
CANADA / JUDGMENT

B.S.D. v. S.K.D.

2021 BCSC 2327

COURT

Supreme Court of British Columbia

DECIDED

29 November 2021

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2021 BCSC 2327 B.S.D. v. S.K.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.S.D. v. S.K.D.,

2021 BCSC 2327

Date: 20211129

Docket: E14025

Registry: Chilliwack

Between:

B.S.D.

Claimant

And

S.K.D.

Respondent

Corrected Judgement: The text of the judgement was corrected on December 2, 2021

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Claimant:

U.K. Dhaliwal

Counsel for the Respondent:

C.K. Sabharwal

Place and Dates of Trial:

Chilliwack, B.C.

January 29-31,

February 1, 4-8, 2019

New Westminster B.C.

October 28-31,

November 1, 4-8, 2019;

September 21-25, 28,

and October 1-2, 2020

Place and Date of Judgment:

Chilliwack, B.C.

November 29, 2021

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Introduction

- [1] This family law trial deals with the financial consequences of the end of the marriage between the claimant B.S.D. ("B."), and the respondent S.K.D. ("S."). The most important issues are property division and spousal support.
- [2] Each party seeks a reapportionment of family property in their favour. There are disputes concerning their respective contributions to the maintenance and improvement of family property, B.'s use of allegedly excluded property to purchase family property, and the effect of his inheritance of property in India. More generally, S. alleges that B. exerted complete financial domination over her during the relationship, in the course of which he diverted and concealed a significant amount of family funds.
- [3] In addition, each party seeks spousal support from the other, in S.'s case to address the effects of the ongoing family violence to which she alleges she was subjected by B. Because he would be unable to pay support at his current income, S. argues that reapportionment of property is also needed to meet the objectives of spousal support.
- [4] Finally, S. seeks retroactive child support and contribution to expenses for the period during which one of the parties' adult children attended full-time post-secondary training.
- [5] The basic chronology of events was established by an agreed statement of facts. To elaborate on it, the parties led extensive evidence and cross-examined each other at length, including challenging each other's credibility based on incidents during the relationship and this litigation that did not relate directly to the matters in issue.

Evidence

Overview

- [6] B. is 66 years old and S. is 62. They were married for the first time in 1991 and divorced in 1999. Each accuses the other of orchestrating that divorce to facilitate a marriage to a third party for immigration purposes. They remarried in 2003.

- [7] In addition to the divorce proceedings, S. began family actions in 2003 and 2007, which in each case led to orders preventing B. from accessing the family's bank accounts. S. abandoned those actions after she and B. reconciled. The parties did not actually separate during any of these proceedings, including after they were divorced.
- [8] They finally did separate on December 25, 2014, when B. left the family home. S. describes the catalyst for the separation as a physical assault on her by B., who in turn claims that he was assaulted by the older of the parties' two adult children.
- [9] In addition to that assault, S. alleges that she was physically and sexually assaulted by B. throughout their relationship, and that the reconciliations between them, which were brokered by friends and family members, were based on his assurances that he would cease this behaviour. B. denies having committed any such assaults.
- [10] The parties were divorced again in January 2018. This trial deals with the corollary relief arising from it.
- [11] The parties' children - T. and M. - are now 29 and 26 respectively. Although they are employed and not dependent on either parent for support, they continue to live with S. in the former family home and contribute to household expenses. They are estranged from B.
- [12] B. worked in a mill until 2009, when he was injured in a motor vehicle accident. His annual employment income in the year before the accident was \$34,807, and \$25,568 in the year that it occurred. He agreed that he always earned more than S. during their relationship up to that point and was in that sense the "primary breadwinner".
- [13] He claims to have been unable to work since the accident. He received CPP disability benefits following it, which ended when he turned 65. Although the specific injuries that he suffered were not described, he referred in his evidence to ongoing back problems.
- [14] He received an insurance settlement of \$278,321 from the accident, in June of 2012. The allocation of that settlement between wage loss and other heads of damages, and its use to purchase property, were points of contention in the trial.
- [15] S. alleges that following the accident B. worked under the table for cash, doing construction-related work for a friend.
- [16] According to his most recent financial statement, which was filed in November 2020, B. receives CPP income of \$9,888 per year. He also has gross rental income of \$13,855 per year, which after deductions for expenses and net federal supplements, is shown as a loss of \$8,022 on his tax return.
- [17] S. works as a seasonal employee at an agricultural nursery, which she has done for many years, collecting employment insurance benefits when it is not operating. Her November 2020 financial statement listed an annual employment income of \$28,424.

- [18] Until they finally separated, the parties lived in the family home on Balsam Crescent in Abbotsford, of which they are still joint owners. It was purchased in 2003 and its appraised value in September 2020, just before the trial concluded, was \$695,000. The parties purchased it using the proceeds of sale of their previous home on Gatefield Avenue in Abbotsford. S. alleges that B. kept some of those sale proceeds for himself, and did not allocate them to the new purchase.
- [19] A mortgage and a line of credit from Scotiabank are attached to the family home. At the time of separation these amounts were \$33,505.23 and \$218,317.68 respectively. When this trial began the mortgage was \$21,767.90 and the line of credit was at \$217,386.02. The mortgage amount has been reduced meaningfully, but S. has only been paying interest on the line of credit.
- [20] Since the separation, S. has continued to pay the mortgage, property taxes and insurance, and has carried out some necessary repairs to the house, which were arranged and paid for by T., the parties' oldest son. B. has not made any contribution to these payments.
- [21] During their relationship the parties bought and sold properties in Ontario, some of which were sold after their separation. Although S. is the registered owner of some of them, it is common ground that they were all intended to be joint family ventures, to be sold at a profit after they had been renovated. B. travelled to Ontario several times to participate in the renovations, although the extent of his participation, in light of his injuries from the accident, was disputed. The details of ownership of these properties are[1]:
- B. has a 1/3 interest in a property on R.R. #27 in Wainfleet, which he bought with two friends in 2012. It was purchased for \$250,000 and has an assessed value of \$383,000. The parties were unable to obtain an appraisal for trial;
 - He previously held an interest in property on Merrittville Highway in Thorold, which he bought with two other friends in 2005. It was sold in 2017. His share of the proceeds - \$75,729.45 - is being held in trust by his counsel;
 - S. is the joint owner of a property in on Thomas Street in St. Catharines, with M.D. She is the wife of D.D., B.'s friend and business partner. It was purchased in 2008 for \$156,000 and has an appraised value of \$287,000. S.'s understanding is that the rental of the property covers the mortgage, utilities and property tax for it; and
 - S. was also a tenant in common, again with M.D., in four additional properties - two in St. Catharines (Seneca Street and Vine Street), one in on Beaver Street in Thorold and one on Gadsby Avenue in Welland. Those properties were all sold after the separation and S. received a total of \$125,943.77 for her share of them. That money was received directly by her and is not being held in trust.

- [22] In her 2017 financial statement, S. also referred to an additional property that she said B. owned with partners, that had a value of \$518,000. She was unable to provide its address or a further description at that time, but in cross-examination referred it as an approximately 50-acre property that contained a house, and said that the partners involved included D.D.
- [23] Finally, there are two properties in India, consisting of agricultural land that is currently leased and, in a separate location, a 1700 to 1800 square foot house that B. began construction on in approximately 2013. B. inherited these properties from his parents, but the evidence concerning the inheritance was scant, and he was not able to recall the year in which that had occurred. The parties were unable to agree whether a pretrial order for joint appraisals of their various properties included these ones, so no appraisal has been obtained for them. An appraisal obtained solely by S. was ruled to be inadmissible during the trial.
- [24] S. has begun an action in India through her cousin to prevent the properties from being sold and B. has taken some steps to have that impediment to sale removed.
- [25] The main bank account used by the parties during their relationship was a joint chequing account at Scotiabank, from which the family expenses were usually paid. B. also maintained a chequing account in his name at TD Canada Trust that he had opened before the marriage.
- [26] S. had an account in her name at CIBC, which she said was opened by B. on her behalf. It was used to deposit government child benefit payments. In August of 2014, after a dispute with B., she began depositing her paycheques into it.
- [27] Both parties withdrew funds from the line of credit shortly after the separation. On December 27, 2014, B. withdrew \$5,000 to cover his expenses, then decided to withdraw a further \$80,000 when he saw S. standing outside the bank. After learning of B.'s actions, S. withdrew \$31,500 herself on the same date.
- [28] In August 2015, B. bought a one-bedroom strata apartment in Abbotsford for \$75,000, at least partly using the withdrawal from the line of credit for the purchase. An appraisal in September 2020 valued this property at \$225,000.
- [29] In October of 2017, he and his current intimate partner, J.S., bought a house in Creston for \$427,989.57. They are joint tenants on the property, but J.S. provided the down payment. When they were unable to obtain a mortgage, because B.'s funds are inaccessible pursuant to orders in this litigation, J.S. borrowed the balance of the purchase price against the proceeds of a property that she had sold previously[2]. She has also paid for repairs to the house, which cost \$17,000-\$18,000. She and B. have a written agreement that B. will reimburse her for 50% of her outlay once this case has been resolved and he receives his share of the family property. The Creston property's most recent assessed value was \$447,000.

Relevant Pre-Separation Events

Early Years of the Relationship

- [30] S. obtained a post-secondary degree in India, and before immigrating to Canada she had worked as a primary school teacher. Her position is that following their marriage in 1991 B. initially did not permit her to work, and that she did not begin doing so until 1994.
- [31] She thought about upgrading her educational credentials in Canada but said that B. would not permit it. He told her that she needed to take care of the children and "work to buy a home". He also told her "you don't have that much brain, how will you be able to study?" and taunted her that she had paid the teachers in order to pass her courses in India.
- [32] Her evidence was that B. began assaulting her in 1993. He became angry that she would not arrange for her sister to marry his nephew, so that the nephew could immigrate to Canada and B. would have some relatives here. Instead, her father had arranged for her sister to marry someone else in India. She described B. as "beating [her] up, torturing [her] for a week to two weeks", after which her brother G.S. explained to him that his nephew was too young to marry their sister.
- [33] S. said that B.'s verbal and physical abuse continued, so a family meeting was held, including her brothers, their family friends G.B. and B.R., and a person from B.'s village in India who had helped him when he first came to Canada. During the meeting, B. announced that they were no longer going to share a house with her brothers, and that the house would have to be sold.
- [34] B. denied having assaulted S. in 1993, as she alleged. When it was suggested that a meeting in relation to the incident was then held at the home of S.'s brother he remembered "somewhat, [that] some conversation did take place", although he was not sure if their friends G.B. or B.R. were also present for it.
- [35] S.'s brother G.S., confirmed the origins of his family's dispute with B. in his father's refusal to agree to a marriage between his and S.'s younger sister and B.'s nephew in India. He confirmed that the actual reason that he and his family stopped sharing a residence with the parties was that B. "had started to beat up" S. He learned of these assaults when S. would come upstairs from her living area in an upset emotional state. He said that after the families stopped sharing a house, B. did not allow S. to visit with him and his family in the ensuing years, and he did not call her for fear of causing fights in their home.
- [36] Their family friend G.B., who was actually the matchmaker who first brought the parties together, also confirmed that an issue arose between them in 1993, when S.'s parents refused to allow their other daughter to marry someone from B.'s family. As a result, "there was a fight and he was beating her". G.B. was part of the group of about four or five people who attempted to settle the matter. They suggested that if the two families were not getting along, the parties and S.'s brother and his wife should sell the house they jointly owned.

1994 Assault and Subsequent Events

- [37] S. described a further assault by B. in 1994, this time resulting in a criminal charge against him. Once again, the trigger for his anger was her family's refusal to assist in facilitating the immigration of any of his family members to Canada. While B. was intoxicated, he punched her in the mouth, pulled her hair, squeezed her mouth so that she could not cry out, and then told her to leave the house. She was bleeding from her nose and mouth as a result of this assault. At that time, she was two months' pregnant with their second child. She left their older child, who was sleeping in his crib, with B. because she feared for her safety. When she went to the hospital to be checked out, the staff called the police. She was referred to an emergency record dated April 23, 1994 that documents her report of the incident and the injuries for which she was treated.
- [38] Her brother G.S. said that he picked her up from a friend's house and took her to the hospital. When he saw her, she was bleeding from her mouth and nose. She stayed at his house for one or two days after that, before returning home. He confirmed that she was pregnant at the time.
- [39] B. was charged with assault. He apologized at another meeting that included G.B. and B.R., as a result of which S. asked Crown counsel not to proceed with the charge. She received a lot of pressure from B.'s friends to take this action, she said. B. was required to take anger management counselling and perform community work service as part of the disposition under which the charge did not proceed.
- [40] S.'s brother G.S. also confirmed that he attended a meeting a month or a month and a half after the incident, attended by G.B. and B.R., during which B. promised not to assault S. again. He said that after the parties resumed living together S. was sometimes able to come to his house to visit, although he still did not call her at home to avoid causing problems.
- [41] B. denied having assaulted S. in 1994, although he acknowledged having been charged, and was unable to recall whether a similar meeting had been held in relation to that incident. His version of events was that instead of having assaulted her and told her to leave, as she described, they had "a bit of an argument", after which she decided to leave herself. He added that if he had actually assaulted her, she could have just called the police from their home.
- [42] S. said that B. continued to "torture [her] verbally" after this charge did not proceed, such as by telling her and T. that he was on his way to her brother's funeral whenever he was required to attend anger management counselling. He also told her that he had only apologized for the incident because otherwise he would not have received his Canadian citizenship. He would not permit her to visit her brother or her parents, have them to come over to the family home, or speak to them on the phone. Despite his actions, she stayed in the relationship in the hopes that it would improve once their second child was born.
- [43] S. described the relationship continuing to deteriorate in the following years, with ongoing verbal abuse from B., and restrictions on her ability to contact her family.

- [44] In 1999 she discovered a recording device under the bed. When she confronted B. about it, he said he had installed it so he would know who she was talking to.
- [45] Their younger son M. described accidentally finding such a device in his father's jacket pocket. He was in middle school at the time, and he hid it in his locker at school because he felt it "violated [his] privacy". He later observed his father looking for it around the house, in a state of panic.

1999 Divorce

- [46] According to S., in 1999 B. advised her that he was going to divorce her so that he could marry and sponsor a young woman to immigrate to Canada, who would ultimately marry his nephew after he divorced her. This was in response to his ongoing grievance that, in contrast to S., he did not have any other family members in Canada. He accompanied this demand with an assault on her, and threatened that if she did not initiate the divorce, he would kill her and her family members, in the same manner as in the notorious "Vernon massacre" (the killing of six members of a family by another family member in that city in 1996). He gave her a one-month ultimatum and reminded her of the threat on each day, inquiring whether she had reached her decision yet.
- [47] He told her that in addition to the recording device in the bedroom, he had also put a device "outside the house" to monitor her phone calls, so that he would "come to know about everything". (S. agreed that when B.'s conduct in arranging the divorce became the subject of court proceedings in 2003, she did not mention any recording devices in her affidavit. She explained she was not sure if she had "read" the affidavit (which I took to mean, she had it translated to her) and that in any case, she "was in such circumstances that [she] could not think of everything.")
- [48] When two or three days were left before the deadline he had imposed for agreeing to the divorce, B. told her that he had already made an appointment with a lawyer and asked her again what her decision was.
- [49] She said that on the day in question he made her sit in the vehicle and "took [her] away" to see the lawyer. He told her not to say anything, and just to sign documents wherever he told her to. She did so. The lawyer whose office they attended was Caucasian and besides B. and herself there was no one present who spoke Punjabi.
- [50] After she signed the documents, she was not aware of whether the divorce was actually carried out. She did not tell anyone about what had happened because of the threats that B. had issued, and because he had the recording system in place for her calls. She said that his behaviour towards her improved for a while, because she had done what he asked. Despite the divorce, they continued to live together as they had previously.

- [51] At this time B. also transferred "the house number" (by which she may have meant the title to their home) and all of the utility bills into her name. He also opened the CIBC account in her name and arranged for the child benefits that they received to be deposited into it.
- [52] She rejected the suggestion that she was the one who had actually sought the divorce, emphasizing that in "our community [it] is extremely shameful, humiliating to divorce". Likewise, she did not retain the lawyer who carried it out, and did not even know who he was. As to the suggestion that she required the divorce in order to sponsor her cousin (specifically, the son of her paternal uncle) to immigrate here, she pointed out that by that point this cousin had already arrived in Canada.
- [53] In response to the suggestion that her father and one of her brothers had married relatives in order to sponsor them, she initially said that she did not know. When it was put to her that at her examination for discovery she had confirmed that her brother had engaged in such a marriage, she said, "Sometimes I know but I don't wish to go into too much detail." In any case, her family could not have given her the idea to seek a divorce for that purpose, she explained, because B. was not allowing her to speak to them, and was recording her calls to enforce the prohibition.
- [54] She then clarified that her father had in fact married his niece, but had actually done so at B.'s suggestion, in the hopes that after they were divorced the niece would marry B.'s nephew, which the niece ultimately refused to do. When she was confronted with her earlier answer that she did not know whether her father had done that, she explained that her initial response was because B. "would [already] know everything about that".
- [55] She agreed that her signature was on the December 1999 separation agreement that underpinned the divorce. Further, while she acknowledged that her signature was also on the child support fact sheet for the divorce, she was not aware of having sworn it.
- [56] Somewhat inexplicably, in light of her repeated assertions throughout her testimony, such when describing her interactions with police officers and lawyers that she does not know how to speak English, she responded to the suggestion from B.'s counsel that she can read and write English with "I -- I read, I write and I even speak, yes."
- [57] B. initially testified that he and S. separated in 1999 because of a dispute arising from her refusal to attend his niece's wedding in India with him, or to permit him to bring the children to it. However, later in his evidence it emerged that the dispute about his niece and her wedding was actually the cause of their 2003 separation.
- [58] In any case, he alleged that at the time of the 1999 separation she had been "harassing" him by repeatedly mentioning her brothers, with whom he had an adversarial relationship, and making other negative comments towards him. As a result, he left the family home to stay with a friend.

