

CANADA / JUDGMENT

A.K.K. v. A.S.K.

2024 BCSC 1237

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1237 A.K.K. v. A.S.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.K.K. v. A.S.K.,

2024 BCSC 1237

Date: 20240710

Docket: E56381

Registry: New Westminster

Between:

A.K.K. also known as A.K.

Claimant

And

A.S.K. also known as A.K. and R. and B.

Respondents

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Claimant:

B.S. Sandhu

Counsel for the Respondents:

P. Mann

N. Jeon

Place and Dates of Trial:

New Westminster, B.C.

November 14-17, 20-24,
27-28 & 30, 2023

Place and Date of Judgment:

New Westminster, B.C.

July 10, 2024

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Introduction

- [1] After a 17.5-year marriage, the parties separated on August 27, 2018. During the marriage they had two children and accumulated substantial assets. These reasons address all issues stemming from dissolution of the marriage including parenting of their youngest child, child support and spousal support, the value of family property and division of family property and family debt.
- [2] The issues in this case are principally concerned with financial questions related to the incomes of the parties, excluded property claims and reapportionment of family property.
- [3] By November 1, 2018 the respondent, was subject to a number of interlocutory orders restricting his use of all funds that were or could be family property. He was required to provide documentary information and accountings concerning certain family property and was also prohibited from selling, disposing or otherwise dealing with family property and was ordered to deposit significant funds into the claimant's counsel's trust account. The respondent breached several of these orders; he concedes he remained in breach at the end of the trial.
- [4] The respondent's failure to disclose documents and information in a timely way, or at all, overshadowed the analysis in this case. In the result, many conclusions will reflect adverse inferences based on the respondent's failures to comply with his obligations under the Family Law Act, S.B.C. 2011, c. 25 [FLA], the Supreme Court Family Rules (the "Rules") and this Court's interim orders.

Background

- [5] The parties were born in India and married in India on February 2, 2001.
- [6] Each party completed secondary school and received minimal post-secondary education. The marriage was arranged by their family members.
- [7] The parties separated a number of times during their marriage--the last separation happened August 27, 2018. The claimant, reported to the police that the respondent had assaulted her, after which he vacated the home. He eventually entered into a peace bond protecting the claimant. The respondent denies any violence occurred.

- [8] The parties have two children; K.S.K. was born in August 2003 and A.K. was born in October 2007. They are currently 20 and 16 years old, respectively. K.S.K. is no longer a child of the marriage for support purposes. A.K. is in secondary school. Both children have resided with the claimant since the parties' final separation. Neither child has any relationship with the respondent at this time and prior counselling has not improved the childrens' relationship with him.
- [9] K.S.K. described several separations of their family from the respondent. At times they left the home to stay at a shelter and on another occasion to live with their grandmother.
- [10] K.S.K. has deliberately chosen not to have a relationship with the respondent. He had seen his father physically and verbally abuse his mother. He was present on August 27, 2018 when the respondent returned home and was drunk. The respondent slapped the claimant and the police were called.
- [11] At the time of separation, they owned two residences in Vancouver. The claimant and children lived at one property, located at East 57th Avenue, Vancouver (the "East 57th property") and the respondent occupied the other at Prince Albert Street, Vancouver (the "Prince Albert property"). Each of those residences contained rental accommodations and each party collected rents from the tenants in the home where they lived. The Prince Albert property has been sold and the net sale proceeds are held in trust.
- [12] In 2009, acquired an Italian restaurant in Vancouver (the "Restaurant"), which he continues to operate. The income earned from the restaurant, the market value of the restaurant and his excluded property claim to the restaurant are issues in this proceeding.
- [13] In June 2014, the respondent acquired property at 3641 West 11th Avenue, Vancouver (the "West 11th property"), jointly with an individual named Ravinder Bhatia (Mr. Bhatia). They constructed a residence on the West 11th property that was sold for profit in November 2017.
- [14] A significant event in the parties' financial affairs occurred in November 2018 when, after separation from the claimant, the respondent disposed of the bulk of sale proceeds from the West 11th property to his brother. The respondent's access to the sale proceeds and the extent to which some portion of these proceeds may be excluded property are central to the issues in this trial.
- [15] Each party has requested the Court to impute income to the other and to incorporate those imputations into any child or spousal support orders that might be made against the respondent.

The Respondent

- [16] The respondent is 60 years old and was raised in India where he lived until the 1980s. He was 38 years old when the parties married.

- [17] In 1985, the respondent left India and settled in Germany where he lived for seven years working in restaurants and learning to cook. He is multilingual. He then travelled to Italy where he obtained a diploma from a culinary school and became skilled in cooking Italian food. He returned to India in 1991, and not long thereafter, travelled to the US before arriving in Vancouver in 1992.
- [18] The respondent married for the first time in 1993 and has two children from that relationship. This marriage ended in 1999.
- [19] In 2000, the respondent returned to India where his family had arranged for an introduction to the claimant with a view to marriage. They married February in 2001 after which the respondent remained in India for three months before returning to Canada without the claimant. She eventually emigrated to Canada in 2003.
- [20] When the claimant arrived in Canada, the parties lived with the respondent's family at a residence owned by his brother and father. The parties eventually moved into a rental suite in South Vancouver and then purchased the Prince Albert property in April 2004 for \$445,000 a deposit of \$116,335 and a mortgage for the balance. The source of the deposit was controversial but is not in issue in this proceeding.
- [21] The respondent has two siblings: I.K. and K.K. In these reasons, I will refer to these brothers by their initials or by the term "brother". I mean no disrespect in doing so.
- [22] While living in Vancouver, the respondent initially worked in an Italian restaurant prior to purchasing the Restaurant for \$78,000. He owns it through his shareholdings in the corporation, B . After purchasing the Restaurant, he invested \$20,000 in improvements to the interior of the premises, including additional seating capacity. The source of the purchase funds expended by the respondent is controversial in this case.
- [23] After purchasing the Prince Albert property in 2004, the respondent purchased the East 57th property in 2014 where they lived until the date of separation. The claimant remained in the East 57th property after separation and collected all of the rents from tenants in that house. The respondent eventually moved to the Prince Albert property and collected rent from tenants in the basement of that house.
- [24] The respondent was injured in two automobile accidents in 2005 and received settlement funds of \$40,500 in October 2007 (the "2007 settlement"). He was also injured in car accidents in October 2010 and November 2012 and received \$105,000 in April 2016 (the "2016 settlement").
- [25] The respondent makes excluded property claims in regard to his contribution of personal injury settlements which he says were used to acquire some assets and develop others. He also said that some money he received from his family to acquire the Prince Albert property and to acquire the Restaurant should be excluded from the division of family property.

The Claimant

- [26] The claimant is 44 years of age and was 21 years old at the time of her marriage to the respondent. Her marriage was arranged by her parents.
- [27] The claimant completed secondary school in India and took some college-level courses but did not obtain any diplomas or certifications.
- [28] She contends that she lacked English-language skills which limited her chances of obtaining employment. She says the respondent would not encourage or assist her to become more proficient in English during the early years of their relationship.
- [29] During their children's infancy, the claimant provided most of the childcare on a day-to-day basis due, in part, to the respondent's employment and business demands.
- [30] At various stages during the marriage, the claimant worked for several employers including Can Pacific in a clothing business, and Golden Boy, a fruit packing company. Both employers paid her minimum wage. She made arrangements for childcare during her shifts.
- [31] The claimant also worked at the Restaurant when needed and had a short-term seasonal position with Canada Post. She also worked for GDI Services, a cleaning company, where she did custodial work at Canada Post premises.
- [32] She said when she obtained employment with Canada Post sorting mail, but she was not interviewed and ability to speak English was not necessary for the job.
- [33] At the time of separation, she was not employed but in May 2023, the claimant began working for FedEx where she earns \$19 per hour, plus additional pay for overtime work.
- [34] After separation, the claimant collected all of the rents from tenants at the East 57th property and used those funds to support herself and the children.

Procedural Background

- [35] The claimant commenced these family law proceedings on October 31, 2018. On that day she obtained without-notice orders concerning property and disclosure (the "October 31 order") and a protection order restraining the respondent's contact with her and one of their sons. The Notice of Family Claim and the October 31 orders were served on the respondent on November 1, 2018.
- [36] The following is a summary of some important features of the orders made concerning family property. The respondent was:
 - a) restrained from disposing of, transferring, converting or exchanging into another form, property, in which the claimant may have an interest without the consent in writing of the claimant, or without further order of the court;

- b) restrained from transferring, disposing, spending, assigning, or dealing in any way with bank accounts in the name of the respondent, including but not limited to the Scotia Bank investment accounts and CIBC accounts, held solely or jointly with anyone;
 - c) required to provide an accounting of funds he had received and withdrew from the parties' GIC accounts;
 - d) required to provide an accounting of ICBC settlement funds, in the amount of \$105,000 he received in 2016;
 - e) required to provide an accounting of the proceeds of sale (up to \$1,078,552.87) he received in 2017 from the West 11th property;
 - f) required to provide an accounting of the GIC funds he withdrew from that account in the amount of \$910,806.77;
 - g) required to deposit the funds that he withdrew from the GIC account in the amount of \$910,810.77, into the claimant's counsel's trust account forthwith; and
 - h) The respondent made no application to set aside or vary these orders.
- [37] On November 21, 2018, a further protection order was made and then extended on March 28, 2019.
- [38] On June 23, 2021, the respondent was ordered to provide his Form 8 financial statement with his personal and business tax returns for the three most recent taxation years. He was required to provide all credit cards, lease agreements and bank account statements for any accounts held by the Restaurant from January 1, 2016 to present (the "June 2021 order"). This Form 8 was not produced until October 2023.
- [39] The June 2021 order also required the respondent to produce a lengthy list of documents and information related to his brother, the development of the West 11th property, records and holdings relating to the Restaurant, tax returns and financial statements for R ., which was the company the respondent and Mr. Bhatia used to develop the West 11th property.
- [40] He was also required to produce complete bank statements for his personal and business accounts, held solely or jointly with anyone else, from January 1, 2016: TD Canada Trust, Scotiabank, Khalsa Credit Union, BMO, RBC, Coast Capital Credit Union, CIBC, Envision Financial, Vancity Credit Union, State Bank of India and Home Trust.
- [41] The June 2021 order also granted the claimant sole occupancy of the East 57th property, and required the respondent to make all mortgage, property taxes and insurance payments.
- [42] It is significant that the June 2021 order included a fine of \$5,000 against the respondent under ss. 212 and 213 of the FLA for failing to disclose and produce documents ordered by the court, failing to disclose financial information pursuant to the Rules; and providing information that was incomplete, false and misleading.

[43] The respondent is also subject to an entered order for costs of \$8,373 that remained unpaid at the time of trial.

Issues

[44] In this trial, the parties made claims with regard to:

- a) parenting of A.K.;
- b) family property and family debt, including whether:
 - i. the respondent has dissipated family property;
 - ii. family property should be reapportioned in favour of the claimant and/or the respondent;
 - iii. the respondent has a claim to excluded property; and
- c) imputation of incomes for both parties for support purposes;
- d) the claimant's entitlement to spousal support, including retroactive spousal support and quantum; and
- e) retroactive and prospective child support.

Credibility

The Respondent

[45] The credibility and reliability of all witnesses testifying at this trial were challenged and these challenges will be reflected in the result. This trial was compromised in several places due to gaps in document presentation and consistency in how documents were presented.

[46] The testimony of both parties raised issues surrounding their credibility but the respondent's testimony is the most troubling. In assessing credibility and reliability, decisions of this Court in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.); and *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013) helpfully summarize approaches to this analysis. In *Bradshaw*, Justice Dillon said:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna*

v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

[47] The following comment of Dillon J. is apposite to this case:

[188] The inability to produce relevant documents to support one's case is also a relevant factor that negatively affects credibility.

[48] The evidence in this trial was replete with credibility and reliability issues involving multiple bank accounts, insufficient accounting records and financial statements, and unresolved taxation issues. Notwithstanding court orders, there was a paucity of documents produced by the respondent pertaining to the sale proceeds of the West 11th property.

[49] I do not intend to outline all of the instances where I find the respondent's testimony lacked credibility and reliability. In these reasons I refer to a number of instances demonstrating the respondent's lack of credibility and reliability. The following instances demonstrate where his behaviour towards his obligations of disclosure and property preservation underscore his unreliability. Most significant was his refusal to abide by the October 31 order or June 2021 order very much undermining his credibility and reliability.

[50] The most glaring example of the respondent's disrespect of the court's order and disregard for his obligations is that between November 1, 2018 and the trial, the respondent refused to pay \$910,000 or any portion into the claimant's solicitors trust account and failed to account for the use of the funds as required by the October 31 order.

[51] The financial records confirm that the respondent had maintained a bank account in which he had deposited \$897,726 in a one-year GIC at CIBC (the "CIBC GIC"). He subsequently transferred that sum together with interest into an account at Khalsa Credit Union on September 6, 2018 and then immediately placed the \$800,000 into four \$200,000 GICs with the Khalsa Credit Union; he closed these on November 6, 2018.

[52] The respondent eventually transferred the \$800,000 invested at Khalsa Credit Union into an account in the name of his brother K.K. He did not disclose the fact of this transfer until cross-examination at trial.

[53] The respondent claims that he received two financial settlements from ICBC relating to injuries from a car accident. The use of these funds is controversial in this proceeding but, contrary to the October 31 order, the respondent failed to provide an accounting of how he used the 2016 settlement funds.

[54] After separation, the respondent deposited significant sums of money into multiple bank accounts. He frequently withdrew large sums of money in cash from bank accounts and was often unable to account for these funds.

- [55] The respondent alleges that he paid a number of debts from the proceeds of sale of the West 11th property but produced no invoices or other evidence of the debts he said he owed. He did not call any of the individuals he had been indebted to in order to confirm the terms of their loans, the timing of the loans or the repayments. Three specific individuals received money from the respondent; Mohammed Malik, Daljit Dhillon and Mr. Ranjit Nandha who were paid large sums into 2022 and 2023. He did not tender evidence from any of these individuals to confirm the respondent's assertion that he owed them money.
- [56] The respondent contends that most of the money he received from the West 11th property development was taken out in cash and used on an as-needed basis, including payment of mortgages on the parties' properties. He says that by the time of trial, all of the \$800,000 plus interest, if any, had been spent. He provided no accounting for these transfers, nor of his brother's investment of the funds. Moreover, neither the respondent nor K.K. provided any documentary evidence concerning these accounts, the location of accounts or use of the funds.
- [57] Here, the respondent has refused to produce relevant documents, notwithstanding that they were in his control and available to him.
- [58] As has often been stated, courts can draw adverse inferences against parties where there is deliberate nondisclosure of information required: see *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93, 1994 CanLII 3195 (S.C.). In *Laxton v. Coglon*, 2008 BCSC 42, at para. 27, the court held that: "once non-disclosure has been established, the non-disclosing party bears an onus of showing that there has since been full disclosure to the court".
- [59] In the context of nondisclosure in family cases, Justice Gropper concluded that disclosure failures can lead to adverse inferences but do not alone constitute a basis for unequal division or reapportionment of family property under s. 95 of the FLA because the inference simply operates to ensure equal divisions are respected where one party has failed to disclose assets: see *Friedlander v. Claman*, 2014 BCSC 2136 at para. 23.
- [60] The circumstances surrounding the respondent's failure and/or refusal to produce the records that could better inform the Court about the disposition of any part of the \$910,000 speak volumes to his credibility. Although he was worried about making the parties' mortgage payments, his worries do not justify breaching the court order, hiding or disposing of family property and defeating the claimant's interest in those funds. He repeatedly testified that he placed \$800,000 of the \$910,000 from the West 11th property in his brother's account in order to protect his money and make the mortgage payments. He disingenuously said he did not know the claimant could obtain some of the money.

- [61] The respondent insisted that he kept this money in his brother's name on the advice of his father, mother and family friends. When asked if his brother had kept the funds in a Khalsa Credit Union account he said, "I do not know, I gave it to my brother". He did concede that he transferred the money to his brother after he was served with the documents on November 1, 2018, including the October 31 order.
- [62] The respondent was asked why, even after receiving the June 2021 \$5,000 fine for insufficient disclosure more particularly for failing to disclose an accounting of the \$800,000. At that point, the respondent blamed his lawyer for not providing him much advice on the question. This response highlights the patent unreliability and lack of credibility demonstrated by the respondent.
- [63] Below, I have discussed the respondent's investment in crypto assets in March and June 2023 which he did not report on his 2023 financial statement. I do not believe the respondent when he says he has lost these investments; he provided no documentation concerning his purchases assets or the losses that may have resulted.
- [64] He said he did not know whether his crypto investment was in Bitcoin or Ethereum. He said he invested to make money and "she took my money and fled". He said communicated with this person he dealt with for about one year. This response is obviously untrue because records show he bought his crypto currencies in May and June 2023, only five months before the trial started.
- [65] Another inconsistency in the respondent's evidence concerns his explanation of distributing tips to his staff from cheques drawn on the Restaurant's account. He said he would take cheques from the Restaurant's account, cash the cheque and pay staff tips in cash. An examination of the 2023 year-end general ledger reveals that various cheques written to the respondent in 2023 were recorded in the general ledger as "loans to shareholder" and not distributed to his staff. In contradiction of his assertions, all staff received their tips by way of cheque totaling some \$21,451 in 2023. It is quite clear the respondent did not cash those cheques and pay tips to staff members. The preponderance of the documentary evidence highlights the respondent's lack of credibility and reliability.
- [66] The respondent's explanation for his reasons for repaying Mr. Malik in 2021 and 2022 for loans made in 2015 and 2016 are not consistent with the facts and probabilities stemming from the accepted evidence as a whole and he lacked credibility. His evidence that he was repaying debts incurred in 2015 and 2016 and 2021 or 2022 (three to five years after the date of separation) was unreasonable and unlikely. Moreover, the fact he had no agreement with Mr. Malik, simply received cash from him, and did not call him as a witness further erodes his credibility.
- [67] In summary, the respondent lacked overall credibility and reliability in his evidence and his claims will be subject to several adverse inferences.

The Claimant

- [68] The claimant's testimony also suffered from credibility issues. As an example, in an October 2023 F8 financial statement, the claimant said that income from the basement of the East 57th property was \$2,550 per month. In cross-examination, she insisted that the income for that suite was only \$2,300 per month. Cross-examined on her earlier testimony, she agreed that by November 2023 the income from the basement had risen to \$3,550.
- [69] She also confirmed that she had not informed the parties' home insurance company of the increase in tenants from two to five thereby putting their insurance coverage at risk.

Parenting

- [70] K.S.K. is currently 20 years old and is an apprentice plumber, earning \$16.75 per hour. During his teenage years, he worked at the Restaurant as a server. He lives with the claimant and A.K. at the East 57th property but does not pay rent. He testified in this trial at the request of the claimant indicating he has had no relationship with the respondent since 2018 and does not wish to reconcile with him at this time.
- [71] K.S.K. testified about witnessing the respondent's violence towards the claimant. He said he had little relationship with his father before separation and usually saw him on Sundays and Mondays because he was working during the days and evenings.
- [72] It is apparent that A.K. had a similar relationship with the respondent before separation and has had virtually no contact with him since. A.K. did not testify.
- [73] The parties share joint guardianship of A.K. The respondent recognizes that A.K. has expressed his desire not to have contact with the respondent at this time. He concedes that the claimant should have final decision-making responsibility with regard to A.K. but wants the claimant to consult with him regarding significant changes affecting A.K.'s life. He also wishes to be consulted with regard to any optional s. 7 expenses.
- [74] Overall, the respondent wants the opportunity to contact A.K. and to keep open the possibility of rekindling a relationship with the child that could include giving him A.K.'s cell number and email address.
- [75] Bearing in mind that A.K. becomes an adult in two and a half years and is at an age where his views must be taken into account, the respondent proposes a constructive and reasonable approach to the relationship that will hopefully result in future contact at the child's discretion.

- [76] In my view, it will be incumbent on the claimant to make her best efforts to encourage A.K. to develop a relationship with his father, notwithstanding the history of the marriage. The ultimate decision, in the absence of any other information, favours a relationship and structure that respects the child's views. The claimant's encouragement of a relationship between A.K. and the respondent is something that is and will be in the best interests of the child in the long run.
- [77] In the result, the claimant will have primary parenting responsibilities for A.K. with A.K. spending time with the respondent when A.K. has agreed to contact or communication with the respondent as the child wishes.
- [78] The claimant is ordered to make best efforts to encourage A.K. to pursue a relationship with the respondent bearing in mind that the primary consideration must be the child's wishes.
- [79] Finally, I accept that if the claimant seeks to recover optional s. 7 expenses from the respondent, she must consult with him before incurring costs exceeding \$250. Given the age of A.K. the claimant must consult with the respondent about significant decisions affecting the child's life. However if there is disagreement between the parties the claimant will be entitled to make decisions without the respondent's consent; if he objects to those decisions it is open to him to apply to court for directions.

