

CANADA / JUDGMENT

Bath v. Bath

2024 BCSC 2215

COURT

Supreme Court of British Columbia

DECIDED

9 December 2024

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2024 BCSC 2215 Bath v. Bath

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bath v. Bath,

2024 BCSC 2215

Date: 20241209

Docket: E64092

Registry: New Westminster

Between:

Rajwant Kaur Bath also known as Rajwant Kaur

Claimant

And

Avtar Singh Bath, Gurbachan Kaur Bath by her litigation guardian Amanda Bagri, and Manjit Kaur Bagri

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 301(B)5, where changes were made on December 19, 2025.

Before: The Honourable Justice Norell

Reasons for Judgment

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Place and Dates of Trial:

Port Coquitlam, B.C.

January 29-31, February 2, 5-9,

and May 6-10, 2024

Written Submissions:

May 21 and June 3, 2024

Place and Date of Judgment:

New Westminster, B.C.

December 9, 2024

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I. Introduction

- [1] These are reasons following the trial of this family law action. There are several family members who share last names. For simplicity, and without intending any disrespect, I will refer to the witnesses by their first names.
- [2] The claimant Rajwant Bath is 48 years old. The respondent Avtar Bath is 54 years old. They married on October 17, 1999, and separated on November 6, 2021. They have two children, a daughter who is 24 years old, and a son who is 11 years old. The respondent Manjit Bagri is a sister of Avtar. The respondent Gurbuchan Kaur Bath is the mother of Avtar and Manjit. Due to a health condition, Gurbuchan is represented by a litigation guardian and did not testify.
- [3] The matters requiring determination are: (1) property division; (2) incomes according to the Federal Child Support Guidelines, SOR/97-175 [Guidelines]; (3) child support; (4) spousal support; (5) parenting arrangements; (6) Manjit's counterclaims for tortious abuse of process and occupational rent; and (7) divorce.

II. Chronology and Overview

- [4] Avtar was born in India and immigrated to BC with his family in 1983 when he was 13 years old. He is the youngest of five siblings. The oldest sister Surinder Boparai had earlier immigrated, and she and her husband lived in the Kelowna area. When the family arrived in BC, they initially lived in Kelowna. The parents (Gurbuchan and her husband Resham Bath) and the next two oldest siblings (Manjit and a brother Jagtar) were employed doing farm work. The two youngest siblings (a sister Sarbjit and Avtar) attended school.
- [5] In 1985, the parents and four youngest siblings moved to Vancouver. The parents continued to work on farms, and Manjit and Jagtar worked in other jobs.
- [6] In 1986, Jagtar was unfortunately fatally injured in a car accident. The parents received life insurance proceeds. In 1987, a home in Vancouver (the "1027 Property") was purchased, partly with those proceeds. Title was registered in the names of the parents and Manjit. This is the first of two properties, the beneficial interest of which is in dispute. Title has since changed several times.
- [7] In 1989, Manjit married and moved out of the 1027 Property, and was removed from the title and mortgage. Subsequently, she and her husband returned to live at the 1027 Property until 1992 when they moved out permanently. In 1989, Sarbjit also married and moved out of the 1027 Property.
- [8] Avtar graduated high school in 1989. In 1991 he began working for the CIBC, initially as a bank teller, and worked his way up to become a branch manager. At some point in the 1990's, Avtar married and divorced, but no details of this were provided at trial. At the time he and Rajwant married in 1999, he was the only sibling living with his parents at the 1027 Property.