- [59] Later in his evidence he explained that their divorce was arranged by S., so that she could sponsor her cousin to immigrate to Canada, by marrying the cousin. He was not represented by a lawyer in this divorce proceeding; only S. was. He identified his signature on the December 1999 separation agreement, but said that the purported witness to that signature, their friend G.B., had not actually been present when he signed. S.'s signature was witnessed by the lawyer (a well-known Abbotsford family law practitioner), whose stamp is attached to his signature.
- [60] Although B. agreed that he and S. had attended the lawyer's office together for the agreement to be signed, he denied having threatened to kill her and her family in the same manner as the Vernon massacre, or that he had engaged in a "countdown" to the day that he would take such action in the month leading up to the document being signed. On the contrary, he was displeased with her wish to obtain a divorce, and as a result he went to India for a period of time.

Significant Events in 2003

- [61] S. said that before B. left to attend the wedding of his niece in India in 2003, he directed her to withdraw \$10,000 in cash from the CIBC account in which the children's benefit cheques were deposited, and to give him one of her sets of gold jewelry for him to take as a gift.
- [62] She was unable to go to the wedding because she had scheduled a cancer biopsy on her breast, which B. suggested she should postpone in order to accompany him. She said that she did not understand the nature of a biopsy at that time and thought she would be having surgery for cancer. As a result, she was very upset and fearful. He was angry when she refused to attend the wedding in the interests of her health.
- [63] B. maintained that S.'s doctor had said that the procedure could be scheduled for one or two months later. He said that S. simply refused to attend the wedding, and would not allow him to bring the children to it.
- [64] As indicated in the overview section, the parties sold the Gatefield Avenue home and bought the one on Balsam Crescent in 2003.
- [65] S. believed that the Gatefield home was sold in 2003 for \$175,000, based on what B. initially told her, and the cheque for the proceeds that she saw later.
- [66] She testified that when B. returned from India, they moved to the basement of the Gatefield home, to allow the purchasers to move in upstairs before the closing date.
- [67] At that point, he told her that he had spent \$100,000 for his niece's marriage, and that after the mortgage of \$30,000 on the family home was paid off, the remaining proceeds from the sale of the house were \$45,000. He presented her with a cheque for \$22,500, representing her share of those proceeds. He told her that they would each live on their own from then on. Angry at the amount he had spent on the wedding, she threw the cheque at his feet and told him to keep it. She was also extremely upset that he had obtained the divorce, sold the

house, and now was leaving her. As he left, he said, "What can you do? I've taken everything away."

- [68] Their son M., who was nine years old at the time, recalled that his father had his bags packed, his mother had a look of disbelief on her face, and an argument ensued between them during which his mother ripped up a cheque.
- [69] Although T. recalled in general that his parents fought constantly, the first specific incident that T. described involved him being summoned from volleyball practice in 2003 by his brother, and finding his mother crying in the school hallway. She described that his father "was gone" had taken "everything". When they got home he saw that all of his father's clothes and personal belongings had been removed.
- [70] S. was cross-examined on the purchaser's statement of adjustments for the Balsam Crescent home, which she had kept in her safety deposit box and not previously listed in her documents. It shows \$137,718.47 (plus credit for a \$5,000 deposit that had already been paid) being allocated to the purchase price, which offers circumstantial support for the proceeds of the sale of Gatefield having been in the range of \$142,000. When it was suggested to her that "this shows on its face what amount went towards the [Balsam Crescent] home" she said, "I see that now" but denied having hidden the document by not listing it. With respect to that failure to list it (as well as a title certificate for the family home that had also been contained in the safety deposit box), she explained that if she had been asked for the documents in the box previously, she would have provided them. When she photographed the contents of the box to fulfil a disclosure request by B.'s counsel, she did not understand that she was required to photograph each item individually.
- [71] After the incident involving the cheque, S. confided in her brother G.S. about the divorce that B. had arranged in 1999. G.S. hired a private investigator, and also retained a new lawyer on her behalf. The lawyer obtained the documents that she had signed at B.'s direction for the divorce, including the separation agreement, and began a new family action on March 21, 2003. When she was asked why the resulting statement of claim did not refer to family violence and did not seek any form of restraining order, S. said that she had "told everything" to her lawyer - the implication being that the lawyer had made those decisions.
- [72] On March 24, the lawyer obtained a without notice order that prevent B. from accessing his bank accounts. S. rejected the suggestion that she had done so to "teach [B.] a lesson". She said that after this was done B. approached their family friend G.B, said he was sorry, and asked for G.B.'s help in arranging a reconciliation.
- [73] Her brother G.S. confirmed that S. disclosed her 1999 divorce to him in 2003. He and his wife paid for her to hire a lawyer, who took the steps of hiring an investigator to look into the circumstances under which the divorce had been obtained, and applied for the order freezing B.'s accounts.

- [74] A further family meeting took place, attended once again by B.'s friends and S.'s brothers. During the meeting their friend B.R. raised the concern that the lawyer who handled the divorce could get into trouble for not having used an interpreter and that B. could get into trouble as well, presumably for having arranged it for immigration purposes despite remaining with S.
- [75] S. testified that, as a solution, B.R. took personal responsibility for retrieving the money that B. had withdrawn, and B. subsequently transferred \$86,000 into B.R.'s account. S. did not know what became of the rest of the withdrawn funds. B.R. told her that they should buy another house, and that if B. "makes another mistake" B.R. would be "responsible for it", by which I took her to mean that B.R. would be responsible for the \$14,000 that was not recovered. She was encouraged to accept this solution by the family friends. They told her that otherwise, her "family would be ruined".
- [76] G.B. testified that he was also informed in 2003 about S.'s divorce in 1999, and the threat by B. underlying her acceptance of it. Crucially, G.B. said that he had not signed the 1999 separation agreement between the parties that purported to bear his signature.
- [77] After the investigator hired by S.'s brother contacted him, B. asked him to say that his right hand had been injured at the time he witnessed the agreement, so that he had signed it using his left hand (presumably to account for any differences in his signature). G.B. refused to go along with that request. He confirmed that he participated in another group process that led to their reconciliation. He also confirmed that the parties had continued to live together throughout the period of this first divorce.
- [78] G.S. testified that once again he attended a meeting with friends and family members, at which B. apologized to S., and claimed that he had made a mistake, and said that he would "bring back all the money he had taken", I infer in relation to the proceeds of sale of the Gatefield home. G.S.'s thinking, in encouraging a reconciliation, was focused on how young the parties' children were at that point.
- [79] B.R. testified about the disposition of the proceeds of the sale of the Gatefield home. He explained that he has some international businesses, and that B. asked him to help take those "family assets overseas". In other words, B. wanted to take the money and "disappear". B.R. informed S. and her brothers of what was occurring, and once everything had "settled down" again between the parties, he returned the funds, which he believed were in the range of \$60 - \$70,000, with interest. He did not know where the money went once it had been returned.
- [80] Under pressure from the friends, as well as from her brother, who pointed out that her children were still young, S. agreed to reconcile, and the parties' remarriage took place on April 18, 2003.

- [81] A consent order from May 2003 in the action she had recently commenced appears to reflect this reconciliation. Pursuant to the order, TD was to release all funds in B.'s account to S., following which the order preventing him from accessing his accounts was to be "rescinded". Further, the law firm that held funds in trust "from the sale of the matrimonial home in the approximate amount of \$45,000" was to release them to S. When this order was shown to her S. claimed to "know nothing about anything". Although her lawyer would have explained everything to her, her "brain was upset" at the time, because of B.'s actions. Her position was that despite the order, everything was arranged between B. and B.R., and no money actually went into her account. Instead, the \$86,000 that was put into B.R.'s account was used to purchase the new one on Balsam Crescent.
- [82] According to S., once they had reconciled, B. did not provide her with any accounting of the location or use of the remaining \$59,000 that should have been left over from the sale of the Gatefield home. In the course of taking responsibility for B.'s financial actions, B.R. said he would ultimately be responsible for the \$59,000, but he advised her not to do anything about it at that time, but rather to "buy your house and sit in it and do whatever you can".
- [83] It was pointed out to S. that in 2007, when she began a further family action, she had sworn an affidavit saying that the funds used to purchase the Balsam Crescent home "came solely from the \$22,000.00 the defendant provided to [her] from the sale of [their] previous residence." She explained that she had rejected the cheque that he tried to give her for \$22,500 and did not know what he had done with it (by which I took her to mean the money that it represented). This explanation was contradicted by a subsequent paragraph in the same affidavit, in which she asserted that B. had kept all of the proceeds of sale from the previous family home "except for the sum of \$22,000 that he later provided to [her]". She added that there was so much pressure on her at that time that perhaps she had forgotten to tell her lawyer that she had given the cheque back to B. She did not ask further about the source of the purchase funds for Balsam Crescent, because of B.R.'s advice after he had recovered the \$86,000 from B.
- [84] In re-examination she said that she had told everything to her lawyer at the time and then told the lawyer "just do what you feel is correct". She did not actually give the lawyer any instructions for the drafting of this affidavit. She could also not recall whether she had reviewed any bank statements before proving the affidavit.
- [85] With respect to his version of these events, B. explained that when the Gatefield home was sold, the proceeds were deposited in the joint account. A document from the Land Title Office to which he was referred showed a declared value for the property of \$181,500, but the amount of the actual sale proceeds was not specified in it.
- [86] He initially testified that they made a down payment of \$90,000-\$92,000 on the new home, but was then referred to a trust cheque to a notary for \$86,000, which he agreed represented the down payment. He denied the suggestion that it had been only \$45,000, and that he had spent balance of the \$100,000 proceeds of the sale of the Gatefield home on his niece's

wedding. He disagreed that the net sale proceeds were as high as \$145,000 or that, based on a down payment of \$86,000, there was still at least \$59,000 of the sale proceeds unaccounted for.

- [87] He said that during that period he made a withdrawal from the line of credit, in an amount that he could not recall, and placed it in a friend's account. He said he did so because of concerns that S. would have his accounts frozen, as she had previously done in the family litigation between them, or withdraw the proceeds herself. In cross-examination he was shown a withdrawal slip for \$95,007.50 from the line of credit in January of 2003, and he agreed that this was an amount he had withdrawn. He said that he was concerned that when he returned from his niece's wedding in India S. might not let him back in the house. He did not inform her at the time he withdrew the funds but did so later.
- [88] He agreed that when he returned in March, the family had moved to the basement of the Gatefield house, to allow the purchasers to move in for a short period before the completion date. He also agreed that he gave S. cheque upon his return, in an amount that he could not recall, which she then tore up. He denied the suggestion that it was for \$22,500, or that he had told her that it was her share of the remaining \$45,000 of the sale proceeds, after he had spent \$100,000 on his niece's wedding in India. His recollection was that he had spent only \$5,000-\$10,000 on the wedding.
- [89] At another point in his evidence, B. testified that following a dispute about his attempt to put aside some money from the sale of their previous home for his niece's wedding in India, and his intention to sponsor her to immigrate to Canada, S. "kicked [him] out of the house" and obtained an order restraining him from disposing of any family assets.
- [90] In any event, he agreed that there was a further meeting involving B.R. in which he and S. were urged to reconcile. He promised during it to account for the money he had withdrawn from the line of credit (not the Gatefield sale proceeds, as S. alleged) which he thought was approximately \$70,000. It was at that point that they remarried.
- [91] As to how family life proceeded after the reconciliation, the parties' son T. explained that his uncles helped with renovations to the newly-purchased Balsam Crescent home, and that he and his brother were permitted to visit them. Before that he did not know what they or his cousins looked like, and he had not met his maternal grandfather either.
- [92] S. described an additional assault by B. against her in 2003, which she was not able to situate within the sequence of events that I have summarized for that year. It occurred after she told him that a woman who was selling them RESPs for their children had alleged that B. had behaved inappropriately towards her. He had been drinking alcohol before she brought this matter up with him. Once she told him, he became angry, hit her "once or twice" and then, when she showed him the caller identification details of the woman on their home phone to verify her statements, grabbed the phone out of her hand and "beat [her] up again."

- [93] She was so upset by this assault that she left a suicide note at home and went to jump off the Mission Bridge. After she parked her car to carry out the act, a passing motorist asked her if she needed any help. She began to think of the children, and decided to return home. She did not report the assault to the police because of the fear instilled in her by B.'s previous threats.

2006-2007 Assaults, Injuries and Family Action

- [94] According to S., following their return from a family trip to India in March 2006, which including attending the wedding of another of B.'s nieces, B. became more hostile to her once again. In her view this was incited by his sisters while she and B. were visiting them in India. As a result, he would "drink alcohol and say obscenities and beat [her] up", I infer on an ongoing basis.
- [95] She described a further specific assault against her in April, 2007. Once again intoxicated by alcohol, B. accused her of visiting her brother after her doctor's appointment, and was also unhappy that her younger brother's wife's niece had been married to someone in Canada, instead of to his nephew in India. He began beating her up, she said. When T. heard her crying he began kicking the door and asking B. what he was doing. B. then grabbed her by the hair and pushed her against the wall, which caused her to become disoriented. She went into the living room and both children were asking her if she was alright. B. swore at them and told them to get away, and that S. was "making it all up". He then grabbed her by the hair again and pushed her against the fireplace. She described being "unconscious and bleeding profusely".
- [96] Following a phone call from T., her brother G.S. and his wife came to the house. G.S. confronted B. about his actions and they began grappling with each other. Their friend G.B. and his wife also arrived and G.B. "called [her brother] outside". The police eventually attended and B. was arrested. S. was taken to hospital in an ambulance.
- [97] T.'s recollection of this assault, at which point was 15 years old, began when he heard his parents fighting, which he did not initially want to get involved with. He then heard loud screaming by his mother and equally loud swearing by his father. When he went out into the hallway he saw his mother on his knees and his father smashing her head against the wall. His father then went back into the bedroom and locked the door. His mother's head was cut open and she was bleeding. T. called G.B., and his uncle G.S. arrived shortly after, with his wife. When his father emerged from the bedroom G.S. confronted him about the assault, at which point his father attacked G.S., and G.S.'s wife attempted to get between them. G.B. and his wife had also arrived by then. T. called 911.
- [98] M. said that he remained in his bedroom until the police arrived, at which point he emerged and saw that his mother's face was "bloodied up". Before that he had heard screaming and his mother crying for help.

- [99] G.S. said that his involvement in this incident began when he received a call from M. that the complainant was beating S. He and his wife went over to the Balsam Crescent residence and observed that S.'s eye was swollen and bleeding and that some of her hair had been pulled out. He asked B. what he had done to her and B. charged at him. His wife and T. got between them.
- [100] Similarly, G.B. said that he and his wife were called by T. and requested to come to the parties' home on the night of the 2007 assault incident. He described S. as injured and bleeding when he arrived.
- [101] S. was referred to photos of her injuries that were taken by the police immediately after the incident, and by her sister-in-law a few days later. They show swelling and discolouration below her left eye and in the area of her left ear, and scratches on her left cheek. She described receiving a fracture "on" the eye, an injury to the "front part" of the ear that was swollen, injuries on the left side of her head and "towards the chin side", as well as an injury to her left arm from being pushed into the fireplace.
- [102] She also described some serious residual effects of this assault. The vision in her left eye has decreased, and the hearing in her left ear has decreased to the point that she cannot "clearly listen to the phone" using it. In addition, the left side of her head "hurts a lot" and she experiences pain in the shoulder arm and chest on that side of her body. As to treatment, she described taking Tylenol and putting medication for her eye.
- [103] She was referred to the ambulance crew report for this incident, which recorded her report at the time that the vision in her left eye was "slightly blurred". The report also indicated that she had not lost consciousness. Further, despite her recollection that she was very upset and "kind of unconscious", so that she needed assistance to go to the ambulance, the report noted that she walked to it without difficulty.
- [104] Although the radiology report contained in her hospital records said there were no "bony findings of facial fracture", S. said that she was sent for follow up x- rays by her family doctor, who told her that there was a fracture. S. did not provide any medical evidence supporting this diagnosis, and her counsel conceded that her testimony of what she was told was not in itself proof of the diagnosis.
- [105] She took a month off from her job to recover from her injuries.
- [106] S. retained another family lawyer, who began a new family action. On April 30, 2007, the lawyer made a without notice application to restrain B. from disposing of any family assets. S. took this step in light of his concealment of the Gatefield sale proceeds in 2003. She did not seek a restraining order for herself because she believed that issue was addressed by the criminal charges (by which I took her to mean the accompanying bail conditions).

- [107] After his accounts were frozen, B. began to make overtures towards through the usual intermediaries, in particular G.B. B.'s sister also phoned her regularly from India, explaining that B. was intoxicated and had made a mistake, and that she would take responsibility for ensuring that he did not misbehave in the future, including preventing S. from visiting her brothers.
- [108] G.B. said that B. later contacted him and was "begging for four or five days to get back together, that he won't do it again." He added that by "it", B. meant "beating".
- [109] A meeting was held at G.B.'s house, during which B. apologized to S. directly for his conduct. He told her she should withdraw the charge against him, a request that was reinforced to her by the family and friends who attended. Feeling that she had no other choice (because of how attached the children were to B. and how much they were missing him as a result of the no-contact conditions of his bail, as well as considering the stigma that attaches to divorce in her community), she agreed to withdraw the charge.
- [110] Despite her description of this external pressure to reconcile, it was pointed out to her that in the affidavit she swore to have the financial orders that had been obtained in that action set aside, she stated that "this decision was not made under duress or pressure from anyone." She responded that if she had not taken these actions B. would have gone to jail, although she added that he would have improved as a person as a result.
- [111] Her brother G.S. described this further meeting of family and friends to address B.'s conduct. This time the concern was that the children were adolescents, and therefore vulnerable to "going wrong" if the family did not remain intact. G.S. did not believe B.'s apology, but "due to the kids" he "had to agree".
- [112] T. said that after this incident he and his brother attempted to convince their mother to separate from his father to end this ongoing abuse. When she decided to reconcile, they were angry with her and said that they would no longer intervene if their father was assaulting her. He said that following B.'s return, the family was once again prohibited by him from contacting S.'s brothers and their families.
- [113] M. said that he and T. were "totally against [the reconciliation]", but their mother told them that she did not want them to grow up without a father.
- [114] To address the outstanding family action she had started, S. filed an affidavit indicating that the children were missing B. and that "their behaviour makes it clear to me that I must reconcile with their father". Accordingly, she asked that the family orders that she had obtained to that point be set aside. This was in the face of her lawyer's advice that it would be a mistake to do so.
- [115] B. then moved back into the family home.