Family Property

Legal Framework

- [80] The division of family property and family debt is governed by the FLA. The relevant provisions are as follows:

Family property

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
 - (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

- (2) Without limiting subsection (1), family property includes the following:
- (a) a share or an interest in a corporation;
 - (b) an interest in a partnership, an association, an organization, a business or a venture;
 - (c) property owing to a spouse
 - (i) as a refund, including an income tax refund, or
 - (ii) in return for the provision of a good or service;
 - (d) money of a spouse in an account with a financial institution;
 - (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;
 - (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
 - (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.

Family debt

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

Valuing family property and family debt

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
- (i) an agreement dividing the family property and family debt is made, or
- (ii) of the hearing before the court respecting the division of property and family debt.

[81] Section 81(b) sets out the entitlement of each spouse on separation to an undivided one-half interest in all family property as tenants in common. Each spouse is equally responsible for family debt. Some property is excluded from "family property" under s. 85 of the FLA.

- [82] Family debt is defined at s. 86(a) as including all financial obligations incurred by a spouse during the period of the relationship. Debt incurred after the date of separation is only family debt if it is incurred for the purpose of maintaining family property: FLA, s. 86(b).
- [83] The value of family property is generally the fair market value at the date of the trial, subject to agreement or as otherwise ordered: FLA, s. 87. In *Maguire v. Maguire*, 2016 BCCA 431, the Court of Appeal discussed the meaning of the term "fair market value":
- [27] The appellant's first argument is that any taxes payable on a sale must be accounted for in the valuation of the parties' interests in HMI and ELC. He says that in order to correctly apply the definition of "fair market value" in s. 87, one must necessarily, i.e., as a matter of law, include the calculation of taxes payable upon a sale.
- [28] Although the FLA mandates valuation based on "fair market value", it does not define that term. The definition of "fair market value" as set out in the business valuation of the jointly appointed business valuator is as follows:

5.01 Fair market value is defined as:

The highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act, expressed in terms of cash.

- [29] The respondent referred the Court to Black's Law Dictionary which defines "fair market value" as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction; the point at which supply and demand intersect": Black's Law Dictionary, 8th ed., sub verbo "fair market value".
- [30] In my view, there is nothing in the FLA that suggests or entails that the meaning of "fair market value" is anything other than its ordinary meaning. The business valuator's definition and the Black's Law Dictionary definition are consistent. Fair market value is the price at which a transaction would occur, in an open and unrestricted market between informed and prudent parties acting at arm's length, where neither party is acting under compulsion. Thus, if the sale of an investment property would trigger a capital gain, and capital gains tax payable by a vendor, the fair market value of the property is not reduced by the taxes payable by the vendor. It follows that the use of "fair market value" in s. 87 does not entail that the fair market value of family property is reduced by taxes payable.

[Emphasis in original.]

See also *D.Z. v. M.Z.*, 2022 BCSC 706 at para. 152.

- [84] Further, the Court of Appeal in *Healey v. Healey*, 2024 BCCA 68 endorsed a summary of principles necessary to reflect tax consequences in the division of family property:
- [87] In *McKenzie v. McKenzie*, 2015 BCSC 241 at para. 8, Savage J., as he then was, summarized the principles arising from the case law as to when tax consequences should be accounted for in the division of family property:

- (1) where there is sufficient evidence to satisfy the Court of tax consequences or other costs inherent in a compensation order the Court should take these into account in setting the compensation amount;
 - (2) the onus is on the payor to provide the trial judge with the necessary evidence of the tax consequences arising from the division of assets or other consequences of having to acquire the funds to pay the payee;
 - (3) there is no absolute rule as to how the compensation order might be calculated, depending, as it does, on the type of assets to divided, timing, the parties involved and other orders in the action;
 - (4) the matter should be considered as of the date of trial, not as of the date the matter comes back before the court; and
 - (5) the overriding principle is fairness.
- [85] In *Brazinski v. Brazinski*, 2023 BCCA 359 at para. 76, the Court of Appeal said that where "property was purchased with excluded property then, even if the evidence was insufficient to determine whether a gift was intended, the presumption of advancement would likely apply".

Property Overview

- [86] The analysis of the parties' family property and family debt and the division of family property is severely hampered by the respondent's continuing breach of court orders, as mentioned above.
- [87] The following list is an attempt to record the status of property owned and debts owed at the date of separation and at the date of trial. I was not provided a copy of the parties' first F8 financial statements that might have better indicated the extent and value of assets at the date of separation although the statute directs that valuation of family property be made as of the trial. Each of the parties provided lists of family property to be divided but the evidence did not support inclusion of all the assets listed nor the value of those assets.
- [88] Property acquired after the date of separation only becomes family property if it is derived from assets that were family property at the date of separation. For example, a 2017 Acura and a 2020 Tesla were acquired after separation. The evidence indicates that the Tesla belongs to the Restaurant and is not family property because the value is subsumed in the value of the corporation. The Acura belongs to the claimant and was acquired in 2022. Absent evidence that these items were acquired with funds that were family property, they should not be included as family property to be divided.
- [89] There was no evidence concerning the fair market values of some assets, such as the Lexus automobile and the Pathfinder automobile. Where there is no evidence about the value of an asset, I will use the lowest value set out in the parties' latest F8 financial statements..

FAMILY PROPERTY

Value from the at Date of Separation

Value at Date of Trial

Prince Albert property

\$538,791 (after sale)

\$228,000 (after interim advances)

East 57th property

\$2,350,000 (current appraisal)

(\$2,350,000)

Net \$ 1,359,884

CIBC GIC (respondent)

\$910,000

Estimated \$ 625,000

Including interest

TD Bank deposit (claimant)

\$21,218

\$20,092 (July 2, 2023)

Shareholder' Loan due from the Restaurant

\$ 25,875

Nil

RBC RRSP (respondent)

\$20,661

\$5,661

CIBC RRSP

\$4,478

\$4,478

Primerica RRSP

\$1,191

\$1,191

Primerica RRSP 533 (respondent)

\$495

\$495

Deposit funds held in trust

O

50,000

2007 Lexus (respondent)

\$12,500

\$12,500

Nissan Pathfinder (claimant)

\$2,000

\$2,000

the Restaurant shares retained earnings

\$73,086

\$70,940

RRSP (claimant)

\$2,225

\$2,225

Rents collected by claimant on East 57th property

\$187,500

Rents collected by respondent on Prince Albert property

\$86,800

Total

\$2,655,771

Debt

East 57th property mortgage

(\$990,116)

To be determined at payout

(\$990,116)

Mortgage payments made by respondent

(\$466,120)

Taxes paid

Line of Credit

(\$22,412)

(\$34,239)

Totals

\$4,234,374

\$2,950,942.

Debt

\$1,466,120

\$1,466,120

Net value of Family Property

\$1,484,482

[90] The analysis of the parties' family property, family debt and the division of family property is severely hampered by the respondent's continuing breach of court orders concerning preservation of the West 11th property sale proceeds, prohibitions against the disposition or transfer of property, his use of the funds generated in the Restaurant and failure to account for family property under his control.

[91] I will address the value of family property in the following analysis of each asset owned by the parties at the date of separation and at the date of trial. Once I have made a division of those assets I will move to consider the parties excluded property claims and claims for reapportionment and unequal division of the family property.

The West 11th Property

[92] The net proceeds of the West 11th property sale represent the asset with the highest value (apart from real estate) at the time of separation. The respondent contends the entirety of this money has been spent and nothing remains to be divided.

- [93] The respondent and Mr. Bhatia signed an agreement in June 2014 to acquire the West 11th property for the purpose of constructing and selling a residence. They proceeded with construction through R , a jointly owned company. They purchased the property for \$1,450,000, with a loan and mortgage from TD Bank in the amount of \$1,100,000, a deposit of \$70,000 and \$311,919 payable upon completion.
- [94] Each owned a one-quarter interest in the property and their spouses, including the claimant, were also owners of a one-quarter interest each.
- [95] The respondent used a BMO line of credit to fund his one-half of the \$311,919 payable on completion. The respondent said the claimant did not know that he was a shareholder in R . He initially testified that the claimant did not know about the development of the West 11th property but later resiled from this testimony; he said she knew he was buying a property but did not know about the financing.
- [96] In November 2014, the respondent also arranged to borrow \$240,000 from his acquaintance, Daljit Dhillon secured by a mortgage against the Prince Albert property financing for the development of the West 11th property. The claimant and respondent granted this mortgage against their home.
- [97] Construction was completed in August 2016 and the respondent and Mr. Bhatia sold the West 11th property for \$3,142,857 in spring 2017. After paying costs including a \$7,000 deficiency holdback, real estate commission of \$112,350 and \$1,136 being the vendor's portion of taxes an discharging the TD mortgage of \$1,100,000, \$1,078,552 was paid to each of the partners in this development. The claimant and respondent received their funds on or about November 9, 2017.
- [98] After all of R . expenses were paid, \$10,000 was kept in trust to address construction deficiencies; that money has been used.
- [99] However, the financial statements for R. for 2017 show that the company held retained earnings of \$309,217. Neither party explained or accounted for the eventual disposition of this equity in R . There was no mention in the evidence of what happened to these funds.
- [100] The respondent testified that the profit from the West 11th property development was divided in four portions, one of which was paid to him and one to the claimant. On September 9, 2017 the respondent deposited their share of \$1,078,552.87 into a TD Canada Trust Bank account ending in 8807.
- [101] The respondent said he and the claimant owned 50% of the West 11th property development and 50% of the monies received from it. The respondent could not recall when he actually received these funds but records confirmed this amount was paid on November 9, 2017 and in his 2017 tax return, the respondent reported net business income of \$81,816.47 coming from the gross sale proceeds of sale . He paid income tax of \$25,508. The claimant's 2017 tax return indicates she received business income of \$81,816 and paid income tax of \$28,508.

- [102] After depositing \$1,078,528 to the parities' bank account, and less than nine months prior to separation, he withdrew \$25,000 on November 27, 2017; \$55,000 on December 29, 2017; and a further \$16,000 on January 2, 2018. He then withdrew \$70,000 on May 3, 2018. There was some suggestion indicating these withdrawals, totaling \$166,000, were used to pay debts stemming from the West 11th property but no accounting of the details of the amounts or the recipients of funds were in evidence. There is insufficient evidence to ascertain how the respondent used these monies. Bearing in mind that the claimant was the owner of one-half of the proceeds from the West 11th property development, and the funds deposited to a joint account, the claimant was not consulted concerning access or control over any portion of the \$1,078,528.
- [103] Next, the respondent took \$897,726 of the net proceeds of the West 11th property sale from the TD Bank account on May 11, 2018 and deposited them into a CIBC GIC where it remained until he transferred \$910,000 to the Khalsa Credit Union, account number ending in 9813, on September 6, 2018. The initial deposit of \$897,726 had increased to \$910,000 at CIBC as a result of interest earned on that term deposit. No mention was made of the \$806 not transferred to the Khalsa Credit Union.
- [104] No records were produced by the respondent confirming what, if any, debts were outstanding from the West 11th property in 2017 and 2018, save and except \$34,299 he took out of the Khalsa Credit Union account to repay an outstanding line of credit with CIBC. It is clear the respondent kept a substantial portion of the \$910,000 for himself, there is no evidence concerning the total amounts he may have kept for himself.
- [105] The respondent said he opened this new Khalsa Credit Union account within one or two days of separating from the claimant.
- [106] Also on September 6, 2018, the respondent took \$800,000 from this chequing account and invested \$200,000 in four separate term deposits at Khalsa Credit Union ending in numbers 9854, 9847, 9839, and 9821. The next day, the respondent transferred \$110,000 to his own chequing account. By September 18, 2018, the respondent had disposed of \$75,689 of the amount remaining in his chequing account. There has been no adequate accounting of the respondent's use of these funds.
- [107] The respondent said he opened the Khalsa Credit Union account because he was afraid he would not have sufficient funds to pay the approximately \$9,000 per month mortgage payments on the Prince Albert and East 57th properties. He said he moved other funds into a separate bank account so that he could use those funds when needed. I do not believe his assertions that he was only worried about his ability to make mortgage payments because he could have easily obtained court approval for such measures or used the Restaurant funds if necessary. It is equally true that the respondent was also fearful the claimant would take money out of the account.

- [108] He did not credibly explain his reasoning for keeping the entirety of these funds out of joint control with the claimant nor did he seek her agreement to use the funds to pay mortgages or any other expenses.
- [109] The respondent was served with the October 31 order on November 1, 2018 and on the same day he removed \$20,000 from his Khalsa Credit Union account in cash. He said he kept this money for his own use if he was in need; he wanted money available for "easy use".
- [110] On November 6, 2018 he removed \$12,000 cash from this account, closed the GIC at Khalsa Credit Union and received \$802,740.84; \$2,740.84 represented interest earned on that account.
- [111] This \$802,740 was then deposited into account number 631200 in the name of K.K. In cross-examination, the respondent initially could not recall if this was a joint account held by him and K.K. or if it was in K.K.'s name alone. In reality, these funds were eventually deposited in K.K.'s account and he remained in possession of these funds. K.K. said he transferred the entire amount to the respondent.
- [112] The respondent said that when he needed money he would ask his brother to obtain it from the Khalsa Credit Union and usually (always) received cash at times in the tens of thousands of dollars.
- [113] When the respondent testified at trial, he said none of the \$800,000 remained with him or his brother because it had all been spent. Although he had been served with the October 31 order, he said he did not review it at the time. He testified that his new lawyer explained the court order to him five weeks after but he did not comply. He explained incredulously, "no one guided me properly at the time" and it was important to pay the mortgage from this money.
- [114] He conceded he breached the order; he said "I am sorry I did not do that". I find the respondent's testimony concerning his breach of the order to be incredulous; with the advice of counsel by early December 2018 he knew his obligations under the order and simply refused to comply. I do not believe the respondent was sorry; if he had realized his error in later 2018 or after, he would have transferred some or all of the funds to the claimants' lawyer's trust account.
- [115] When cross-examined further about his failure to comply with the October 31 order, he said he had received counsel from other persons in his family, presumably advising him against compliance with the court order. He said he transferred the funds to his brother because he did not want anything in his name at the time. He said, "I acted according to my counselling". He would not identify the source of that advice.
- [116] He testified that the money was all spent by the time of trial, but when asked if any of the funds remained in the Khalsa Credit Union account; he responded, "I don't know--I gave it to my brother". I have no doubt the respondent and K.K. it were in regular contact and would discuss the respondent's need for cash. His response that he did not know what his

brother had is patently untrue and underscores his lack of credibility. I do not believe the respondent gave his brother \$800,000 without knowing the details concerning his use of those funds or amounts remaining in his brother's bank account. It is more likely than not that the respondent kept an accounting of the funds given to his brother and would have known all of the details concerning his brother's account.

[117] At one point the respondent said he wanted interest on the money for his needs but he refused to provide any information about interest that was earned.

[118] The respondent was cross-examined on an affidavit he swore June 25, 2023 where he deposed he did not have any funds available to pay property taxes on the former family home. As a further example of his lack of credibility, he testified that he used the funds from the West 11th property to pay the Coast Capital mortgage (on the West 57 property) monthly from September 2018 until May 2023. It is clear from the Restaurant records and the respondent's bank records that he repeatedly paid the Coast Capital mortgage from funds taken out of the Restaurant and put into his own account.

[119] The respondent made it clear that he transferred the \$800,000 to his brother after he had received the October 31 order. He said he kept back the \$110,000 from the funds received from CIBC (before transferring funds to his brother) for his future needs.

[120] In yet a further inconsistency in his testimony, the respondent said that some of the \$900,000 deposited to the Khalsa Credit Union in November 2018 had come from his \$105,000 ICBC settlement and the West 11th property sale proceeds. He invited the Court to accept that part or all of the 2016 settlement money was used on the construction of the West 11th property. He was asked if the contribution to this building project had come from the TD account or CIBC account; his response was "could be either I don't know".

[121] Overall, on questions relating to the respondent's use of the \$800,000 transferred to his brother, his testimony was unreliable and replete with contradictions, inconsistencies and improbable assertions.

[122] After persistent cross-examination, the respondent eventually testified that the first time he had disclosed to the claimant that he had transferred \$800,000 to K.K. was during this trial. When asked why, he responded that "no one asked and I did not tell". Contrary to that answer, he also said he did not disclose these facts until the trial because he was frightened and needed the funds in his brother's name to pay the mortgages.

[123] In the end, I have little doubt that the respondent continues to hold, either directly or through his brother, portions of the \$800,000 given to K.K. I do not know what portion, if any, of these funds remain in the respondent's possession or control. Having made mortgage payments from funds he took from the Restaurant, he clearly did not use all of the funds transferred to his brother to make all of the mortgage payments on their two homes.

- [124] In the circumstances, I will infer that the respondent likely did not spend the entire \$800,000 and has put some of that money elsewhere without informing the claimant about its location. I reject the respondent's assertion that the entire \$910,000 from the proceeds of the West 11th property sale have been spent and are gone and they are no longer in his name nor in K.K.'s name. K.K. said he paid out the entirety of the \$800,000 and any interest thereon (although he did not know if any interest had been earned on these funds while in his possession) before the trial started.
- [125] I conclude that the value of the family property resulting from the West 11th property development at the date of separation was at least \$910,806 plus the money the respondent kept to himself at that time. This is the amount the respondent was required to pay into court and his failure to do so has significantly prejudiced the claimant.

Crypto Investment and Other Funds

- [126] In cross-examination, the respondent disclosed that he had invested in crypto currencies through an individual who advised him on purchases. He said he did not disclose his crypto holdings because he said he "did not know if I had to". He said he does not know if he has a crypto wallet and did not know the individual who took his investment but believes he has lost that money.
- [127] On examination of the respondent's RBC bank account, those records show that in June 2023 he purchased \$16,075 in an investment that is described as "crypto.com" followed by another purchase from crypto.com of \$1,574.
- [128] The respondent produced no documents or records regarding the source of funds invested in crypto currency of more than \$17,500. His failure to produce any information other than the bank record of purchases reinforces my view that the respondent has not been truthful in providing evidence or disclosure of his holdings.
- [129] The nondisclosure of this information leads me to infer and conclude the respondent may have had these and other undisclosed assets by the time of trial.
- [130] Although the respondent indicated that this bank account had a balance of \$1,504 on October 3, 2023, the same account had a closing balance in May 2023 of \$8,212 and by May 15, the account had some \$24,212 on deposit. The source of these funds was not disclosed by the respondent nor was there evidence from the respondent about his expenditure of \$22,000 between May 15 and October 3, 2023.
- [131] I infer from these banking records that within six months of the trial he spent this money without ever disclosing or accounting for the source or use of the funds. At or about the same time, he also recorded a deposit of \$16,000 to his personal account and an immediate \$16,000 cash withdrawal from the Restaurant.

[132] The respondent's use of this RBC account including the purchase of crypto investments and the deposit and withdrawal of \$16,000 without candid explanation by the respondent undermines my confidence in his evidence.

[133] I infer that he used funds that were family property in this investment activity and that \$24,000 was, in 2023, family property in his possession.

\$50,000 Deposit

[134] The respondent explained that he had made an attempt to purchase the claimant's interest in the Prince Albert property in August 2022. He paid \$50,000 into a realtor's trust account and concedes that this \$50,000 came from the \$800,000 held by his brother and is family property to be divided equally between the parties.

[135] I infer from this decision that the respondent was disingenuous when he explained his reasons for not complying with the court order because he was concerned about making ongoing mortgage payments. By this time his attempt to use this of \$50,000 to obtain the Prince Albert property amplified his disregard for the court's order to deposit those funds with the claimant's lawyer. There was no justification for keeping funds in his brother's account and not paying those funds to the claimant's lawyer as ordered; his actions are contemptuous of the court. His actions do not reflect a concern with having sufficient money to pay the mortgages.

The Restaurant

[136] The value of the Restaurant is a complicated issue that affects the calculation of value of family property to be divided and the respondent's income for the years after separation. Ms. Daum provided her November 9, 2023 opinion concerning the fair market value of the respondent's shares in the Restaurant in her report tendered at trial. There was no issue concerning the admissibility of Ms. Daum's report.

[137] I have reached a conclusion that Ms. Daum's opinion concerning valuation of the fair market value of shares in the Restaurant was not reliable for a number of reasons. I will set out my analysis of this issue and the conclusions resulting from that analysis. Counsel did not address some of these issues during trial. However, Ms. Daum was cross examined on some of her assumptions, including her belief that financial statements provided to her were accurate and included a value of the Tesla purchased in 2020.

[138] It must be remembered assumptions underlying an expert's opinion must be proved at trial particularly where those assumptions are pertinent to the opinion. In this case, Ms. Daum appeared to have received documents from the respondent that were not included in the trial evidence presented. For financial records including the general ledgers from 2018 to 2022 were not produced.

