Citation: *Ibid* at para 43.

38. Harvey has not received rental income from third party tenants to the property.

Citation: *Ibid* at para 44.

39. Herrington is now claiming occupancy rent 26 years after she left the matrimonial home and 23 years after Minutes of Settlement were reached.

Citation: *Ibid* at para 45.

40. Herrington has not provided any evidence as to the market rental value of the property to base a claim for occupancy rent.

Citation: *Ibid* at para 46.

41. If the mortgage is removed, Herrington still has a responsibility to solely pay the Legal Aid lien on title which is currently at \$37,702.58 as of March 2, 2015 with 3% annual interest. The Legal Aid lien was placed on title solely for the benefit of Herrington to pay for her legal services.

Citation: *Ibid* at para 47.

42. Paragraph 1(c) of the Minutes of Settlement provide that Herrington's share of the value of the matrimonial home is to be deducted for the Legal Aid lien as well as any other valid or invalid mortgages other than the first mortgage with CIBC.

Citation: *Ibid* at para 48.

43. The parties specifically agreed in paragraph 1(a) of the Minutes of Settlement dated April 12, 1995 that Herrington's value of the property would be determined based on the appraisal which was completed on May 1, 1995. The Minutes of Settlement dated April 12, 1995 are still in effect.

Citation: *Ibid* at para 49.

44. The Applicant has not contributed in any way to the property since the Minutes of Settlement dated April 12, 1995 were signed. Harvey has paid for all the carrying costs for the property including mortgage costs, property taxes, utilities, gas, hydro and home insurance.

Citation: *Ibid* at para 53.

45. Since the Minutes of Settlement were signed, Harvey have also solely paid the entire amount to pay off the CIBC mortgage for the matrimonial home.

Citation: *Ibid* at para 54.

46. Since the Minutes of Settlement were signed, Harvey have also solely paid the property taxes for the matrimonial home as follows:

Year	Amount Paid
1996	\$1,850
1997	\$1,950
1998	\$2,000
1999	\$2,100
2000	\$2,200
2001	\$2,300
2002	\$2,400
2003	\$2,500
2004	\$2,600
2005	\$2,700
2006	\$2,800
2007	\$2,900
2008	\$2,900
2009	\$2,900
2010	\$2,950
2011	\$3,200
2012	\$3,300
2013	\$3,350
2014	\$3,356
2015	\$3,400
2016	\$3,500
2017	\$3,550

Total: \$60,706

Citation: *Ibid* at para 55.

PART III – ISSUE

47. The issues for this application is as follows:

- A) Should the mortgage be deleted from title;
 - B) If the Mortgage is deleted from title, what is the value of Herrington’s interest in the property;
- and
- C) Should Herrington be granted occupant rent?

PART IV – ARGUMENT

A. The Mortgage should be deleted from title

48. A matrimonial home is defined under s. 18(1) of the *Family Law Act*, RSO 1990, c F3 as being:

Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home. R.S.O. 1990, c. F.3, s. 18 (1).

49. The property is a matrimonial home as it was owned occupied by Harvey and Herrington until the date of separation. After separation, Harvey continued to occupy the property and pay all the carrying costs for the property while maintaining ownership.

50. Section 21(1) of the *Family Law Act*, RSO 1990, c F3 provides that a spouse is not entitled to register a mortgage onto a matrimonial home unless one of the following conditions is met:

- (a) the other spouse joins in the instrument or consents to the transaction;
- (b) the other spouse has released all rights under this Part by a separation agreement;
- (c) a court order has authorized the transaction or has released the property from the application of this Part; or
- (d) the property is not designated by both spouses as a matrimonial home and a designation of another property as a matrimonial home, made by both spouses, is registered and not cancelled. R.S.O. 1990, c. F.3, s. 21 (1).