- [9] In 1997, another home in Vancouver (the "1078 Property") was purchased. Manjit, her husband and their children lived there. Title was registered in the names of Manjit, her husband, Gurbuchan and Resham. This is the second of the two properties, the beneficial interest of which is in dispute. Title has since changed several times.
- [10] Rajwant was born and raised in India. In 1999, she and Avtar were married in India. It was an arranged marriage and they had little contact until their wedding day. After the marriage, Avtar returned to BC and sponsored Rajwant to immigrate. Their daughter was born in 2000. Rajwant and their daughter arrived in BC in April 2001.
- [11] Rajwant, Avtar, their daughter, and their son (who was born in 2013), lived at the 1027 Property with Avtar's parents. The extended family resided together in two different arrangements for the next 17 years.
- [12] In 2008, Avtar was diagnosed as having a malignant tumour in his pancreas. He underwent surgery, and after a convalescence attempted to return to work, but was either terminated or quit. There is a dispute regarding his diagnosis, subsequent health conditions, and the reason for the end of his employment. Except for limited part-time work in the last year, he has not been employed since 2009.
- [13] In 2011, Resham fell and suffered a serious brain injury. He was hospitalized and in a rehabilitation centre for 14 months. When he was discharged, he began living with Manjit at a new home she built on Main Street in Vancouver. Gurbuchan continued to reside at the 1027 Property. The circumstances of Resham's move, and whether the financial arrangements between the family members changed after this, are in dispute.
- [14] In November 2017, Resham passed away. Title to the 1027 Property was transmitted to Gurbuchan. Shortly thereafter, Gurbuchan began living with Manjit. The circumstances of this change in living arrangements are in dispute. Rajwant, Avtar and their children continued to reside at the 1027 Property.
- [15] Rajwant's and Avtar's relationship began deteriorating in early 2018. Later in 2018, title to the 1027 Property changed again. Gurbuchan transferred part of her interest to Manjit and Avtar. Whether the deterioration of Rajwant's and Avtar's relationship had any connection to the 2018 transfer is in dispute.
- [16] By September 2021, Rajwant's and Avtar's relationship had reached a low point, culminating in an event and discussions between Rajwant, Surinder and Manjit. In October 2021, Manjit signed documents, in her personal capacity and as Gurbuchan's power of attorney, to transfer 75% of the title of the 1027 Property to Rajwant. However, that transfer was not accepted at the Land Title Office ("LTO") due to defects in the power of attorney. Shortly thereafter, Rajwant and Avtar separated, and Manjit declined to complete the transfer. There are disputes regarding the circumstances of this attempted transfer.

- [17] The separation took place on November 6, 2021 after Avtar suffered a mental health crisis. The police were contacted and he was brought to hospital and discharged the next morning. He was charged with assault and making threats. Terms of his undertaking upon release included to not contact Rajwant or their children except as permitted by the Ministry of Child and Family Development ("MCFD"), and to not attend the 1027 Property. Those charges were eventually resolved with a peace bond which has expired. Avtar denies the circumstances of the charges against him. The MCFD file was closed over two years ago, and Avtar has had regular limited parenting time since then.
- [18] Rajwant seeks an order that she and Avtar are 100% beneficial owners of the 1027 Property through an express trust established in 2001. Rajwant alleges that shortly after she arrived in Canada, Gurbuchan established the trust through statements made to her. She argues that contemporaneous and subsequent events are consistent with the intention to create a trust. Alternatively, she alleges unjust enrichment and seeks a remedial constructive trust. Avtar, Manjit and Gurbuchan deny any trust, and allege that the legal title reflects the beneficial ownership. They argue that contemporaneous and subsequent events are not consistent with the intention to create a trust, and unjust enrichment is not pleaded nor does it exist.
- [19] Rajwant seeks an order that Avtar is a 25% beneficial owner of the 1078 Property through a resulting trust established in 1997. Rajwant alleges that Avtar contributed 25% of the purchase price through a \$65,000 down payment. She relies on statements of Gurbuchan, Avtar and Manjit. Avtar and Manjit deny that Avtar contributed to the property, deny any trust, and allege that the legal title reflects the beneficial ownership. They argue that contemporaneous and subsequent events are not consistent with the alleged resulting trust.
- [20] The parties have a number of other bank accounts, RRSPs, TFSAs, pensions, chattels, and debts for division.
- [21] Both parties seek unequal division of property. Rajwant claims that since 2009, she disproportionately shouldered all of the income earning, child-care, and household responsibilities. Avtar denies this and claims that after he became ill, he cared for the children while Rajwant worked. Avtar seeks unequal division on the basis of his limited ability to earn income and his post-separation debt.
- [22] There is no dispute regarding Rajwant's income, but there is regarding Avtar's income. Rajwant seeks to impute income to him on the basis of intentional unemployment. Avtar claims that the sequelae of the pancreatic surgery rendered him unable to work, and this has been compounded since separation by depressed mood and anxiety.
- [23] Avtar claims spousal support on the basis of need. Rajwant denies that he is entitled to spousal support.
- [24] Since separation, the parties' two children have lived with Rajwant in the 1027 Property. Avtar seeks increased parenting time. Rajwant seeks an order that the existing parenting time remain in place. Rajwant seeks sole parental responsibilities. Avtar opposes this.

- [25] There is no issue regarding child support, except as to the amount according to incomes and the Guidelines.
- [26] Pursuant to an order for exclusive occupancy, Rajwant and the children have lived in the upstairs of the 1027 Property since separation. The property has a downstairs suite that is rented. Manjit counterclaims for damages for what she alleges is abuse of process in filing a certificate of pending litigation ("CPL") against the 1078 Property, and for occupational rent for the 1027 Property. She also seeks vacant possession of the upstairs of the 1027 Property. Rajwant denies these claims.