[139] Family property includes a share or an interest in a corporation: FLA, s. 84(2)(a). The value of family property is based on its fair market value on the date of the hearing respecting the division of family property: FLA, ss. 87(a) and (b)(ii).

[140] As noted in Maguire at para. 28, this includes:

The highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act, expressed in terms of cash.

[141] Ms. Daum opined that the value of the Restaurant was between zero and \$33,000 with the difference between those two estimations based on whether the respondent repaid a \$101,000 loan taken by the respondent from the company between May 1, 2018 and April 30, 2023. She said that if this loan to shareholder was repaid, then the company would have a value of \$33,000 and absent repayment the company would have no value.

[142] Ms. Daum did not address the fact that between the date of separation and date of trial the respondent moved more than \$323,705 from the Restaurant into his own account notwithstanding that the amounts withdrawn exceeded loans he took and his Line 15000 incomes after separation. The absence of the general ledgers prevented the court from assessing the basis for these payments and whether they impacted the value of the business covering the period from separation until April 30, 2022.

[143] Ms. Daum adjusted goodwill to nil because she believed this sum is not a tangible asset that should be included in an evaluation exercise. I was curious that the respondent had attached a value for goodwill when he purchased the business but she attached no value to that item in 2023.

[144] Ms. Daum relied on the following assumptions:

- b. As at the Valuation Date, all assets, wherever located to which the Company had ownership rights of any nature, had been recorded in the accounts of the Company and represented a continuing benefit to the Company.
- c. The fair market value of the Company's assets and liabilities, except as noted, are equivalent to their respective netbook values.
- d. As at the Valuation Date, all liabilities of the company had been recorded in the accounts of the Company.
- e. The Company had no significant undisclosed liabilities, contingent liabilities, including potential environmental liabilities, contractual obligations, commitments or litigation pending or threatened at the Valuation Date.
- f The Company had no redundant assets or liabilities that have not been noted in this report.
- g. The Company's unaudited financial statements are free from material misstatement, and there are no unrecorded commitments or contingencies.

- h. Netbook values of property and equipment approximate the fair market values at the Valuation Date.
 - i. The second vehicle purchased in fiscal 2021 is for personal purposes.
- [145] In order for the Court to accept Ms. Daum's opinion, the assumptions must be proved by one or both parties.
- [146] Ms. Daum did not visit the restaurant nor did she examine the plant and equipment or the seating capacity of the restaurant. She did not interview the respondent or speak with his accountant.
- [147] Ms. Daum's opinion did not take into account the fair market value of the shares of the Restaurant as an ongoing business nor its value at the date of separation.
- [148] Her opinion was premised on the accuracy of various assumptions concerning the value of assets including goodwill at the time she formed her opinion. She used what was described as an asset-based technique of measuring the value of hard assets net of all outstanding liabilities. She said that where shares are valued, adjustments are made for the tax shield differences between market values of the assets and their cost base for income tax purposes. Ms. Daum recognized that the family property in this case is in the shares of the Restaurant owned by the respondent and that the respondent did not own any of the assets personally.
- [149] She proceeded to discuss the capitalized earnings or cash flows of a business with reference to the shareholder equity in the tangible assets supporting its operations. She then suggested that when earnings or cash flows exceed the value of its tangible asset backing, no value is ascribed to commercial goodwill and/or intangible assets.
- [150] Her opinion was based on her review of documents and was subject to the assumptions, restrictions and qualifications noted in the report. She calculated the fair market value of the Restaurant November 9, 2023 to be \$33,000. This amount includes the \$101,000 loan by the Restaurant to the respondent in the anticipation that the loan will be repaid. Absent repayment of that debt, the Restaurant would have no value.
- [151] She said:
- Our calculation of fair market value in a notional market must be differentiated from the concept of price. . As a result, the price at which a sale of the business might take place may be higher or lower than the notional market value estimated herein.
- Therefore, while our conclusions are suitable for notional valuation purposes, the share values determined in this report may not be an appropriate asking price if the businesses were actually exposed to the market for sale."

[152] Ms. Daum said she used an adjusted net book value of the business measuring the depreciated value of hard assets but net of all outstanding liabilities. She assumed the fair market value of tangible assets was equal to the depreciated book values of those asset. She believed that the cash flow ranges do not support the attribution of any goodwill to the business.

[153] There are a number of issues raised in Ms. Daum's assumptions that undermine the valuation she attributed to the Restaurant.

2020 Tesla

[154] First, Ms. Daum said that all assets had been recorded in the accounts of the company and represented a continuing benefit to the company.

[155] In reviewing the company's financial records from 2019 to 2022, this assumption has not been proved. First Ms. Daum said that the Restaurant purchased a 2020 Tesla on August 21, 2020 and concluded that the respondent was using the Tesla for his personal purposes 50% of the time although she said it was not needed for the purposes of the business. This assumption was against the evidence given by the respondent. He said he was using the new Tesla to deliver food for the business.

[156] It is not clear how she reflected his personal use of the vehicle when assessing the fair market value of the business. The Tesla was purchased for \$60,866, including a \$15,000 down payment and deposit and \$37,886 financed with RBC. the Restaurant records payments of \$440 per month to RBC.

[157] The financial statements reflected the value of plant and equipment on April 30, 2020 at \$54,728. In that year, the company's long-term debt was \$40,000 (likely money owed to the government of Canada).

[158] Plant and equipment for the Restaurant increased in 2021 by only \$6,000 from 2020. On the other hand, long-term debt increased from \$40,000 in 2020 to \$83,215 in 2021 reflecting the increased debt due to the acquisition of the Tesla without any reported increase in property, plant and equipment values. It is clear to me that the debt incurred to purchase the Tesla is recorded in the 2021 to 2023 financial statements without any recognition in the statement of assets of the value of the car acquired in 2021.

[159] Although Ms. Daum testified that the Tesla was included in the plant and equipment (assets) of the company, she was demonstrably wrong.

[160] In years 2019 and 2020 the Restaurant's amortization expenses were \$2395 and \$2148 respectively. However, in years 2021 amortization increased to \$15,477 dropping to \$6,488 in 2022. In 2023 amortization expenses dropped to \$4,664.

- [161] Nonetheless, Ms. Daum's opinion functions on an assumption that the fair market value of the company's assets is the equivalent to the respective net book values. That assumption was not proved in this trial. Moreover, the netbook values of the tangible assets did not include the capital cost of the Tesla as depreciated over time. She offered no explanation for why a market valuation of the plant and equipment, including the 2020 Tesla, was not included in the valuation.
- [162] In addition, Ms. Daum was not provided the contract of sale for the purchase of the Tesla indicating the total purchase price was \$60,886.
- [163] In her analysis, Ms. Daum said that she had identified personal expenses in the Restaurant that ought to be excluded from the expenses of the company. She said she had excluded one-half of the cost of the Tesla on that basis.
- [164] Thus, it is curious as to why the value of the Tesla as an asset was excluded entirely from the tangible asset calculation when only one-half of the expenses were excluded because they were for his personal use.
- [165] It is clear to me that the financial statements made available to Ms. Daum did not accurately reflect the 2021 to 2023 balance sheets. Coupled with the respondent's testimony concerning his use of this new Tesla in the business, she did not take into account that the financial statement reflected the debt incurred to purchase the asset but not its value as an asset to the business, thus rendering the financial statement unreliable. Thus, it is apparent that the company's tangible assets are more likely in the order of \$73,000 if an "adjusted net book value" approach was used.

Fair Market Value of Shares

- [166] I recognize Ms. Daum's opinion is based on a theory that the value of a business is somewhat dependent on the earnings history of that business. However, she concedes that other businesses with apparently similar product are for sale for between \$128,000 and \$500,000.
- [167] She was not provided a copy of the 2009 purchase agreement of the Restaurant assets and did not appreciate that her understanding of the purchase price was incorrect; the price was \$78,000, not \$70,000.
- [168] Ms. Daum said that she had obtained the asking price for three restaurants in Vancouver ranging from \$128,000 to \$249,000. She pointed out the disconnect between her valuation of the Restaurant shares and these other establishments and said "it is quite possible that these restaurants are anticipating sales of assets only" and that prospective buyers of those restaurants would be looking only to buy employment.

- [169] Ms. Daum said she could not assess the value of this business on the basis of the highest price a willing buyer might pay. She did not have any information other than advertised sale prices for other restaurants and she did not contact these restaurants to question them about their profitability.
- [170] There was no evidence supporting her assumption that the fair market value of the assets would be the same as their depreciated value at the time. Moreover, having made inquiries about sales of similar restaurants in Vancouver without any attempt to assess whether these businesses represented comparable enterprises or comparable plant and equipment she discounted any good will value in the business without visiting the Restaurant's premises or the other restaurants she described.
- [171] Ms. Daum assumed that the company had no significant undisclosed assets or liabilities but recognized the respondent had not accurately reported his own income stemming from loans he took from the Restaurant. The Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 15(2) mandates that if shareholders owe money to the corporation and the debt is not repaid within one year, those amounts must be added to the shareholder's income in the next year for the purpose of taxation. Ms. Daum said the respondent may be required to pay income tax on the sum of \$101,000 owed to the corporation for the years in which those loans are accrued and she assumed he would make those payments without comment about what happens if he fails to report that income.
- [172] Family property includes all property that either party owned at the date of separation and which is not otherwise excluded property. The Restaurant was created in 2009 and at the time of separation, the claimant's interest in the shares the respondent was the owner of all of the shares in the Restaurant and the claimant was entitled to an undivided one-half interest as a tenant in common. The financial statements for the Restaurant's year-end 2018 reflected that the respondent was owed \$25,825 from the company by way of a shareholders loan. This was a personal belonging to the respondent as at separation. Sometime between April 30, 2018 and April 30, 2019 the respondent was repaid his \$25,825 shareholders loan and incurred a debt owing to the Restaurant of \$16,463. After separation, that debt grew to \$101,000. Moreover, part of the debt arose from payments of \$8,000 by the respondent to a law corporation acting for him in this dispute.
- [173] The respondent provided no evidence concerning the \$25,825 received by him in that time. In view of the respondent's behaviour throughout their post-separation lives, I infer that he took this \$25,825 after separation was not disclosed or accounted.
- [174] Other shareholder loans (to the respondent) to himself based on cheques he wrote to Ranjit Singh Nandha for \$17,000 on April 24, 2023 and \$6,000 on May 31, 2023. As noted above, the respondent's testimony on this point lacks credibility. And those payments are both properly attributed to the respondent as loans from the company.

- [175] Ms. Daum recognized that the monies given to Mr. Nandha formed a portion of the respondent's debt owing to the Restaurant. The evidence concerning the respondent's shareholder loan account from the date of separation to trial is simply unsatisfactory based on the extensive list of other funds he took from the company after separation.
- [176] In May 2023, the respondent took \$15,500 from the Restaurant's bank. He paid \$6,000 to Mr. Nandha for rent (presumably his rent on the Prince Albert property), \$3,500 for his tips, \$4,300 for his pay. Further, \$2,000 was transferred electronically from the Restaurant to his RBC account. Curiously, the respondent remains a tenant in the Prince Albert property now owned by the same Mr. Nandha and pays rent of \$3500 per month. He testified reports receiving no rents from the same property he had rented out following the separation.
- [177] In addition, the respondent took another \$16,000 from the Restaurant and deposited that sum into his personal bank account, immediately withdrawing the same amount in cash but this payment to himself is not recorded in the general as income or additional loan from the company.
- [178] Other income allocations were made as of April 30, 2023 to the respondent including a bonus payable of \$20,000 which was applied to reduce his shareholder loan and two other allocations to reduce the shareholder loan account recorded as JE 6 and JE 17, totaling \$31,500 and \$30,271, respectively. Before those three payments, the shareholder loan account was at \$162,512. Thus, the net effect for 2023 was an increase in the respondent's shareholder loan account for 2023 of \$34,529 since the year-end 2022.
- [179] It must be emphasized that changes in shareholders loans to the Restaurant's financial situation between April 30, 2018 and April 30, 2019 happened most likely after the parties separated. As noted above, I have inferred that the respondent most likely dissipated \$25,825 owing to him from the Restaurant for which he has provided no accounting or explanation. By year-end 2019, the respondent owed the Restaurant \$16,463.
- [180] Next, Ms. Daum recorded that the respondent purchased the Restaurant for \$70,000 after which he invested an additional \$20,000 in renovations to the premises. This fact is incorrect. The respondent did not give Ms. Daum the Restaurant purchase agreement confirming the respondent paid \$78,000 to purchase the business which became the Restaurant; that price included \$38,000 for goodwill.
- [181] Interestingly, Ms. Daum was provided copies of the Restaurant's general ledgers for April 2019 to April 2023 and adjusting entries for the period of April 30, 2019 through 2022. Neither party introduced that evidence at trial save and except for the year ending April 30, 2023.

- [182] Although Ms. Daum reviewed some historical sales and profit data from the Restaurant, she did not comment on the net incomes in 2016 of \$158,600 based on sales of \$498,000, and in 2015 of \$135,900 based on sales of \$487,700. Retained earnings in 2015 were \$110,780 and \$248,494 in 2016. These profit ratios were dramatically higher than the period from 2019 to 2023. The general ledger for 2023 discloses that prior to April 30, 2023 the respondent's loan to the company was as high as \$162,012.
- [183] This trial concluded before the end of 2023 and thus there is no 2024 year-end summary of the respondent's income for that year. Between September 28, 2018 and June 30, 2023 the respondent transferred \$323,705 from the Restaurant's BMO account largely to the respondent's personal bank account for expenses he was paying including mortgages against their two homes.
- [184] In my view, the respondent's actions concerning money taken from the Restaurant insofar as the funds taken between 2018 until 2023 were over and above his T4 income and the loans from the company, has likely caused a depletion of cash from the tangible assets that could affect the value of the shares. I am unable to assess the extent to which the value of those shares and the claimant's interest in them have been impacted.
- [185] As at April 30, 2023, \$81,771 was unpaid but attributed to him as income, reducing his loan to the company. He had previously received the cash representing that reduced portion of his shareholder loan account but he has not accounted to the claimant for the monies received when preparing his October 2023 F8 financial statement.
- [186] The respondent has not disclosed the purposes or use of these shareholder loans or other withdrawals. There appears to be no reason he would not have drawn these amounts out as wages or dividends.
- [187] Although the records indicate some of those funds were used to make mortgage payments, neither party explained whether these transfers to the respondent's personal bank account represented income, shareholder loans, or dividends or some other disposition of funds not disclosed in the records. In the end, it is clear the respondent did not use the entire \$800,000 transferred to his brother in 2018 to pay all of the mortgage payments on both houses; he used some the Restaurant money for that purpose.
- [188] Many years have passed since the respondent began taking funds from the Restaurant without repaying same within one year. He has not declared any of those amounts as taxable income in the years up to April 30, 2023. The respondent did not provide journal entries for funds withdrawn from the Restaurant before April 30, 2022.

Conclusion

- [189] It is clear that the respondent's management of the Restaurant's finances is confused and uncertain. It is extremely difficult to determine what the value of the business might have been but for his breach of the order and withdrawal of funds.

- [190] I am satisfied the parties failed to prove the accuracy of many of Ms. Daum's assumptions. Most prominent of her failures was to recognize the anomaly of increased debt without recognition of the Tesla purchased by the Restaurant as an asset in the financial statements. Her entire valuation was dependent on the book value of assets as representing the only measure of fair market value of the Restaurant at the time. The undepreciated value of the Tesla at the time of Ms. Daum's valuation of the shares is uncertain but I am satisfied that, in the absence of better evidence, that vehicle would have had a value of at least \$40,000 at the date of trial.
- [191] Further, as indicated above there were a number of Ms. Daum's assumptions that were not proven in the evidence which reduces the weight that can be given to her opinion.
- [192] Due to the confusion stemming from the respondent's use of the Restaurant funds, the absence of important financial records including postseparation general ledgers, assessment of the value of the respondent's shares in the Restaurant is very difficult.
- [193] It is agreed money taken out of the corporation by the respondent, which appears in the financial statements as a shareholder loan, should be repaid or included in the respondent's line 15000 income for each year the loan went outstanding for more than one year. However, as between the parties, the respondent is obliged to repay that loan which will substantially increase the value of the business.
- [194] To the extent that the respondent has removed large sums from the Restaurant's account to his own benefit beyond shareholder loans or T4 income, he has diminished the value of the shares of the Restaurant and adversely affected the claimant's interest in it. It is not possible to do an accurately mathematical calculation of the value of the shares. Accordingly, taking into account the issues discussed here, and due to the uncertainties in the documents (or documents not produced) I must perform an assessment of value.
- [195] I have concluded Ms. Daum's valuation of the Restaurant shares does not reflect the fair market value of this business. Other businesses in the area were looked at but not considered. The respondent placed sufficient value on the business that he was prepared to pay \$38,000 for goodwill. Nevertheless, in Ms. Daum's opinion goodwill is not a "tangible asset" and is given a nil value in her assessment. Moreover there was no attempt to find the fair market value of the plant and equipment at the time of trial.
- [196] Taking into account all of the factors noted above including the Court's comments in Maguire and most importantly the lack of explanation as to the details of the \$324,000 removed from the Restaurant by the respondent after separation, I can not accept Ms. Daum's opinion as to the "notional fair market value" of the shares. The weight of her opinion as to the fair market value of the shares in the corporation was diminished in part by her failure to take into account the asking prices of similar restaurants for sale at the time.

- [197] Ms. Daum recognized that her valuation of shares does not represent the value of the business "if it were actually exposed to the market for sale"; In reaching my conclusions concerning the value of the Restaurant, I accept Ms. Daum's opinion that it is unlikely a new purchaser would offer consideration for goodwill. It may have been impractical to ascertain the fair market value of this restaurant unless it was placed on the market for sale. However, it appears no effort was made to obtain a standalone fair market value appraisal obtained of the tenant's improvements, plant and equipment in place in November 2023.
- [198] It is likely that the unexplained withdrawals of money from the Restaurant's accounts contributed to a diminution of the value of the Restaurant shares from the date of separation until trial. Moreover, the effect of company's loans to the respondent and the failure to include the value of the Tesla in the assets of the company lead me to conclude that the value of the shares in the Restaurant is at substantially greater than \$33,000. If the depreciated value of the Tesla is included in the Restaurant's assets, I conclude that the value of the shares would be at least \$70,000 in recognition of the \$15,000 deposit paid to purchase the vehicle and the original purchase price of the Tesla. Recognizing the uncertainty and limitations of the financial statements and information available, I have concluded \$70,000 is a reasonable estimation fair market value of the shares in the company the shareholder equity for the company as at April 30, 2023 as if the value of the Tesla is included. Coincidentally this measure is more reflective of the retained earnings at April 30, 2019 of \$73,086 shortly after August 2018.

Debts

- [199] The respondent argues that he incurred several debts to individuals who had loaned him money prior to separation and those loans should be recognized as family debt that was properly repaid from family property he held after separation. He contends he used money derived from the West 11th property to pay some of these debts.
- [200] I will deal with each loan or debt he contends was owing after separation. To be clear, the respondent did not seek any court approval for the payment of these debts from the \$910,000 from the West 11th property.

Malik Loans

- [201] The respondent testified that he had borrowed significant sums from Mr. Malik, which he used for building costs for the house on the West 11th property. He said the last time he borrowed money from Mr. Malik was around 2015 or 2016. He said advances from Mr. Malik were made from time to time as needed but he never borrowed money after August 2018 and could not remember how much he had actually borrowed.

- [202] Initially he borrowed \$25,000 from Mr. Malik. The respondent had known him for some time, but he said incredulously that he did not remember Mr. Malik's first name. He eventually remembered his name was Mohammed. This loan was followed by a number of small advances from Mr. Malik, totalling another \$50,000.
- [203] He testified he needed money for investments at that time although he could not remember how Mr. Malik gave him the loan. Later he testified that Mr. Malik paid him with cash but there were no written records of those advances, no written agreements, and no other evidence of these loans. He said he did not ask Mr. Malik for cash.
- [204] Concerning the enormous time gap between 2015 to 2016 when funds were advanced by Mr. Malik, and 2021 when those funds were repaid, he explained Mr. Malik was simply not in a rush to be repaid and the respondent wanted to invest this money in some other place. Somewhat illogically, the respondent said he invested by obtaining loans but did not invest the money because "the GIC was an investment".
- [205] In cross-examination, the respondent's answers concerning the loan from Mr. Malik further undermined his credibility and reliability. When asked why he borrowed money, he said "it might have been I spent money on (other) items".
- [206] He was asked about a cheque for \$50,000 dated February 2, 2021 that he gave to Mr. Malik. He said he was paying back money that Mr. Malik had loaned to him prior to the separation.
- [207] Furthermore, he said he also gave \$25,000 (by cheque) to a company owned by Mr. Malik, New Fraser Meat Enterprises, on April 24, 2021 with cash he had received from his brother (from the \$800,000 transferred to K.K.) Oddly, the respondent said he had been given cash by Mr. Malik personally but chose to repay Mr. Malik's company.
- [208] There were no documents or records produced confirming the existence or terms of any loan from Mr. Malik or his company to the respondent. The respondent's acquaintance with Mr. Malik was longstanding. Regrettably, Mr. Malik was not presented as a witness to corroborate or support the respondent's assertions concerning pre-separation loans. Absent evidence of a written agreement, specific amounts and the timing of any advances or repayment terms, the respondent's testimony that he was indebted to Mr. Malik before separation is not believable.
- [209] Throughout this proceeding the respondent remained in breach of the October 31 order, most importantly when he refused to account for the proceeds of the West 11th property sale and he refused to pay those funds into her solicitor's trust account. The payment of each loan to Mr. Malik and other payments to Mr. Dhillon (described below) were all completed in breach of the October 31 order.
- [210] I infer that Mr. Malik was not subpoenaed to this trial because the respondent was aware he would not confirm the respondent's assertions concerning loans made to him.