51. None of the condition in section 21(1) of the *Family Law Act*, RSO 1990 c F3 has been met in this case.

52. If none of the conditions in section 21(1) of the *Family Law Act*, RSO 1990 c F3 is met, the Court has the power to set aside the mortgage under section 21(2) and 23 of the *Family Law Act*, RSO 1990 c F3 which provides as follows:

21(2) If a spouse disposes of or encumbers an interest in a matrimonial home in contravention of subsection (1), the transaction may be set aside on an application under section 23, unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or making an agreement to acquire it, that the property was a matrimonial home. R.S.O. 1990, c. F.3, s. 21 (2).

23 The court may, on the application of a spouse or person having an interest in property, by order,

- (a) determine whether or not the property is a matrimonial home and, if so, its extent;

(b) authorize the disposition or encumbrance of the matrimonial home if the court finds that the spouse whose consent is required,

(i) cannot be found or is not available,

(ii) is not capable of giving or withholding consent, or

(iii) is unreasonably withholding consent,

subject to any conditions, including provision of other comparable accommodation or payment in place of it, that the court considers appropriate;

(c) dispense with a notice required to be given under section 22;

(d) direct the setting aside of a transaction disposing of or encumbering an interest in the matrimonial home contrary to subsection 21 (1) and the revesting of the interest or any part of it on the conditions that the court considers appropriate; and

(e) cancel a designation made under section 20 if the property is not a matrimonial home. R.S.O. 1990, c. F.3, s. 23.

53. The Ontario Court of Appeal in *Stoimenov v Stoimenov et al.*, 1985 CanLII 2166 (ON CA) held that under the predecessor legislation, the *Family Law Reform Act*, R.S.O. 1980, c.152 that a mortgage shall be set aside in a case where the mortgagee had actual knowledge that the property was a matrimonial home and consent was not obtained from the other spouse prior to registering the mortgage.
54. In this matter, the original mortgagee was specifically told by Herrington that the property was a matrimonial home and that Harvey would not consent to the mortgage.
55. Since the mortgagee had actual knowledge that the property was a matrimonial home and consent was not obtained by Harvey, the mortgage should be set aside under sections 21(2) and 23 of the *Family Law Act*, RSO 1990 c F3.
56. In addition to section 21(2) and 23 of the *Family Law Act*, RSO 1990 c F3, the mortgage should also be set aside on the basis of section 23(1) of the *Real Property Limitations Act*, RSO 1990 c L15 which provides a 10-year limitation period to seek enforcement of the mortgage after there is a default. The wording of this statute is as follows:

23. (1) No action shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of the land or rent, or to recover any legacy, whether it is or is not charged upon land, but within ten years next after a present right to receive it accrued to some person capable of giving a discharge for, or release of it, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment in writing of the right thereto signed by the person by whom it is payable, or the person's agent, has been given to the person entitled thereto or that person's agent, and in such case no action shall be brought but within ten years

after the payment or acknowledgment, or the last of the payments or acknowledgments if more than one, was made or given. R.S.O. 1990, c. L.15, s. 23 (1).

57. In *McVan General Contracting Ltd v Arthur*, 2002 CanLII 45035 (ON CA) the Ontario Court of Appeal, dismissed the appeal of a decision to delete a mortgage from title and to dismiss an application for payment and power of sale after the 10 year limitation period was missed.
58. When the mortgage was transferred to Laurentian Bank in 1993, the mortgage was in arrears and no payments have been made towards the mortgage since 1993. All mortgage enforcement actions have now been administratively dismissed. Since the limitation period has expired and no action can be brought to enforce the mortgage, the mortgage should likewise be deleted from title.

B. If the mortgage is set aside, what is Herrington's interest in the property

The Minutes of Settlement dated April 12, 1995 conclusively resolves Herrington's interest in the property

59. A settlement agreement is a contract. For a concluded contract to exist, there must be (1) a mutual intention to create a legally binding contract; (2) the parties must have reached agreement on all essential terms of the settlement.

Citation: *Olivieri v Sherman*, 2007 ONCA 491 (CanLII) at para 41.

60. A determination as to whether a concluded agreement exists does not depend on an inquiry into the actual state of mind of one of the parties Where, as here, the agreement is in writing, it is to be measured by an objective reading of the language chosen by the parties to reflect their agreement.

Citation: *Ibid* at para 44.