- [116] In cross-examination she added that after B. returned to the home, he began to attend her doctor's appointments with her. That inhibited her from discussing the effect of his assaultive behaviour on her mental health, which she had done with her previous doctor.
- [117] Although her brother G.S. provided some assistance with the outside portion of the subsequent renovations to the new home, she was not otherwise permitted to contact her family following this reconciliation, and none of them would visit her because of their fear of B.
- [118] B.'s version of the 2007 incident is that S.'s other brother J. had provided T., who was then 15 years old, with alcohol and allowed him to become drunk. When B. discovered this, he confronted S., who said that only a small amount of alcohol had been provided. They had a verbal argument about the issue and he then went to bed. Later, S., her brother G.S. and G.S.'s wife entered the bedroom and began to assault him. During this assault they gave the phone to T., who called 911. The police attended and B. was arrested, G.S. having fled the home in the meantime. Despite having been the victim, B. was charged with assault. (T. explained that this was actually a separate incident from the assault on his mother. It arose after he slept over at that uncle's house, and did not result in any confrontation. T. said that his uncle had not provided him with any alcohol, and did not know how his father had gotten that idea. In the past his father has provided him with home-made alcohol for social events.)
- [119] B. explained that he entered a guilty plea to the assault charge because it would have interfered with his ability to support the children's participation in soccer, which they were then playing at a high level and were dependent on him to be able to attend. He maintained that following his conviction the entire family was required to engage in counselling, not only him.
- [120] He described receiving injuries to the side of his neck, the top of his head and his wrist and hand in the assault on him. He was referred to a hospital report from April 20, 2007 that appears to diagnose a contusion to his wrist. He denied the suggestion that this injury was caused by him punching S. repeatedly.
- [121] He was not prepared to accept that marks under S.'s eye and on her arm in photos that are shown in photos taken by the police after the incident had been caused by him punching her. He said that when all three of them started to beat him up he defended himself, and he did not know whether S. was hit in the course of that or not. He conceded that it was possible she had been, but he would not have done it deliberately. As to the more serious injuries that she described, he denied that she was unable to see clearly out of her left eye, that the hearing in her left ear was impaired, or that she began to suffer from headaches and pain in her left shoulder and arm as a result of his actions.
- [122] He said that after that incident S. continued to remind him that her brother had left his chain in the bedroom on the day that "you were fighting and he beat you up."

- [123] His explanation for reconciling with S. was the same as the one of entering a guilty plea to the criminal charge that arose from the assault - it was for the sake of the children, in light of the advanced level of sports in which they were participating and their need for his support to continue in them.
- [124] To further illustrate this pattern of false allegations that he alleged, B. described an incident in which T. had gone to a neighbour's house, phoned the police and accused B. of assaulting him, after S. had found drugs and cigarettes in T.'s room. B. said that S. told the police that there had been no assault and that the police concluded the matter by telling T. to improve his behaviour in the future.
- [125] Towards the end of her cross-examination, S. described a separate incident in 2007 in which B. put his knee on her chest while she was lying on her bed, in the same manner as a police officer in the U.S. had killed an African-American man (I took her to be referring to the murder of George Floyd). While B. had her in that position, he was "beating [her] up" using both hands. She told him to go ahead and beat her until he got tired, but finally could not take it anymore and began screaming. The children then broke down the door, or else she "would've died like that guy". Since then she becomes extremely upset when she sees news stories about the George Floyd case on TV.

Sponsorship of B.'s Niece

- [126] The current family home has a self-contained basement suite that was rented out for significant periods during the parties' relationship.
- [127] S. testified that in 2010 B. sponsored another of his nieces to come to Canada, on the basis that she would be a nanny for their children. Because the children were 14 and 17 by that time, they did not actually require a nanny. B. did not involve her in the process of sponsoring the niece and she was not aware of having signed any documents in relation to the process.
- [128] The niece stayed in a room in the basement, which B. had renovated as a recreation area for the children and their friends after their former tenants vacated it. S. had advocated renting it out again to earn additional income for the family.
- [129] The niece did not perform any domestic duties in the home, where she lived until about 2013. At the end of that period she became pregnant and moved out.
- [130] B. agreed with the suggestion that he had sponsored a niece (2008 or 2009 was the period originally suggested) to immigrate, on the basis that she would be a nanny for the family. He did not consult S. before sponsoring her, because S. had previously refused to allow him to sponsor the niece whom he had adopted. On his version of events, this second niece's role was to do housework and prepare meals for the children. She lived in the basement suite, which had been vacant for about two years. He paid her by writing cheques, and she would return the cost of her rent and food to him in cash. He denied that he kept those cash

payments for his own use, maintaining that they were used for other household expenses. He said that he was unable to obtain copies of the cheques he had written to her, because they were from too long a time ago to be available at the bank.

- [131] T. said that his cousin simply arrived one day and began to occupy the space that had formerly been his and his brother's recreation area downstairs. He was in grade 11 at the time. To the extent that his cousin was ostensibly to be employed as the family's nanny, he and his brother did not need one and she did not perform any such duties. M. also agreed that there had been no advance notice of his cousin's arrival and that he and T. did not need the care of a nanny at their ages.

2014 Assault and Change in Banking Arrangements

- [132] S. described another assault on her in August 2014, after she confronted B. about the amount that was on their line of credit. There was \$218,000-\$219,000 owing, whereas she had understood that he had paid it off with his personal injury settlement. She told him she had heard through a third party that he claimed to have obtained \$400,000 in this settlement, rather than the amount he had disclosed to her. He explained that the amount on the line of credit was due to having paid his niece as a nanny, because they had brought her to Canada on that basis; as well as to the cost of the house they were building in India. After being confronted in this manner B. eventually became angry, assaulted her, and told her that from then on he was not going to accept her paycheque. In response she began depositing her cheques in her CIBC account (into which the child benefits were deposited), which she had not been using for a significant period before that.
- [133] A day or two later, while intoxicated, B. threw away a plate of food she had prepared for him and was about to assault her again, when she ran outside of the house and phoned T. Both children arrived and interceded, persuading her to spend the night at her brother J.'s home. B. accused her of inciting the children against him. (M. described this incident in the same terms.)
- [134] By the time she returned home after work the next day B. had cooled down. However, in the days that followed he began to "torture" her verbally for having told the children about his actions.
- [135] She and T. convened another meeting of family and friends, the upshot of which was that she and B. should have one more opportunity to remain together, but should separate if any further incidents occurred. T. recalled that his mother wanted to separate following this incident but that his father was ultimately able to persuade her to remain together.
- [136] In contrast, B claimed that at that time he discovered that S. had opened her own account at CIBC, and was no longer depositing her pay into their joint account. When he confronted her, she responded that it was her income, and she was entitled to deposit it where she wished. He said that he told her that if she would "take care of everything else" (in reference to the family's bills, I infer) then he did not need her paycheque. He had

previously offered numerous times to hand his cheque over to her, but she would refuse, saying that she did not want the headaches. He added later in his evidence that S. was depositing her paycheque elsewhere because she was "pushing [him] to work."

General Evidence of Family Violence

- [137] Unrelated to any specific time period, S. said that B. would "beat [her] up and send [her] to work", including when she was pregnant and during times when her employer said she should not be at work (due to illness, I infer). She gave this testimony in response to cross-examination on the extent of her financial claims against him.
- [138] Also in general, T. said that it was "nothing out of the norm for my dad to get up and just slap my mom". As an example, he recalled an incident that occurred when he was six or seven years old, in addition to the ones that S. had described. It involved B. pinning S. down on the sofa, with his knees on her arms so that she could not defend herself, and punching her repeatedly in the face, leaving it bloodied.
- [139] B.R., who described himself as a friend of B.'s, also confirmed that over the years he had attended numerous meetings - "more than ten", he agreed - with the parties and S.'s family members. The subject matter of these meetings was B.'s "serious anger management issue where he physically abused [S.] a lot of times."
- [140] While he did not see any of this abuse actually being committed, he saw "marks" on S. "once or twice". However, B. admitted to him many times that "[he] won't do this again", or "this won't happen again", in relation to the assaults. In the case of one of the assaults that S. had reported to the police, he described B. pleading with him to ask S. to "rescind her charges".
- [141] He recalled that during one of the meetings to address B.'s behaviour the parties' children, who were older and starting to assert themselves, gave the parties the ultimatum that they either had to separate or the children would move out.

Sexual Assaults

- [142] In addition to these physical assaults, S. alleged that B. committed sexual assaults on her during the relationship. She said that they began in 1994, when their relationship began to deteriorate. They occurred more frequently on weekends but also during the week. She did not feel that she could tell anyone about them, because they were "shameful".
- [143] These assaults included forcing her to have intercourse she had given birth to their children by C-section, which caused her distress and (it was not clear whether in relation to one or both children) an infection in the stitches she had received from the delivery. .

- [144] In addition, she said that she had to "work all day" and was then forced to have sex when she returned home. She referred to B. ripping her clothes and physically assaulting her before carrying out the sexual assaults. She resorted to sleeping in the living room, "thinking that "if the children hear[d] the uproar perhaps he [would] feel ashamed of himself". Despite this measure, B. would drag her "inside" (to their bedroom, I infer), causing scratches on her knees and elbows in the process.
- [145] When she locked herself in the basement to avoid such activity he would use a screwdriver to open the door. That happened two or three times during the years after his niece moved out of the basement.
- [146] These acts continued during the time when she was going through menopause and did not wish to engage in intercourse, because of the pain and other symptoms she was experiencing. She referred to them occurring during this period on weekends when the children were out.
- [147] B. would also force her to perform sexual activities that he had seen while watching pornography during the day. At one point he asked her to make a "movie" of their sexual activity, which she refused. He subsequently brought to her attention a video recording of them engaged in such activity that had been posted to the Internet. He claimed that it had been recorded in India, but she recognized the blanket and bedsheet that they had brought home from a trip there (which I understood to mean that the video had been made in Canada). He told her to throw the blanket away, in case anyone came into their room and recognized it from the video.
- [148] B. showed her the video sometime before 2014. She was too ashamed to discuss it with anyone after that, and when she was asked about it during her examination for discovery in January 2019 she had a panic attack and had to go to hospital. She was prescribed medication for anxiety and that time, and still takes some unspecified form of it for that condition. (T. described her having quite a severe panic attack following her examination for discovery, which he believed was in 2018, requiring her to go to the hospital and receive medication.)
- [149] S. was so concerned about the invasion of her privacy caused by this reference to the movie in her discovery that she made a complaint to the police. B.'s use of the video in this litigation left her humiliated, she said, and "made [her] dead while [she is] alive". He could have taken all of the property, but should not have done that, in her view. She still does not sleep in their former bedroom, because when she does she can see the video of their intimate activity playing in her head.

- [150] These sex-related allegations were not put to B. in cross-examination, although I could infer, based on the general tenor of his testimony, that he would have denied them. His position on the video of their sexual activity, which he addressed in his direct evidence, was that when he saw that it had been posted he recognized the bedroom as being one they had stayed in during a visit with family in India in 2007. His suspicion was that it was made by members of her family.

Pre-Separation Financial Issues

- [151] S. began working at the nursery in April, 1996, after the family returned from a trip to India. She would sign her paycheques and employment insurance cheques over to B. She did not ask where they were being deposited because she did not want to cause further altercations.
- [152] S. said that B. looked after all of their banking matters during the relationship. For example, she did not know which account the mortgage payments for the Gatefield home were being made from after they purchased it. She said that if she asked him questions about the family's finances, he would ask her why she was worried about it and that he was "handling everything." He also insisted, over her protests, that they obtain a \$100,000 line of credit on the Gatefield home, originally for the purpose of purchasing a lot on which to build a new house. Such behaviour was part of the ongoing pattern of assaults, threats and domination that she described.
- [153] Other than saying that funds would be withdrawn from it to build the house in India, he never advised her of any of his actions with respect to the line of credit. The only time she accessed it during the relationship was when B. requested her to withdraw \$5,000 from it and send it to him in India for the construction of the house. Although she had no receipt for having sent it (she thought it was by Western Union), B. told her he had received it.
- [154] T. confirmed that his father made all of the family's financial decisions, "from what kind of orange juice we're buying to buying a house", and that "what he said went".
- [155] B. was also responsible for having both of their tax returns prepared by their accountant. She said that she did not have permission to ask B. anything about what was contained in their returns. For example, she had no idea how they were making ends meet in 2011, when their combined income was reported as slightly over \$18,000. She also could not explain how the rental income that had been declared during the period that B.'s niece was living with them had been arrived at.
- [156] With respect to incoming financial correspondence, B. was the one who kept the key to their mail box, which he took with him when he went to Ontario to carry out renovations to the investment properties.

- [157] She was shown records of another account at Scotiabank in both of their names, containing transactions from August 2015 to June 2017. She had never seen this account before and as a result had never used it. Similarly, she knew nothing about an Envision account that had been opened in her name, and for which records were obtained beginning December 31, 2013, or RRSP or "dividend accounts" at the same institution. In re-examination, she said that B. had attended Envision with her when the account was opened there in 2013.
- [158] She was unable to recall the disposition of a \$5,000 withdrawal from the line of credit on November 14, 2014, which B.'s counsel suggested, based on similar withdrawals up to two days before from St. Catharines, occurred while he was doing renovations in Ontario. She also could not confirm that B. was actually still in Ontario at that point. As an overall response, she said that she would never withdraw money or perform other banking transactions unless B. had directed her to.
- [159] B. agreed that when he was in Canada he handled the family's banking, including the payment of bills, and that S. would routinely sign her paycheque over to him.
- [160] In furtherance of S.'s theory that B. diverted family funds for his own purposes during the relationship, her counsel reviewed some of his other financial arrangements with him.
- [161] He said that he kept using the TD account in his own name, which he had had for many years, because it had no monthly fee. He used it for making and receiving certain payments. For example, his disability payments went into it because he only had a blank cheque from that account when he was making his application for them. At some point their son T. was made a joint holder of the account, although the reason was not specified. The available records show ongoing deposits to, and withdrawals from the account during the relationship.
- [162] B. reviewed the records of the RRSPs and similar investments in his name at Scotiabank in 2013. He emphasized that he did not conceal these matters from S., and that in fact the documents relating to them remained at the family home after they separated:
- He agreed that he had withdrawn \$19,373.38 from the Scotiabank RRSP on June 11, 2013. He did not directly respond to the suggestion that he had placed the net amount of that withdrawal in someone else's account, after paying tax on it.
 - His RRSP at TD, which had contained \$31,136.54, was mostly depleted to cover living expenses after his accident, he said. The small amount remaining in it was placed in the Scotiabank RRSP when the parties renewed the mortgage on the family home. His registered pension plan (RPP) at Great West Life of \$18,043.11 was also moved into the Scotiabank RRSP, he said. He was not able to provide any documents showing the transfer, and thought that they had been left in the family home at the separation.
- [163] He was also asked about various activities that he carried out using the line of credit and the joint account:

- He agreed that a \$5,726.25 withdrawal from the line of credit on December 28, 2012 did not have a corresponding deposit into the joint account. He thought the withdrawal might have been for a trip to India that was taken in February 2013. He also noted that a payment on the line of credit of \$5,000 was made on January 8, 2014.
- He agreed that while a \$4,000 cash advance had been taken from the line of credit in February 2013, only \$2,000 had been deposited to the joint account. He denied that he had kept the other \$2,000 for his personal use and thought once again that the balance might have been for the impending India trip. He maintained that a \$3,529.46 cash advance the following day must have been for a bill payment, such as their credit card, and in re-examination noted that there were no payments to their VISA account for that month. Once again there was no corresponding deposit into the joint account.
- He thought that \$7,000 withdrawal from the line of credit in April had been sent to India, although he could not recall whether it had been sent through the bank or Western Union, and he did not have any documents in reference to it. He denied that a further cheque for \$7,950 from the line of credit the following day had been given to one of his friends to hold for him.
- A cheque of \$2,147 in May that was not deposited in the joint account was used to pay "some kind of a bill" he said, and he denied once again that a cheque for \$3,000 in June that did have a corresponding deposit in the joint account had been deposited with one of his friends. He denied that a \$4,000 cash advance in July that was not deposited in the joint account had been for his own use, and gave the same response for three cheques from the line of credit in June and July that totalled \$3,550.70. He described a \$4,000 advance on August 27 that did not find its way into the joint account as either having been taken by him to India on his trip that September, or sent there by him, and gave the same response in relation to a \$6,000 advance in September. He explained that one does not need to declare cash being brought to India in amounts below \$10,000. He added that he might also have paid some bills or purchased some items.
- In re-examination he confirmed that a \$5,000 withdrawal from his TD account on September 13 was deposited into the joint account three days later.
- He rejected the suggestion that he had received two advances totalling \$5,900 in October, on the basis that he was still in India at that point. (In re-examination he reviewed the stamps on his passport and confirmed that he was in India from September 20 to December 19, 2013. However, advised that he had access to his Canadian banking during that period[3]).
- He could not recall what had been done with a \$6,000 cash advance in March 2014, citing the ongoing depression from which he had been suffering, but he thought it could have been a deposit for one of the properties that was purchased in that year. He also could not account for an advance of \$6,807.50 that was received later that month. He thought that S. might have withdrawn it, or that it could have been for the payment of a bill.

· Finally, in October of 2014 he withdrew \$11,000 from the joint account while he was in St. Catharines, which he said was to fund renovations on some of the investment properties. He did not provide any bills or receipts in relation to these expenses because they remained at the family home, from which he had taken only the "main few documents" when he left.

[164] He was also referred to records from his own TD account from 2013:

· He thought that a deposit of \$17,357.31 in April might have been for his disability payments, which he said had been on hold for a while. He could not recall the origin of a \$8,000 deposit, followed by a cheque written from the account for \$5,000 on the same day, at the end of that month.

· He could not recall the origin of a cheque for \$4,513 that he deposited in the account in September, 2013, which was followed by a \$5,000 withdrawal later that month. He denied that he had withdrawn the money and given it to someone else for safekeeping, pointing out that he had gone to India that month and may have needed it for house construction.