III. Credibility, Reliability, and Admissibility of Evidence

- [27] The court can accept some, all, or none of the evidence of a witness, or attach different weight to parts of their evidence. In assessing the credibility and reliability of evidence, I am guided by the factors and approach in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013). The factors include: the ability and opportunity of a witness to observe events; whether the witness' evidence is consistent or inconsistent with other independent evidence; whether the witness changes his or her evidence or has said something different on a previous occasion; whether the evidence seems reasonable or unlikely; and any motive to shade evidence or lie. The court considers whether the evidence is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 at 357.
- [28] Rajwant on the one hand, and the respondents on the other, allege that the evidence of the other is not credible or reliable. All allege that the other has failed to make full and timely disclosure. Almost all of the evidence at trial was contested. I have summarized only the evidence that is material to the issues to be resolved and will make findings of fact in the analysis sections of these reasons.
- [29] Rajwant relies on statements made to her by Gurbuchan as part of her trust claims. The statements are tendered as hearsay, and there is an issue regarding their admissibility as Gurbuchan was unable to testify. All counsel agreed that this evidence would be tendered, subject to argument in closing submissions on its admissibility. I address those statements later in these reasons.
- [30] I turn now to the matters in issue.

IV. Property Division

A. Legal Principles and Issues

- [31] Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], governs the determination, valuation, and division of family property and family debt.

- [32] Section 81 provides the general rule that spouses are both entitled to family property and responsible for family debt regardless of their respective use or contribution. Upon separation, each spouse is presumptively entitled to an undivided half interest in all family property and is equally responsible for family debt.
- [33] Section 84 defines family property. It includes all property that on the date of separation is owned or beneficially owned by at least one spouse, but not "excluded" property. Family property also includes the amount by which the value of excluded property has increased since the later of the date the relationship began or the date the property was acquired.
- [34] Sections 1 and 85 define excluded property which, subject to s. 96, is not divided. Excluded property includes property acquired by a spouse before the relationship began, and a gift from a third party. The burden of proof rests on the party seeking the exclusion: *Pisarski v. Piesik*, 2019 BCCA 129 at para. 24.
- [35] Section 86 defines family debt. It includes all debts incurred by a spouse during the relationship, as well as debt incurred after separation for the purpose of maintaining family property.
- [36] Section 87 provides the general rule that, unless an agreement or order otherwise provides, the value of family property must be based on its fair market value as of the date of the trial. In this case, the parties agree that bank accounts and credit card debts which have been used for post-separation daily living will be valued at the date of separation: *Asselin v. Roy*, 2013 BCSC 1681 at para. 171.
- [37] Although the presumptive rule is for equal division of family property and debt, s. 95(1) states that a court may order unequal division if it would be "significantly unfair" to divide them equally. The factors that may be considered in assessing whether there would be significant unfairness are listed in s. 95(2). I will refer to these later when discussing the arguments concerning unequal division.
- [38] As Rajwant argues that the registered legal titles to the 1027 Property and the 1078 Property do not reflect the beneficial ownership, and the respondents argue that they do, the indefeasible title provisions of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA] are relevant. Section 23(2) of the LTA states:

An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following: ...

- [39] This sub-section creates a presumption that the registered title accurately reflects actual ownership: *Mac v. Mak*, 2016 BCSC 1140 at para. 107, *aff'd* 2017 BCCA 115.
- [40] In *Suen v. Suen*, 2013 BCCA 313 at para. 34, the Court discussed three situations in which the presumption of indefeasibility may be rebutted:

- (i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;
- (ii) the operation of an agreement between the parties which is contrary to the registered legal title; or
- (iii) taking into account the underlying equitable interests between the parties (e.g. considerations that arise in claims for unjust enrichment).

- [41] Rajwant argues that all three situations apply: a resulting trust for the 1078 Property; an agreement in the form of an express trust for the 1027 Property; and in the alternative, unjust enrichment and a constructive trust for the 1027 Property. The respondents argue that Rajwant has not established that the trusts exist or any unjust enrichment and therefore has not rebutted the presumption in s. 23(2) of the LTA. I will discuss the legal principles concerning those trusts when discussing the particular properties.
- [42] Tying these legal principles together with the parties' positions, leads to the following overall property issues and results.
- [43] First, has Rajwant established that the 1027 Property is subject to an express trust benefitting her and Avtar, thereby displacing the presumption of indefeasible title? The current value of the 1027 Property is \$1.81 million. At the date of separation, Avtar and Manjit each held a 25% registered interest in the property since 2018. If Rajwant establishes that she and Avtar are the beneficial owners of 100% of the 1027 Property pursuant to an express trust, then the 1027 Property is family property. However, if Avtar's registered interest reflects his beneficial interest, then his interest in the 1027 Property as of 2018 is excluded property because it was a gift to him: FLA s. 85(1)(b.1). In this scenario, the only portion that is family property and that could be divided is the increase in value of his 25% interest since 2018, being \$71,250: FLA s. 84(2)(g)(ii). Rajwant did not plead or seek division of excluded property pursuant to s. 96 of the FLA. Alternatively, has Rajwant established that the respondents have been unjustly enriched and that a remedial constructive trust should be ordered?
- [44] Second, has Rajwant established that the 1078 Property is subject to a resulting trust in favour of Avtar, thereby displacing the presumption of indefeasible title? The 1078 Property has never been registered in Avtar's name. If the registered title reflects the beneficial interest, the 1078 Property is not family property and cannot be divided: FLA s. 84(1)(a). However, if Rajwant establishes that through a resulting trust, Avtar is a 25% beneficial owner of the 1078 Property since it was purchased in 1997, then its value as of the commencement of their relationship is excluded property: FLA s. 85(1)(a). In that scenario, the family property would be the increase in value of that 25% interest since the marriage began: s. 84(2)(g)(i). There was no appraisal evidence for those dates, but the 2022 property tax assessment (which is hearsay) valued the property at about \$1.4 million as of July 2021.