- [211] I do not accept the respondent's explanation concerning the delays between the alleged loan and repayment of the debt to Mr. Malik. Moreover, if the debt had been incurred in 2015 or 2016, it was more likely that the debt would have been paid much earlier when the respondent received the proceeds from the sale of the West 11th property or extinguished by the statutory limitation period. In any event, I am not persuaded the respondent owed Mr. Malik for any loans taken before the parties separated.
- [212] Because I do not believe the respondent used funds from the West 11th property sale to repay any debt owing to Mr. Malik or that Mr. Malik loaned the respondent money to pay for construction costs on the West 11th property, I conclude that these payments did not discharge a "family debt". I also conclude it is more likely than not that any funds paid to Mr. Malik or his company came from family property derived from the sale of the West 11th property.
- [213] I have no confidence in the truthfulness of the respondent's evidence regarding the loans and repayment to Mr. Malik or that any monies that might have been advanced by Mr. Malik were given before the parties' separation.
- [214] The respondent's explanation of his borrowings from Mr. Malik is simply inconsistent "with the probabilities affecting the case as a whole and shown to be in existence at the time": Faryna at 356. The respondent has failed to prove that these payments were a family debt to be shared by both parties.

Dhillon Loan

- [215] The respondent contends that he borrowed \$50,000 from Mr. Dhillon which formed part of the family debt extant before the parties separated.
- [216] In June 2015 Mr. Dhillon had loaned the respondent \$240,000 secured by a mortgage against the Prince Albert property to fund his share of the West 11th property development costs. This loan was repaid.
- [217] After repaying the \$240,000, the respondent also borrowed \$250,000 from Mr. Dhillon secured by a mortgage to enable him to purchase the East 57th property. Eventually, the respondent also repaid Mr. Dhillon the \$250,000 debt from funds obtained from a mortgage from Coast Capital Savings. Although the respondent was unsure when the debt was repaid, he was able to refresh his memory that the refinancing happened around January 1, 2018 after which Mr. Dhillon released his mortgage against the East 57th property.
- [218] The respondent's testimony concerning a payment of \$50,000 to Mr. Dhillon on February 1, 2020 lacked credibility. He said he had borrowed money from time to time as "we went along" and he paid some interest. However, he waited until February 2020 to pay the principal outstanding, notwithstanding that any loan he took from Mr. Dhillon would have been advanced before the parties separated.

- [219] The respondent produced no record of when these advances were made nor the terms or amounts of these loan advances. In the absence of confirmatory evidence that Mr. Dhillon gave him loans from time to time totaling \$50,000 (in addition to large loans secured by mortgages against the respondent's land) I do not believe the respondent. Mr. Dhillon was not called to testify at this trial; he would have been the obvious person to confirm the existence of a loan, the amounts advanced and the interest charged.
- [220] The respondent's failure to provide any detail concerning the terms of loans he obtained from Mr. Dhillon (apart from the loans secured by mortgages) I am not convinced that any debt alleged to be owing to Mr. Dhillon was incurred before separation or that it constituted a family debt that he paid after separation. There is no clear or cogent evidence on this point other than the respondent's assertions on this question and I do not accept, as true, the respondent's claims.
- [221] The respondent's explanation for the delay between any advances of money by Mr. Dhillon and the respondent's repayment was that Mr. Dhillon did not want an earlier repayment of the \$50,000 debt that had been outstanding since 2017. This assertion is, in my view, unbelievable. Moreover, payment of this debt by the respondent was a breach of the October 31 order.
- [222] Coupled with the respondent's avowed purpose of keeping money in K.K's bank account to pay the mortgages (with the effect of preventing the claimant from accessing those funds) and his continuing breach of the court order until the end of the trial, I infer that the monies paid to Mr. Dhillon were most likely not payments of family debt.

Ranjit Nandha

- [223] The respondent contends he made payments to Ranjit Nandha totaling \$23,000 which he claimed were payments of debts incurred before separation. A payment made on April 24, 2023 was for \$17,000 he claimed was payment for painting at the West 11th property. The payment was made by cheque from the Restaurant bank account but recorded this payment as "loan to shareholder". There was no invoice from Mr. Nandha produced nor any explanation for why he had been paid this sum six years after the West 11th property was granted an occupancy permit. This payment was also made contrary to the October 31 order.
- [224] Next, the respondent paid another \$6000 to Mr. Nandha on May 31, 2023 which he also contended was a debt incurred before the parties separated.
- [225] Absent any corroborative evidence such as invoices issued by Mr. Nandha. I do not believe the respondent on this point; these payments in spring 2023 were made more than six years after the work on the property had been completed based on the August 24, 2016 (date of Occupancy Permit). There is no credibility in his assertion on this point.
- [226] Mr. Nandha was not presented as a witness for the respondent at this trial.

[227] I reject any assertion that these payments to Mr. Nandha were related any debt owed by the respondent owing as at the date of separation or in any way related to painting services for the West 11th property.

Mortgage Payments, Taxes and Line of Credit

[228] There is no doubt that both residences owned by the parties before separation were "family property" and the respondent made mortgage payments on the parties' property totaling \$449,645 after taking into account \$16,474 in payments that were reversed on January 6, 2023, May 5, 2023 and February 17, 2023.

[229] I am satisfied that the respondent's payment of mortgages (\$449,615), taxes (\$22,412) and the parties' line of credit (\$34,239) came from family property in his possession.

[230] In the circumstances of this case, it is appropriate to credit the respondent's payment of family debts against his use of family property to make those mortgage, tax and line of credit payments to achieve an equal sharing of that debt. This principle is articulated in *Piderman v. Piderman*, 2015 BCSC 475:

[46] Respecting the respondent's claims for reimbursement of half his payments on the mortgage and the line of credit, I take the law to be as set out in *K.M.J. also known as K.M.N. and J.H.D.N.*, 2014 BCSC 1895. There, in paras. 137-164 *Betton J.* conducted a detailed analysis of the approach to division of assets and debts set out in the *Family Law Act*. In the context of the present case an observation at para. 155 is pertinent:

Similarly, the good faith retirement of all or some of a family debt post-separation but before hearing cannot relieve the other spouse of their obligation to share in that family debt. The Act specifies that we start with the value at hearing date, but provides tools in ss. 87 and 95 to adapt to the peculiar circumstances that might arise to achieve the intent of the legislation.

[231] In the result, the mortgage payments made by the respondent of \$449,645, taxes and repayment of the line of credit will be credited to the respondent and taken into account in determining the net amount remaining from the \$910,000 available at date of separation.

[232] The respondent concedes he received all of the rental income derived from the Prince Albert property before it was sold, which he claims totals \$86,800. He declared this income for Prince Albert property on his tax returns for those years. The parties agree that the claimant received all of the rental income from the East 57th property totalling \$187,500 which was not reported to the CRA and remains untaxed income in her hands.

[233] The respondent also paid municipal property taxes for the East 57th property and the Prince Albert property for 2018 to 2023 which totalled \$22,412.75. The claimant contends the respondent received rents of \$86,800 from January 2019 to December 2022 from the Prince Albert property and the claimant received between \$2,350 per month and \$3,550 per month from tenants at the East 57th property.

- [234] After the Prince Albert property was sold in June the parties received interim distributions from the sale proceeds; \$200,000 to the claimant and \$110,000 to the respondent. The balance held in trust is \$538,791.
- [235] This June order also included a direction that from the net sale proceeds of the Prince Albert property, \$50,000 be paid towards the mortgage in favour of the Coast Capital savings account registered against the East 57th property and to pay the balance owing of property taxes in the amount of \$23,643.03.
- [236] The claimant would like to purchase the respondent's interest in the East 57th property. The parties agree that the current market value of the property is the assessed value of \$2,350,000 and is subject to a mortgage of approximately \$1,000,000.
- [237] I conclude that the respondent made all of the of these payments related to their properties from funds taken out of the Restaurant's account, rent payments he collected by the respondent and/or from the \$800,000 held by his brother. In the respondent's hands, All of these funds used to pay expenses were family property and the burden of the payments will be shared equally as will the fair market value of the family property.
- [238] The value of the Restaurant is a complicated issue that affects the calculation of value of family property to be divided and the respondent's income for the years after separation.

Excluded Property

- [239] The respondent contends his two personal injury settlements totalling \$145,500 are excluded property. The 2007 settlement was for \$40,500 and the 2016 settlement was for \$105,000. He contends that he used \$40,500 to purchase the Restaurant and \$105,000 to perform construction work on the West 11th property.
- [240] In the alternative, he contends that the sum of \$143,196, including a \$35,000 payment to the parties' line of credit, should be reapportioned in his favour pursuant to s. 95(2)(i) of the FLA.
- [241] The respondent produced his lawyer's letter dated August 12, 2007 outlining a settlement of \$57,000 "new money" of which \$40,500 was paid to the respondent. The only indication in this correspondence concerning the nature of the claim was that \$10,618 was paid for past and future special damages. Thus, there is no means by which the respondent's past and future wage loss award could be separated from the non-pecuniary award.
- [242] The respondent also produced a letter from his then counsel also confirming settlement of his claims from his October 20, 2010 and November 28, 2012 accidents. He received \$105,000 for those damages. Counsel retained none of the medical records, wage/business loss records or other documents relating to the settlement. There was no breakdown of the settlement as between pecuniary and non-pecuniary losses.

- [243] The respondent did not testify as to the nature of these claims, the nature or extent of his injuries, nor the amount of money he received for lost wages and non-pecuniary claims. It is clear from his lawyer's account dated October 12, 2007 that there was an investigation of his wage loss claim with his employer.
- [244] Similarly, in his lawyer's April 6, 2016 account, counsel recorded that they had destroyed his tax and wage/business loss records. Again, the respondent gave no evidence concerning the nature or extent of injuries that occurred in the 2010 and 2012 accidents. Most importantly, he did not explain the extent of his wage loss recovery in contrast to other damages that might be excluded property.
- [245] The respondent claims that he used some of the 2007 settlement funds to purchase his business that became the Restaurant. He said he used portions of the \$105,000 from the 2016 settlement and to fund the new construction on the West 11th property.
- [246] He seeks to be credited with some portion of this settlement. He conceded that some tracing must be performed as the entirety of the settlement was used to purchase "different assets". He contends that the \$40,500 was used to purchase the Restaurant and he should be entitled to retain the full amount of the appraised value (\$33,000) representing the current market value of the shares in that company.
- [247] In the alternative, he says that if the settlement funds are not excluded property, then they should be divided unequally as provided for under s. 95(2)(i) of the FLA based on his disproportionate contribution to the acquisition of those assets.
- [248] Finally, the respondent seeks to exclude from the calculation of family property \$84,426 given to him by his father and brother from a refinancing of the father's residence in November 2003. He said these funds were paid by a cheque payable to his brother and father and those funds were later transferred to him in the next year to complete the parties' purchase of the Prince Albert property.
- [249] Although the respondent testified that there was an agreement under which he and the claimant held a one-half interest in the Prince Albert property in trust for the respondent and his brother, no copy of the signed agreement was presented at trial.
- [250] At one point, K.K. commenced an action against the respondent and the claimant for a 50% interest in the Prince Albert property. This proceeding was discontinued and no claim is made in this proceeding to recognize the interests of the respondent's father or K.K. in the Prince Albert property.
- [251] When the parties acquired the Prince Albert property, title was registered in both parties' names as joint tenants and the claimant was never asked to agree that the respondent's family had an interest in the property. Notwithstanding the respondent's assertions, concerning the interests his family claimed in the Prince 'Albert Property, he acknowledged making a declaration on November 25, 2014 wherein he declared that the parties were sole owners of the Prince Albert property and they did not hold any interest in the lands in

trust for any other person.

[252] The respondent called his mother, R.K. to testify concerning advances of money to the respondent made in February 2012. She was confused and inaccurate in many of her responses. She had commenced an action claiming she had loaned money to the respondent for purchase of the East 57 property and later claiming an interest in that property. This claim against the respondent was later discontinued. R.K. denied any involvement in those proceedings and did not give any lawyer instructions to start the claim. I could discern no reliable evidence from her that was pertinent to the issues argued at this trial.

Legal Framework

[253] The FLA sets out the excluded property regime as follows:

Definitions

1 In this Act:

"excluded property" means property that would otherwise be family property but is excluded under section 85 [excluded property];

Excluded property

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) inheritances to a spouse;
- (b.1) gifts to a spouse from a third party;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) a spouse's beneficial interest in property held in a discretionary trust

- (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
 - (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.
 - (3) If property is excluded from family property under subsection (1), the exclusion applies despite any transfer of legal or beneficial ownership of the property from a spouse to the other spouse.
- [254] A spouse who asserts property is excluded under s. 85(2) of the FLA bears the burden of proving that fact on the balance of probabilities: see *Shih v. Shih*, 2017 BCCA 37 at paras. 42-44. While mathematical precision is not required to establish excluded property, there must be clear and cogent evidence before the court: *Shih* at paras. 40, 43.
- [255] The Court in *Hagman v. Yasmina*, 2024 BCSC 807 summarized the application of exclusion rules extent at the time this proceeding was commenced. This is significant because of the 2023 amendment which provides for different treatment of property transferred from one spouse to the other. The Court said:
- [108] Bill 17, the Family Law Amendment Act, S.B.C. 2023, c. 12, received royal assent on May 11, 2023. It amended s. 85 of the FLA, which now provides that if property is excluded property pursuant to s. 85(1), then "the exclusion applies despite any transfer of legal or beneficial ownership of the property from a spouse to the other spouse": s. 85(3), FLA. The transitional provisions for the statute provide that the previous s. 85 continues to apply to any proceeding which was started before the date upon which Bill 17 received royal assent: s. 24, Bill 17. The parties agree that it is the previous version of s. 85 of the FLA which applies to this proceeding.
- [109] Accordingly, the applicable s. 85 of the FLA provides that property acquired by a spouse before the relationship began is excluded from family property. It also provides that inheritances to a spouse are excluded property and do not form part of the family property which is subject to a presumptive equal division under s. 81 of the FLA.
- [115] Based upon Justice MacNaughton's clear analysis as set out above, I am satisfied that it is not only the intention of the transferor of the early inheritance or gift, in this case to a child, that is relevant to the necessary analysis. Rather, it is the intention of the spouse in gifting the excluded property to either their spouse, or to the marriage, that is the second critical stage in the analysis.

- [116] The party seeking an exclusion has the onus of proving an exclusion, on a balance of probabilities, with clear and cogent evidence: Pisarski at para. 24; Shih at para. 43. As Justice MacKenzie wrote in Pisarski:
- [24] The onus on the appellant to prove her contribution was excluded property pursuant to s. 85. The proper test for establishing a claim to excluded property is proof on a balance of probabilities: Shih v. Shih, 2017 BCCA 37 at para. 42. Precision or mathematical certainty is not required, but to discharge the burden, the party seeking to prove property is excluded property must do so with clear and cogent evidence: Shih at paras. 40, 43. If documentary evidence is not available, the party seeking to exclude property will need to testify as to their recollection of the disputed transactions and that evidence will be scrutinized for credibility: Shih at para. 43. In balancing the evidence as a whole, the judge is permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties: Shih at para. 44.
- [117] Finally, while an exclusion may be traced into other assets or property by way of s. 85(1)(g) of the FLA, the FLA does not permit reimbursement where excluded property has been spent or dissipated: K.S.P. at para. 478.

[Emphasis added.]

Analysis

The 2007 Settlement

- [256] The Court in Shih at para. 43 discussed excluded property claims that sometimes stem for historical transactions many years before. The court said that where "documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility".
- [257] The respondent did not provide any accounting or details concerning the \$40,500 received in the 2007 settlement to establish these funds should warrant an excluded property claim in regard to the shares in the Restaurant.
- [258] The respondent says the \$40,500 was used to purchase the Restaurant. The purchase price of the Restaurant was \$78,000 and the transaction was completed June 30, 2009. There is no evidence about where the respondent kept the \$40,500 between 2007 or how he financed the purchase of the Restaurant in 2009 or the extent to which any of those funds were used in the purchase.
- [259] Other than the respondent's assertions, it is unclear whether any portion of the 2007 settlement existed at the time of the purchase or if, in the interim, it used for other purposes such as family expenses or the acquisition of other undisclosed assets. Absent some evidence on this point, the significant gap in time between his receipt of the \$40,500 and his purchase of the Restaurant raises doubts about whether all or some of those funds

were used to purchase the business. There is a copy of the asset purchase agreement but no other bank records or documents that could confirm or support the respondent's assertion that the funds were used to acquire the business.

- [260] The Restaurant financial statements for April 30, 2010 (being the first year the respondent operated the business) reveal that the company owed the respondent \$102,307 by that year end, likely representing his initial shareholder loan to the Restaurant. Thus, although there is no direct evidence to confirm that fact, those year-end statements are some evidence that the respondent invested \$102,307 in the business upon its incorporation.
- [261] However, other doubts concerning the respondent's claims for an exclusion of property appear in the subsequent Restaurant financial statements. These financial statements reveal that between the purchase date and April 30, 2015, the Restaurant's debt to the respondent declined to \$73,327, but by year-end 2016, the respondent was indebted to the Restaurant for \$242,896. At that juncture, shareholder retained earnings in the company were \$248,494.
- [262] By April 30, 2017 the Restaurant owed the respondent \$2,555 and by April 30, 2018 the company owed the respondent \$25,825 although retained earnings had reduced to \$42,065.
- [263] By year-end 2019, the respondent had incurred a shareholder loan due to the corporation of \$16,463.
- [264] I am satisfied that if the respondent had used some part of the \$40,500 to purchase the Restaurant, recorded in the financial statements as a loan from the shareholder to the company, by 2016, the entire debt owed to the respondent had been repaid and he had received an additional \$242,960 from the Restaurant, recorded as debt owing to the company.
- [265] In April 2018, the year the parties were not yet separated, but circumstances had changed dramatically and the Restaurant owed the respondent only \$25,825. However, by fiscal year-end 2019, the respondent had again become a debtor to the company for \$16,463. That debt grew to \$41,293 in 2020, \$52,768 in 2021 and \$70,518 in 2022. By April 2023 the respondent's debt to the company was \$101,000.
- [266] Thus, it is abundantly clear that if the respondent had contributed his 2007 settlement to the purchase of the business, he has since withdrawn the entire contribution from the company and incurred additional debts to the company.
- [267] In essence, the respondent's investment of his settlement funds would have been returned to him by the end of 2019. He did not provide any evidence concerning what he had done with the funds. In Hagman, Justice Blake addressed this kind of outcome when she said that the FLA will not permit reimbursement where the excluded property has been spent or dissipated. In my view, this principle applies to the extent that the excluded property has been returned to the respondent as early as 2019 without explanation concerning the subsequent use of that money.

- [268] In this case, by the company's fiscal year ending April 2019 the personal injury settlement funds had likely been taken out of the Restaurant. The respondent did not give any evidence about what he did with those funds after they were paid to him between prior to April 30, 2019.
- [269] The respondent did not suggest that the 2006 settlement funds were invested in any other enterprise or investment. In my view, the respondent has failed to prove that any value in the shares of the Restaurant can be traced to the 2007 settlement funds.
- [270] There are two other difficulties with the respondent's excluded property claim. First, excluded property includes only non-wage loss settlements; awards representing compensation for lost income are not excluded property. Although it is probable the respondent received settlement funds that would have been excluded property, I have no evidence to assist in making any finding about which portion of the settlement would have been excluded property.
- [271] Reasonable inferences can be made concerning details of excluded property and tracing that property into other property. The respondent did not testify about any details concerning the funds he said were invested in the Restaurant or subsequently withdrawn from the Restaurant. He did not describe the nature or extent of his injuries or details about his wage loss; he was silent on this point.
- [272] Of note, in January 2006, the claimant also received her personal injury settlement funds of \$22,000. By contrast, the claimant testified that her damages settlement was absorbed into household expenses and she did not seek an exclusion of those funds from division of family property. It is equally possible the respondent used some or all of his 2007 settlement for the same purposes.
- [273] In my view, the respondent has failed to provide adequate evidence that the 2007 settlement funds are excluded property. The respondent could have given some evidence about his injury claims, including information concerning his income at the time and the time he was off work due to the injuries. He did not produce bank records indicating where the settlement funds were kept or how they were used in the purchase of the business.
- [274] On this point, the respondent has failed to prove with cogent and clear evidence that the 2007 settlement proceeds are excluded property.