· He denied the suggestion that the banking records for July 2014, which showed him moving large sums in and out of the joint Scotiabank account from his TD account (deposits of \$8,000 and \$4,000 and withdrawals of \$5,000 and \$6,300 that month) demonstrated his efforts to control S. financially, by instilling a sense of panic in her about whether there would be sufficient funds in the joint account to cover their obligations. He explained that he had to deposit a cheque for \$75,841.08 into the TD account in June because it was payable in his and T.'s name (\$70,000 was subsequently deposited into the joint account and used to pay down the line of credit), and that more generally he paid some bills from that account as well.

[165] B. alleged that S. has kept a large amount of gold jewelry in her possession, including bangles necklaces and rings, and he provided a list of these items during his testimony. He said that they were previously kept in a safety deposit box that the parties maintained at TD Bank. He was unable to verify their continued presence there because when he inquired the only safety deposit box at that institution was one in Ms. D.'s name. As far as he could recall, the box had previously been kept in both of their names. Entries from June 2013 to March 2014 in the TD records show deductions for "SDB" [which likely stands for "safety deposit box"], but he rejected the resulting suggestion that he kept a box in his own name. He also denied the suggestion that he had taken the gold items with him to India and that they remain there.

The Separation

[166] S. said that the incident that led to the separation began on Christmas Eve, 2014, when B., who once again was intoxicated, assaulted her as she was about to leave for her brother G.S.'s house, by pulling her hair and pushing her against a cupboard. He was angry with her for leaving, despite the fact that one of the other outcomes of the reconciliation meeting the previous August had been that she would be allowed to visit her family whenever she wanted to. He began phoning her repeatedly at her brother's house. Later in the evening,

he walked to her brother's house, retrieved her car, and drove it home.

- [167] T. also came over to G.S.'s house at some point. B. phoned him there and S. could hear, from T.'s side of the conversation, that they were having an argument. B. then repeatedly phoned her other brother J.
- [168] G.S. recalled B., while drunk, calling him, T., and S. at the get-together and verbally abusing them.
- [169] S. said that when she and the children came home the next morning, B., who was still intoxicated, opened the front door, "uttered obscenities" to her, and raised his hand as if to strike her. T. interceded but B. attempted to strike her again. The children were trying to remove her from the situation. Passersby stopped their vehicles and, I infer, called the police, who attended. B. was arrested and she heard him repeating in a loud voice that the children and everyone from her side of the family were "dead".
- [170] T. described his father expressing anger to him about his mother going to her brother's house that night, and telling him to call her and tell her to come home. His father said that otherwise he would go there "and drag her out by the hair".
- [171] His uncle J.S. then invited him to come over to the event. He confirmed that after he arrived there, B. called S. and then J.S.'s home phone repeatedly to utter threats. At that point T. grabbed the phone and told B. off, which provoked further anger from B.
- [172] The following morning he, S. and his brother returned home to find the door locked. B. opened the door and when they started to enter, lunged at S. and slapped her, requiring T. and his brother to intercede to protect her. As S. had described, this altercation spilled on to the front lawn and someone who observed it called the police. T. denied having struck his father, and said that their only physical contact was in the course of restraining him from hitting S.
- [173] M. said he had first come home at about 1:00 am, and found the front door lock changed and the garage door keypad inoperable. His brother updated him on the situation, and as a result he spent the night at a friend's house. When he, his mother and T. returned the next morning and knocked on the door, his father "came lunging out at [his] mom", saying he was going to kill her. He and his brother tried to "break it up", but scuffles kept erupting until the police arrived.
- [174] B. ended up being charged with assault and uttering threats. One of the conditions of his release was to have no contact with S. or the children, except that he was permitted to speak to S. by phone, provided that any such conversations ceased on her request, and only resumed if initiated by her.

- [175] B. testified that he had called S.'s brother's house repeatedly to find out why S. and the children were staying there so long. He ended up having a verbal confrontation on the phone with her brother J., who made an obscene comment about B.'s niece and told him they would be coming over to beat him up in front of his children. He agreed that he swore at J. in response. His son T. then phoned him and told him not to call anymore.
- [176] As a precaution against the threatened assault by J., B. asked a friend to come over, changed the front door lock, and unplugged the automatic garage door opener. He saw J.'s car parked outside the family home at one point, but nothing came of it, and he finally went to bed at about 3 a.m. He did not call the police about the threat he had received because he did not want them to be involved with his family.
- [177] He was awoken later that morning by the sound of the doorbell being rung repeatedly. When he opened the front door, he found S. and his children there. T. began "beating [him] up" and then pulled him outside to continue the assault. M. attempted to separate them. S. was standing about 10 feet away. Some passing pedestrians called the police, who attended shortly after that.
- [178] Despite having been the victim of the assault, he was still arrested and charged with assault. He said that he did not accuse T. of assaulting him when he was dealing with the police because he did not want T. to end up with a criminal record.
- [179] He eventually resolved the assault charge by agreeing to enter into a peace bond. (S. said she talked to the police about having the case dismissed. T.'s perspective was that the family did not want to proceed with the charges as a show of good faith to B., hoping that he would "better himself" through anger management counselling. M. expressed it as not wanting their father to have a criminal record and said that "we wished him a better future").
- [180] There was a meeting at B.R.'s house in 2016, in an attempt to assist the parties to reconcile. S. did not attend personally but was approached by B.R. and B.'s friend D.D. about a reconciliation. Her position during this process was that she no longer had the strength to resume living with B., given all of the assaults and financial deception that she had endured by that time. The children had also expressed that they were unable to tolerate any further assaults on her.
- [181] T. suggested that the parties live separately, but refrain from actually divorcing, and that they remain as a family. He went as far as to suggest that he, his brother and S. would live in the basement of the family home and B. could live upstairs. He testified that B. rejected this suggestion, and declared that he was going to proceed with a divorce rather than have any further relationship with the family. B. demonstrated a hostile and vengeful attitude, and said that he was going to "take the house".

- [182] In what appears to have been a reference to this meeting, B.R. said that he was also involved in discussions after the parties separated, during which he emphasized the benefits dividing up their assets without legal proceedings. B. was not receptive to this approach, and was fixed on going to court. He told B.R. that he wanted to see S. "on the street", and that he wanted to bankrupt her.
- [183] B.R. later attempted, without success, to involve B. in an informal mediation process with S. after that, a service that he has performed for other couples. He stopped talking to B. after that, concluding that B. was "just using [him] all these years " and that "every time [B.] screwed up he would come to [him] and try to get the fence mended between [B.] and the family".
- [184] Despite his anger at his father's assaultive behaviour, T. said that until 2016, when his father made it clear that he wanted nothing more to do with him, they had always had a good relationship and that, aside from that behaviour he "couldn't have asked for a better dad." In response to the suggestion that he has taken his mother's side in this litigation, he explained that once his father said he wanted nothing further to do with him, he concluded that "I can't be there for my dad, I've got to be there for my mom". He would welcome having a relationship with his father "any day of the week, but that's on him."
- [185] Similarly, M. described B. as "a good dad" and that over all they had a good relationship, although if he and T. "ever made him angry, he would give us a slap here and there." He has not had contact with his father since 2014 and said that in light of the revelations about his father's conduct since then, such as that his father assaulted his mother while she was pregnant with him, further contact was "something we did not want to force." In cross-examination he agreed that he had taken his mother's side in this litigation and had no interest in seeing his father. He also described the decisions being made about the course of the litigation as a "family thing" - in the sense, I took it, that those decisions would be made collectively. However, he denied the suggestion that he wanted the litigation to go a certain way, responding that "we just want justice and we'll live with the result."
- [186] In his evidence, B. accused T. of threatening him during the 2016 meeting. He agreed that T. had suggested that he and S. remain married but live separately, rather than suffer the embarrassment of divorcing. He rejected the suggestion, on the basis that he needed someone to care for him if he became ill. He said that he has not spoken to either of his children since he filed the notice of family claim. He explained that he was afraid of what they would say to him.

Nature and Use of B.'s Personal Injury Settlement

- [187] B.'s counsel sought to enter an email from his counsel in his personal injury action, which set out the breakdown of the settlement among the various applicable heads of damages. S.'s counsel objected on the basis that this communication was hearsay, and I ruled against the application of B.'s counsel to have it admitted pursuant to the business records

exception. B.'s counsel later abandoned a potential application to have it admitted pursuant to the principled hearsay exception. As a result, there was no admissible evidence of the manner in which the settlement was apportioned.

- [188] S. testified that B. told her that he had received a settlement of \$100,000, from which the lawyer had taken \$40,000, and that he had put the balance of \$60,000 on the line of credit. She did not see any documents confirming this. When she asked him why the settlement was so low he said, that his former employer had indicated (to the insurer, I took it) that he had only been working part-time, which was not accurate. She responded to the suggestion that she was fully aware of the details of his settlement based on correspondence from his counsel by pointing out that B. kept control of the key to the family's mail box (which she had previously explained was in a common neighbourhood set of mailboxes, outside their house).
- [189] B. said that shortly after receiving the settlement in 2012, he deposited it in an account in his sole name, then transferred \$153,281.94 of it into their joint account, by depositing a draft in that amount. After paying off their line of credit, which had a balance of \$104,032.58, this left \$49,249.36 of the deposit in the joint account.
- [190] B. initially deposited the remaining \$120,000 in another account that he opened in his own name. He provided a printout showing the opening of the account on July 11, 2012 and a deposit of \$120,000 into it on that day. On August 1, a draft of \$120,067.85 was withdrawn from that account and it was closed. B. testified that the draft was then deposited into the parties' joint account at Scotiabank. Records of the joint account show that amount, less \$7.50 for the cost of the draft, being deposited into it on August 20.
- [191] B. agreed with the suggestion that this account was used for the parties' daily living expenses (he later also accepted the term "family expenditures"), and that there were payments and withdrawals from it for that purpose after this deposit. Later in his cross-examination he emphasized that although his settlement funds were used to pay off the line of credit, without them the parties would not have been able to buy any of the properties.
- [192] On September 5, \$145,000 was withdrawn from the joint account and placed in a high interest-earning account. According to B., this money was then used for several purposes - to purchase the Wainfleet property on December 6, 2012, his share of which he agreed was \$83,333; to purchase the Commando property jointly with T. for \$60,000; to pay onto the line of credit; and, eventually, to place back in the joint account. A deposit of \$40,000 back into account on October 1 was followed by a withdrawal of the same amount by draft later that day. B. was unable to recall for what property the \$40,000 was used for, but said that he was making inquiries with the bank about it.

- [193] On being referred to the banking records, he agreed that a draft of \$61,028.92 on October 31 was for the Commando property, and that a deposit of \$40,000 on December 3, followed by a withdrawal of \$45,000 shortly afterwards, represented a payment on the line of credit. He did not recall the precise details, but again promised to "look into it" with the bank.
- [194] B. was able to identify a \$85,000 cash advance from the line of credit on December 3, 2012 as having been his share of the purchase price for the property in Wainfleet. As I indicated above, he previously testified that this purchase was funded by a withdrawal from a high-interest account, which had in turn been funded by a transfer from the joint account, but this turned out to be incorrect.
- [195] Thus, it appears that the parties used the line of credit to purchase the properties on Seneca Street in St. Catharines (September, 2012), Wainfleet (December, 2012), Thorold, and Welland (both July 2014).
- [196] When it was suggested to S. in cross-examination the investment properties in her name were purchased using B.'s personal injury settlement funds she said that she didn't "know anything", and that all she would ever do is "hand over the cheques" to B. and "sign". She agreed that she made no contributions to the Ontario properties from any accounts that were in her own name.

Extent of B.'s Post-Accident Disability

- [197] S. testified that following the accident B. first returned to his former occupation as a painter, and then began building a house with his friend C.B. He told her that he was working on a cash basis and directed her not to tell anyone, because his personal injury settlement was still pending and he was concerned about being video-recorded while he was working.
- [198] T. described his father having had "a very minor accident" in 2009. He confirmed that following it his father would do cash work, an assertion he based on his observations of his father leaving the house, in work clothes and carrying a lunch kit, to work for C.B., who had a framing company M. also described his father resuming work after "a couple of months", getting picked up in the morning and dropped off at night by C.B.
- [199] According to S., B. carried out renovations to the family home in 2010 or 2011, in particular installing kitchen tiles and hardwood floors, and painting the house. Similarly, T. said that he and his father performed extensive renovations to the home after the accident, including removing the carpets and baseboards and installing laminate flooring, as well as painting. M. described it as a "full house renovation", and recalled it being carried out mainly by his father and T., with "a little bit" of help from him.
- [200] S.'s brother G.S. said that once the Balsam Crescent home was purchased, he assisted B. with the renovations, by having some of the trees on the property topped and assisting in the cleanup work.

- [201] B.'s position was that these renovations, including putting in a basement suite, were carried out by the children under his supervision. In cross-examination he elaborated that he could do "little things", such a small amount of painting or minor repairs, but not heavy work.
- [202] With respect to his work on the Ontario properties, B. testified that if there was only "a little bit of work" to be done on a property then he and his business partner would do it. If more was required, they would hire a contractor. In contrast, T. said that he would accompany his father and C.B. to Ontario, to help them with the "full renos" to the investment homes there. His father personally carried out "pretty much any type of renovation you could do to an older house" during those projects.
- [203] Once B. was unable to work he transferred his employee retirement plan to a registered retirement income fund. He testified in direct examination that the fund was then "cashed out", but during cross-examination he corrected himself and explained that it had been transferred into his Scotiabank RRSP. He was unable to provide any documents showing these transactions, but maintained that he had submitted a document to Scotiabank giving his consent to the transfer.
- [204] Although she agreed that B.'s bank statements remained in the family home after the separation, S. said that she was not aware of the extent of his disability payments, because of his overall control over financial matters. All he told her, in 2014, was that he received "somewhat" of a payment in that regard.

Post-Separation Events

S.'s Situation

- [205] S. said that she knew B. would withdraw money after the altercation, based on his previous conduct, and since she did not know what was in their accounts she went to their Scotiabank on December 27 to make inquiries. It was not a "race to the bank", as B.'s counsel suggested to her - she was going to be grocery shopping in the area and decided to drop by the bank as well. When she saw B. there, she went to buy the groceries first and returned when he was gone.
- [206] When she inquired at the bank she was told that \$85,000 had been withdrawn and, because it was their joint account, B. had been entitled to withdraw it. She then called B.'s friend D.D., who advised her that B. had immediately placed the withdrawn funds in his friend J.G.'s account. S. withdrew the balance of \$31,500 and placed it in her own account at Scotiabank out of fear that otherwise S. would eventually withdraw it as well. She used \$17,000 of the withdrawn line of credit funds January of 2015 to assist T. in buying a car, after the one he had broke down.
- [207] S.'s 2017 financial statement described her expenses as almost twice her income, and she said that those expenses have gone up since then.

- [208] When the mortgage was renewed after the separation, it had a higher interest rate and B. was required to make a higher monthly payment than under the previous one.
- [209] Her brother G.S. has continued to assist her since the separation, both with her living expenses and her legal fees. Between himself and her other brother J. they are contributing about \$1,000 per month for her expenses.
- [210] T. said that he and M. take turns covering household expenses such as phone, water, gas, electricity, property taxes (although S. stated in her evidence that she has paid those and that at one point the children "were not paying on a regular basis for the utilities") and insurance. The phone, gas and electricity bills are in T.'s name. While he still wants to be able to enjoy his life, he said that "whatever I can do, I try to." His income on his tax returns for the years 2014-17 was, respectively, \$19,958, \$33,298.21, \$32,063.57, and \$16,031.21.
- [211] M.'s income for those years was admitted to be \$13,586, \$40,698, \$31,531 and \$22,767 in those years. He generally confirmed T.'s description of these payment arrangements.
- [212] T. described the necessary repairs to the family residence that have been carried out since the separation. They included replacing the copper piping throughout the house and extensive renovations to the main bathrooms (S. added that landscaping was carried out, the driveway was repaired, and motion sensor lights were installed outside). T. purchased all the necessary material, for which he provided receipts. In addition to the work that he and his brother could do themselves and some plumbing work that he had to pay for, he enlisted friends who work in the required trades to carry out the necessary tasks for him, as favours.
- [213] The former basement suite has not been rented out since B. brought his niece over from India. Addressing the possibility of renting it out again to provide additional income, T. noted that, in addition to the need to replace missing kitchen appliances, it is not a legal suite, and all of the renovations that were carried out to turn it into one were done without permits. (S. also responded to the suggestion that she should be returning it to a state in which it could be rented out by referring to the risk of being reported due to its illegal status.)
- [214] When B. left the home the family vehicle remained at the home. It was registered in his name and when the insurance expired he refused to renew it. At the suggestion of her sons, S. turned the vehicle over to him in 2016. Her brothers have since purchased an older vehicle for her to use, and were paying the insurance on it for her.
- [215] By requiring the children to pay the household bills, S. was able to save for her legal fees, which she described as "court expenses". She was referred to the record of her CIBC account in January 2016, which showed a balance of \$18,445.33. Similarly, she described deposits of approximately \$26,000 and \$14,000 to that account in February 2017 as representing "all [her] savings", and money given to her by her father to help her out. She referred as well to T. repaying in small amounts the \$17,000 that she had loaned him for his

car. (It appeared however that only the money her father gave her would account for those large deposits, whereas small payments by T. would only contribute to the overall balance.)

- [216] In the same manner, loans from her brothers towards paying the mortgage and the line of credit have also permitted her to save money to pay for the conduct of this action. They will have to be repaid, once this action is concluded and she receives her share of family property.
- [217] T. said that S. goes to the bank on her own, assisted by Punjabi-speaking employees there. His contribution is limited to checking the incoming mail and reviewing documents with her if she does not understand something, although one of his cousins who is an accountant assists her with what I took to be the more complicated matters. He denied that he assists her with this litigation.
- [218] Shortly before her testimony concluded in September 2020, S. discovered that her GST refunds were being deposited in the parties' joint account, instead of the account in her name, as she previously believed, and that B. had been accessing them and making withdrawals and bill payments. It also turned out that the statements for the joint account have been going to the Tims Street address - B.'s strata property in Abbotsford. A Scotiabank official identified \$2,552.34 as having been used by B. from this account, once in 2016 and five times in 2020 (B. explained that the use of S.'s funds was completely inadvertent, and had occurred after he made test deposit and withdrawal, just to see if the account was still active, and then saw amounts in the account that he mistakenly believed were pension payments and his own GST refunds).
- [219] To counter the argument that it is B. who has been deceptive and manipulative with respect to financial matters, his counsel cross-examined S. extensively on her own allegedly secretive arrangements, including her lack of disclosure relating to some of them:
- She applied and was qualified for a \$12,000 line of credit at Scotiabank after separation. She did so at the suggestion of the Punjabi-speaking bank employee who assists her, and who suggested that it could be useful. She did not list it in her financial statement in 2017 because she did not think she would need to use it and it "was not in [her] mind either".
 - She agreed that she opened a new safety deposit box at CIBC shortly after the separation, but she did so to preserve her personal documents in case B., who still had a house key, returned to the family home. All she did was move over the same contents to a new location. It was pointed out to her that an immigration document of B.'s, and the statement of adjustments and title certificate for the Balsam Crescent home, which were contained in the box, had not been included in her list of documents. She emphasized that she had taken photos of everything and provided the photos for disclosure. Although she did not know their exact nature, she knew that the latter two documents were important ones relating to their home, so she kept them.