[45] Third, what are the other family property and debts and what are their values for the purpose of division?

[46] Fourth, once all of the family property and debt is determined, would equal division be significantly unfair, and if so, how should family property and debt be divided?

B. 1027 Property

1. Evidence

a) Purchase of the 1027 Property

[47] Manjit testified that in 1987, she and her parents bought the 1027 Property for \$140,000. Her parents had \$50,000 from life insurance following Jagtar's death, some savings, and they obtained a mortgage for \$75,000. The three of them opened a joint account to pay for the mortgage. Title was registered in the names of Gurbuchan and Resham as to an undivided two-third interest as joint tenants, and Manjit as to an undivided one-third interest.

[48] After Manjit married in 1989, title to the property was transferred to Gurbuchan and Resham as joint tenants, and Manjit was released from the mortgage. Thereafter, Manjit did not contribute to the mortgage.

b) Alleged Statements Regarding Ownership of the 1027 Property

[49] Rajwant relies on the following statements as establishing an express trust:

a) When she arrived in BC in 2001, Gurbuchan told her that "this is our house". She states that Resham, Avtar, and the other siblings told this to her as well, but her main discussions were with Gurbuchan. Rajwant denied that this was simply Gurbuchan and Resham welcoming her to their home; and

b) Within a few months of her arrival, Gurbuchan clarified that although Gurbuchan and Resham were on title, Rajwant and Avtar owned the property. Rajwant described Gurbuchan's statements in various ways. Gurbuchan told her that the home belonged to all of them, but anything that needed to be done to take care of the home was now the responsibility of Avtar and Rajwant. Rajwant's other descriptions of Gurbuchan's statements included that this is: "your house"; "yours and Avtar's house"; and "our home". Rajwant testified that "when they were saying our house, that was the house of all of us. That was my house as well as Avtar's too", and "at the time we were four who were in that our home concept". Gurbuchan also told her that the last mortgage payment had been made, and "now your home is free".

[50] Rajwant testified to the following further conversations after 2001 which she argued were consistent with the Gurbuchan's intention that she created a trust:

a) In 2005, when her parents were immigrating to Canada, Gurbuchan told her that when her parents arrive, "they will be very happy that their daughter's house is very beautiful"; and

- a) In 2012, after Resham suffered the head injury, the family had a dispute about where Resham should live after he was discharged from care. Gurbuchan reported to Rajwant and Avtar that Manjit thought they should leave the 1027 Property. Gurbuchan reported that she told Manjit that Rajwant and Avtar would not be going anywhere, and that this is "your home and you will live there".
- [51] Avtar testified that he has never told Rajwant that they owned the 1027 Property, nor did he hear his mother or anyone else say that the property was or would be theirs. His parents completed paying the mortgage in 1992. He denied there was a family dispute about where Resham should live after the head injury. He said it was clear that his father could not return to the 1027 Property due to his injury. He denied being a party to a conversation where Gurbuchan reported what she had told Manjit about who would live in or owned the property.
- c) Financial Arrangements Concerning the 1027 Property
- [52] All parties rely on the financial arrangements between the four adults living in the 1027 Property, as being either consistent with the intention to create a trust (Rajwant), or not consistent with this (Avtar, Manjit and Gurbuchan).
- [53] Rajwant testified that from the time of her arrival in BC in 2001, and up to separation in November 2021, she and Avtar: (a) received the income from the downstairs rental suite in the 1027 Property, and never shared it with anyone; (b) paid all of the expenses of the property except the property taxes and insurance, which Gurbuchan and Resham paid until about 2017 because they were assisting her and Avtar; and (c) arranged and paid for renovations to the house on several occasions from 2003 up to 2021. The renovations were partly paid from the rental income. She also personally did maintenance and assisted with renovations, but Avtar did little. This financial arrangement continued after part of the title was transferred to Manjit in 2018, until separation.
- [54] Avtar testified that from the time of his and Rajwant's marriage to the time his father was injured in 2011: (a) his parents received the income from the rental suite, and paid the property taxes, City of Vancouver utilities, insurance, and for all renovations to the property. His mother has continued to pay for the property taxes, City utilities, and insurance to date; (b) the only expenses he and Rajwant paid were groceries and their own personal living expenses. All house-related expenses were paid by his parents; and (c) he and Rajwant gained advantages by living with his parents, and did not suffer any disadvantages. They were not paying rent to his parents, and his mother helped look after their children. As a result, the money he and Rajwant earned was put into savings. They occasionally drove his parents to places and made a meal and ate together. After his father was injured in 2011, "everything changed" and there was a "role reversal". Avtar now collected and kept the rent and used it for house-related expenses, repairs, and renovations to the property, and their own expenses. This situation remained until the date of separation.