The 2016 Settlement

- [275] The analysis of the respondent's excluded property claim regarding the 2016 settlement of \$105,000 is also hampered because he failed to provide any accounting of these funds, as ordered by the court.

- [276] The respondent received his second ICBC settlement on April 6, 2016. He testified he used some of these funds for construction on the West 11th property and that these funds can be traced to the \$910,000 that he placed into GIC accounts at CIBC and later into accounts at Khalsa Credit Union and eventually into the name of his brother. He concedes that only some portion of this \$105,000 should be excluded from the assessment of family property because not all of the funds were used in the West 11th property investment.
- [277] The respondent received the \$105,000 only four months before an occupancy permit for the West 11th property was issued by the City of Vancouver. First, I am not persuaded that the respondent proved that he used some or all of the \$105,000 on the West 11th property development given that occupancy occurred shortly after he received the money.
- [278] The respondent produced no documents or records to indicate how and when he financed these alleged contributions to the West 11th property development. He did not give oral testimony concerning any of the details except to claim that monies paid to Mr. Malik, Mr. Dhillon and Mr. Nandha many years after the parties' separation were related to funds he had borrowed and used on the West 11th property.
- [279] As in the case of the 2007 settlement funds, the respondent provided no clear or cogent evidence concerning the use of the 2016 settlement funds. The evidence reveals only that a lump sum was received by the respondent without allocation between loss of income and other damages.
- [280] There is evidence in his solicitor's fee account that the respondent was investigating a wage loss claim at the time of both settlements. The respondent possessed the only means to obtain evidence concerning the amount of nonpecuniary damages he was paid in both cases. The respondent concedes that the 2016 settlement must be traced because they were used to purchase "different assets"; he provided no information to inform or assist the court in assessing his claim.
- [281] He was cross-examined on an affidavit in which he said he used \$150,000 from personal injury settlements that formed part of the \$900,000 eventually transferred to his brother. This assertion is inconsistent with his evidence that he took \$910,000 from the West 11th property proceeds, deposited them in a CIBC account and eventually transferred those funds to a Khalsa Credit Union account and into K.K.'s name alone.
- [282] The respondent testified at one point he used all of the \$150,000 in settlement proceeds after 2018, he also says that he used \$40,500 to invest in the Restaurant many years before. His evidence on this point was contradictory. Later he conceded that the \$40,500 injury settlement had not been used to fund the West 11th property project.
- [283] The respondent also acknowledged that he used a joint line of credit with the claimant to pay for building expenses. He said that he had received some money from his brother and his father to assist in building the West 11th property residence without providing any detail about expenses incurred with a few months issuing the occupancy permit.

- [284] I am mindful of the comments in Shih that clear and cogent proof can be inferred from a witnesses' assertion without supporting documents. This Court is invited to infer that money ordinarily excluded from the parties' family property retains the "excluded property" characterization notwithstanding a paucity of evidence including bank records or accounting records.
- [285] It must be remembered that the claimant was not directly involved in the development of the West 11th property. However, she was treated as a one-quarter owner of this project and was assessed and paid income taxes reflecting her ownership interest.
- [286] The respondent was subject to the court order to provide an accounting of his ICBC settlement funds received in 2016, the parties' share of the profit from the West 11th property development in the sum of \$1,078,552 and the GIC funds he withdrew in the amount of \$910,806.
- [287] His failure to provide the accounting of the 2016 settlement funds (as required by the October 31 order is a major obstacle in accepting his assertion that this amount was used to fund new construction on the West 11th property and should be excluded property. He alone has frustrated a fair and fulsome analysis of this question. If he had provided this accounting it would have been fresh in his mind and completed within two years of completing the construction on the property.
- [288] Moreover, for the same reasons noted above, the respondent has provided no detail concerning the composition of his settlement and an explanation about the lost income portion of same. The respondent's limited testimony that \$105,000 from his settlement money was used to fund the construction on the West 11th property is unsupported by the evidence.
- [289] As mentioned above, the respondent testified that he had invested in cryptocurrency at some stage. He said he lost this money, but provided no details of the amounts, the timing or efforts to locate the person selling these investments. There is, for example, no way to determine if those funds invested in cryptocurrency emanated from the respondent's personal injury settlement.
- [290] Nonetheless, the evidence that he purchased crypto investments as late as spring 2023 that he did not list these investments in his October 2023 F8 financial statement raises questions about his credibility and reliability.
- [291] The policy outlined in Shih concerning expectations that spouses are entitled to "keep what is theirs" and share the balance is difficult to apply in this case, where the respondent set out from November 1, 2018 to prevent the claimant from securing or receiving her interest in family property. He transferred \$800,000 to K.K. in ostensibly to mortgage payments but eventually used the Restaurant funds to make many of those payments.

- [292] In considering the threshold test of significant unfairness as a prerequisite to a reapportionment claim, I must view the broader context of the respondent's excluded property claims in the light of his apparent disposition of the funds before and after the parties separated August 28, 2018. On November 1, 2018 the respondent was served with the October 31 order and he immediately transferred \$800,000 into his own account at Khalsa Credit Union and closed that account five days later when the money was put into his brother's account at the same institution. In the end, the mortgage payments made were \$449,645, and could have amounted to only 56% at best of the \$ 910,000 he appropriated to himself.
- [293] As with the 2007 settlement, there is no doubt that a portion of the 2016 settlement would have included a wage loss component and that the respondent's use of a portion of those funds would have been characterized as "family property".
- [294] Because of the gap in time between receiving the 2006 settlement and the eventual purchase of the Restaurant and the juxtaposition of the 2016 settlement with the certificate of completion of the West 11th Property, it is my view the settlements were not used as alleged by the respondent nor did he prove them to be excluded property.
- [295] I do not accept the respondent's bald assertions that he used both of his injury settlements to purchase the Restaurant and fund the West 11th property development, he provided no documentary evidence supporting the assertion that these funds are excluded property.
- [296] Finally, I have concluded that if the respondent used the 2006 settlement funds toward the purchase of the Restaurant business, those funds had already been returned to him before the parties separated. He did not account for his use of the funds after his shareholders loan to the Restaurant was repaid.
- [297] In the result, I find the respondent has failed to prove that monies he invested in the development of the West 11th property included portions of his 2016 settlement that might have otherwise been excluded property.

Family property Available for Division

- [298] Taking into account my findings concerning the value of family property before consideration of the parties claims for reapportionment under s. 95 of the FLA the parties would be entitled to receive \$724,242 each.

Reapportionment of Family Property

Legal Framework

- [299] The statutory framework warranting an unequal division of family property is set out in s. 95 of the FLA. Unequal division of family property can be made where it would be "significantly unfair" to divide that property equally:

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

- [300] Reapportionment requires objective evidence of something unjust, unreasonable or unfair in an important or substantial sense: see *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 42.
- [301] In *Singh v. Singh*, 2020 BCCA 21, Justice Garson summarized the required analysis of reapportionment claims made under s. 95(2). She said:
- [130] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, Justice Harris, for the Court, engaged in an extensive analysis of s. 95. He first noted that the Legislature sought to increase certainty, fairness, and predictability in property division matters with the FLA by reducing the discretion of the courts to depart from equal division: at para. 36. The test in the previous legislation (Family Relations Act, R.S.B.C. 1996, c. 128) only required unfairness, whereas the FLA requires "significant unfairness." In addition, the legislature more precisely specified the factors to be considered in applying this threshold.
- [131] Justice Harris agreed with the analysis in *Remmem v. Remmem*, 2014 BCSC 1552, in which Justice Butler (as he then was) defines "significant" as "extensive or important enough to merit attention" and something that is "weighty, meaningful or compelling," concluding that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": at para. 41, citing para. 44 of *Remmem*. Justice Harris then noted that it would be unwise to attempt to define the meaning of "significant unfairness" but found that reapportionment under s. 95 would require "something objectively unjust, unreasonable or unfair in some important or substantial sense": at para. 42. He said:
- [44] in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion.
- [132] Ultimately, Justice Harris held that unequal division was justified in the case under appeal given that the significant increase in value to one property in question was caused in part by the respondent after separation: at paras. 52-53.
- [133] In *V.J.F. v. S.K.W.*, 2016 BCCA 186, Justice Newbury described s. 95 as requiring a high threshold of "significant unfairness" to depart from equal division: at para. 81. Other cases have reached similar conclusions about the high threshold necessary to reapportion assets under s. 95. In *Khan v. Gilbert*, 2019 BCCA 80, for example, Justice Fenlon noted that cases in which unequal contribution was found to reach the significantly unfair threshold have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: at para. 32.
- [134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in

some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

[302] In *Hannon v. Hopson*, 2022 BCCA 314, the Court confirmed the existence of a subjective component:

[102] that assessment should consider the legitimacy of any asserted subjective expectations--that is, whether the spouse truly held his or her asserted expectations and whether they were reasonable--as well as the strength of those expectations. It is only after this objective assessment of the parties' subjective expectations is completed that the court will turn to the discretionary, exclusively objective assessment of whether, considering all of the relevant factors, equal division would meet the significant unfairness threshold.

[303] These authorities highlight the respondent's burden to address the threshold of significant unfairness in that the circumstances relied on must:

- a) be weighty, meaningful or compelling having regard to the factors set out in s. 95(2);
- b) be objectively unjust, unreasonable or unfair in some important or substantial sense;
- c) include marked, prolonged, and intentional or unexplained disparities in contribution to the family burdens; and
- d) meet a high threshold, in that there would be injustice if the court failed to deviate from an equal division.

(See *Hannon* at para. 69.)

[304] Equal division must prevail unless persuasive reasons can be shown for a different result.

[305] The law relating to non-disclosure and hidden assets with relation to reapportionment was summarized by Justice Dardi in *M.C.V. v. F.V.*, 2018 BCSC 96:

[123] In my view, a spouse's failure to disclose financial assets may be considered as a factor under section 95(2)(i) in ordering an unequal division of family property. In certain circumstances, a failure to order unequal division in the face of a failure to disclose assets or debts may lead to significant unfairness: *E.H.H. v. C.L.M.*, 2017 BCSC 1299 at para. 119.

[124] Ms. C. relies on the approach taken by Mr. Justice Fraser in *Cunha v. Cunha*, (1994), 99 B.C.L.R. (2D) 93 (S.C.), a case decided under the FRA. The *Cunha* approach urged a robust exercise of the adverse inference power when one party in matrimonial litigation conceals assets: at paras. 11-13.

- [125] In *Laxton v. Coglon*, 2008 BCSC 42, Mr. Justice Kelleher clarified that the Court in *Cunha* did not reappportion family assets pursuant to s. 65 of the FRA. Rather, the Court, having not been satisfied that adequate disclosure had been made, inferred that the value of the undisclosed assets was at least equal to the value of the disclosed assets: at paras. 27-29. It is key that the principle in *Cunha* only applies where there is a sound evidentiary basis to support the notion that one of the parties to the litigation has hidden assets. See also *Nearing v. Sauer*, 2015 BCSC 58, at para. 126.
- [126] In *Wu v. Sun*, 2011 BCCA 239, the Court of the Appeal, while affirming that strong measures are justified in discouraging nondisclosure, cautioned that there must be sufficient evidence upon which the court may draw any adverse inferences regarding the existence of undisclosed family assets: at paras. 40-42.
- [127] In *Nearing*, the Court concluded, at para. 132, that the adverse inference referred to in *Cunha* and the subsequent authorities continues to be applicable to the new regime for property division under the FLA. I agree.
- [306] Fleming J. (as she then was) in *Chang v. Xia*, 2015 BCSC 1994 also discussed the circumstances where one party fails to disclose assets or dissipates assets as follows:
- [47] Where a spouse fails to disclose financial assets and dissipates family assets after separation, the court may impute assets to the spouse and/or reappportion family assets or debt pursuant to s. 95(2) of the FLA if the court finds it would be significantly unfair to order an equal division, or the common law.

Claimant's Claim for Reapportionment

- [307] The claimant argued that whether the respondent has hidden assets or dissipated all of the proceeds from the West 11th property development, there was a litany of instances where the respondent used withdrawals from the Restaurant account, the Khalsa Credit Union account, and cash withdrawals from bank accounts he controlled in the time following separation. He has not provided credible disclosure to explain these withdrawals and the Court should infer that he had \$802,740 in November 2018 (not including interest). She should be entitled to the entire proceeds from the Prince Albert property sale (\$530,000) and the \$50,000 held in Sutton Realty Funds to achieve the goals of reapportionment under the FLA.
- [308] It is important to take into account that the respondent was in continuous breach of the October 31 order up to and including the trial. I have concluded that neither the respondent nor his brother could be believed in their assertions that all of the \$910,000 has been spent or disappeared.
- [309] Although the respondent paid mortgage payments for both the East 57th property and Prince Albert property, not all of those funds were paid from the \$910,000 as he alleged.

- [310] I simply do not know what happened to all of this money. K.K. would have been the best person to inform the Court of how he dispersed those funds. He attended court under subpoena requiring him to bring all relevant documents and he failed to do so. He claimed that his bank account containing the respondent's money was a "private matter" and did not want to disclose those documents notwithstanding he claims he gave the respondent all of the funds he had received from the respondent.
- [311] The respondent refused to acknowledge after separation that the claimant was an owner of an undivided one-half of the \$910,806 as a tenant in common with him. He appropriated the entirety of this money in violation of the October 31 order.
- [312] In his nefarious plan, the respondent was abetted by his brother in this wrongful misappropriation of the claimant's interest in the family property. K.K.'s testimony lacked credibility but he was clear that the respondent had informed him he wanted to shield the \$800,000 to enable him to make mortgage payments.
- [313] Another example of K.K.'s collusion was his assertion that whenever asked for the money he mostly paid the respondent cash. He said that he delivered cash between two and nine times, the largest payment being \$90,000. On one occasion the respondent asked for \$80,000 cash. K.K. telephoned the bank and collected this amount in \$100 bills.
- [314] Overall, K.K.'s practice of delivering large amounts of cash to the respondent was animated by the respondent's desire to avoid scrutiny of his use of these funds. This evidence highlights the respondent's efforts to deprive the claimant of access to these funds. I have no confidence that portions of the \$800,000 do not remain with K.K. or the respondent or that they have not been diverted by the respondent to defeat the claimant's interests.
- [315] As I have indicated, it is unclear whether the respondent is responsible for dissipating family property or failing to disclose the existence of assets or both. In these reasons, I account for the respondent's payment of the mortgages as a joint responsibility that will be taken into account against each party's interest in the funds.
- [316] In the context of these facts, if the respondent had abided by the October 31 order, there would have been \$910,806 plus interest available for an equal division between the parties. From the West 11th property profits, \$34,239 was paid to discharge the parties' line of credit after separation. It is not clear whether this debt was paid from the initial sale proceeds (\$1,078,552.87). The respondent's failure to comply with the October 31 order alone is egregious. There is no doubt his actions constituted "significant unfairness" and warrants an unequal division of what might be left at this stage because his actions caused real prejudice to the claimant.
- [317] The respondent used the \$910,000 to make mortgage payments, those payments from the \$910,000 did not likely exceed \$350,000 and there is no credible explanation from the respondent concerning his use of the approximately \$560,000 plus interest (\$65,000) difference.

- [318] In my view, the respondent also compromised the claimant's access to family property in his use of the Restaurant's money after separation for his own purposes.
- [319] Between April 30, 2018 and April 30, 2019, the Restaurant repaid the company's \$25,825 debt to himself. This money would have been family property at the date of separation and has not been accounted for. The respondent then started taking loans from the company, effectively removing \$42,288 from the business by April 30, 2019 and by not reporting the loan as income to CRA (all of which happened after separation), his Guidelines income would have been hidden thereby reducing his support obligations.
- [320] The loans to the respondent increased dramatically up to 2023 as did his compensation from the company in 2023.
- [321] As I discussed above, there was no significant increase in the property plant and equipment owned by the company (\$53,651 in 2019 and \$49,675 in 2023) after acquisition of the Tesla which was. What is unusual in the financial statements is that the sum of \$40,000 recorded as a long-term debt for the company in 2020 likely originated with the government loans connected to COVID-19 measures, two years before the acquisition of the new Tesla. Moreover, in that year the respondent's loan owed to the company increased only \$25,000.
- [322] There were substantial withdrawals of funds from the Restaurant into the respondent's accounts that are not reflected in the financial statements.
- [323] After separation the respondent used some the Restaurant funds to make mortgage payments, he has not provided any clear accounting for the use of any of the funds he withdrew from the Restaurant over this time period.
- [324] In light of the confusion created by the respondent in his management of the Restaurant funds it is open to the court to find that the value of the asset to be divided is the value at the date of separation rather than the date of trial because of the respondent's misconduct. Because I have fixed the value of the shares to be divided equally, I do not think there is anything otherwise significantly unjust if the claimant receives her one-half interest as assessed.
- [325] However, I am satisfied the claimant is entitled to reapportionment based on the respondent's scandalous behaviors in his dealings with the \$910,000 from the West 11th property development and unaccounted withdrawals of money from the Restaurant. The respondent's other efforts hide or obscure the whereabouts of the \$910,000 to deprive the claimant of her interest in family property under the guise of needing funds to pay the mortgages rises to a level of significant unfairness. He has either hidden, spent or lost hundreds of thousands of dollars.

- [326] The principles dealing with flawed disclosure of property by one spouse, hiding assets or dissipating assets summarized by Fleming J. are apposite to this case. The remedy includes imputing assets to a defaulting spouse or ordering unequal division of remaining assets: see Chang para. 47.
- [327] When reappportionment or imputing assets to a party can be ordered where after separation, a spouse has caused a significant decrease in the value of family property. Moreover, under s. 95(1)(f) and (g) of the FLA, where a spouse has acted in bad faith, or caused a substantial reduction in the value of family property reappportionment is an appropriate remedy. If family property is transferred away and defeats or adversely affects a spouse's interest in family property, property can be imputed to that spouse or reappportionment is can be ordered. This is the reality in this case.
- [328] The respondent made some of the mortgage payments from funds taken from the Restaurant but retained or misused family property without giving a clear accounting to the claimant. I have inferred that he has a large portion of the West 11th property, and funds taken from the Restaurant may have been fully spent or held beyond the claimant's reach.
- [329] In Friedlander, the Court commented on the interplay between adverse inferences and reappportionment of family property under s. 95:
- [23] The adverse inference approach does not constitute unequal property division or reappportionment pursuant to s. 95, of the Family Law Act (formerly section 65, of the Family Relations Act, R.S.B.C. 1996, c. 128). Rather it "simply operates to ensure equal division between the parties where the court is satisfied on the balance of probabilities that one party has not fully disclosed assets": Laxton at para. 29.
- [330] This discussion is apposite to the circumstances highlighted by the claimant's request for reappportionment in this case. The respondent's dissipation of family property or refusal to disclose the location of family property animates the decision to reappportion family property in this case. The goal is to ensure that a spouse is not deprived of a one-half interest in family property based on actions that bring about significant unfairness as described in ss. (f) , (g) and (i).
- [331] The respondent contends that before the Court can divide assets unequally on the basis of a spouse's undisclosed assets, there must be a strong evidentiary basis for concluding that the spouse had hidden assets. He contends that his dissipation of family assets after separation cannot be redressed under s. 95(2)(g) of the FLA. He contends the claimant is entitled only to up to 50% of the unaccounted GIC funds (\$80,991.80).

- [332] In my view, this position cannot succeed. There was an abundance of evidence he held the \$910,000, gave it to his brother and took \$25,825 shareholder's loan from the Restaurant. These were tangible assets he owned at separation. He simply refused to comply with the October 31 orders prohibiting disposition of family property to provide an accounting and pay the funds to her lawyer.
- [333] In this case, the claimant benefited by the respondent's payments on mortgages over both properties and some of which came from the \$910,000. By reason of his failure to comply with the October 31 order, to properly account for money taken from the Restaurant, to disclose details of his purchases of crypto currencies, and all obstruct a fair assessment of his assets, it has been nearly impossible assess the extent to which the claimant has been prejudiced.
- [334] It is substantially unfair that the claimant should suffer a loss of her interest in family property over and above the mortgage payments made to preserve those homes.
- [335] Taking into account the \$446,120 in mortgage payments made by the respondent some of which were likely taken from the \$910,000, and funds taken out of the Restaurant (inferred at \$100,000), I infer and conclude the respondent has retained approximately \$560,000 plus interest of \$65,000 (at 0,0205%) he has used for his own purposes.
- [336] Moreover, the respondent appropriated the \$25,825 from the Restaurant loan owed to him at the time of separation that defeated the claimant's interest in that amount.
- [337] This reappportionment could otherwise be achieved by an imputation of family property to the respondent as discussed in Friedlander.
- [338] In order to achieve an equal division of this portion of their family property, the claimant will receive \$337,900 being a disproportionate share of family property to ensure she receives one-half of the family property as redress for the respondent's significant unfairness in either hiding or misappropriating family property.