- She agreed that she had not listed the safety deposit box in her 2017 financial statement, but maintained that she has provided all of the information concerning it to her counsel. When she was being cross-examined in November 2019, she said that it had "not come into [her] mind" to provide the bank slips that show her access to the box that B.'s counsel had requested, but she said she was willing to do so. She also believed that she had done everything necessary to allow counsel to attend at the bank to photograph the contents, as agreed with her own counsel, and had located the key for the box. However, as of November 2019, she had not yet gone to the bank with the key for this purpose.
- She did not place any gold jewelry in this box, as B. alleged, nor was she in possession of any such jewelry during that period. (Her counsel had referred her to the photos of the box's contents, which appeared to be a variety of personal documents but no jewelry.)
- She reiterated that B. had taken the family's gold jewelry to India for his niece's wedding and that with her consent he had given a "gold set" to his other niece. Just as she had no control over the family's money, she had no control over the jewelry, she said. The only gold jewelry she owns now are two items that she bought herself with bonuses from work (after the separation, I infer).
- At the suggestion of the Punjabi-seeking employee at CIBC who assists her with banking, she opened a TFSA at that bank in 2016, and closed it in February 2017 after providing the payments to her children. A CIBC document indicating that it was opened in August 2014, before the separation, was put to her in cross-examination, but she maintained that it was not opened until that later date.
- Another TFSA in her name had been opened at that bank in 2014 (by B. she said), and closed on the same date in February 2017 as the other one. (In re-examination she clarified that B. had gone to the bank with her when it was opened, and that until after separation she did not actually know what a TFSA was.) The amounts that she obtained when these TFSAs were closed formed part of the funds that she provided to her children. She was not clear which funds had been transferred into each TFSA from her main account by the bank or how much had been transferred into the one that was opened in 2014. She was unable to obtain the bank records as far back as 2014 because the bank had moved to a different location since then, she explained.
- A deposit of \$5,290 into that TFSA in September of 2014, likely came from her own account at CIBC, she said. She had been depositing her paycheques in the account since the dispute with B. the previous month, and that account also contained money that her father had given her to help her out. She had not been able to save any money previously in the relationship.
- She thought that a further \$5,000 deposit to that TFSA in January of 2015, shortly after the separation, which B.'s counsel drew to her attention to contradict her claims of financial hardship, could also have come from her father. By that point she was also asking the children to help her out financially. (Her CIBC account records for the corresponding month do not contain a withdrawal in that amount, but I note that her answer with respect to the deposit into the TFSA was that it could have come from her account or from her father, unlike the previous deposit.)

- In the same way, she could not specifically identify the source of a \$11,000 TFSA deposit in 2016, which she withdrew the following year. It may have come from money she was receiving from the children to save for her future needs, or in relation to one of their vehicles - either one that had been registered in her name and then sold, or one that she had loaned the money to purchase. Another deposit, this time of \$15,000, was made in November 2016. She said that she had been able to save this money, for future expenses such as legal fees, but as a result was "not living a good life, not eating well, not dressing well". In re-examination she confirmed that these amounts came from her CIBC account.
- She did not disclose these TFSAs in her 2017 financial statement, believing that her reference to a CIBC account dealt with all of her accounts there. She explained her failure to list the closing of those accounts and the dispersal of the funds from them that "whatever was asked from [her, she] provided." She gave the same explanation for her failure to disclose the CIBC account records for December 2014.
- When it was suggested that she had not provided the requested disclosure of the details of accounts in her name at Envision Credit Union, which were opened in 2013 and remained open at the time of her cross-examination, or listed it in her 2017 financial statement, she repeated that B. had handled all of the banking and that she was previously unaware of having any accounts there.
- In reference to the RRSP account at Envision, which at one point in 2018 appeared to contain or reflect a purchase of \$17,475.22, she said that B. never explained what a RRSP was. If she had asked for such an explanation, he would have told her that she was not capable of understanding.
- In response to the suggestion that she has a TFSA in her name at TD, she said that she did not obtain the details of that account because she "had nothing of [her] own over there" - that is, she did not regard it as her account. The only thing she had ever done at that bank was sign for the account.
- Until she was shown the applicable document she was not aware that the total TD assets under her name are \$15,707.05, and did not know what mutual funds (of which the RRSPs are comprised) are. In re-examination, she asserted that she did not attend the bank in relation to any purchases of mutual funds. She confirmed in the relevant documents that B. is in fact the beneficiary of the funds, a term she was not familiar with before separation. The purchase of more than \$10,000 worth of RRSPs was entirely the result of arrangements made by B., she said, although she would have accompanied him to carry it out. This included a spousal RRSP.
- She rejected the suggestion that a Punjabi-speaking bank employee would have explained the nature of the RRSPs and funds that were being purchased to her. When it was put to her that in fact she had demanded RRSPs in her own name from B., she referred once again to the ongoing threats and assaults that she had received from him, and was only able to sign where he told her to.

- In response to the disclosure requests from B.'s counsel in relation to TD, she went to the bank and signed an authorization for his counsel to access them.
- She did not look at the RRSP statements, even though they were mailed to the family home address, because T. told her that they did not know what was in it and that when their lawyer needed to look at it they would provide it.
- When she was questioned further about which RRSPs had been disclosed in her 2017 financial statement (the TD RRSPs) S. explained that she had not completed the form herself and moreover that "[her] brain has been ruined by inflicting bearings on [her]".
- She and T. submitted the requests for information about her CIBC TFSA together. She had not provided it previously because she thought it would have been included with disclosure about her other CIBC accounts. As to her compliance with the disclosure requests with respect to Envision and TD, she was not previously aware that there were RRSPs in her name at any other institutions, as I have summarized previously.
- Whenever she received T5 forms from these institutions showing the interest these various RRSPs and TFSAs had earned, she just put them in an envelope and gave them to her lawyer.
- She agreed that she has also continued to receive bank statements from TD, which she does not look at because she finds them too stressful. She has either provided them to her counsel or asked T. to do so. Some of the statements for 2019 were still at her home however, and she said that wherever was needed could have been obtained from her.
- Finally, she described the two \$20,000 withdrawals from her CIBC account in February of 2017 as being repayments to her children for amounts that they had advanced to her for legal fees. She later described this process as having advanced them the funds so they could pay them to her lawyer. She did not explain why that step was necessary.

[220] As I will discuss, S. opposed B.'s application for a divorce in December 2016 at least partly on the basis that it would prejudice her claims against the property in India. In response to the suggest that she actually opposed it because she did not wish to be divorced from S. (a proposition that underlies B.'s theory that she was motivated by anger at his decision to end the relationship), she referred to his control of the family's finances, including his withdrawal from the line of credit, his use of family funds to build the house in India; his general deceitfulness in those matters; and her need to make claims against those assets, as reasons for her opposition.

[221] She had initially taken a passive approach to preventing B. from accessing his bank accounts after he made his divorce application. This was on the advice of B.R., who suggested to her that he would speak to B. about resolving matters, and that once B. had calmed down he would be more amenable to settlement. That is why she did not seek to restrain B. from access until 2017. She rejected the suggestion that she later refused to agree to allow B. to access his own bank accounts, even after he had provided the disclosure requested by her lawyer, purely out of vindictiveness. Rather, she continued to be afraid

that he would improperly dispose of the funds in his possession. While she acknowledged that any debt that B. incurred if he could access his accounts would not affect her, she described there being "a single widowed lady [that is, his current partner J.S.] who's a millionaire that's living with him, so he has someone to help him" and that "her has sources to spend lavishly". In contrast, she has no one to assist her.

- [222] More broadly, she reiterated that it is B. who has repeatedly indicated that he will proceed in the courts in order to see her and the children "put out on the streets". In response to the suggestion that this litigation has been entirely driven by her lack of trust in B., she said that she had trusted him by resuming her relationship after each time that he had assaulted her, and that it was because of that trust that she was now "being given the runaround in court".
- [223] In furtherance of the theory that her actions are motivated by anger at B.'s refusal to continue their relationship, S. was asked about having made, at some more recent time, a "friend" request to B. on Facebook. She said that she had not done so intentionally, although it was possible that someone else had used her phone to do so.
- [224] S. testified that her physical health plays a role in her current situation. She described ongoing vision problems in her left eye, which she has checked regularly, pain on the side of her head where she was struck in one of the assaults and pain in her neck. She has a liver ailment that sometimes causes a lot of pain and a work-related repetitive-strain problem with the circulation in her right hand. The hand problem needs surgery but she cannot afford to take the time off of work. The required medication for her various health issues is expensive and her struggles to afford it, to the point of asking her doctor for free samples.
- [225] T. and M. also updated their mother's mental health situation. T. said that she calls or texts him constantly when he is out, inquiring when he will be home and saying that she is scared (such as by the activation of the sensor lights outside the house), and will not go to sleep until he or M. is home. M. described her as anxious and "always stressed", and said that she will no longer sleep in the master bedroom.

B.'s Situation

- [226] B. said that he withdrew a total of \$85,000 from the line of credit on December 27, 2014, because he was concerned that S. would withdraw the maximum available amount, at a point when he did not have access to his car or a place to live. After withdrawing the money, he gave \$80,000 of it to a friend, J.G., to hold for him, after first placing in a joint account he held with two business associates. He later retrieved \$29,000 of it from J.G. in several installments, which was used for his personal expenses, legal fees and constructing the house in India. He had J.G. hold the money, instead of depositing it in his own account, because he was concerned that S., would apply to have his access to it cut off.

- [227] He thought that a \$5,000 deposit in September of 2015, into a TD account that he had opened the previous month, was borrowed "from the other people", although he went on to refer to J.G. holding his \$85,000 withdrawal from the joint line of credit. When it was suggested that J.G. was holding onto the money so that S. would not be able to access it, he disagreed and said he needed money for his own expenses.
- [228] He explained that he purchased the Tims Street apartment after the separation, instead of renting a place until the litigation was resolved, because he was concerned that all of the funds he had withdrawn would be used up on rent. He used the remaining \$51,000 of the money that was being held by J.G. for this purchase, and made up the rest of the price with a loan from J.G. He identified deposits to his account of \$4,000 and \$5,000 in June 2015 as having come from J.G. for this purpose. There is no mortgage on the property, and S. said that he was required to enter into this arrangement with J.G. because he was unable to obtain one. There is no documentation for the loan - "everything is verbal" - and as of the time he testified he had not begun paying it back.
- [229] With respect to the Creston property, B.'s current partner J.S. testified that she and B. live both at that property and in the apartment in Abbotsford. She said that they do not wish to rent out the apartment "because the renters damage it", and they go back and forth between the residences to visit her adult children, who live in the lower mainland. At one point she and B. stayed in Creston for four months, pursuant to a leave of absence she had taken from her job, but at the time she testified she was back working five days per week in Mission, and she and B. were going to Creston for extended weekends, using her holidays to extend them.
- [230] The property is on an acreage but B. did not believe that the surrounding property could be rented out separately for agricultural purposes, because of the nature of the terrain. In contrast, his partner J.S. said that the farmland could be leased "if we would like to do so."
- [231] As of the time he testified, B. had not provided the agreement under which he and J.S. had previously rented out the house on the Creston property - for approximately 11 months, for \$750 per month. It is no longer being rented because they are planning to renovate it, he added. He clarified in cross-examination that they are actually paying to have the house renovated by someone else.
- [232] In his first financial statement, which was filed in June, 2017, B. listed annual expenses of \$35,025.12 were more than twice his income of \$14,638.01, which that year consisted of his disability payments, a net loss on rental from the Wainfleet property, and the withdrawal of RRSPs.
- [233] J.S. described her employment income as being between \$36,000 - \$42,000 per year. She provides financial support to B., in light of his relatively meagre disability income.

- [234] B. withdrew \$7,947.50 from his Scotiabank RRSP in 2016 for what he described as his "living expenses". Later in his evidence he attributed a \$6,000 deposit into his own account at TD Canada Trust in June, 2016 to an RRSP withdrawal, because he did not have enough "in [his] account to survive." (This may have been the same Scotiabank RRSP withdrawal that he previously referred to.) He then withdrew \$5,000 from that TD account to pay legal fees. He also referred to a deposit of \$6,619.10 to this account in September 2016, which he said he had withdrawn from his Scotiabank RRSP and initially deposited into account belonging to friends, before he retrieved it. He explained that he had not put it into the parties' joint account because he was afraid that S. would withdraw it. He described a withdrawal of \$5,000 that November as also being for his personal use, by which I took him to mean his personal needs, although he added that he did not "remember much" in relation to it.
- [235] In cross-examination he said that the Scotiabank RRSP currently contained about \$35,000, although he had not provided an updated statement at that point. A statement from 2016 put the amount at \$34,356.16. He agreed that by the 2016 statement there was \$8,103.70 less in the RRSP than there had been at the end of June 2013.
- [236] He did not include these RRSP withdrawals under the property disposition section of his June 2017 financial statement. His counsel objected to the exploration of this topic in cross-examination, and said that her office took responsibility for any shortcomings in the document.
- [237] A deposit of \$6,000 on May 24, 2016, to the TD account that he had opened in August 2015, was described as having been borrowed from his friend G.B. He said he was unable to meet his expenses otherwise.
- [238] He opened a TD savings account on July 10, 2017, with an initial deposit of \$75,729.45. \$73,007.50 was withdrawn by a draft of July 25. He said that this money came from his share of the sale of the Merrittville property. He initially explained that he had to open up a new account to receive the draft "because my other account was frozen". He then claimed to have been unaware of the order freezing his accounts, and advised that "I had a bill and so I paid off my bill." Once his counsel told him he had to provide all of the money, he gave it to her to hold in trust. He claimed he had not understood that he could simply have had the proceeds of the sale made payable to her in trust. He ultimately conceded that it was "a small mistake".
- [239] The \$5,000 deposit that he made into the account on August 22 also came from G.B. He denied that it was his own money that G.B. had been hold onto for him.
- [240] As of the time of his cross-examination he had not provided a current statement of the account in his name at TD. The information he had provided ended in February 2017.
- [241] B. was unable to recognize a bank draft for \$49,000, dated May 5, 2018 and payable to him. It bears the handwritten note "redeemed by purchaser" on the back. He said he had not seen it until his counsel showed it to him.

- [242] B. testified that he currently suffers from depression, which arises from his inability to work since the accident, and was previously under the care of a psychiatrist. His depression was exacerbated by a lack of support from S. during the relationship, he said. In 2016, he was able to wean himself from the medication that he had been described to deal with that illness. He also saw a neurologist for the back injury that he received in the accident until 2017.

Investment Properties

- [243] B. testified that the Vine and Seneca Street properties were paid for in full from the line of credit, and then mortgages were placed on them after they had been rented out. The funds thus obtained were split equally between S. and her joint owner. B. said that he instructed her to put the funds thus obtained on the line of credit, but he did not know whether she had done so, because he was in India at that time.
- [244] He explained in cross-examination that the mortgages were placed pursuant to a plan involving himself and B., as well as the co-owner of the properties and her husband D.D., his business partner. He also agreed that the properties were placed in her name because her regular employment would enable mortgages to be obtained on them.
- [245] However, the Beaver and Gadsby properties were purchased outright and no mortgages were placed on them.
- [246] S. provided him with a power of attorney in November 2011. He explained that it was provided so that he would be able to deal with the properties that were registered in her name.
- [247] B. testified that he and his partners receive \$1,200 per month as rent on the Wainfleet property, which he declares as income. He said that the amount of profit is variable - to a maximum of \$3,000 per year - and sometimes there is no profit after expenses. He had not been able to find the rental agreement in order to disclose it in this litigation.
- [248] S. agreed that B. found and renovated all of the investment properties and she never saw any of them herself. She confirmed that certain properties were held in her name, jointly with the wife of B.'s business partner, because mortgages were required to purchase them.
- [249] A joint bank account at TD was opened in her name and the name of her co-owner in relation to the purchase of the properties. It was opened by their respective spouses and she never actually went to the bank to deal with it. She also did not receive any of the funds from an additional mortgage that was placed on one of the properties.
- [250] When D.D., the husband of her co-owner, proposed selling four of the properties, she told him to discuss the matter with B. and do as he thought best. She did not have any knowledge about how to deal with the situation.

[251] For his part, T. said that he contributed \$21,000 - \$25,000 to the purchase of an unspecified Ontario property (likely Commando Street, given the other evidence connecting him to it), with the idea that the investment would help him get started in the real estate market. His name was also placed on title. The balance of the purchase price was obtained from a mortgage. He did not ultimately receive back any of his investment.

Properties in India and Proceedings There

[252] These properties consist of agricultural land and, in a separate location, a 1700 -1800 square foot house. B. had the house built.

[253] S. testified that she was involved in the decision to construct a house for the family there. B. had suggested that they could stay there when they were "marrying off" their children in India. The construction was to be funded by withdrawals from their line of credit, although she also referred to having money from the agricultural property being leased out. She heard B. asking his sister in India on the phone whether the lease funds had been deposited into an account. She heard B. and T. discussing the plan to build the house after they returned from a trip together to India in 2013. She confirmed that she made no contribution to the construction from any account in her own name.

[254] B. agreed that the construction began "in and around" 2013 and that his intention at that time was to build a house for himself, S. and their children to use. It was financed by withdrawals from the line of credit, as well as loans from family members in India.

[255] T. confirmed that during the trip that he took to India with his father in early 2013 they "went to a couple of architects" and that the plans for the house were sent to them after they returned home.