- [55] Manjit testified that up until the separation, she never: (a) asked for or received any share of the rental income; (b) paid for any renovations at the property; or (c) considered that Avtar and Rajwant were tenants.
- d) Resham's Death, and Transmission and Transfer of the 1027 Property in 2018
- [56] Avtar and Manjit submit that the property transfers after Resham's death are not consistent with an intention to create an express trust in 2001.
- [57] Resham passed away in November 2017, and in December 2017 title was transmitted to Gurbuchan as the sole surviving joint tenant. In about December 2017, Gurbuchan moved into Manjit's home. Rajwant testified that Manjit took Gurbuchan to live in her home, against the wishes of Rajwant and Avtar. Manjit and Avtar denied this.
- [58] In October 2018, Gurbuchan transferred title of the 1027 Property to herself and Avtar as to an undivided one-half interest as joint tenants, and to herself and Manjit as to an undivided one-half interest as joint tenants. Gurbuchan executed a deed of gift stating that out of love and affection, she transfers "one half of my legal and beneficial interest in my property". Avtar's and Manjit's signatures were witnessed by Mr. Desai, a notary. Gurbuchan's signature was witnessed by a lawyer.
- [59] Avtar did not tell Rajwant about the transfer to him or Manjit. He said that the decision to transfer was not his to tell. However, Rajwant knew about the transfer. Starting in late 2018 or early 2019, Rajwant from time to time asked him why Manjit's name was on title. The transfer eventually became a strain on their marriage.
- [60] Manjit testified that she did not tell Rajwant about the transfer. She said it was her mother's decision.
- [61] Rajwant stated that she knew that Avtar was on title with Gurbuchan because the property tax notices delivered to the 1027 Property were addressed to both Avtar and Gurbuchan. However, no one told her that title had also been transferred to Manjit. She only discovered this in September 2021 when she attended Mr. Desai's office (discussed below). She denied that she asked Avtar why Manjit was on title and that this was a source of dispute between them.
- e) Deterioration in Relationship between Rajwant and Avtar
- [62] Rajwant testified that her relationship with Avtar was okay until December 2017. It changed after Gurbuchan went to live with Manjit and deteriorated from there. Avtar told her that he could "kick her and the children" out of the house.
- [63] Avtar testified that until 2017, he and Rajwant had a good family life. The relationship changed around 2018. After Rajwant learned that Manjit was on title, that became a significant source of dispute. He denied that he told Rajwant that he could have her and the children removed from the house. Gradually their relationship became worse.