Respondent's Claim for Reappportionment

- [339] The respondent's claim to excluded property included his two motor vehicle settlements and the \$84,000 he contends was given to him in 2003 to pay for the Prince Albert property. I rejected those claims for exclusions of those funds from division of family property. He also contended his property exclusion claim fails, he should be entitled to seeks an unequal division of this in consideration of the nature and extent of his contributions of formerly excluded property. In Hannon, the Court summarized the principles to be applied:
- [84] To summarize my conclusion on this argument, it is the nature and extent of a spouse's contribution of formerly-excluded property, considered in light of all of the relevant circumstances (along with the specified factors under s. 95(2)), that is relevant to a decision as to whether it would be significantly unfair to divide family property equally. The fact that formerly-excluded property became family property does not, by itself, mean that it would

be unfair, let alone significantly unfair, to divide family property equally. Rather, as with any kind of contribution to the family property and finances, a judge must consider the extent of the spouse's contribution of formerly-excluded property in light of the relevant circumstances and factors to decide whether equal division would result in significant unfairness.

[Emphasis added.]

[340] In Hannon, the trial judge concluded that a significant portion of the family property had its origins in the settlement funds which were formerly excluded property but had ceased to be excluded property and should be reapportioned to reflect his contribution to there joint property.

[341] The Court recognized that the settlement funds had, at one stage, been excluded property but Mr. Hannon had gifted those funds to the spousal relationship. The settlement funds were not necessary to protect Mr. Hannon against economic needs in the future and refused his claim.

[342] Justice Butler said that the parties did not have an expectation that the injury settlements would remain separate. In this case, the claimant had allowed her injury settlement to be used for family purposes and funding ongoing expenses. I infer this is some evidence of their mutual expectations. The parties had operated as a single economic unit and it would not be significantly unfair that his claims be treated as hers.

[343] In this case, the respondent recognizes if he could establish that claim on the facts that his injury settlements could be reapportioned only if denial of his claim would be significantly unfair. He provided virtually no evidence how this money might have been used to further the development of the West 11th property. I have concluded that is claim is true, in part because the settlement funds were received within a few months of the occupancy permit issuing for the development and he produced no evidence to support his allegations, keeping in mind he remained in breach of the October 31 order in failing to account for those funds and there is no sense that he will suffer any injustice if not rewarded with a remedy.

[344] There was no evidence concerning where the money was kept or used. The respondent breached the court order requiring him to account for those settlement funds and it behooves him at this stage to seek an unequal division of that amount of money in the face of his behaviour.

[345] In this case, the respondent's failure to provide accounting information concerning the \$105,000 settlement seriously impacted the Court's ability to assess significant unfairness. There is no evidence, other than his testimony, that this money was used as alleged and no documentary evidence was presented. The respondent cannot be shielded from the impact of his own breach of the court orders to support his claim to relief by way of reapportionment of family property. There was no evidence that any part of the \$105,000

settlement remains in his possession or is subject to a claim of unequal division.

- [346] The respondent also alleged that members of his family gave him approximately \$84,000 to assist in the purchase of a house. He recognizes that the evidence did not support this as an excluded property claim stemming from a payment from his family members but he contends it would be significantly unfair if he was required to include this money in family property subject to an equal division.
- [347] Although the respondent produced documents relating to the acquisition of the Prince Albert property, there was nothing to indicate the source of funds used to complete that purchase.
- [348] Although the respondent may have received this sum from family members, the home was purchased in their names as joint tenants and nothing confirms the use of his family's money in that purchase.
- [349] Simply because the money that might have been received by the respondent from his family may have been excluded property at the time, I cannot conclude that this fact alone constitutes significant unfairness at this stage in the parties' relationship.
- [350] Taking into account the principle articulated in *Hopson* I am required to look at relevant circumstances and factors to determine if equal division would result in significant unfairness. These include the duration of their relationship, whether a spouse has caused an increase in the value of the property beyond market trends.
- [351] In *Khan v. Gilbert*, 2019 BCCA 80 the Court of Appeal discussed the framework for this analysis where one party has contributed more to an asset than the other:
- [31] In *Slavenova v. Ranguelov*, 2015 BCSC 79, Justice Savage (as he then was) said:
- [60] The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions.
- [Emphasis added.]
- [32] Cases in which unequal contribution to family expenses and burdens were found to make it significantly unfair to divide family property equally have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: *Nanara v. Nanara*, 2017 BCSC 1447; *E.H.H. v. C.L.M.*, 2017 BCSC 1299.
- [352] Taking into account the fact that this was a 17.5 year marriage, the claimant's support of the respondent's career in undertaking childcare responsibilities, the increase in the value of the Prince Albert property was due to market trends only, and the respondent's actions

affecting other family property, he has not met the burden of proof to establish that an equal division of the proceeds of the Prince Albert property would be significantly unfair and should be divided unequally. Taking into account all of the other circumstances, including the nature and extent of his purported contribution of excluded property, I find that it would not be significantly unfair to divide this property equally.

Child Support

- [353] The claimant seeks retroactive and ongoing child support from the respondent. He concedes that retroactive child support for the two children should be payable from 2018 until 2021. He says that for 2022 and 2023 he should be responsible for child support for one child.
- [354] The only question to be resolved on this issue is the parties' incomes (including the imputation of income) and the Federal Child Support Guidelines, SOR/97-175 [Guidelines] support calculations.
- [355] The respondent concedes that retroactive child support ought to be paid together with agreeable s. 7 expenses. He juxtaposes this concession with the fact that the claimant retained the entire rental income from the East 57th property and had the exclusive use of the upstairs portion of the East 57th property.
- [356] The court has discretion to recognize that delay in seeking child support may influence the outcome of a retroactive claim. The court should consider reasonable excuses for the parent's reluctance to bring interim applications for support in a timely way.
- [357] In *Michel v. Graydon*, 2020 SCC 24, the Supreme Court of Canada discussed the impact of delay in making applications for child support outlined by Justice Bastarache in *D.B.S. v. S.R.G.*, 2006 SCC 37. The Court in *Michel* said:
- [113] It bears repeating that a delay, in itself, is not inherently unreasonable and the mere fact of a delay does not prejudice an application, as not all factors need to be present for a retroactive award to be granted (*D.B.S.*, at para. 99; *Swiderski (C.A.)*, at para. 43). Rather, a delay will be prejudicial only if it is deemed to be "unreasonable", taking into account a generous appreciation of the social context in which the claimant's decision to seek child support was made (*D.B.S.*, at para. 101). Indeed, the courts should not hold constraints and inequalities faced by recipient parents against the child. Accordingly, a delay motivated by any one of the reasons set out above, at para. 48, should generally not be understood as arbitrary within the meaning of *D.B.S.* Lastly, an unreasonable basis for the delay does not negate the payor parent's blameworthy conduct; indeed the blameworthy conduct may sometimes cause or contribute to the delay.

[114] Courts may pay particular attention to the length of the delay after the beneficiary ceased to be a "child" or "child of the marriage" or after the reason that caused the delay has ceased to be. The longer this delay, the more weight may go against the justification (Dring, at para. 177, per Hunter J.A.). This tends to uphold the values of certainty and finality, with the goal of encouraging parties to move forward with their lives following family breakdown (see Colucci, at para. 28).

[Emphasis in original.]

[358] In this case, the claim for child support was made in the original notice of family claim. The respondent ignored his responsibilities to the children other than to leave the claimant collecting rents for the East 57th property while he paid the mortgage costs on that property.

[359] Presumably, the funds received by the claimant from tenants were sufficient to meet the financial needs of the children and herself and explain, in part, why she did not seek a formal order for support. In the result, there was a reasonable explanation that no support application was made. The claimant did not unreasonably delay seeking an order.

[360] A significant aspect of this family law case stems from the respondent's abject failure to provide documents including bank statements and relevant financial information in a timely way and, in some instances, not at all. Moreover, the respondent's refusal to comply with the orders and disclose relevant financial information could reasonably have impacted the claimant's ability to make an application for support.

[361] Based on some of the financial information produced by the respondent, albeit not all financial information as ordered, there is no evidence the respondent would suffer any hardship as a result of paying retroactive support for the children. The respondent may have disposed of over \$800,000 in family property (and interest earned on that sum) contrary to the court order and did have in his possession considerable funds at various institutions between the date of separation and the trial.

[362] In the result, I am satisfied that the claimant is entitled to retroactive child support for the two children from the date of separation until May 2022 (when K.S.K. finished schooling) and ongoing support for the claimant to the present based on the parties' respective Guidelines incomes.

Spousal Support

[363] The claimant seeks spousal support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] and/or the FLA. Given the lack of certainty in the claimant's submissions, I intend to deal with her support claims under the DA as set out in the claimant's notice of family claim.

[364] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715, the Court said that spousal support entitlement may be:

- a) compensatory, to redress economic disadvantages as a result of the breakdown of the marriage;
- b) contractual; and
- c) non-compensatory, based on the needs of the recipient spouse.

[365] The DA sets out the authority to grant a support order to a spouse after separation and upon granting the final order for divorce, as follows:

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and

I any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

I relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[366] Delay in making applications for spousal support can be fatal to the claim. Justice Giaschi discussed the principles in *Wellard v. Wellard*, 2020 BCSC 1877:

[171] Delay in bringing an application for spousal support has been considered in a number of cases. Some of those cases were summarized by Justice Schultes in *Segura v. Segura*, 2020 BCSC 650, at para. 131:

[131] Regardless of whether there is any entitlement, counsel submits that serious concerns should arise from the lengthy delay by Ms. Segura in seeking spousal support. In addition to the passage from *Kerr* that I have cited, he refers to cases from this jurisdiction in which delays in seeking support weighed against a support order:

· *Halliday v. Halliday*, 2016 BCSC 2036: Despite the fact that the applicant had suffered from chronic fatigue throughout the relevant period, the Court found that there was no reason that she could not have applied for spousal support as soon as the payor left the family residence, noting that she "was not being held at ransom" by the payor during that period. As a result, support was made retroactive only to the point that she filed a notice of intention to proceed with her court action and demanded support from the payor.

· *Vik v. Vik*, 2018 BCSC 611: the Court found that it would be unfair to the payor to order spousal support retroactive to the recipient's initial court actions, which were filed five years before the trial and had not sought spousal support. Instead support was made retroactive only to the previous year, when the recipient had finally made a court application that included such a request.

· Lee v. Lee, 2011 BCSC 286: an unexplained delay of eight years between seeking spousal support in a counterclaim (under the previous court rules) and making the application for it that was before the Court was found to disentitle the would-be recipient spouse from receiving any retroactive award.

[172] Lee is particularly relevant to the matter before me. In that case, spousal support was claimed in a counterclaim filed October 2002, but an application for support was not filed until October 2010. Justice Pearlman held that the lengthy and unexplained delay warranted a dismissal of the claim for retroactive support.

[367] The claimant contends her entitlement to spousal support is based on compensatory and non-compensatory grounds, taking into account:

- a) their 17.5-year relationship was of long-duration; and
- b) the claimant assumed the caregiving role for the children during the relationship and made sacrifices to her career which allowed the respondent to advance his business interests, including the Restaurant and the West 11th property.

Compensatory Support

[368] The respondent contends that the claimant's support claim based on compensatory entitlement has not been proved. She was deliberately unemployed or underemployed from the date of separation until trial.

[369] The respondent highlighted some of the claimant's reasons for not working: her unsubstantiated claim of depression and worry that K.S.K. was vaping in high school. She concedes that no medical notes or information concerning her depression have been produced.

[370] The respondent contends the claimant was capable of working outside of the home after the parties separated and her failure to take any efforts to secure employment before beginning work at FedEx in 2023 disentitles her to support.

[371] The respondent argues the claimant did not suffer any loss of educational or employment opportunities and he did not stop her from pursuing English classes or other avenues of improving her employability.

[372] The respondent contends that the claimant's work history reflects her ability to find and keep employment during the marriage notwithstanding her claims to limited abilities to speak English. He contends she could have easily found new employment at which point her standard of living would have equaled or exceeded the respondent's standard of living.

[373] Prior to separation, the claimant worked at the Restaurant, and in two other jobs. She did not point to any opportunities she failed to pursue due to her role as the primary caregiver.

- [374] Thus, the respondent argues that the Court should impute income of \$34,600 per annum to the claimant from the date of separation.
- [375] He contends that the claimant continues to enjoy a life equal to or better than the standard of living enjoyed prior to separation. She had the benefit of exclusive occupancy of the family home and retain all the extra tax-free income from renting out the suites. The respondent says that the decision in *Larochelle v. Larochelle*, 2018 BCSC 1347 supports the principle that absent evidence of sacrificed opportunities as a result of the marriage and her role as primary caregiver, and where the standard of living is the same as it was during the relationship, no support should be awarded.
- [376] In this case, the claimant achieved a grade 12 education in India and was studying at college prior to marriage. Their first child was born approximately six months after she arrived in Canada. The claimant left work and received maternity benefits. At this stage, the respondent encouraged her to leave her employment with Golden Boy and she began working in the Restaurant on an as-needed basis.
- [377] From time to time throughout the marriage as the claimant was employed at these minimum wage jobs and she was mostly responsible for child care including arranging care for the children when the parties worked. She would drop off and collect them from school or daycare after her work ended. The respondent's work schedule started at around 10:00 am and ended at midnight to 1:00 am the next day. The schedule continued to the date of separation; this meant that his role was limited and left the claimant with the bulk of the parenting responsibilities.
- [378] The claimant testified that she worked between 2006 and 2010 for two companies; Can Pacific and Golden Boy. After 2010, she worked in the Restaurant. She said that in October 2007 she took no time off from Golden Boy except for a few weeks before the child's birth. She received maternity benefits for one year after their second child was born.
- [379] In the Restaurant, she would work during emergencies, or performing dishwashing and food preparation tasks. She was receiving a cheque for her wages but the respondent deposited that cheque in an account controlled by him.
- [380] The claimant continued to work in the restaurant until 2017 when there were arguments between the parties. She said that when the children started school she was working.
- [381] In 2017, the claimant was employed at GDI Services and Canada Post where she earned \$14,589 with the former and \$1,667 with the latter. In total, the claimant's assessed income was \$108,818 which included her one-half of the gain on the sale of the West 11th property.
- [382] The claimant testified that her sister-in-law had alerted her to opportunities for new immigrants to learn English in Canada. The claimant contends she asked the respondent if she could be permitted to pursue English language training but he rejected her request.

- [383] The claimant said that after separation she was under profound stress which interfered with her capacity to work. Their eldest child was skipping school; he eventually received counselling at school.
- [384] I accept the claimant's assertions that their marriage ended with an event in which the respondent was violent towards her. Much of the friction in their marriage stemmed from the respondent's dominance over her personal choices. For instance, she said the respondent refused to permit her to have a male family doctor.
- [385] In *Marquez v. Zapiola*, 2013 BCCA 433, D. Smith J.A. discussed the principles underpinning compensatory support:
- [33] Compensatory support recognizes the need to compensate a spouse for the economic disadvantages arising from the marriage and to account for the economic advantages that are conferred on a spouse as a result of the marriage (*Moge v. Moge*, [1992] 3 S.C.R. 813 at 864). The economic disadvantages typically include the assumption of primary responsibilities for child care and household management. Those functions often result in an impairment of that spouse's future economic opportunities. The economic losses to a spouse who has been out of the workforce for a lengthy period are, in most instances, a significant impediment to that spouse's ever realizing his or her maximum earning capacity (*Moge* at 861-863, and 867-868).
- [386] The respondent's behaviours since the separation and in particular his deliberate failure to comply with the October 31 order made the assessment of her spousal support entitlement more difficult. Nevertheless, she was able to support herself on rents received from the basement tenants at the East 57th property.
- [387] Before separation, the claimant was the primary caregiver to the parties' children. The respondent had marginal involvement in the home and with the family while he focused on the Restaurant.
- [388] It was clear that the respondent managed the family finances and did not respond to the claimant's requests for educational programs that might improve her English. I do not accept that the claimant was as deficient in her English language skills as she purported, but do find that her responsibilities in the home and, from time to time in the workplace, without support from the respondent prevented or impaired her from becoming more fluent in English.
- [389] Although the claimant's testimony was sparse on some details, I recognize the comments of D. Smith J.A. in *Marquez* that in assuming the primary responsibilities for children and household management, she experienced economic disadvantages because she was less able to venture into the workplace. She was limited to minimum wage work and she was not free to pursue roles that could have offered her better prospects. The respondent enjoyed a commensurate release from household management and childcare to pursue his role at the Restaurant.

- [390] This was a longer marriage that should be seen as a joint endeavour. The respondent contends that the claimant's standard of living did not change after separation; she enjoyed the benefit of living in the East 57th property and taking the rental income that, in the end, supported her. It should be noted that the claimant's enjoyment of the rental income was artificially exaggerated because she was not paying income tax on those earnings. To some degree, the respondent benefited in the short term by her decision not to report the income.
- [391] I conclude that the claimant experienced a diminution in her overall ability to compete in the marketplace because of the breakdown of their marriage and her focus on the well-being of the children. It was also obvious that the respondent's multiple violent and controlling behaviours had impacted her overall ability to function during their separations. The respondent denied any role in limiting the claimant's access to language training or other improvements; for reasons noted elsewhere in these reasons, I do not believe the respondent.
- [392] I accept that the claimant had a somewhat productive work history notwithstanding that she undertook the bulk of childcare responsibilities. She worked many years between 2006 and 2010 at low-wage positions and in the business of the Restaurant. The duration of her employment convinces me she was a capable employee but possessed limited language and employment skills.
- [393] Regrettably, there was no evidence concerning opportunities for education or advancement that the claimant could not pursue or did not pursue as a consequence of the marriage breakdown or her role in the family.
- [394] The claimant eventually obtained full-time employment with FedEx in 2023. This was her first employment post-separation and she earns a salary above the basic minimum wage.
- [395] In the result, I conclude that the claimant has demonstrated a modest compensatory claim to spousal support.

Non-Compensatory Entitlement

- [396] In *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC ref'd, 33002 (28 May 2009), the Court articulated the principles pinning non-compensatory support claims:
- [54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[397] The respondent argues there was a dearth of evidence to support the claimant's assertion that she was in need of support; he submits that the claimant had an obligation to mitigate her financial circumstances by taking employment.

[398] The respondent argues the claimant has not established any link between her economic hardship and the breakdown of the relationship.

[399] He pointed out that she had a savings bank account that remained at approximately the same level from the date of separation until the present. She has not increased her personal debt since separation and can work full time. Her banking records indicate she had \$26,375 on deposit in September 28, 2018, increasing to \$29,000 and dropping to as little as \$10,600 by November 30, 2021 and back to \$20,092 by July 2023. Interestingly, the claimant removed \$9,138 by way of a bank draft on February 16, 2021 and on the same day, she deposited \$4,700 to the account.

[400] In the claimant's F8 financial statement made October 13, 2023, she disclosed annual expenses of \$51,304. She had \$1,000 in unsecured debt and income of \$63,360, including \$30,600 per year in gross rental income which was artificially inflated because she did not report any rental income to the CRA. By contrast, the respondent reported having annual income of \$45,000 and annual expenses of \$65,223 against personal debt of only \$5,000 (not including car loans and business debt).

[401] In *Marquez, D. Smith J.A.* addressed the principles applicable to non-compensatory spousal support:

[34] Non-compensatory support acknowledges the interdependencies that marriage creates and which often "cannot be easily unravelled" (Bracklow at para. 30). It allows for a level of entitlement to meet the spouse's "needs" following marriage breakdown. "Needs", however, is a relative concept that extends beyond a level of support for the mere basic necessities of life; non-compensatory support includes a level of support that takes into account the standard of living enjoyed by the spouses during the marriage. In *Moge*, Madam Justice L'Heureux-Dubé recognized the importance of this latter factor, particularly with respect to long-term marriages (at 870):

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement [citations omitted]. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution [citations omitted.]

In short, in the proper exercise of their discretion, courts must be alert to a wide variety of factors and decisions made in the family interest during the marriage which have the effect of disadvantaging one spouse or benefiting the other upon its dissolution. In my view, this is what the Act [Divorce Act] mandates, no more, no less.