[256] As of the time that he testified, the agricultural land was leased out and B. was receiving 150,000 rupees per year for its use. The money is retained by the person who looks after the house and used for expenses related to it. B. does not declare it as income for tax purposes, and did not include it in his 2017 financial statement.

[257] The parties disputed whether a pretrial order for joint appraisals included those properties, so no such appraisal has been obtained for them. B. sought to tender a document from the equivalent of a registrar in that area, indicating that the "agricultural collect rate" in 2018, which amounts to its value, was 654,000 rupees per acre.

[258] B. said he received this property from his parents, who are deceased, but when he was asked when he had inherited it, he was unable to recall. He said that the documents showing the inheritance remained in the family home after he left. He agreed with the suggestion in cross-examination that he had not taken any steps to obtain additional copies from India. He explained that he was reluctant to provide a power of attorney to someone in India to obtain them for him, because of concerns that it might be misused.

- [259] In October of 2013 he arranged to have \$10,100 sent to him in India for the construction of the house, through the father of a friend. He identified a cheque written from the joint account for \$10,000 in January 2014, as a repayment to his friend for doing so. Also in January of 2014, he sent \$3,400 to India, and in December of that year the equivalent of \$1,000 Canadian (this time in U.S. funds) for the same purpose.
- [260] He also provided a list that he had prepared listing the expenses he had occurred to maintain the agricultural property between 2015 and 2018.
- [261] In cross-examination he estimated that he had spent \$35,000-\$40,000 on the house in India, but agreed that he did not have any records of the amounts spent. B. also left two deposit slips from the State bank of India at the family home when he left, S. said she was not aware that he had such an account.
- [262] The plans for the house, which B. reviewed with her before it was built, also remained at the family home after the separation, and S. identified them at trial.
- [263] With the assistance of the children, S. has begun an action in India with respect to these properties, and has obtained a stay against B. selling them. She said that the application for a stay was made on behalf of T. and M., because they are the ones who will inherit it. She has given her cousin a power of attorney to conduct it, and he has hired a lawyer on her behalf. She did so "out of fear", because B. said during his examination for discovery that he was going to give the land to his sisters. Her cousin phones to advise them whenever there is a court date. There have been considerable delays in the progress of the case, for reasons such as a lawyers' strike in India and the shutdown of the courts there due to the COVID-19 pandemic.
- [264] Although the application for a stay was without notice, S. denied that she did not want B. to find out about the overall action in India.
- [265] She opposed B.'s application for a divorce in 2018, on the basis of a letter from her lawyer in India asserting that it would prejudice the claim in India. The lawyer referred in the letter to having been requested to provide it by S., but she clarified that her cousin had actually requested it on her behalf. She agreed that in her affidavit opposing the divorce, she did not indicate that a stay against selling the property had already been obtained by that point.
- [266] In response to suggestions that she has not been forthcoming in providing disclosure about that action for the purposes of this litigation, she said that she has passed on whatever information she received from her cousin in India to her lawyer here.
- [267] She maintained that she has also obtained whatever documents her lawyer requested about the action. In response to the disclosure requests by B.'s lawyer, she provided a document called an "amended plaint", which listed her and the children as plaintiffs. It appears to seek a half-interest in the land on their behalf, along with declarations that B.'s ability to alienate it is restricted, and that the children have the role of "ancestral co-parceners" in it. S. explained that her aspect of the claim, which she is seeking to have reflected in orders

made in this action, arises from the use of the family line of credit in Canada to build the house on this property.

- [268] She has been told that when B. travelled to India in March of 2019, he attempted to have the stay removed. As of September, 2020, when her cross-examination concluded, her cousin had not informed her of the next court date.
- [269] She is fearful of reprisals from B.'s family if she travels to India to participate in that action, and the state of her health and finances also precludes such a trip, so she would like to obtain her share of the property through the present litigation if possible.
- [270] T. described the purpose of the action as "to prevent [B.] from selling that and taking off with the money before all of this has been settled". They had been alerted by B.'s brother that B. was going to be selling it. In terms of communication with the lawyer who is handling the case in India he said that "it's mostly done with my mom" and that she would "regularly talk with that lawyer", although in re-examination he said he doesn't "have a clue" how much she actually does so. He was confronted with an affidavit that he swore earlier in this litigation, which he said he had written himself, in which he had sworn that he had been advised of certain matters by their lawyer in India. He explained that he was referring to information he had received from his mother about what the lawyer had said. In addition to that lawyer's assistance, T. believed that the cousin himself as has some knowledge of "land titles" in India.
- [271] M. also described his mother as "mostly" dealing with this issue. His confirmation that he had not spoken to the lawyer was contradicted by a passage, similar to the one in T.'s affidavit, that he "had been advised by our lawyer in India" about the litigation there. Like T., he explained that the lawyer "has advised our family and the word has been passed down to me."
- [272] In his evidence, B. declared himself to be capable of defending that action in India. However, in cross-examination he said that he could not afford the travel to India that would be required to defend the action, and he would have to borrow the funds from someone over there. When he was asked why he would not be willing to deal with the property in this proceeding, he said that "his sister also had an interest in the property, and failing to follow his parents" wishes would leave him vulnerable to a lawsuit from her.

Children's Educational Expenses

- [273] S. agreed that her original counterclaim did not include a request for child support. Based on a phone conversation that she overheard between B. and one of his sisters about eligibility for child support, she mistakenly believed that she was not able to seek it once the children turned 19, regardless of their educational status. She agreed that at the point she filed her amended counterclaim seeking that support the children were both "gainfully employed". She was unable to recall the dates on which each of their educational programs had been completed. She confirmed in cross-examination that she has not paid school fees

for either of them since the separation, and that they were "working a little bit to cover some of their expenses" while they were in their programs. She had no knowledge of their incomes during the years for which they have provided their tax returns.

- [274] B. testified that before separation M.'s heavy equipment operator training was paid from the family's line of credit. He referred to a transfer from the line of credit into the joint account of \$12,000 on December 2, 2014, followed by a withdrawal of \$11,370 from that account two days later, as shown in the bank records.
- [275] M. agreed with that chronology, but added that he took that course because of a lack of financial support from his parents to complete his business diploma. (He was unaware of how student loans worked at that time). S., mistakenly it appears, maintained that M. was still taking that course at the time of separation.
- [276] T.'s electrician training at BCIT ran from March 2014 - December 2017. The school portion was provided in four 10-week sessions, each followed by a placement with a company for practical experience. He received "some" employment insurance benefits while taking the school sessions and a \$1,000 grant after completing each one. He was paid like a regular employee, albeit at a lower level, during the practical experience portions. Each level of school cost \$2,200-\$2,600. He thought that his parents, who had not separated yet, paid for all or a portion of his first school session, and had promised to pay for all of it. In fact, he ended up paying for the remaining sessions himself.
- [277] Despite this, T. emphasized that he would not have been able to support himself living on his own during his training - that is, if he had been responsible for covering the cost of his food and accommodation in addition to his educational expenses. He also confirmed that after the separation his mother gave him money to buy a car, and that he "paid her off when [he] could".
- [278] M. added that his mother had "recently" (he testified in September, 2020) given him \$20,000.

Assessment of Credibility and Essential Findings of Fact

Principles

- [279] The relevant considerations are concisely described in the often-cited decision of *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd*, [2012] S.C.C.A. No. 392:
- [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.) [Faryna]; 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 (Faryna at para. 356).

Positions

Claimant

[280] B. submits that S.'s testimony was inconsistent throughout, and that her demeanour was "combative, dismissive and argumentative". His counsel's very detailed analysis of the various shortcomings in her evidence can be distilled down to several core themes:

- Her deceptive approach to her responsibility for providing disclosure in the litigation;
- Her repeated unrealistic claims (1) to have virtually no knowledge of the family's pre-separation financial activities, despite her participation in many of them; (2) to have insufficient ability in English to understand key documents and transactions; and (3) to have no memory of important events because of injuries inflicted by B.;
- The complete improbability of the 1999 divorce scenario that she described;
- The absence of any objective medical evidence to support the extensive injuries and disabling ongoing effects that she claimed were caused by the assaults on her by B.;
- The numerous inconsistencies between parts of her testimony and past statements, including sworn affidavits (such as the very different account of the disposition of the Gatefield sale proceeds that she swore to in 2007); within different parts of her testimony; and with the testimony of other witness;
- The ongoing indications that she is pursuing this litigation out of vindictiveness, such as the groundless and vexatious proceedings she has instituted in India; and
- The failure of her counsel to comply with the so-called rule in Browne v. Dunn, [1893] J.C.J. No. 5 to confront B. with critical aspects of her testimony, such as the sexual assaults she alleged, which should result in the attribution of less weight to all of the points he was not given an opportunity to address.

[281] In contrast, B. was said to have testified in quite a straightforward manner, to have been willing to acknowledge various past mistakes, and to have provided a description of his financial activities that was largely supported by the objective banking evidence.

Respondent

- [282] In S.'s submission, a major shortcoming of B.'s evidence, which much seriously affect his credibility, was his blanket denial of any assaultive behaviour towards her in the relationship, coupled with his allegations that in fact her family members assaulted him in one of the incidents and T. did so in another. When maintained in the face of not only S.'s compelling descriptions of what occurred, but also of the reliable supporting evidence from her children, other family members and family friends, his position that he is the victim borders on the ridiculous. The evidence further shows him to have been financially manipulative and devious, as well as resistant to making full disclosure, supporting the inference that he has hidden assets from her. He was evasive, argumentative and, for example in the case of his initial claim to have been in India in the fall of 2014, careless with the truth.
- [283] In contrast, S. is submitted to have presented as a witness in a manner that was very much in keeping with the reality of her situation - she is a relatively unsophisticated person who was trapped for many years in a cycle of abuse and financial control by B. I took her counsel to be submitting, in essence, that in light of the circumstances that she faced, her lack of knowledge about the various financial arrangements in the relationship and her inability to answer some of the questions put to her does not detract from her general credibility. Whatever one makes of her admission of an ability to read and write English, that does not equate to sophistication in dealing with affidavits, banking documents and other more complex material.

Discussion

- [284] I will start by noting that because both parties testified through interpreters, an assessment of their testimony must be based only on its actual content, and not including the particular words used to convey it, which were of course determined by the interpreters.
- [285] S.'s evidence was not without its flaws. For example, she tended to resort reflexively to the effects of having been repeatedly assaulted when explaining any shortcomings in her memory, and to claim that she knew nothing about certain subjects even in situations about which she would have had at least some general knowledge of them. She was also contradicted by some of her affidavit evidence from earlier proceedings about the proceeds of the Gatefield home and the purchase of the Balsam Crescent one, and by her initial evidence about whether other members of her family had engaged in immigration marriages.
- [286] But on the basic contours of her version of events - such as the family violence, B.'s control of the finances, the motivation for the 1999 divorce, and B.'s use of the Gatefield sale proceeds - I found her evidence believable. Her accounts of B.'s assaultive behaviour, in particular, contained the numerous compelling and idiosyncratic details that I have summarized, and overall struck me as having the natural and unforced qualities of a

recitation of actual events. Most importantly, her testimony was supported in many critical aspects (especially on the family violence and the repeated brokered reconciliations) by the evidence of her children, her brother G.S. and the family friends G.B. and B.R.

- [287] Although there is no question that the children are estranged from B. and have taken S.'s side, they were quick to distinguish his positive qualities as a father from his behaviour as a spouse. G.B. and G.R. were his friends, as much as or more than they were S.'s, and they seemed to describe his misbehaviour ruefully, rather than with any hostility, within the context of what I found to be their overall fair and balanced testimony.
- [288] Crucially, G.B. supported S.'s position about her purely passive involvement in the 1999 divorce by revealed B.'s involvement in and resulting concerns about having falsely procured it, including having forged G.B.'s signature, and B.R. confirmed B.'s intention to hide the bulk of the Gatefield proceeds outside the country.
- [289] B.'s efforts to impute a motive of vindictiveness to S. fell short. At the end of the day, I found her to be no more angry or emotional about B.'s actions toward her that one would expect from someone who had actually had to endure them. Her lack of knowledge about the parties' various investments and accounts did not strike me as implausible in light of the financial control that I am satisfied B. exerted. Put another way, I conclude that she was vague about those arrangements because she had never had any involvement in them, other than to present herself to sign for the ones in her name at B.'s direction.
- [290] The worse that can be said about her approach to disclosure is that at times she seems to have passively relied on her counsel to request relevant items from her, or assumed that simply forwarding everything in her possession to her counsel met her obligations, which are not indications of deliberate non-disclosure.
- [291] B. on the other hand, maintained untenable positions on all of the key issues, especially the obvious propositions that he was in the position of having to repeatedly seek the intercession of family and friends to be forgiven for assaulting S., and that he had complete control of the family finances. By his own admission, he moved various amounts of money outside of S.'s control, based on the supposed fear that she would freeze it or remove it herself. In general, he had an implausibly limited knowledge of the transactions that were put to him, considering that he was the one carried who them out. He also had no plausible explanation for his use of the Gatefield proceeds, which B.R. showed convincingly to have been his effort to make off with a substantial portion of the family property, beyond a bare denial that he had done anything improper. Similarly, his claim that S. orchestrated the 1999 divorce was fatally undermined by G.B.'s convincing evidence of B.'s efforts to convince him to lie to help B. escape responsibility for having forged his signature to obtain the divorce.

- [292] To the extent that the motivations of the parties are helpful in assessing their credibility, I am satisfied that B. is the party who seems to be bent on retribution in this litigation, based on his response to B.R.'s efforts to resolve the situation after separation, which tends to support S.'s evidence that he vowed to "put them out on the street".
- [293] Therefore, while I will make the additional specific findings that are required in relation to each claim, I conclude in general S.'s evidence is credible and worthy of acceptance on the major issues, and that B.'s should be approached with caution, except to the extent that it is supported by reliable external evidence. This general acceptance of S.'s evidence includes her narrative of the physical assaults, B.'s level of financial control, his role in arranging the 1999 divorce, and his behaviour towards her and within the family in general.
- [294] The one specific exception that I should identify at this point is that I cannot give any significant weight to S.'s the allegations of sexual assault, which were not put to B. in cross-examination. The rule in *Browne v. Dunn* is not absolute - the goal is to achieve trial fairness, and there is no fixed remedy, only the application of the trial judge's discretion to attempt to achieve fairness in the circumstances: *Nagy v. BCAA Insurance Corp.*, 2020 BCCA 270 at para. 99. While, as I have said, I could infer that B. would have denied these acts in the same manner as the other assaults that were put to him, the reality is that he was deprived by the lack of fair notice even to put those distinct yet equally serious allegations into a context that might have lent some plausibility to his denials.

Property Division

Principles

- [295] The Family Law Act ("FLA") establishes a regime for the division of property based on the concept of "family property", from which certain categories are excluded. Focusing on the principles that may apply in this case:
- Family property includes property that is owned by at least one spouse at the time of separation (s. 84(1)(a)), or that is "derived from" family property (s. 84 (1)(b)). It is to be divided equally between the spouses (s. 81), unless it would be "significantly unfair" to do so (s. 95) having regard to the factors listed in ss. (3). These factors include a spouse causing a significant increase or decrease in the value of family property after separation, beyond market trends (s. (3)(f)), or substantially reducing the value, or disposing of property during the relationship (s. (3)(g)). There is also a catch-all reference to "any other factor that may lead to significant unfairness" (s. (3)(i)).
 - Significant unfairness for the purposes of s. 95 is a more stringent threshold for unequal division than the test of unfairness under the former Family Relations Act. Generally, s. 95 requires "something objectively unjust, unreasonable or unfair in some important or substantial sense" to justify unequal division. It is a constraint on judicial discretion to reapportion property: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras.41-42.

- Section 95 also omits the reference to the relative contributions of the spouses to the "acquisition, preservation, maintenance, or use" of property during the relationship as a factor supporting reapportionment that was found in the former Family Relations Act, in favour of narrower considerations. It has been held that if it had been intended that the relative contributions of spouses would be a significant factor or one frequently relied on to find significant unfairness, the Legislature would have said so. To allow it to become a regular consideration in the context of s. 95 would create uncertainty and complexity: *Jaszczywska* at para. 43.
- In contrast to family property, excluded property is not subject to presumptive equal sharing and remains the property of the spouse who claims the exclusion, except for any increase in its value between the start of the relationship (or the date the property was acquired, if it was after the relationship began) and the separation date. That increase is considered family property (s. 84(2)(g)).
- The spouse who claims that property is excluded has the burden of demonstrating that it has that status (s. 85(2)).
- The definition of excluded property includes personal injury settlements, except that any compensation in the settlement for income loss is not excluded (s. 85(1)(c)). If the spouse claiming the exclusion cannot show what portion of the settlement relates to lost income, then none of it will be excluded: *Jackson v. Jackson*, 2015 BCSC 2114 at paras. 11-12. However, in appropriate circumstances the court may infer from the surrounding circumstances, such as settlement negotiations in the personal injury action, that none of the settlement addressed income loss: *Hopson v. Hannon*, 2020 BCSC 794 at paras. 193-194. Similarly, in *Boyd v. Foster*, 2019 BCSC 901, aff'd 2020 BCCA 177, the court drew an inference from the mediation briefs that a certain portion of the settlement was compensation under that head of damages.
- Property that is derived from excluded property, or from the disposition of it, continues to be excluded (s. 85(1)(g)). This permits the spouse claiming an exclusion to "trace" the property despite its use to purchase other property during the relationship.
- Excluded property is not to be divided unless there is family property or debt outside of British Columbia that cannot practically be divided, or it would be significantly unfair not to divide the excluded property based on "the duration of the relationship between the spouses, and a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property" (s. 96):
- Like family property, family debt - consisting of "all financial obligations incurred by a spouse" from the beginning of the relationship to separation (s. 86) - is subject to presumptive equal sharing, once again unless it would be significantly unfair to do so (s. 95). This includes post-separation debt that is incurred to maintain family property.