61. When examined objectively, the April 12, 1995 minutes of settlement clearly show a mutual intention to create a legally binding contract with respect to Herrington's interest in the property.
62. Paragraph 1 of the minutes of settlement provides that Herrington is to receive the following "sums of money as set out herein as full and final settlement of her net family property equalization claim" [emphasis added]. Paragraph 1 of the minutes of settlement then describes how the value of the property is to be divided between the parties. Given the words "full and final settlement" it is clear that the parties intended to create a final agreement that settled Herrington's interest in the property.
63. Further, paragraph 1(j) of the April 12, 1995 minutes of settlement clarifies that the parties intended for this agreement to be enforced. Paragraph 1(j) of

the April 12, 1995 minutes of settlement states that the parties “hereby authorize, direct and empower any police force within the appropriate jurisdiction to enforce these Minutes of Settlement if necessary [emphasis added]. If the agreement was not intended to be enforceable, there would be no need for police enforcement.

64. The April 12, 1995 minutes of settlement also provides for all essential terms as to how the property is to be divided.
65. Shortly after the April 12, 1995 minutes of settlement were signed, Harvey was required to obtain an appraisal of the property, which he did. The appraisal valued the property as worth \$180,000 as of May 1, 1995.
66. Paragraph 1(b) of the minutes of settlement dated April 12, 1995 provides that the appraised value of the property shall be reduced by the CIBC mortgage and the real estate commission.
67. The value of the CIBC mortgage was \$52,454.92 shortly after the minutes of settlement were signed (the actual mortgage owing was slightly more on April 12, 1995). As such the equity in the property on April 12, 1995 should be reduced by \$52,454.92 to \$127,545.08.
68. Real estate commission also needs to be deducted from the net value of the property pursuant to the minutes of settlement dated April 12, 1995. Although the agreement does not prescribe a specific rate for real estate commission, given the standard real estate commission of 4.5% (4.5% of \$180,000 = \$8,100), it would be reasonable to reduce a further \$8,100 from the net value. This reduces the net value to \$119,445.08 which gives Herrington \$59,722.54 equity in the property.
69. Pursuant to paragraph 1(c) of the minutes of settlement, Herrington’s equity in the property has to be further deducted by the value of the Legal Aid Ontario lien (placed on title to pay for Herrington’s legal fees) that is still on title and needs to be paid off. The value of the Legal Aid Ontario lien was \$37,702.58 as of March 2, 2015 with 3% annual interest. With 3% annual interest, the value of the Legal Aid Ontario lien would be \$38,833.66 on March 2, 2016, \$39,998.67 on March 2, 2017, \$41,198.63 on March 2, 2018 and \$42,434.59 on March 2, 2019. As such, Herrington’s \$58,722.54 equity needs to be deducted by \$42,434.59 to pay off the Legal Aid Ontario lien, which reduces Herrington’s equity to \$16,287.95. Harvey will then be responsible for paying the Legal Aid Ontario lien.
70. Pursuant to paragraph 1(d) of the minutes of settlement dated April 12, 1995. Herrington is also entitled to an additional payment of \$6,500. As such, the payout to Herrington should then be increased to \$22,787.95.