[402] In the end, the claimant remained in the East 57th property and was able to collect rents from the date of separation until trial. The costs associated with servicing the mortgage debt, taxes and other expenses will largely be met by a balancing of family property at separation, payment of debts and expenses.

[403] The claimant maintained a fluctuating bank account wherein she had between \$26,455 and \$20,000 and no increase in personal debt between the date of separation and trial.

[404] In my view, the claimant could also be entitled to spousal support on a non-compensatory basis. Her needs extending beyond the mere basic necessities of life are obvious. However, the evidence does not support an assessment of those needs beyond the time it took her to obtain employment with FedEx in 2023. The claimant provided little other evidence to support a non-compensatory claim after the separation.

[405] In the result, the claimant is entitled to support under compensatory principles only.

Retroactive Spousal Support

[406] The Court of Appeal in *Legge v. Legge*, 2021 BCCA 365 addressed principles regarding retroactive spousal support:

[34] With regard to the certainty of the payor's obligations, the judge did not refer to the conclusion reached by Justice Cromwell in light of the circumstances in *Kerr*. After outlining the concerns associated with retroactive spousal support, Justice Cromwell stated:

[210] Neither of these concerns carries much weight in this case. The order was made effective the date on which the proceedings seeking relief had been commenced, and there was no interim order for some different amount. Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations. Ms. Kerr diligently pursued her claim to trial and that being the case, there is little need to provide further incentives for her or others in her position to proceed with

more diligence.

[Emphasis in Legge.]

[407] The Court continued:

[40] In my view, the approach taken in *Lee and Segura* to a spouse's delay in seeking spousal support is correct. A trial judge must consider the needs of the spouse seeking support both at the time the support should have been paid and at the time of trial. If a spouse has established a "clear entitlement" to spousal support, and that he or she underwent hardship in the past and remains disadvantaged at the time of the hearing to determine spousal support, it would be unusual for a court to make no award for spousal support where financial resources permit, notwithstanding the delay. This is because a denial of spousal support in such circumstances could not meet the statutory objectives. In short, a court should strive to make an award that takes into account the payor's circumstances, but also gives effect to the objectives of spousal support. This can be done by awarding an amount--either by way of lump sum spousal support or reapportionment of property--that reflects a shorter duration of support. It can also be done by awarding prospective support instead of some amount for retroactive support. However, as emphasized in *Kerr*, a court should take a flexible approach when balancing the countervailing interests to arrive at an award that fulfills the objectives of spousal support and is sensitive to a payor's hardship.

[45] Justice Martin's comments [in *Michel*] on how to approach the delay factor as one of the D.B.S. considerations are, in my view, relevant here with appropriate adjustments for the spousal support context:

[111] This factor requires the court to consider why a claimant waited to bring an application. While timely applications are the norm and are to be encouraged, there are many reasons why even a person in need may delay making an application. In light of what the jurisprudence discloses, the focus should be on whether the reason provided is understandable. I do not think we should be looking for a "reasonable excuse" for the recipient parent's delay (D.B.S., at paras. 100-3 (emphasis added)). That language, unfortunately, works to implicitly attribute blame onto parents who delay applications for child support.

[Emphasis in *Michel*.]

[408] In my view the claimant is entitled to retroactive support from the date of separation. Although she had rental income to support her and the children, she was not in a position to immediately look for work and has been required to account for the rental income as part of their ownership of both properties.

- [409] It is likely she did not apply for interim support because she was receiving those rents. However, I have decided the parties must share equally the costs of managing their homes and account to the other for rents they received. These two homes were owned as part of their joint enterprise.
- [410] The respondent had notice of her claim for spousal support from November 1, 2018 and he failed to pay any child support or spousal support by the commencement of this trial.

Imputing Incomes to the Parties

- [411] There are several issues that must be resolved prior to a final determination of the incomes available or to be imputed to the parties, both retroactively and prospectively.
- [412] An accurate assessment of the parties' incomes is constrained by the respondent's failure to explain his use and investment of the \$910,000, gaps in documentary disclosure, confusion surrounding the financial affairs of the Restaurant, including an accurate assessment of the respondent's income from the company, and the overall absence of credible explanations given by the respondent.
- [413] In the result, I will draw inferences from facts presented by the parties concerning their financial circumstances.
- [414] When a court is unable to determine a parent's income due to incomplete financial disclosure, the court may impute income in the absence of the required information: see *Sullivan v. Struck*, 2015 BCCA 521 and s. of Guidelines:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (g) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

I the spouse's property is not reasonably utilized to generate income;

- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income

[415] In *Gartner v. Gartner*, 2024 BCSC 445, Justice Gibb-Carsley said:

[47] The court has a broad discretion to impute income to either or both spouses for the purposes of determining spousal support: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para 34. The burden of establishing an evidentiary basis for imputing income to the other spouse lies with the spouse seeking to impute income: *MacCarthy* at para. 35; *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36; *Jendruck v. Jendruck*, 2014 BCCA 320 at para. 23.

[416] Disclosure of all assets, liabilities and income information is crucial in the assessment of the parties' incomes. The respondent does not suggest that he met his disclosure obligations as required by the Rules and the interlocutory orders.

[417] This Court is often referred to the decision of Justice Fraser in *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 at paras. 9-10, 1994 CanLII 3195 (S.C.) which is apposite to the facts in this case:

Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation...

It is not enough to respond to non-disclosure by an award of costs. Nor is it enough, in a case like this one, to deal only with what is known. Either of these approaches, or both together, may still reward the non-disclosing litigant for his conduct, depending whether his concealment has been successful.

[418] In *Sullivan*, the Court of Appeal set out the approach to considering retroactive support:

[78] I accept that in calculating a retrospective support order, the correct approach is to use the payor's actual income for the relevant period, if it is readily ascertainable: *Cornelissen v. Cornelissen*, 2003 BCCA 666 at paras. 39-41. This approach is consistent with what the Supreme Court of Canada had to say in *D.B.S. v. S.R.G.*, 2006 SCC 37.

Analysis

The Respondent

[419] Ascertaining the parties' income levels for spousal support and child support purposes is enormously complex. The determination of the incomes of each party requires a consideration of the financial results from the development of the West 11th property and the entanglement of the respondent's financial affairs with the Restaurant. I must also draw inferences regarding certain post-separation events.

[420] The starting point in this analysis is the parties' Line 15000 income tax returns. However, the assessment is made more difficult in this case because the fiscal year-end for the Restaurant is April 30 and the data provided was only to the year ended April 30, 2023. Thus the respondent's 2023 income is more difficult to assess because he withdrew large sums of money from the Restaurant, portions of which were taken out as loans from the company. He also declared a significant bonus and other payments from the Restaurant at year-end

2023 that would have been available for child support purposes.

- [421] The assessment of the respondent's income and use of family property has been greatly hampered by reason of his ongoing breaches of the October 31 order and his inability and refusal to explain some of the data shown in documents he produced.
- [422] The claimant seeks retroactive and prospective child support. Although the claimant accepted the expert accountant's opinion (discussed below) as a starting point, she contends the respondent's Guidelines income should be imputed much higher, at \$140,000 to \$150,000, being an estimate of his income based on various anomalies in the information provided.
- [423] She argues that arrears of child support including support for the full 12 months of 2023 would be \$93,804, based on her contention that the respondent's income from 2018 to 2023 has been in the range of \$64,000 to \$153,000.
- [424] The respondent argues that his Guidelines income should be imputed at \$74,000 for 2023 and at a lesser amount for the previous years. He says that his child support arrears should be set at \$58,228.
- [425] In order to assess the respondent's Guidelines income, the following must be taken into account: the income from the Restaurant, the interest that was or could have been earned on the deposit of \$910,806, and rental incomes from the Prince Albert property and East 57th property.

Income from the Restaurant

- [426] The respondent's testimony and the documents presented at trial did not permit an accurate analysis of the Restaurant's financial performance and funds that should have been available for child support purposes.
- [427] Ms. Daum gave opinions about the respondent's Guidelines income in addition to that of the Restaurant. Regrettably, it appears Ms. Daum did not receive a full outline of many of the Restaurant's financial details concerning, among other facts, funds transferred from the Restaurant account to the respondent's personal accounts between the parties' separation and trial. She did not take into account this outflow of funds from the Restaurant nor other cash deposits to his personal bank account. Ms. Daum commented on the respondent's outstanding shareholder loans from the company and the potential that the CRA would consider these loans to be income for tax purposes.
- [428] Ms. Daum concluded that the respondent's Guidelines incomes were: \$57,000 for 2020; \$38,000 for 2021; and \$60,000 (corrected to \$74,000) for 2022, before taking into account the impact of the respondent's shareholder loans for the fiscal years from 2019 to 2023. She did not address the respondent's income for 2018 and 2019.

- [429] The parties accept generally that Ms. Daum addressed the components of the respondent's Guidelines income based on his T1 income tax return that included employment and rental income. She adjusted her opinion to reflect that because of amortization expenses, personal expenses charged through company accounts, and amortization expenses for the Tesla, there should be an added back to the respondent's income, in part because he used the Tesla for personal purposes. Although the respondent testified that he used this vehicle for food deliveries, Ms. Daum did not consider this to be a proper expense for the corporation. In addition, Ms. Daum included an increase in the value of non-taxable benefits that accrue to the respondent personally.
- [430] On closer analysis, there were shortcomings in Ms. Daum's opinion to be addressed below.
- [431] The Restaurant used a local BMO account to carry on the financial aspects of the business. Notwithstanding the court order restricting the respondent's use of family property, between September 28 2018 and June 30, 2023 the respondent took \$323,705 from the Restaurant's BMO account by way of cheques and deposited same to his personal accounts with Vancity, RBC, Coast Capital Savings and Khalsa Credit Union between the date of separation and the date of trial. The respondent was cross-examined on each Restaurant cheque contained in Exhibit 41, many of which he confirmed and some others he was unable to identify or agree with. In addition, between January 19, 2019 and February 6, 2023 the respondent made cash deposits to his Vancity account totaling \$114,790 over the same time period without confirming the source of those cash deposits.
- [432] Thus, between the date of separation and trial, \$323,705 was moved from the Restaurant's account to the respondent's personal accounts (averaging \$5,221 per month over 62 months) and \$114,700 was deposited in cash (averaging \$2,340 per month over 49 months) to the same personal account.
- [433] Some of the \$323,705 in withdrawals from the Restaurant's BMO bank account were eventually used to make some mortgage payments on the parties' properties. There is no doubt the respondent had an abundance of resources following their separation and can not be excused from paying spousal support because she was getting by on rents that are shared between them.
- [434] After 2018, the respondent began taking money from the Restaurant; he exhausted his shareholder loan to the company and he incurred a shareholder loan to the company on an increasing basis up to and including 2023. The amount of money taken from the Restaurant and allocated to loans to and from the shareholder was as follows:

Year

Cumulative the Restaurant loan to the respondent

Annual withdrawal from the Restaurant loans to and from the respondent

2018-2019

\$16,463

\$25,825 + \$16,463

Total = \$42,288

2019-2020

\$41,973

\$24,830

2020-2021

\$52,768

\$10,975

2021-2022

\$70,518

\$17,775

2022-2023

\$101,391

\$30,873

[435] It is conceded that, for income tax purposes, any funds received by the respondent forming the balance of loans to the Restaurant and not repaid in the year after the loans were made must be included in the shareholder's taxable income for the next year. No less certain is my view these loans (whether income or true loans) were funds available to support their children.

[436] I conclude that the monies taken by the respondent from the company as noted above will be considered income for child support and spousal support purposes (for each April 30 year end) because they would otherwise form part of his Line 15000 income in those years.

[437] It is also clear from portions of the 2023 general ledger that \$81,771 was allocated to the respondent as income for 2023 thereby reducing the amount of his shareholder loans to \$101,391 outstanding by the year-end. This allocation will be income in his 2023 income tax return available for child support.

[438] The transfers of cash and cheques from the Restaurant between 2018 and 2023 to the respondent's accounts exceed the funds accounted for in his T4 compensation, loans to shareholder or other debts. Unfortunately, no other the Restaurant general ledgers for prior years were made available.

- [439] At the time of trial, the respondent had not filed his personal 2023 income tax return that would include payments due in the year-end statements as of April 30, 2023. Thus, I'm satisfied that the respondent's 2023 T4 income will be at least \$81,771 (including \$20,000 in bonus income). Increases in the shareholder loans up until April 30, 2023 should be imputed to him for each year when they are recorded.
- [440] In addition, the respondent's increased loans from the Restaurant in 2023 totaling \$30,873 should be added to his Guidelines income for 2023.
- [441] Taking into account the respondent's accumulated Line 15000 income from 2018 to 2022 was \$184,800 and his accumulated loan to shareholder as of April 30, 2022 was \$70,518, the respondent's income allocations over that time are \$255,318 or \$51,063 per year.
- [442] The post-separation transfers from the Restaurant's account to the respondent's personal account up to April 30, 2023 were \$288,105 and by June 2023 this amount increased to \$323,705. The funds removed from the Restaurant into the Vancity account exceeded his income by \$18,638. This amount represents money he has taken from the company but is not included in his income and does not appear in the loan to shareholder debt owing.
- [443] In addition, the respondent received \$114,000 in cash in his Vancity account. The origin of these funds is unclear. This sum may have come from the sale proceeds from the West 11th property or rents collected from tenants in the Prince Albert property; I simply do not know. Absent better evidence, I am left to assume that these two amounts including the \$18,638 (totaling \$132,638) came from an undisclosed source and may include income he has not disclosed. Because of the uncertainties stemming from the pattern of withdrawing funds from the Restaurant's account and depositing them to his personal account, I will not impute that sum to him.
- [444] In 2023, the respondent took \$120,267 from the Restaurant's BMO account which was deposited to the same group of personal bank accounts noted above. Some of these withdrawals correspond with loans to the respondent as shareholder while others appear to be payment of the respondent's tips and shareholder loans. In October 2022 there are two payments of \$4,000 each to the respondent's law firm representing him in this action, recorded as shareholder loans.
- [445] The respondent testified that some cheques he issued in his name for "tips" or cash were distributed to employees. This is contrary to the evidence in the Restaurant general ledger which clearly outlines the payments to each employee for their share of tips. Moreover, insofar as cheques issued were noted to be "tips", those cheques were, at times recorded in the general ledger as loans from the Restaurant to the respondent.
- [446] In my view, all of these payments likely constituted breaches of the October 31 order by the respondent to the extent that he caused a diminution in the value of the Restaurant shares and the value of that component of the family property.

- [447] The respondent said that in the early days after separation, he used the Restaurant funds to pay mortgages on the Prince Albert property and East 57th property. However, there were multiple cheques deposited to the Coast Capital Savings account for mortgage payments in 2022 and 2023 with funds taken from the Restaurant.
- [448] When questioned about the Restaurant cheque issued May 15, 2023 for \$16,000 that was not deposited to his Vancity account, the respondent could not explain what was done with this money. He said he may have cashed this cheque and kept the funds for himself. Without further evidence, I infer that these funds should be included in the respondent's Guidelines income for 2023.
- [449] To the extent that the respondent's loan from the Restaurant increased by \$30,873 in the company's fiscal year-end 2023, his income allocation of \$81,771 and his withdrawals from the company in 2023 were \$120,267, of which \$34,600 will be included in the company's April 2024 year-end. Overall, it is difficult to assess with any certainty how much income from the Restaurant the respondent will have received in 2023.
- [450] I am constrained by the evidence to conclude with some certainty that the respondent's income from the Restaurant in 2023 will be \$128,644.

Interest Income from the West 11th Property Profit

- [451] My negative conclusions concerning the respondent's credibility and his failure to account for the receipt and disposition of the \$910,810, contrary to the October 31 order, require me to make inferences concerning his actual income derived from the investment of this amount.
- [452] I intend to impute income to the respondent under ss. 19(1)(d), I and (f) of the Guidelines.
- [453] The October 31 order restrained the respondent from disposing of, transferring, converting or exchanging into another form, property in which the claimant might have an interest. He was required to account for various sums he received over the course of their relationship. The respondent failed to comply with this order and I am in no doubt that the respondent earned or could have earned interest income in addition to his Line 15000 incomes declared for 2019 to 2023 and the amounts set out in Ms. Daum's opinion. I find that the respondent diverted income which would affect the level of support he is obliged to pay. He failed to account for interest received on the GIC settlement funds or failed to utilize those funds to generate income. He failed to provide information concerning the interest that could have been earned on the \$910,000 despite his obligation to do so.
- [454] I am satisfied that the respondent's refusal/failure to pay \$910,806 into the claimant's solicitors bank account, failure to provide an accounting of the parties' share of the profits from the West 11th property development, failure to account for the \$910,806 he withdrew from the parties' GIC accounts and accounting for the settlement funds he received in 2016 in the amount of \$105,000 were deliberate actions that deprived the claimant of an ability to

accurately assess the income earned (or that should have been earned) by the respondent after separation.

- [455] The respondent presented no evidence concerning the interest earned or that could have been earned while these funds were in his brother's bank account. One half of the interest imputed to the entirety of the \$910,806 received in November 2018 would have belonged to both parties equally and should have been included in their incomes until trial. While recognizing that the respondent may have used some of this money to make mortgage payments, he did not provide any calculation or estimate of the amounts so used.
- [456] It was enormously difficult to understand the respondent's use of the Vancity account given the volume of the Restaurant funds deposited to the respondent's personal accounts, some of which were used to pay the Coast Capital mortgage.
- [457] Although the respondent was initially deposited the \$910,810.77 in a GIC earning interest he did not say if interest was earned on the entire deposit. Due to the respondent's failure to properly account for the \$910,810 I infer that interest could have been earned (and might have been earned) on the \$910,000 including the \$800,000 held by K.K.
- [458] K.K. said that he held the money in an ordinary bank account (by which I understood him to mean not a GIC or other investment account) and was not certain if interest was earned on the money while under his control.
- [459] The respondent testified at one stage that he wanted the interest on the \$800,000 invested but, subsequently paid no attention to his brother's investment of those funds.
- [460] I am unable to ascertain with any certainty the amount of money the respondent earned or could have earned by investing the \$910,000 he received for the balance of his profit from the West 11th property development. Even if the respondent had used these funds to make monthly mortgage payments which he estimated to be \$9,000 per month, the funds would not have been exhausted for at least 101 months excluding accumulated interest that could have been earned on the declining balance.
- [461] It is also clear the respondent used the Restaurant funds to pay some of the Based on the respondent's and K.K.'s testimony, I am satisfied the two brothers colluded to keep at least \$800,000 out of the claimant's reach and would have continued to earn interest. But for this collusion, I infer that the respondent would have ensured it was 2.05% each year based on the investment return paid by Khalsa Credit Union in September and October 2018.
- [462] In the portion of these reasons that deal with the claimant's claim for reapportionment, I am satisfied it would be significantly unfair if the family property was not be reapportioned to reflect the respondent's failure to invest the profit from the West 11th property development for 63 months to the extent of \$46,000.

- [463] I deal with the respondent's failure to account for the net sale proceeds of the West 11th property (\$1,078,552.87) elsewhere in these reasons. The respondent and claimant paid some tax on the profits but kept \$910,810 in his own account. He never provided a fulsome accounting of the \$268,552 he did not give to his brother.
- [464] As noted above the respondent was disingenuous in his claim that the bulk of the \$910,810 was used to pay the two mortgages when he could or should have been earning interest on those funds.
- [465] In the result, I infer that the respondent earned or could have earned interest at an average rate of 2.05% on a declining balance but not less than \$700,000 per year. Because each party was entitled to a one-half interest in the \$910,810 plus interest earned on that amount, for the purposes of establishing Guidelines income, I will impute one-half of the notional interest income of \$14,300 (\$7,175) per year for each year up to and including 2023.
- [466] The claimant will be compensated in the reapportionment of family property, and will receive additional funds that were denied to her by reason of the respondent's breach of the October 31 order and her entitlement to a share in the income earned or that should have been earned on the investment.

Rental Incomes

- [467] During the time the respondent occupied the Prince Albert property, he claimed he received rent of \$1,200 per month from September 2018 until February 2019, when the rent increased to \$1,600 per month. By January 2023, the rent had increased to \$1,900 per month. The amounts he received for 2018 and 2019 are not accurately reflected in his income tax returns in which he claimed no rental income for the Prince Albert property.
- [468] In total, the respondent collected \$86,800 (rented for 53 months) from tenants at the Prince Albert property and the claimant collected \$187,500 (rented for 61 months to trial) from tenants at the East 57th property.
- [469] For the purposes of assessing the respondent's income for 2018 to 2023, both properties were family property in which each party had a one-half interest as a tenant in common. Each was equally responsible for family debt: see FLA, s. 81; although the respondent was the sole owner of the East 57th property.
- [470] For this reason, I direct that the combined amounts of rent collected at the Prince Albert property and the East 57th property for each year be shared equally and form part of their Guidelines incomes.