· With respect to extra provincial property, if one of the conditions in s. 106(2) of the FLA is met (in this case by the fact that both spouses habitually reside in this province) then s. 109(2)(a) permits the court, to substitute family property or debt that is in located in British Columbia for a spouse's rights in the extra provincial property (ss. (i)), or to require the spouse who has title in that extra provincial property to pay compensation to the other spouse (ss. (ii)), instead of dividing the extra-provincial property. A court can only make orders dealing directly with such property if it is satisfied that the orders would be enforceable against a spouse in the jurisdiction where the property is located (s. (2)(b) and (c))

Positions

Claimant

- [296] B. takes the position that his personal injury settlement funds were excluded property. His counsel did not address the inadmissibility of his personal injury lawyer's letter particularizing the nature of the settlement in her closing submissions, but simply asserted that the "[f]unds documents clearly indicate that the settlement award is for injuries" and that there is "nothing documented" indicating that they represent compensation for lost income.
- [297] B. submits that he has reliably demonstrated, by reference to documentary evidence, the link between his deposit of part of the settlement funds in to the parties' joint account and their subsequent use of the joint line of credit, which had been paid off by the deposited funds, to purchase some of the Ontario investment properties. Thus, he should be permitted to trace those funds to some of the purchased properties, or the proceeds of their sale, and receive the interests in them that his excluded funds represent.
- [298] As to potential remedies, he submits that the excluded funds could be "reduced from the total amount that would be attributed to the parties' net worth." In the alternative, the property in Wainfleet that is registered in his and two of his friends' names, and the parties' half of the purchase price of the properties on Seneca Street, Beaver Street and Gadsby Avenue, which were registered jointly in the names of S. and the wife of B.'s relative, all of which came from the excluded funds, should be allocated to him in the property division. This outcome is expressed to be in the alternative to an equal division of the properties.
- [299] He also takes the position that the property in India is excluded, because of its origin in an inheritance. He argues that it would be contrary to the principles of judicial economy, and may lead to an inconsistent outcome with the proceedings in India, to purport to address it as part of this action, and that it should be left to be dealt with in the proceedings in India.
- [300] With respect to the overall division of property, B. submits that the former family home should be divided equally. He resists any claim by S. for an unequal division of it, and points out that she did not pay all of the costs of maintaining the property after separation herself, as she claimed, but was assisted by the contributions of the children to utilities, other bills and, most recently, home repairs. Similarly, while some of the \$31,500 that the

she withdrew from the joint line of credit was used to make mortgage payments, she also provided \$17,000 of it to T. to buy a vehicle. She has had the benefit of occupation rent, in that the actual cost to her of living in the property, as defrayed by the contributions from the children, is significantly less than if she had to rent a comparable home elsewhere. As a further reason that it would not be significantly unfair to divide the property equally, B. emphasizes his contributions to the upkeep of the family home during the relationship, including the renovations that he carried out.

- [301] He concedes that the \$85,000 that he withdrew from the line of credit after separation, part of which he used to purchase the Tims Street apartment, is not family debt, and that he should be solely responsible for it, just as S. should be solely responsible for the \$31,500 that she withdrew during that period. The remaining family debt should be divided equally, he suggests. There is no basis on which to allocate a share of the Tims Street apartment itself to S.
- [302] The home in Creston that he jointly owns with J.S. was purchased after separation, with a down payment that she supplied, and has no connection with family property. Accordingly, he submits that it is not subject to property division as part of this process.
- [303] He seeks a reapportionment in his favour of those Ontario properties that were registered in his name. His position with respect to the proceeds of sale of the Merrittville Highway property, which was purchased in 2005 and sold in 2017, is that his significant contributions to it, which included conducting renovations that significantly increased its value and making regular payments with respect to it, mean that it would be significantly unfair for the proceeds to be equally divided. He takes the same position with respect to the Wainfleet property, with his value-increasing renovations offering a further basis for reapportionment in addition to the use of the settlement funds to buy it that I have previously summarized.
- [304] For those Ontario properties in S.s' name that were not purchased using settlement funds - Thomas Road and Vine Street - he relies on his renovation efforts and the resulting increase in their value to resist any unequal division in S.'s favour, and maintains that they should be equally divided.

Respondent

- [305] S. argues that B. has not met his burden of showing that the personal injury settlement, or some portion of it, was not in relation to lost income, and thus meets the definition of excluded property. She refers to *A.A.P. v. G.T.F.*, 2015 BCSC 662 at para. 69, in which the failure to provide evidence on this point led to the court's rejection of a claim that a portion of the equity in the former family home was derived from excluded property. In particular, the court noted that it was not the burden of the other spouse to prove that some portion of the settlement related to lost income.

- [306] However, if the settlement is found to be excluded property, S. characterizes B.'s testimony in support of tracing these funds to the Ontario property as "vague", and points out that "clear and cogent evidence" is essential before property will be found to have been derived from excluded property: *Zellwegger v. Zellwegger*, 2018 BCSC 1227 at para. 64.
- [307] A further difficulty that S. points to is that these settlement funds were used for ordinary family purposes after they were transferred into the joint account. She submits that if no specific excluded property is retained, then any subsequently-acquired property cannot be said to have been derived from it. Crucially in this regard, "value" is not synonymous with "property": *Wells v. Campbell*, 2015 BCSC 3 at para. 28, and commingling of excluded and family funds may make it impossible to trace the excluded ones: *C.P. v. K.W.A.*, 2018 BCSC 332 at para. 172.
- [308] S. also suggests that it may be open to me to apply the presumption of advancement, which infers a gift in a case of a gratuitous transfer of property from one spouse to the other, to the transfer of the settlement funds to the joint account in this case, and their subsequent use to purchase some properties in each of the parties' names. *V.J.F. v. S.K.W.*, 2016 BCCA 186 held that this long-standing presumption has not been extinguished by the FLA, although it was not applied in the particular circumstances of that case (a transfer of excluded property into the wife's sole name). However, subsequent decisions have held that the presumption does not apply to the transfer of excluded property into joint names, for example *C.J.B. v. A.R.B.*, 2017 BCSC 1682 at para. 382.
- [309] S. emphasizes that regardless of the availability of the presumption it is open to me to find that there was a gift by B. of the excluded funds. Unfortunately, the case she cited in support of that proposition - *Namdarpour v. Vahman*, 2017 BCSC 1189 at para. 73 - actually involved a finding that the spouses had gifted their respective settlement funds to each other, in order to jointly purchase property.
- [310] Finally on the subject of excluded property in Ontario, S. submits that it is illogical for B. to seek to maintain the exclusion only for the properties that were purchased in his own name, when all of the affected properties were purchased as part of the same transaction. (In fact, as I have summarized, B. is also seeking the parties' share of the purchase price for the properties in S's name, but I took it that her argument would apply equally to any inconsistency in the remedies that he is seeking.)
- [311] With respect to the property in India, S. submits that B. has not met his burden of demonstrating that an exclusion exists. He did not provide any documents dealing with his alleged inheritance and in his testimony he was actually unable to recall when he received it. Nor has he cooperated in having it valued for this case. Crucially, there is evidence that family funds were sent to India in 2013 to build a vacation home on it. It is unreasonable to defer the litigation concerning her interest in the property to the courts there, S. submits, when there is property in B.C. that can be divided to compensate for it.

- [312] As to the overall division of property, S. submits that the fact that she has covered all expenses related to the family home since the separation date - now almost seven years ago - should result in the reapportionment of it in her favour. She refers to the ongoing financial assistance that she has had to seek from her brothers and her children in order to do so. Failing a complete reapportionment of that property, she should be credited with everything she has had to spend since the separation to preserve the home.
- [313] The Tims Street apartment was purchased with money from the joint line of credit, and the absence of a mortgage on it permitted B. to live without paying any accommodation cost. This, she argues, should result in this entire property also being reapportioned in her favour. (Later in her written submissions however, she appears to argue for an equal division of this property, reasoning by analogy from the decision of D.C.O. v. J.S.O., 2008 BCSC 1047 at paras. 28-31, in which the parties were found jointly liable (and entitled to share jointly in any profit from its eventual sale) for a property that was purchased in one spouse's name, but using a joint line of credit.
- [314] For the Ontario properties, S. points to the absence of any specific description by B. of the renovations that he performed, or of any documentary evidence to support the expenses that were necessary to carry them out, which he says were paid from the family line of credit. She describes him as seeking reapportionment of some of them on the basis of unsubstantiated claims. In contrast, it is clear that she was required to prove her employment and pledge her credit in relation to some of these properties, and that B. found it convenient to have some of them registered in her name because she had an income from employment. As a result, she asserts that the Ontario properties remain family property.
- [315] Her position is that the Creston property was purchased by B. using family assets that were hidden and "siphoned off". Notably J.S.'s evidence that she provided the down payment for that property was not supported by any documentary evidence.
- [316] In addition, she submits that lack of financial disclosure by a spouse can itself be a factor leading to a finding of significant unfairness and justifying a reapportionment, citing Bamford v. Mulyati, 2017 BCSC 945 at para. 43 and Ahmadi-Abbasabadi v. Ahmadian, 2017 BCSC 648 at para. 171.
- [317] While S.'s further claims to reapportionment pursuant to s. 95(3) arise from the insufficiency of B.'s income in relation to a potential order of spousal support, and will be dealt with under that heading, she points out that s. 95(2)(i) permits the court to consider any other factor that may lead to significant unfairness, aside from the analysis under s. 95(3): C.M v. M.S., 2015 BCSC 1031 at paras. 35-36. In this case that could include the "abysmal" conduct of B. throughout the marriage and since separation, including hiding assets and moving money around without her knowledge.

- [318] She also cites authority that confirms the relationship between property division and spousal support as means of addressing the economic consequences of the marriage and its termination to a spouse - support in the short term, and property division in the longer term: *J.E.H. v. P.L.H.*, 2013 BCSC 752 at para. 105.
- [319] Thus, S.'s overall position is that the family property should be reapportioned 75% in her favour.

Discussion

- [320] First of all, I am not satisfied that B. has met his burden of demonstrating that his personal injury settlement was excluded property.
- [321] He did not provide any admissible evidence of the portion of it that was attributable to wage loss, and did not pursue the potential avenue of the principled hearsay exception in relation to the email from his personal injury lawyer after his initial arguments for its admissibility fell short. Unlike cases in which courts have been prepared to draw inferences about the apportionment of damages, there is no other reliable basis, such as admissible documents generated in the personal injury litigation, on which to base such an inference. While I would be prepared to take judicial notice of the fact that awards arising from motor vehicle negligence cases overwhelmingly include a component of non-pecuniary damages, that does not permit me to infer that any particular portion of this settlement was allocated to it.
- [322] Even if that hurdle had been overcome, it seems clear from the banking records that the settlement became part of the family's general financial resources shortly after it was received, with a significant portion of it being placed into the joint account and then being spent on various required expenses, including paying off the line of credit. As a result, the payments to purchase four of the Ontario properties using the line of credit cannot be said to represent any identifiable "property" to which a tracing of an exclusion could apply. There was a fairly comprehensive commingling of the settlement funds from the outset.
- [323] I would not however apply the presumption of advancement or find that the settlement was the subject of a gift here. There was no identifiable "transfer" of the settlement to S. that could be presumed to have been a gift, nor any evidence of actual gifting. The funds simply went in and out of the parties' accounts for various family purposes.
- [324] It follows that I would not reapportion any of the Ontario investment properties or the proceeds of their sale to B. on the basis that they were derived from excluded property.
- [325] As to B.'s role in locating and renovating the properties as a basis for reapportionment, I am satisfied that it was simply his fulfilment of his particular role in the relationship, just as working in her job and attending to the home fulfilled S.'s role, so that no significant unfairness would result from dividing these properties equally.

- [326] Conversely, I am unable to find that placing some of them in S.'s name was for anything more than mortgage qualification in light of her employment, within the greater context of their joint family investment, so as to justify reapportioning any of them to her.
- [327] The allocation of family debt or the responsibility for post-separation withdrawals were not really disputed. There is no principled basis to depart from the requirement that the parties share equally in the mortgage and line of credit on the family home, or that B. is responsible for the \$85,000 that he withdrew from the line of credit and S. is responsible for her withdrawal of \$31,500.
- [328] However, S.'s request for a reapportionment of the Tims Road apartment, which he purchased with at least part of the withdrawn funds, runs afoul of s. 84(b)(i) of the FLA. That section includes in its expanded definition of "family property" only property that is derived from property that is owned or is the subject of a beneficial interest of at least one spouse. This withdrawal was of course the incurring of debt, not the use of family property, and so B. is responsible in the division of that debt only for what he actually withdrew. The J.S.O. decision relied on by S. does not grapple with this distinction, so I am unable to apply it for the purpose she seeks.
- [329] There is also no evidence, only S.'s suspicions, that the purchase of the Creston Property was somehow the product of diverted family funds. While there was some lack of clarity in J.S.'s description of how she used her own funds to make the down payment, in relation to the proceeds of a previous sale of her property, there was no particular basis on which to doubt her complete responsibility for that payment, as opposed to the source being funds derived from the parties' family property. There is therefore no basis for including that property in the overall division.
- [330] I am likewise unable to accept B.'s argument that S. should not be credited for her payments since separation towards the line of credit and mortgage secured by the family home, or the insurance and property taxes for the home, simply because the children contribute to household expenses. This argument confuses a spouse's post-separation contributions to the preservation of family property, which are part of the definition of family debt and subject to equal sharing, with an assessment of the other sources of contribution to that spouse's overall household budget, which is irrelevant to that analysis. As long as S. actually incurred these expenses to keep the house, and there is no suggestion that she did not, then it does not matter that her sons' contributions (as well, it appears, as her brothers' and father's) enabled her to do so while still affording to live.
- [331] As to B. reference's to occupation rent to moderate the extent of that family debt, based on S. having had the benefit of remaining in the family home, I think that argument founders on the absence of evidence that B. has incurred accommodation costs since separation to an extent that would make it substantially unfair for him to be equally responsible for the cost of preserving the family home. On the current evidence, the strongest inferences are that he has lived rent and mortgage-free at the Tims Street apartment, which was

purchased with family debt (and, he says, an undocumented and so-far uncollected loan from a friend); and in Creston with J.S., based on a promise to repay her when this judgment is rendered, all the while acquiring or maintaining equity in both.

- [332] The other important question to be resolved with respect to family property in Canada is whether it would be substantially unfair to divide the property evenly in light of any diversion of family funds by B. to his own use. The most significant event in support of that argument was B.'s retention of the proceeds of the Gatefield home sale, which I am satisfied, based on B.R.'s evidence, B. provided to him with the intention of making it inaccessible to S. However, the statement of adjustments for the Balsam Crescent shows that \$142,718.47 was applied to its purchase, which is only slightly below the \$145,000 that S. says were the net Gatefield sale proceeds. This aligns with B.R.'s evidence that he had the diverted funds returned (although his recollection of the amount is lower than the actually down payment for Balsam Crescent). In other words, whatever shortfall might have resulted from B.'s deceitful efforts, which had they been carried through would have left S. with the \$22,500 from the cheque he gave her, B. ultimately applied the Gatefield proceeds fully, or almost so, to the purchase of the new family home on Balsam Crescent. This deprives the argument of its factual foundation.
- [333] The cross-examination of B. on his various transfers and withdrawals during the relationship certainly demonstrated the degree of financial control that S. described, as well as the implausible vagueness about his own actions that I found undermined his credibility. Despite this, I could not identify any movements of family funds that would support a specific inference that funds were placed beyond S.'s reach, as opposed to simply being moved around to address various situational requirements.
- [334] There is one exception. It is clear from the cross-examination on his post-separation activities that in 2016 he drew substantially on the Scotiabank RRSP that was created during the relationship, and did not report those withdrawals in his 2017 financial statement. The amounts were \$7,947.50, \$6,619.10 and \$5,000. S.'s counsel established that the RRSP was reduced by \$8,103.70 between June 2013 and his 2016 statement. B. is obviously responsible for restoring S.'s equal share of the total amount he has withdrawn from that RRSP since the date of separation, in addition to the equal division of the RRSP itself as it stood at the date of separation. (Of course, if an equal division of property is made, S.'s entitlement to have those funds restored will be subsumed in her entitlement to an equal share of the RRSP as it stood at the date of separation.)
- [335] The authorities cited by S. in support of non-disclosure as a basis for finding of significant unfairness are not applicable here. They are about the drawing of an adverse inference about the extent of the offending spouse's assets in the absence of proper disclosure. In Bamford the spouse did not participate at all in the proceedings and failed to disclose the assets that she accumulated personally during the marriage, and the court had been asked to draw an adverse inference from the non-disclosure about the extent of those assets. In Ahmadi-Abbasabadi the non-disclosure "put the wife at a great disadvantage [by making] it

impossible for her to determine, with the certainty to which she is entitled, precisely what the relative finances were and are." Those are much more extreme shortcomings than the present situation, which mainly involves a failure to provide updated statements concerning certain accounts and to list them in B.'s financial statement. Without minimizing such behaviour, when the court can ascertain most of the assets it is preferable to address non-disclosure through the vehicle of costs: *Devathasan v. Devathasan*, 2019 BCSC 661 at paras. 203-205.

- [336] Because the unequal division of property pursuant to s. 95(3) depends on a finding that the objectives of an order of spousal support have not been met, I will address S.'s potential entitlement under that heading.
- [337] The final aspect of division that needs to be addressed is with respect to the properties in India. First of all, I think there is a sufficient basis in the evidence, including S.'s pleadings in the action there, to find that these were inherited properties, and thus excluded property under the FLA regime. It is also clear that family debt, in the form of withdrawals from the line of credit, was incurred to build the house on the village property, which will have increased that property's value. That does not remove those withdrawals from the definition of family debt, but any potential unfairness to S. is moderated by the fact that, if the FLA regime is applied, she is entitled to half of its increase in value of the property during the relationship, which will have been substantially due to the construction of the house.
- [338] As I indicated in my summary of the legal principles, the requirements for the court to take jurisdiction over dealing with this property under s. 106(2) have been met by the parties' habitual residency, and none of the factors listed in ss. (5) lead to the conclusion that such jurisdiction should be declined. In fact, several of the ss. (5) factors, especially "(b) the relative convenience and expense for the spouses and their witnesses" and "(d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals" strongly favour the assumption of jurisdiction.
- [339] However, I would not make an order purporting to divide that property, because there has been no evidence that permits me to be satisfied that such an order would be enforceable against B. in India, as s. 109(b) requires. Rather, I think this is a case in which B. should pay compensation in this jurisdiction to S. for her interest in it. Accordingly, I order that he compensate her for one-half of the increase in the value of both properties, from the date he inherited them until the date of separation.