71. Given that Herrington received \$36,000 from Robert Kernighan in 1991 as an advance for an interest in the property, Harvey submits that no payment should be ordered to Herrington for her interest in the property. Alternatively, based on the April 12, 1995 minutes of settlement, Harvey should be ordered to pay \$22,787.95 to Herrington for her interest in the property, which Harvey can immediately make payment for.
72. Harvey has not acted in breach of the minutes of settlement dated April 12, 1995 because he was not required to make payment until the mortgage was removed.
73. These minutes of settlement should be enforced. As a general rule, courts hold parties to their bargains. Epstein J.A. for the Ontario Court of Appeal in *Remedy Drug Store Co v Farnham*, 2015 ONCA 576 (CanLII) stated Courts are motivated to enforce settlements for good reason. . . ."There are strong policy reasons for the court's attitude to settlements: it is in everyone's interest that litigation be concluded by the parties' agreement".
- Citation: *Remedy Drug Store Co v Farnham*, 2015 ONCA 576 (CanLII) at para 54.**
74. In *Chilikoff v West Capital Placer Inc.*, Justice Kristjanson stated: “[w]here parties enter into minutes of settlement, they are generally required to honour that settlement, and are not permitted to resile from the terms of their settlement absent demonstration of vitiating factors such as duress or unconscionability.
- Citation: *Chilikoff v West Capital Placer Inc*, 2016 ONSC 6354 (CanLII) at para 18.**
75. There is no indication of duress or unconscionability in these minutes of settlement.
76. The minutes of settlement dated April 12, 1995 provide for no time limitation for implementing the agreement. The delay in Herrington receiving her equity in the property is her own fault as she unlawfully consented for the mortgage to be placed on title without the consent of her spouse, she made no payments toward the mortgage and she waited approximately 26 years (1991 to 2017) to take any action to try to remove the mortgage from title.
- Herrington is prohibited from relying on the Partition Act, R.S.O. 1990, c. P.4 to escape a contractual agreement*
77. The minutes of settlement dated April 12, 1995 is a contract. Parties are not permitted to rely on the *Partition Act*, R.S.O. 1990, c. P.4 to escape a contractual agreement.

78. The parties reached an agreement with respect to Herrington's interest in the property that did not involve sale of the property. This was meant to be "a full and final settlement".
79. Contractual arrangements between the co-owners will take precedence over the right for partition or sale under the *Partition Act*.

Citation: see eg *Brienza v Brienza*, 2014 ONSC 6942 (CanLII) at para 34.

Herrington's conduct has been malicious, oppressive and vexatious in unlawfully registering the mortgage onto the property without the consent of Harvey, defaulting on the mortgage and waiting 22 years to take any action to comply with the Minutes of Settlement dated April 12, 1995 or take any action remove the mortgage from title.

80. The court has the discretion to refuse partition in circumstances where there is malicious, oppressive or vexatious conduct.

Citation: see eg *Latcham v Latcham*, 2002 CanLII 44960 (ON CA) at para 2.

81. Herrington does not come to court with clean hands. She unlawfully placed the mortgage on title for her own benefit without the consent of her spouse.
80. Herrington made no payments on the mortgage which has clouded title to the property since the early 1990s and made it extremely difficult for Harvey to sell or refinance his home.
82. Harvey had to commence an application on his own in 1994 at considerable time and expense to try to remove the mortgage from title which Harvey could not finish because of financial limitations.
83. Herrington has not made any financial contribution toward the property since 1991.
84. Herrington did not make any demonstrated efforts to comply with the April 12, 1995 minutes of settlement by either making payments toward the property or taking any action to try to remove the mortgage from title until 2017.
85. After not making any financial contribution to the property in approximately 28 years, Herrington is now seeking to profit from the present day value of the property and is using her own inaction and/or violation of the April 12, 1995 minutes of settlement as a basis for seeking the present day value of the property.
86. Harvey submits that *partition* should also be refused on the basis that Herrington engaged in malicious, oppressive and vexatious conduct by

unlawfully placing the mortgage on title without his consent and by not taking any action to comply with the April 12, 1995 minutes of settlement or pay off or remove the mortgage until 2017 when this application was commenced, Herrington has engaged in malicious, oppressive and conduct to obtain more money from the present day value of the property. As such, the request for partition should be refused.

In the event sale of the property is ordered this matter should be adjourned before a Master to determine each party's respective contributions to the property