- [471] Ms. Daum included income to the respondent stemming from the rental of the Prince Albert property. She did not consider his rental income for four months of 2018 or 2019. She simply accepted the respondent's representations to the CRA which do not accurately reflect his income for support purposes. Moreover, Ms. Daum's calculations depended on the respondent informing her that the rents were \$16,800 per year commencing 2020, 2021 and 2022.
- [472] In her calculations, Ms. Daum accepted the respondent's tax returns indicating that costs were deducted for tax purposes when calculating his income from the Prince Albert property tenants.
- [473] It is clear Ms. Daum was misled. The respondent testified that in February 2019 until January 2023 he was receiving \$1,600 per month from tenants in the basement of the property. The rent stayed the same until January 2023 when it increased to \$1,900 per month. Thus, the actual rent for 2019, 2020, 2021 and 2022 was \$19,200 per year commencing 2023 increased to \$22,800.
- [474] Similarly, the expenses made after separation will be allocated equally to both parties.
- [475] There is no dispute that the claimant received all of the rental income from the East 57th property as did the respondent from the Prince Albert property. Because the claimant did not report rentals received on the East 57th property, there was no determination of the quantum of net revenue from those rents after the deduction of expenses. On the other hand, the respondent did report net income from rentals after deducting expenses.
- [476] Nevertheless, ss. 19(1)(g) and (2) of the Guidelines allow for the deduction of reasonable expenses against gross income to be assessed. The initial onus of proof rests with the party seeking to impute income. The determination of appropriate expenses to be deducted when considering the imputation of income was addressed in *Barry v. Davis*, 2021 BCSC 546:
- [43] Section 19(1)(g) of the Guidelines permits the court to impute income to a party if they have unreasonably deducted expenses from their income. Section 19(1)(g) applies to sole proprietorships, and can also be applied where there is an incorporated business: *D.M.B.* at paras. 147-150. Under s. 19(1)(g), it is sufficient to show that the other party has deducted business expenses to meet this initial evidentiary burden on the claimant: *C.M. v. V.M.*, 2016 BCSC 2144 at paras. 39-40; *Sobiegraj v. Sobiegraj*, 2014 ONSC 2030 at paras. 65-67.
- [44] Once the claimant establishes this evidentiary foundation, the onus shifts to the responding party to show that her business expenses are a reasonable deduction from her income for child support purposes: *C.M.* at para. 39, citing *Sobiegraj*.

- [45] According to the court in D.M.B., "[d]etermining what are reasonable deductions should involve a detailed analysis of the deductions claimed in order to assess the items that make up the sums deducted": at para. 148. Notwithstanding the failure of the respondent to provide documents necessary to analyse the business expenses in detail, the court may still undertake an assessment of the claimed deductions: D.M.B. at para. 149.
- [46] Expenses must be reasonable and for legitimate business purposes, in all the circumstances. As provided for in s. 19(2) of the Guidelines, the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.): *Dornik v. Dornik*, 1999 BCCA 627. Where expenses are personal in nature (providing a personal benefit to the party) and/or constitute an ordinary living expense, it is not appropriate to deduct the expenses, and the expenses should be added back into the party's income: D.M.B. at para. 150, citing *Ursel v. Ursel*, 2014 BCSC 1219; *Kowalewich v. Kowalewich*, 2001 BCCA 450.
- [47] After establishing that the receiving party has (or will) deduct expenses, the onus shifts to that party to prove expenses deducted from income are reasonable. If an expense provides a personal benefit and/or is an ordinary living expense, it is added back to the other party's income. I accept that utilities and other services related to a rental suite can be deducted from income. However, mortgage interest and property taxes are incurred regardless of the existence of the suite and should not be deducted from income for child support purposes.
- [478] In the respondent's 2022 tax return, he incorrectly records income as \$16,800; the rental is \$19,600. Of the total expenses--\$28,940--he attributed 50% to his personal use, \$7,026 of which relates to insurance, repairs and maintenance and utilities. Deductions for interest in bank charges and property taxes total \$21,912.
- [479] As summarized in *Barry*, deductions from gross rental income of expenses should not include expenses that provide personal benefits or constitute ordinary living expenses that should be added back into the other party's income: see *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254; *Kowalewich v. Kowalewich*, 2001 BCCA 450, and *Nazarinia v. Amid-Nazarinia*, 2024 BCSC 189 at paras. 275-278.
- [480] In the circumstances of this case, I conclude that the expenses for mortgage interest and property taxes are expenses that the respondent would incur regardless of his rental arrangements for the basement suites. These expenses are not ones that should be deducted from income for the purposes of determining the respondent's support obligations.
- [481] Neither party provided any estimate of the incremental costs incurred in maintaining the rental portion of the house. Absent better evidence, I estimate that the deductions should be measured by 20% of the rental income and with the balance attributed equally to the parties for calculation of their Guidelines incomes.

[482] I accept that rental payments received totalled \$274,300. 80% of that amount is \$219,440 will be imputed to the parties' Guidelines income. I find that each party will be allocated \$1,924 per month from September 2018 until trial and that is the amount that will be included in each party's Guidelines income for child support purposes.

Conclusion

[483] I am satisfied that the respondent's taxable income for 2023 includes \$81,771. This sum became income to him by reason of the three allocations set out in the general ledger together with the \$30,873 by which his shareholder loan had increased by the corporation's year-end because these amounts would have been available to pay child support.

[484] These increases in the respondent's shareholder loans for each year commencing 2018 until trial should be added to the income determined by Ms. Daum for those years to arrive at the amounts available to pay child support.

[485] In summary, in addition to the Guidelines income estimated by Ms. Daum, the following must also be taken into account:

- a) the income of \$81,771 attributed to the respondent in the fiscal year 2023 general ledger (including bonuses and other allocations) will be imputed for the year 2023;
- b) for the years 2019, 2020, 2021 and 2022 the respondent's income will include the estimated available income set out in Ms. Daum's report for the respondent except that her inclusion of rental income will be deleted and the rental incomes attributable to both parties will be substituted and included in the respondent's imputed income;
- c) for four months of 2018 and the year 2019, the respondent's Guidelines income will include the repayment of the \$25,825 shareholder loan owed to the respondent and the \$16,463 loan incurred by the respondent to the Restaurant;
- d) the respondent's line 15000 income for 2019 was \$32,400;
- e) for 2023, the respondent will be imputed income equal to 80% of one-half of the rental income received by the claimant after the conclusion of the trial ;
- f) for each month of each year between the date of separation and the commencement of trial \$962 being 80% of one-half of the average of rentals collected;
- g) one-half of the amount of interest on the sum of \$700,000 that was paid or should have been payable at 2.05% per annum (\$8,750 per year) will be imputed to the respondent. I infer that this same amount was more likely than not available annually between the date of separation and the date of trial. This inclusion of income reflects the respondent's failure to account for the \$910,000 and pay it into trust in 2018;
- h) \$15,000 received from the disposition of an RRSP in 2023 will be imputed to the respondent; and

- i) \$16,000 drawn by the respondent from the Restaurant on May 15, 2023 will be included in the respondent's imputed income for 2023.

[486] The income tax payable on rents should not be a factor included in the determination of the parties' Guidelines incomes for support purposes.

[487] On the basis of the evidence presented, I am satisfied that this question should be resolvable between the parties to achieve an equal sharing of the burden and benefits of disposing of either the Prince Albert property or the East 57th property, whether the latter is sold to a third party as proposed by the claimant. If after the determination of taxes and division of the burdens stemming from these calculations the parties are unable to achieve a resolution.

[488] I find that the amounts calculated by Ms. Daum, including the revised income for 2023 at \$74,000, will be the starting point for determining the respondent's Guidelines income. I accept that the respondent has diverted funds that would otherwise have affected the level of child support he was required to pay, that he did not reasonably utilize funds on deposit to generate income and he failed to provide information to facilitate a proper assessment of his income.

[489] I will impute income to the respondent stemming from his opportunity and responsibility to invest the \$910,000 in the order of \$16,400 per year. This amount of interest would be shared by the claimant.

[490] Based on the above, the respondent's Guidelines income for child support purposes is as follows:

Source of Income

2018

2019

2020

2021

2022

2023

Ms. Daum estimates with rent adjustments

T4 income \$33,600

T4 income \$32,400

\$59,768

\$37,126

\$71,670

\$81,771

Rent Prince Albert @ 80%

\$2,5250

\$7,575

\$7,575

\$7,575

\$7,575

\$6,312

Rent East 57th at 80%

\$4,762

\$14,285

\$14,285

\$14,285

\$14,285

\$11,904

Interest on \$700,0000

\$2,3912

\$7,175

\$7,175

\$7,175

\$7,175

\$7,175

the Restaurant loan and repay loan

\$42,288

\$37,126

\$11,475

\$17,750

\$30,873

RRSP

\$ 15,000

Total income

\$103,723

\$125,929

\$77,636

\$118,455

\$153,035

The Claimant

[491] Although the burden of establishing that income should be imputed to a spouse falls on the party seeking the imputation of income, there is broad discretion in the court to make such an order when the evidentiary foundation is established.

[492] The analysis is informed by the comments of D. Smith J.A. in *Marquez*:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

[38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29).

[Emphasis added.]

- [493] The claimant argues that from the date of separation until May 2023, her only income for Guidelines purposes came from renting basement suites at the East 57th property. By way of simply averaging the rents collected over 61 months, the claimant's income is approximately \$23,664 per annum.
- [494] The determination of child/spousal support engages considerations connected to the division of family property. The authorities have directed the court to make findings regarding the division of family property before considering support issues. This direction is apposite to the circumstances in this case because of the interconnections between some of the property issues and support issues.
- [495] As an example, it is my view that imputing income requires a consideration of the sharing of rental incomes and how the family debt is addressed in the payment of mortgages, taxes and expenses. In this case, the rental incomes represented family property and the mortgage is family debt.
- [496] Section 19 of the Guidelines gives the court discretion to impute income to a spouse "as it considers appropriate in the circumstances" including specific considerations. Children have a right to receive support based on their parents' incomes, some of which are derived from rental properties.
- [497] As mentioned above, the respondent asserts that the claimant was deliberately unemployed or underemployed and that some amount of income should be imputed to her under s. 19(1)(a) of the Guidelines. The test to be applied is one of reasonableness, having regard to the individual's age, education, health, work history and work availability: see *Marquez* at para. 37.
- [498] The respondent correctly contends there was no medical evidence suggesting the claimant was unable to work after separation. He says the claimant provided no evidence to support her contention that her psychological state impaired her capacity to earn income or that A.K.'s needs warranted her decision not to look for work until 2023.
- [499] The claimant had obtained employment in 2017 during which she earned approximately \$18,000. She did not work after separation until she obtained employment with FedEx in 2023, where she earns \$19 per hour and \$28 per hour when working overtime, which seems to average five to ten hours per week.
- [500] K.S.K. was 15 and A.K. was 11 years old when the parties separated. K.S.K. ceased to be a child of the marriage when he started working as an apprentice and became self-supporting in 2022. He continues to live with the claimant but does not contribute to household expenses.
- [501] A.K. is currently 16 years old and continues to be dependent on her. The respondent does not oppose a support order for A.K.

- [502] The claimant argues that the respondent failed throughout their marriage to assist her to learn English to a level that would facilitate her returning to the workforce. I do not accept the claimant's assertion that when she worked for Canada Post or in her other employment she did not have sufficient English language skills to retain that employment.
- [503] The respondent challenged the claimant's credibility on a number of issues. He contends the claimant had failed to provide adequate disclosure about tenants and rent she was receiving after separation. The claimant's testimony was not entirely reliable or credible on several points. As an example, she failed to disclose information requested by the respondent concerning the identity of tenants; the respondent argued that if their identity had been disclosed they might have been called as witnesses at the trial. At the time, there were multiple new tenants living in her home and the claimant was unable to provide names or contact information of several tenants, although she did name one long-term tenant.
- [504] She said previous tenants paid utility bills but the current tenants do not. She could not explain whether early electricity costs were shared by tenants or not. At one time, tenants paid 25% of the electricity and Hydro charges to the East 57th property. The claimant was vague in her responses to these questions and gave the impression she did not wish to account for all the income she might have received.
- [505] The respondent argues that prospective child support for A.K. should be based on his Guidelines income of \$84,000 per year. He contends the claimant's underemployment or unemployment since their separation in August 2018 should influence the divided responsibilities for s. 7 expenses and on the question of spousal support.
- [506] In my view, it was not unreasonable, in the circumstances following a fractious separation that involved family violence, for the claimant to not return to work immediately after September 2018 for the reasons noted above. Moreover, given A.K.'s age at the time of separation, her ability to take employment would have been limited due to her parenting role. There was no corroboration of the claimant's contention that their youngest son was having difficulties at school and required more of her attention, thereby restricting her ability to take employment.
- [507] There was a dearth of evidence on the question of the claimant's employability. However, I accept that the claimant's circumstances should have changed by the time A.K. turned 14 years of age in fall 2020. I am satisfied that, given the fact the claimant had a work history from early in the marriage, which would have required some ability in the English language, she was likely capable of obtaining new employment not long after separation. There was little evidence that she lacked the language skills to perform her duties at FedEx in 2023.

[508] I find that the claimant most likely could and ought to have obtained employment at some time prior to 2023. I conclude she did not take all reasonable steps to return to the workforce after September 2020. Based on the claimant's ability to earn income at FedEx, I impute income of \$37,000 from September 2020 to her based on her current wages working five days per week.

Conclusion

[509] The claimant's Guidelines income for child support purposes from the date of separation should be imputed at \$37,000 per year reflecting employment income she could have earned from September 2020 until May 2023. I also impute income to the claimant based on the cumulative rents received for both properties from the date of separation, net of expenses of: \$21,860 per year from January 1, 2019 and \$7,287 from September to December 2018.

[510] Taking into account all of these imputations of incomes, I conclude that child support payable to the claimant will be as follows:

Year

Number of children

Guidelines income

Child support

Accumulated support arrears

2018

Two

\$48,328

\$757

\$ 3,028

2019

Two

\$103,723

\$1,572

\$ 18,864

2020

Two

\$125,929

\$1,857

\$22,284

2021

Two

\$77,306

\$ 1,205

\$14,460

2022

One

\$118,455

\$1,097

\$13,164

2023

One

\$153,035

\$1,380

\$16,560

[511] The arrears of child support owing by the respondent is \$88,360.

[512] The claimant also seeks contributions to K.S.K.'s tutoring expenses of \$1,920.04, K.S.K.'s plumbing school training totaling \$1,400 and to expenses for medications. The respondent objects to paying a share of the medications. The claimant said the pharmacy costs were incurred due to concerns that K.S.K. be immunized.

[513] I did not hear sufficient evidence to enable me to decide whether these pharmacy charges were necessary. I will make an order for the payment of all the expenses presented except those pharmacy charges.

Spousal Support and Lump Sum Spousal Support

- [514] Taking into account the DivorceMate calculations I have determined that for the year 2019 the claimant was entitled to \$937 per month spousal support; for 2020 \$272 per month; for 2021 nil support; for 2022 \$369 per month; and for 2023 \$1343 per month. The accumulated arrears the end of 2023 are \$34,992.
- [515] The claimant seeks lump sum spousal support of \$150,000. She contends that receiving a lump sum for spousal support will better enable her to purchase the respondent's interest in the East 57th property.
- [516] In *Parton v. Parton*, 2018 BCCA 273, the court outlined the pathway to considering requests for lump sum spousal support. Dickson J.A. said:
- [47] In some cases, a lump sum spousal support award is preferable to an order for periodic payments. When deciding whether to make such an award, the court should weigh the advantages and disadvantages of a spousal support order in lump sum form compared to those of an order made in the more common periodic payment form. In *Davis v. Crawford*, 2011 ONCA 294, the Ontario Court of Appeal discussed the relevant factors for consideration and, in doing so, emphasized the need to distinguish the purpose of a lump sum spousal support award from the effect of such an order. As the Court noted, any lump sum spousal support order will, in effect, involve the transfer of property from one spouse to another, although the redistribution of assets is not the purpose of spousal support:
- [60] It is well accepted - and undisputed - that a lump sum award should not be made in the guise of support for the purpose of redistributing assets: *Mannarino; Willemze-Davidson v. Davidson* (1997), 1997 CanLII 1440 (ON CA), 98 O.A.C. 335 (C.A.), at para. 32. Moreover, the governing legislation does not recognize redistribution of assets as one of the purposes of a spousal support award.
- [61] That said, a lump sum order can be made to "relieve [against] financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home)": Family Law Act, s. 33(8)(d).
- [62] In any event, the purpose of an award must always be distinguished from its effect. Any lump sum award that is made will have the effect of transferring assets from one spouse to the other. The real question in any particular case is the underlying purpose of the order: *Willemze-Davidson* at para. 32.
- [63] Similarly, it is well accepted that an important consideration in determining whether to make a lump sum spousal support award is whether the payor has the ability to make a lump sum payment without undermining the payor's future self-sufficiency.

...

- [66] Most importantly, a court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages of making such an order.
- [67] The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example, short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.
- [68] Similarly, the disadvantages of such an award can include the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.
- [69] In the end, it is for the presiding judge to consider the factors relevant to making a spousal support award on the facts of the particular case and to exercise his or her discretion in determining whether a lump sum award is appropriate and the appropriate quantum of such an award.

[Emphasis added.]

- [517] The indicators supporting a claim for lump sum spousal support apposite in this case include:
- a) terminating contact or ongoing ties between the parties particularly where there has been domestic violence;
 - b) it is important to provide the spouse capital to meet her immediate need for housing; and
 - c) ensuring that support will be paid where there is a risk of nonpayment; and deficiencies in proper financial disclosure in a case where the respondent has the ability to pay a lump sum order.
- [518] Against these advantages, the court must consider all disadvantages that might accrue as a result of depriving the payor spouse from the opportunity to seek variation in the future. In this case, the respondent is 60 years of age and may very well face retirement at age 65 or thereabouts. Importantly, the respondent's income for 2023 is uncharacteristically higher than his incomes in previous years. Thus, to base a lump sum payment on that year's income alone would frustrate his ability to seek a variation if his income circumstances changed in subsequent years and his potential to retire at age 65.

- [519] One overwhelming factor affecting this decision is the respondent's continued breach of the October 31 order concerning the \$910,000 he says was dissipated and his failure to provide disclosure of documents relating to his financial condition. I have little confidence that he will meet his disclosure obligations in the future thereby interfering or obstructing her ability to collect her support.
- [520] Moreover, the respondent paid no child support since the parties separated.
- [521] The DivorceMate calculations suggest that the claimant's entitlement to spousal support would extend from nine years to 18 years from the date of separation. Recognizing that the respondent's income for 2023 was out of line with his previous incomes, part of which included redemption of an RRSP, I have accepted the respondent's suggestion that support should be payable based on \$107,000 on a Guidelines income. The midrange on this calculation is \$218 per month to a high of \$663 per month. Taking into account the uncertainties stemming from a lump sum payment I award the claimant \$40,000 lump sum spousal support.

Conclusion

- [522] I conclude that the parties have lived separate and apart since August 2018 and are entitled to a decree of divorce on the usual terms.
- [523] I recognize that there may be tax implications stemming from the sale of the Prince Albert property and the sale of the East 57th property.
- [524] The burden of these taxes will be shared equally by the parties by way of a deduction from each of their shares in the family property.
- [525] The claimant will make best efforts to encourage A.K. to pursue a relationship with the respondent, taking into account A.K.'s wishes.
- [526] The family property, valued at the date of trial, will be divided unequally in the claimant's favour and she will receive \$337,900 over and above the equal division of the family property as set out above.
- [527] The mortgage payments and taxes paid by the respondent are subtracted from the value of the property. The respondent will transfer his interest in the East 57th property to the claimant in exchange for payment to him (or credit) of \$1,175,000 less one-half of the outstanding mortgage and the usual adjustments as at the date of transfer.
- [528] If the claimant is unable or unwilling to complete the purchase of the East 57th property within 45 days from the date of this order, then the East 57th property will be jointly listed for sale. In this case, the parties will have liberty to seek further directions concerning the sale of the property after the expiry of 45 days from this order.
- [529] The respondent shall retain all shares of the Restaurant for his sole use and benefit.

- [530] I make no order concerning the parties' entitlement to Canada Pension division. This can be dealt with as provided for in the statute.
- [531] The respondent will pay the claimant retroactive child support for two children from September 2018 until January 2022 and thereafter for A.K. until he no longer is a child of the marriage.
- [532] The respondent will pay retroactive spousal support from September 1, 2018 until the end of 2023 and \$40,000 lump sum spousal support.
- [533] I recognize there may be some issues with regard to calculations in these reasons. The parties have leave to make further submissions regarding any concerns or errors or clarifications with those calculations.

Costs

- [534] If any party wishes to speak to costs, they may contact Supreme Court Scheduling to secure a date for a hearing, provided they do so within 30 days of release of these Reasons.

"Armstrong J."

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