f) Attempt to Transfer the 1027 Property in 2021

- [64] Rajwant relies on the events in the autumn of 2021, prior to the separation, as being consistent with the intention to create an express trust in 2021, and an acknowledgement by others of the trust. The respondents deny this. As there are several events, all of which are contested, I divide this section accordingly.
- i. September 25 and 26, 2021
- [65] Rajwant testified that on September 25, 2021, Avtar came home around dinner time, was harassing her and the children, and told them that this was his house and he could "kick" them out. Avtar telephoned the police to have them removed. As a result, Rajwant telephoned Surinder and told her that Avtar was going to force her and the children out of the house. Rajwant denied that she talked about title to the 1027 Property, but said that was the subject of a conversation the next day. Rajwant denied telling Surinder that her bags were packed and that she was leaving the house, however, at her examination for discovery she testified that she did say this.
- [66] Avtar testified that he does not have much recollection of this day. He felt the environment at home was unsafe for him and he telephoned the police non-emergency line, asking for advice on "how to separate in a peaceful manner". He denied threatening to have Rajwant and the children removed from the home.
- [67] Surinder testified that she received a telephone call from Rajwant, who told her that she was packing her bags, leaving the house, and taking the children. Rajwant made a number of complaints regarding Avtar. Surinder told Rajwant not to leave and she would speak to Avtar. Rajwant asked why Manjit was on title to the 1027 Property, and stated that she should be on title and wanted that.
- [68] Manjit testified that Surinder conferenced her into the call with Rajwant. Rajwant was not made aware of this at the time. Manjit's description of the conversation was similar to that of Surinder, except that during the 10 to 15 minutes she listened to their conversation, she did not hear any discussion about the 1027 Property.
- [69] Both Surinder and Manjit testified that after the phone call between Rajwant and Surinder, they spoke with each other. Surinder convinced Manjit to give her 25% share of the 1027 Property to Rajwant. Manjit testified that she agreed to do so because Surinder put her under "profound pressure". Both testified that this was an effort to save Avtar's and Rajwant's marriage, and so the children would not be separated from Avtar.
- [70] Rajwant testified that the next day, on September 26, 2021, Surinder telephoned her and told her that she did not need to leave, this was her home, and Manjit has Gurbuchan's power of attorney and would transfer the property to her name. Manjit called her later that day and disclosed that she had been on the call with Surinder the previous evening. Manjit told her the same thing as Surinder and that she would transfer the property so that Rajwant would be on title so that Avtar could not kick out her and the children. Manjit told her that they

would go to the notary, Mr. Desai, the next day. Rajwant testified that at the time, she did not know that Manjit's name was on title. Rather, she thought that Gurbuchan's interest would be transferred to her. Rajwant denied that she told Manjit that transferring an interest in the property to her would be a good solution and she would not leave the home.

- [71] Manjit testified that when she telephoned Rajwant, she told her that she had heard the telephone conversation with Surinder the night before. Manjit asked Rajwant what she would think about Manjit giving her a quarter share of the 1027 Property, and Rajwant told her to do it.

ii. September 27 to October 5, 2021 - Meetings with Mr. Desai

- [72] The next day, September 27, 2021, Rajwant and Manjit attended Mr. Desai's office. Rajwant testified that Manjit said she had Gurbuchan's power of attorney, and instructed Mr. Desai to transfer 75% of the property to Rajwant - Gurbuchan's 50% interest and Manjit's 25% interest - and to make a deed of gift to Rajwant. This is when Rajwant learned that Manjit was on title. Rajwant denied that she asked or convinced Manjit to transfer Gurbuchan's share to her, or that the transfer was contingent on any conditions. Mr. Desai told them it would take about a week to prepare the documents and to come back then.
- [73] Manjit testified that she met Rajwant on the street outside Mr. Desai's office and told her that she had brought her mother's power of attorney. She did not bring the power of attorney with the intention of transferring Gurbuchan's 50% interest to Rajwant. Rather, the power of attorney was among the other papers she brought. When Rajwant saw the power of attorney, she asked Manjit to transfer Gurbuchan's share as well. Rajwant assured her that Gurbuchan could stay occasionally at the 1027 Property, which was what Gurbuchan wanted. Manjit said that she felt pressured and happy by Rajwant's assurances, and on this basis, without thinking, told Mr. Desai to transfer both her own and Gurbuchan's interest to Rajwant.
- [74] Manjit testified that in 2023, her mother was diagnosed with dementia. Manjit said that Gurbuchan understood things in 2021, but later described an event in mid-October 2021 that suggested the contrary. Manjit testified that she did not tell her mother that she attempted to transfer her interest in the property to Rajwant. She agreed that her mother was living with her at the time and knew that Rajwant and Avtar were having a dispute, but stated they did not talk much and that things had happened very quickly.
- [75] Rajwant and Manjit returned to Mr. Desai's office on October 5, 2021, and they signed documents to transfer 75% of the property into Rajwant's name. Rajwant testified that Manjit told her that if this did not work, Gurbuchan was ready and willing to sign the papers. Mr. Desai sent Manjit to get independent legal advice, but Manjit denied that the lawyer gave her any.
- [76] Mr. Desai's file contains a document entitled "Enduring Power of Attorney", dated April 2, 2013. There are also two Form A transfers. In the first, Manjit transfers her 25% interest in the property to Gurbuchan for natural love and affection. Her signature is witnessed by a

lawyer. In the second, Gurbuchan transfers her (now) 75% percent to Rajwant. This was signed by Manjit as her power of attorney. There are also two deeds of gift, one signed by Manjit for her transfer of her interest to her mother, and one signed by Manjit as her mother's power of attorney and witnessed by the lawyer, stating that out of love and affection, she transfers her "legal and beneficial interest".

iii. Text and Audio Messages

[77] Rajwant relies on text and audio messages that were sent by Manjit on the day after she and Manjit signed the transfer papers. The admissibility of these messages was the subject of a mid-trial application. The respondents opposed the admissibility. I ruled that they were admissible.