Spousal Support

Principles

- [340] Focusing once again on those that apply in this case:

- There is concurrent jurisdiction to order spousal support under the Divorce Act ("DA") and the FLA. Where it is sought as corollary relief in a divorce action, as in this case, it is typically granted under the DA unless the parties request otherwise: *Domirti v. Domirti*, 2010 BCCA 472 at para. 7. The parties in this case have not made such a request, so I will proceed under the DA.
- Section 15.2(4) of the DA provides that "in making an order [for spousal support] 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 (c) any order, agreement or arrangement relating to support of either spouse."
- The objectives of a spousal support order, as set out in s. (6) are to "(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; (c) 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: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42.
- Objectives (a) and (b) under s. (6) refer to compensatory support. Non-compensatory, or needs-based support, is reflected in (c) and (d).
- Compensatory support is intended to address the economic disadvantages that the recipient spouse suffered as a result of the marriage or its breakdown, frequently as a result of assuming primary child care and household responsibilities. It can also deal with economic advantages that were enjoyed by the other spouse as a result of the recipient spouse's efforts: *Chutter v. Chutter*, 2008 BCCA 507, reconsideration denied 2009 BCCA 177, leave to appeal refused [2009] S.C.C.A. No.41, at paras. 50-51.
- While this form of support does not guarantee either spouse the same standard of living as they had during the marriage, the longer the relationship between them and the greater their economic union, "the greater will be the presumptive claim to equal standards on dissolution": *Moge v. Moge*, [1992] 3 S.C.R. 813 at p. 870.
- If compensatory support is not justified, non-compensatory support may be ordered solely on the basis of the recipient spouse's need. The purpose of such support is to narrow the gap between the needs and means of the spouses upon marital breakdown. It is based on the idea that the primary responsibility for meeting the needs of the disadvantaged spouse should fall on the former partner, rather than society: *Chutter*, at para. 54.
- A consideration of the needs of the recipient spouse goes beyond their ability to simply meet expenses - their post-separation standard of living must be considered in light of the former marital standard: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 34. On the other hand, a mere disparity in income between the former spouses does not automatically give rise to entitlement: *Lee v. Lee*, 2014 BCCA 383 at para. 60. Rather, "there must at least be some evidence of how the

applicant's lifestyle has been diminished and, even then, other factors may have to be considered": *Madruga v. Madruga*, 2015 BCSC 1605 at para. 39.

- When addressing non-compensatory support, the objective of ss. (d) is only to "promote" the self-sufficiency of the recipient spouse "in so far as practicable". When addressing that issue, "regard must be had to all of the circumstances, including the age and gender of the spouse, her/his skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be quite a different matter": *Tedham v. Tedham*, 2005 BCCA 502 (B.C. C.A.) at para. 33.

- A finding of entitlement does not have to be solely based on one form of support or the other - both compensatory and non-compensatory principles can be reflected in it. In essence, the court is to apply the relevant factors and strike the balance that best achieves justice in the particular case: *Chutter* at para. 49, citing *Bracklow* at para. 32.

- Once entitlement to support is found, the Spousal Support Advisory Guidelines offer a "useful tool" for calculating the amount and duration of support to be paid: *Chutter* at para. 100. They take into account such factors as the duration of the relationship, the respective ages and incomes of the parties, and whether child support is also being paid, and generate ranges of potential support based on them. Although the SSAGs do not have the force of legislation, "their advice must be taken seriously and best practice would explain any deviation from them": *Beninger v. Beninger*, 2009 BCCA 458 at para. 28

- Section 15.2(5) of the DA prohibits the court from taking into consideration any "spousal misconduct". Despite this general prohibition, the effect of such conduct on relevant matters, such as the recipient spouse's ability to earn income, is still an appropriate factor: *Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 21. Section 166 of the FLA is a legislative reflection of this principle, allowing consideration of misconduct that "arbitrarily or unreasonably...causes, prolongs or aggravates the need for spousal support..."

- In addition, as part of the process of property division under s. 95 of the FLA, ss. (3) allows the court to consider "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". This consideration is permitted if the objectives of spousal listed in s. 161 of that legislation, which are identical to s. 15.2(6) of the DA, have not been met, "on making a determination of spousal support". Property division is solely within provincial jurisdiction, so no issue of paramountcy between the FLA and the DA arises. As a result, I see no reason why the inability of a spousal support order to meet the objectives under s. 15.2(6) of the DA cannot also be taken into account when dividing property under the FLA.

Positions

Claimant

- [341] B. seeks spousal support based on non-compensatory principles. As a result of his 2009 accident he is unable to work, and his income has been lower than S.'s since then, including in the period since separation. He also had to move from the family home to what he describes as "a modest one-bedroom townhome". In contrast, S. maintains ongoing employment and has been able to remain in the family residence, assisted by the adult children. He submits that an award at the high range of the SSAGs at their respective incomes, retroactive to the beginning of January, 2015, would be appropriate, with consideration given to making a lump sum award to achieve a highly desirable "clean break" between the parties.
- [342] He resists S.'s application for support on the basis of his current very low income, which is not based on employment, and his non-existent current and future job prospects.

Respondent

- [343] S. argues that this is a case in which B.'s conduct towards her has "caused, prolonged or aggravated" her need for support, as contemplated by s. 166 of the FLA, thus making it relevant to the analysis. The physical abuse that she has alleged has included injuries to various parts of her body, including an eye injury that affects her vision and, equally importantly, has caused her to suffer ongoing anxiety, such as an irrational fear of intruders. In addition to her own evidence of the abuse, she refers to the support for it that is provided by the medical and police reports, the criminal charges that were approved, as well as the testimony of her children, which included direct observations of B.'s actions and its effects. T.'s observations are said to be especially compelling on this issue.
- [344] She characterizes the claimant's explanations for the assaults, which involve denials that they occurred or claims that others attacked him, as bordering on the ludicrous, especially the claim that she, her brother and her brother's wife beat him up in the 2007 incident.
- [345] She acknowledges the absence of an expert report diagnosing a psychological condition arising from these assaults, and linking any such condition to her ability to achieve self-sufficiency. As she explained in her testimony, she believed that she had to work, and did not know how to consult a psychologist. Her counsel described her as an "unsophisticated and traditional woman with very limited English skills", which hampered her ability to seek that kind of assistance.
- [346] As an example of the effect of this kind of harm on spousal support, she cites *Vik v. Vik*, 2018 BCSC 611, in which a finding that B. suffered a psychological illness as a result of the breakdown of the marriage that prevented her from working and led to financial hardship entitled her to non-compensatory support.

- [347] In short, S.'s position is that she is not able to work to full capacity because of the physical and psychological harm inflicted by B., and therefore she requires support to bridge the gap to self-sufficiency that has been created.
- [348] Looking at the parties' relative financial positions, S. describes herself as having limited means. As to a basis for compensatory support, she emphasizes her evidence that she did seasonal nursery work in order to be available to care from the children, and that B. did not allow her to upgrade her skills to find a better job. As a result, she describes herself as having been primarily a stay at home mother who did not have an opportunity to pursue a career.
- [349] She takes issue with B.'s suggestion that his circumstances are severely restricted - pointing to his ongoing ability to work cash jobs and conduct renovations, including to the property that he co-owns with his current partner, as well as his ability to travel to India since separation to work on the property there. No medical evidence supporting his inability to work has been provided and should take notice of the fact that many people of his age are able to obtain some form of employment. Further, he has not disclosed his sources of rental income and has not satisfactorily explained why the Tims Street apartment could not have been rented to earn income once he and his partner bought the one in Creston.
- [350] She seeks a lump sum payment of support, or a reapportionment of property pursuant to s. 95(3) of the FLA.

Discussion

- [351] In my opinion, B.'s focus on the parties' respective incomes and S.'s continued occupation of the family home ignores completely the consideration of the "condition, means, needs and other circumstances" of each spouse that the DA requires. S.'s income plus the amount by which M. and T. defray her expenses do not exceed B. and his partner J.S.'s combined household income. As to her occupation of the family home, she will have to buy out his interest in it, or sell it and pay him half its net value, whereas B. owns the Tims Road property outright, subject to a loan to a friend that I am doubtful actually exists, and has a joint interest in the Creston property. His post-separation standard of living is at least as good as, if not better than, the parties' standard during the marriage. Consequently, no order of spousal support in his favour is justified.
- [352] It goes without saying that B. does not have the means to pay spousal support, so a finding of entitlement on S.'s part is meaningful only as a gateway to a consideration of whether property needs to be reapportioned to address any unmet spousal support objectives.
- [353] Her situation is more challenging, resting as it does on the family violence that I have found was committed against her by B. However deplorable family violence may be (and there is no question that it is a serious stain on society), it is essential to keep in mind that family law legislation does not make it a free-standing basis for compensation to the victim. That would be accomplished by a civil action based on the assaults themselves.

Rather, the relevance of such conduct is to one of the existing bases for spousal support under the DA. That is why actions by a spouse that causes, prolongs or aggravates the need for support is admitted as an exception to the general prohibition on consideration of the parties' conduct. Put simply, family violence does not offer a basis in itself to order support.

- [354] The other important consideration that must be addressed at the outset is the evidentiary basis for assessing the effects of the family violence in this case. I have no difficulty taking judicial notice that assaults of the kind that I have found were committed here would inevitably cause emotional and psychological harm, in addition to the physical injuries that were inflicted, and that S.'s testimony convincingly demonstrated that she has suffered those additional types of harm. Where I think I would exceed the bounds of judicial notice however, would be to find, in the absence of supporting medical or psychological evidence, that S. has suffered specific debilitating physical injuries (most significantly, vision and hearing loss), and that either those injuries the psychological effects of the assaults have left her with an identifiable level of employment disability. There is a gap in the evidence on those points that I am unable to supplement.
- [355] Dealing first with compensatory support, the evidence that S. gave up greater opportunities to work outside the home or career advancement in order to fulfil domestic duties in the marriage is scant, amounting to the assertions that B. did not allow her to work outside the home for the first few years of the marriage, and that he denied her request to upgrade her qualifications by further education. These propositions were also not put to B. in cross-examination, so it is difficult to give them significant weight. Aside from that limited evidence, I cannot identify any particular deprivations suffered by S., or any benefits conferred on B., as a result of the marriage or its breakdown. Her employment and her ability to support herself are the same as they were during the marriage, and B. has not been placed in any better position following the marriage's breakdown by her efforts during it. I accept that ongoing abuse during a marriage could well diminish a spouse's ability to be self-supporting after it, but that is where the lack of evidence leaves me unable to make the necessary factual findings.
- [356] I also do not see any basis for non-compensatory support here. The post-separation financial circumstances of each household are roughly comparable, and in fact S. has the higher personal income of the two. Leaving aside the amount she has paid to preserve the family home, which has required the assistance of her children and family with other expenses to sustain and for which she will be compensated in the property division, her standard of living does not seem to have altered significantly from what it was during the marriage. As in the case of compensatory support, the absence of any reliable and objective evidence of a disability resulting from the family violence leaves me unable to identify an economic need that B. should be required to address. I note that in the *Vik* decision that S. relies on, the spouse who received non-compensatory support was found to have suffered "psychological illness resulting from the breakdown of the marriage that prevented her from working and that resulted in financial hardship" (para. 70), and had

gone on disability leave after the other spouse assaulted her. Those factors weighing in favour of needs-based support are not present here.

[357] I should add that this outcome would not have changed even if I had also been able to attach meaningful weight to the sexual assaults, which are of course also a serious form of family violence.

[358] Thus, I find that there is no entitlement to spousal support on S.'s part, and as a result no basis to proceed to a consideration of its impact on property division pursuant to s. 95(3).

Retroactive Child Support for T.

Principles

- In order to remain a "child of the marriage" for the purposes of receiving child support pursuant to the DA, a child who is over the age of majority must be "unable, by reason of illness, disability or other cause, to withdraw from [the parents'] charge or to obtain the necessities of life " (s. 2(1)).

- Post-secondary education can be a valid reason for an adult child to be unable to withdraw from their parents' charge. The simple fact of their attendance at a post-secondary institution is not sufficient however. Instead, that court must ask "whether, considering all of the child's circumstances, the child's educational pursuits are reasonable" and if they are, "whether it is appropriate that the pursuits be financed by the parents": *Nordeen v. Nordeen*, 2013 BCCA 178 at paras. 15-16.

- Orders for retroactive child support are governed by the principles set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231. Consideration must be given to four factors: whether there is a reasonable excuse for support not having been sought earlier; the conduct of the payor parent, including any blameworthy conduct; the circumstances of the child, both at the time of the application and when the support would have been paid; and any hardship to the payor parent that would result from a retroactive award (paras. 101, 106-113, 115-116).

- The date of retroactivity will be the date that the payor parent received effective notice that child support should be paid. Such notice does not have to be provided in a formal manner, as long as the subject has been broached by the recipient parent. Unless there has been blameworthy conduct by the payor, an award should not go back more than three years from the date of retroactivity (paras. 118, 121, 123-4).

- The amount awarded must follow the Federal Child Support Guidelines, but the court can avoid any resulting unfairness by applying the undue hardship provisions of the Guidelines or reducing the period covered by the award, despite the date of effective notice (paras. 127, 129-30).

- An original order for retroactive child support cannot be made under the DA unless the child in question was still a "child of the marriage" at the time it was applied for: *Michel v. Graydon*, 2020 SCC 24 at paras. 12, 14, citing *D.B.S.* at paras. 88-89.

Positions

Claimant

[359] B. says that T.'s evidence about having covered his own school fees contradicts S.'s claim. Her evidence about preparing a \$14,500 cheque for that purpose is also undermined by his testimony that the actual fees were significantly less than that. More significantly, he reminds me that courts have been reluctant to impose the burden of retroactive support on disabled payors with minimal incomes (*Mattu v. Mattu*, [2000] B.C.J. No. 1339 at para. 48) and that such an award would constitute a significant hardship on him, given his limited and fixed income.

Respondent

[360] S. argues that T. could not have afforded his electrician training program unless he had been able to stay at home, and when they were an intact family both parents intended to pay for their children's education. She seeks child support from the beginning of the program in December 2014 (but after the date of separation, I infer) to its completion in 2017, with the tuition fees covered as s.7 expenses.

Discussion

[361] This claim resolves on a technical (although certainly not trivial) point.

[362] The amended counterclaim seeking child support and s. 7 expenses was filed on December 20, 2017. T. completed his program that month and, assuming that he could have been characterized as a child of the marriage for support purposes due to his previous educational commitments, they had ended by that point and he could no longer be characterized as dependent of parental support in light of them. As I have summarized, Graydon prohibits initial orders for child support once the child in question is no longer a child of the marriage. S. also invoked the FLA in the amended counterclaim that added child support, but that does not assist her, because the jurisdiction to make an initial order is likewise required to be made in respect of a "child". As a result, the claim must be dismissed.

Summary and Ancillary Orders

[363] The family property, consisting of the parties' interest in the family home; their interest in the Ontario investment properties (and any amounts being held in trust or elsewhere in relation to those of the properties that have been sold); and the balances of all of the bank accounts, RRSPs and other investments that were in the names of either or both of the parties at the date of separation (December 25, 2014), as referred to in the summary of the evidence above, will be equally divided.

[364] The family debt, consisting of the mortgage on the family home and the line of credit secured by it, will be equally divided, subject to the following adjustments:

- B. will be responsible for the \$85,000 that he withdrew from the line of credit on December 27, 2014;
- S. will be responsible for the \$31,500 that she withdrew from the line of credit on the same date; and
- B. will compensate S. for half of the amount that she has paid since the date of separation towards the mortgage on the family home, the line of credit secured by it, and the property taxes and insurance in relation to it.

[365] The properties in India in B.'s name are excluded property. B. will compensate S. from the family property in B.C. in an amount equal to one-half of the increase in the value of the properties in India, between the date on which B. inherited them and the date of separation.

[366] In view of the length of time that S. has occupied the family home and her contributions to its preservation, she will have the option of purchasing B.'s interest in it by paying him one-half of its net value. In order to accomplish this, she may allocate to him any other amounts that she might otherwise be entitled to receive pursuant to the division of property that has been ordered.

[367] The valuation date for all of the property referred to above will be the date of this judgment, representing "the date of the hearing before the court" pursuant s. 87(b)(ii) of the FLA.

[368] The family home, the remaining unsold Ontario properties and the properties in India will be the subject of updated joint appraisals (or in the case of the Wainfleet property, an initial appraisal), with the appraisal of the properties in India to include the change in their value between the date on which they were inherited and the date of separation. The cost of the appraisals will be borne equally by the parties.

[369] The lack of current values for the family property and the increase in value of the excluded property makes it impossible to arrive at the required equalization payment at this point. If the parties are unable to agree on the calculation of any amounts that are required to give effect to this division of property, there will be a reference to the Registrar, who will certify the resulting findings.

[370] There is also liberty to apply if any further orders are necessary to give effect to the division of property, such as orders for sale.

[371] Although S. requested a protection order at the conclusion of her testimony, her counsel did not seek one in final submissions. I think this was a correct decision on the current evidence, which does not disclose any recent contact by B., other than comments he made to a third party which suggest that he has driven by the family home on at least once more recently. Of course, it is open to her to seek such an order if at any point that events occur that meet the criteria for one under the FLA, regardless of the outcome of this trial.

Costs

[372] Counsel asked for the opportunity to speak to costs once the outcome of the trial is known. Pending any such submissions, I will express the tentative view that success on the important issues has been roughly evenly divided, and that therefore the parties should each bear their own costs.

"Schultes J."

- [1] B. also referred in his evidence to a property on "Commando Street", which I feel comfortable taking notice is in Welland, Ontario, which he owned jointly with his son T. It was not dealt with in the agreed statement of facts or in final submissions, but it appears from B.'s evidence that it was sold in 2014 and the proceeds became part of the family funds.
- [2] Although the documents J.S. was referred appear to show a withdrawal of the purchase funds from her bank account.
- [3] S. was cross-examined on the stamps of in a copy B.'s passport to suggest that he was also in India during the fall of 2014, which could potentially have undermined some of her evidence about his financial activities. B. was recalled later in the trial to clarify that was not correct, and that in fact his last trip to India before the separation was the one in 2013 that he had initially described.

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