87. In *Ferreira v Macedo*, 2016 ONSC 951 (CanLII) at para 57, the Divisional Court ruled it was reversible error for the application judge to not refer the matter to a Master for an accounting of proceeds following ordering the sale of the property.
88. Specifically in *Ferreira v Macedo*, the divisional court ordered that:
- [61] An order shall issue that the property at 28 Harvie Avenue in the City of Toronto be listed for sale and sold and the proceeds of sale prima facie to be split equally between Ferreira, on the one hand, and Macedo on the other, or held in trust pending accounting before a Master.
- [62] On the accounting, the Master shall determine all adjustments to be applied to the proceeds to reflect the contribution of each of the parties and the respective benefits received, including taking into account the following:
- (a) The initial contribution of Ferreira and Macedo to the purchase of the property, including down payments and legal fees;
 - (b) Financial contributions of Ferreira and Macedo to the carrying costs of the property since its purchase;
 - (c) Occupation rent and/or rental received from third parties;
 - (d) Capital improvements to the property; and,
 - (e) Inflation or interest factors to apply to categories of adjustment.
89. Counsel for Herrington has not consented for Harvey to submit any further affidavits following the examination for discovery in September 2018.
90. Herrington has not made any financial contributions to the property since 1991. Up-to-date contributions made by Harvey should be provided to a Master in determining each party's respective share of the proceeds if sale of the property is ordered.

C. Herrington is not entitled to Occupancy Rent

91. Occupational rent can only be claimed in the exceptional case.

Citation: *Foffano v Foffano*, 1996 CanLII 8097 (ON SC) at para 25

92. In determining whether this is an exceptional case worthy of awarding occupational rent, the following circumstances can be considered in deciding whether to award occupancy rent:
- (a) the conduct of the non-occupying spouse, including the failure to pay support;
 - (b) the conduct of the occupying spouse, including the failure to pay support;
 - (c) delay in making the claim;
 - (d) the extent to which the non-occupying spouse has been prevented from having access to his or her equity in the home;
 - (e) whether the non-occupying spouse moved for the sale of the home and, if not, why not;
 - (f) whether the occupying spouse paid the mortgage and other carrying charges of the home;
 - (g) whether children resided with the occupying spouse and, if so, whether the non-occupying spouse paid, or was able to pay, child support;
 - (h) whether the occupying spouse has increased the selling value of the property;
 - (i) ouster is not required, as once was thought in some early decisions.

Citation: *Higgins v Higgins*, 2001 CanLII 28223 (ON SC) at para 53

93. In considering these factors, this matter is clearly not the exceptional case to award occupancy rent.
94. Herrington has waited 25 years since leaving the property to bring this claim for occupancy rent. This is undue delay.
95. Herrington has not contributed in any way towards the property since 1991.
96. Herrington has not paid child support since the children moved in with Harvey in 2006.
97. Herrington cites violence from Harvey as the reason for why she left the property. This claim is not credible. In addition to being strongly denied by Harvey, at the time in February or March 1992, Herrington was represented by counsel and was pursuing a claim for exclusive possession of the property. Claims of violence or inappropriate conduct from Harvey would have significantly helped her claim for exclusive possession of the property and/or seeking a restraining order but Herrington acknowledges in her testimony dated September 27, 2018 that she did not allege violence in any court documents from Harvey until September 2018 (over 26 years later). Herrington has not provided any corroborating evidence of domestic violence from Harvey. After testifying on September 27, 2018 that a police officer

recommended that she leave the home she refused an undertaking to provide a police report.

98. Harvey has made significant improvements to the property since returning to the property in February or March 1992.
99. Herrington's ability to exercise the equity in the property has been limited because on her own wrongdoing in unlawfully placing a mortgage on title which would have had to be paid out if the property were sold.
100. The minutes of settlement dated April 12, 1995 settled Herrington's interest in the property.
101. Herrington has also not obtained a rental market appraisal for the property which would determine how much to award for occupancy rent.

PART V – ORDERS SOUGHT

102. The Respondent, Ian Harvey seeks the following orders:
 1. An Order that the mortgage (instrument number C820125) be deleted from title to the property municipally known as 299 Warden Avenue, Toronto, Ontario M1N 3A3.
 2. An Order that the Applicant, Gail Herrington has no further interest in the property municipally known as 299 Warden Avenue, Toronto, Ontario M1N 3A3 or in the alternative an order that the Respondent Ian Harvey shall pay the Applicant, Gail Herrington \$22,787.95 forthwith for her interest in the property.
 3. An Order that the remainder of the Applicant, Gail Herrington's application be dismissed.
 4. An Order for costs to the Respondent, Ian Harvey on a full recovery basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF MARCH, 2019

Sage Harvey

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