[78] On October 6, 2021, Manjit sent the following text messages to Avtar:

At 3:04 pm: We put house $\frac{3}{4}$ on RAJWANT'S name

At 3:08 pm: Me and Bebe [Gurbuchan] are free now

[79] On October 6, 2021, at 3:24 pm, Manjit sent the following audio file to Rajwant. It is an audio message from Manjit to Avtar. The translation states:

Hello Tara [Avtar], after very serious thoughts, I have named my and Bibi's [Gurbuchan's] share under Rajwant's name as it was causing us a lot of problems, I did not want things going wrong in my household, And, you are going to give it to kids and he/she [she] is going to give it to kids, we took this action after serious deliberations because you are very much in wrong, Tara, you refrain from bringing people over in the house, you better reform, if you want to get your meals, get them quietly otherwise your life would be hard, my advice to you, still, is that you better change and start working some small little job. OK

[80] On October 31, 2021, there is another set of text messages between Surinder and Avtar which partially relate to the 1027 Property. I will replicate the complete exchange later when discussing the 1078 Property, but for now it is sufficient to say that they are angry and threatening texts from Avtar stating that he has already consulted property fraud lawyers, is pursuing legal matters, and attaching copies of documents from 1997. There is also another audio message from Manjit to Avtar which Manjit sent to Rajwant on November 2, 2021.

[81] Rajwant obtained the text messages surreptitiously by looking at Avtar's phone in October 2021 and taking pictures of them. She received the audio message directly from Manjit on October 6, 2021. She did not disclose the audio messages until December 2022, and did not disclose the text messages until about a week before this trial commenced. She was cross-examined as to why these were not produced earlier, and as to whether she has been selective in what she disclosed. She said that she did not think the text messages with Surinder were relevant because she was not a party.

- [82] Avtar did not list or produce these text and audio messages. He was cross-examined as to why he had not done so. Avtar testified that he provided "what he had" but his phone had been stolen in January 2024 (just before trial) and this impacted his disclosure. He denied any other messages or conversations with Manjit about the transfer of the 1027 Property. Avtar testified that he did not have any independent recollection of receiving the texts or audio message from Manjit, sending his later text messages to Surinder, or receiving the other audio message from Manjit (referred to later). He learned of the transfer because Rajwant told him about it in October 2021 and said that she was divorcing him and would have him removed from the house. Avtar testified that he could not acknowledge receiving texts and audio messages, because he does not have an independent memory of them, despite the texts were on his phone.
- [83] Manjit also did not list or produce these text and audio messages. She was cross-examined as to why she had not done so. She said she always deletes her text messages promptly and may have deleted these. The texts and audio messages produced by Rajwant are all the messages there are. There were no other communications between her and Avtar regarding the 1027 Property.
- [84] Manjit testified that she did not speak to Avtar before or after she went to Mr. Desai's office. She sent the text messages to tell Avtar that she and Gurbuchan had transferred their interests in the property and were "now free" from this fight. The "we put" in her text message refers to her and Gurbuchan. When she said in her audio message that she did not want things going wrong in her household, she meant that she did not want to become the reason for the family's break up and be blamed. The phrase "you are going to give it and he/she [she] is going to give it to the children", meant that "you and the children will live together" in the house. When she stated "you are very much in the wrong", she was referring to the complaints Rajwant had made about Avtar, and she was angry about that. She testified that she sent the audio file to Rajwant "by mistake" and she intended it for Avtar, implying that this message was possibly never sent to Avtar. Avtar did not respond to her texts or audio messages.

iv. October 7 to Separation - Transfer does not Complete

- [85] Rajwant testified that a day or two after signing the transfer documents, Manjit told her that the power of attorney did not work but that she was fixing this. Rajwant was then awaiting further news.
- [86] Manjit testified that after giving Mr. Desai the power of attorney on October 5, 2021, he telephoned and told her that the power of attorney was not an original. She then searched for and provided the original to him. Then on October 12 or 13, 2021, Mr. Desai telephoned her and told her that the power of attorney did not work. She told Rajwant this on the same day. After this, Rajwant asked her to get an opinion from a lawyer. Rajwant told her that once the 1027 Property was transferred into her name, she would get away from Avtar. This made Manjit think that Gurbuchan would not be able to go to the 1027 Property.

- [87] Manjit testified that the transfers were not completed for three reasons. First, the power of attorney did not work. Second, Rajwant did not fully commit to the "conditions", which were that she and Avtar would occasionally take Gurbuchan to stay at the 1027 Property, and Rajwant laid charges against Avtar and he could not return to the home (although she later denied the criminal charge was a reason). Third, Manjit never truly wanted to transfer her interest to Rajwant, but was pressured to do so by Surinder. After signing the transfer documents, she "came to [her] senses" and concluded that she should not have used the power of attorney.
- [88] Both Rajwant and Manjit testified to other events during the month of October and early November after it appeared that there would be difficulty with the transfers being registered. They do not need to be detailed as they do not add anything to the issue of whether the attempted transfer was consistent or not with an intention to create an express trust or an acknowledgement of the trust by Manjit. In summary, Rajwant said she was led to believe that the transfer was still pending, and Manjit said that Rajwant knew the transfer was not proceeding and was trying to devise ways to have the property transferred to her, or Rajwant's and Avtar's daughter.
- [89] Rajwant and Avtar separated on November 6, 2021. Avtar testified that upon his release from hospital the next day, he stayed a couple of days with each of Sarbjit and Manjit, and then a few weeks with a cousin and friends. In January 2022, he moved to a rental suite.
- g) Mr. Desai
- [90] Mr. Desai's file was not produced until the Friday before the trial commenced. There is an issue regarding its production. Rajwant testified that since separation, she tried repeatedly to obtain the file, but it was refused by Mr. Desai. She made a complaint to the Society of Notaries Public of BC, which was not of assistance, and production was resisted by Manjit.
- [91] Manjit denies that she resisted production. She testified that in 2022 she tried to get Mr. Desai's file and when she spoke to him, understood that it had been destroyed. She now thinks that she misunderstood him. In January 2024, she asked her counsel to try again, and the file was produced.
- [92] Avtar testified that after Rajwant told him the property was transferred to her, he went to Mr. Desai's office. Mr. Desai told him he did not have to show him any documents, but later Mr. Desai told him that the transfer had been cancelled.
- [93] Mr. Desai's file includes an undated notice from the LTO stating that the transfer documents cannot be registered because the age declaration on the power of attorney indicates that the attorney may not be 19, and it did not comply with another provision of the Power of Attorney Act, R.S.B.C. 1996, c. 370. Mr. Desai filed a withdrawal request for the power of attorney on November 8, 2021.

[94] Mr. Desai was called as a witness by Rajwant. He testified that he had a medical event on October 14, 2021, and his memory of the time period after that is not good. He testified about the requests to produce his file. He thought it had been produced. As Mr. Desai agreed was possible, I find that he has melded memories of the 2018 visit, when Gurbuchan transferred part of the title to Manjit and Avtar, with the 2021 visits. I therefore do not rely on his evidence with respect to who contacted him and was present in his office. However, I accept his evidence regarding the defects in the power of attorney. He was not aware of the defects when he filed the transfer documents at the LTO. After he received the rejection from the LTO, Manjit came to his office to correct the power of attorney, but she also had to sign new transfer documents, and she told him that she no longer wanted to proceed with the transfers. He never told Rajwant that the transaction was not completing.

2. Positions of the Parties

[95] Rajwant's notice of family claim does not plead material facts and alleges only that the 1027 Property is held "in trust or on constructive trust on behalf of" Rajwant and Avtar. Rajwant's closing submissions were confined to allegations of: (1) an express trust established by Gurbuchan (presumably also as agent of Resham) in 2001; and (2) unjust enrichment of Gurbuchan and Manjit with a remedy of constructive trust.

[96] Rajwant argues that the statements that Gurbuchan allegedly made in 2001 regarding ownership of the 1027 Property establish an intention to create the express trust, and the following are consistent with it: (a) the later statements of Gurbuchan, Avtar and Manjit; (b) the financial arrangements regarding the property from the time she arrived in BC until separation; (c) the attempted transfer of the property to her in September 2021; and (d) the text and audio messages. With respect to Gurbuchan's hearsay statements, Rajwant argues that they are admissible as they are necessary and reliable.

[97] On the credibility and reliability of Avtar and Manjit, Rajwant argues that the court should consider that they opposed admitting the text and audio messages, and should draw an adverse inference against them for failing to make full disclosure. Rajwant submits that it is highly improbable that they never had any other communications regarding the 1027 Property (or the 1078 Property). The transfer documents and messages are contrary to their positions, and their explanations about them are not credible. It is also highly improbable that Manjit concluded that she had improperly used her mother's power of attorney and had never discussed the transfer with her mother, who was competent and residing with her. Further, Manjit attempted to prevent her from obtaining Mr. Desai's file.

[98] The respondents submit that Rajwant has not established an express trust. They argue that Gurbuchan's alleged statements are hearsay and presumptively inadmissible, and do not meet threshold reliability. They submit that the more sensible meaning of the statements is that Gurbuchan was welcoming Rajwant into the family and the parents' home. Even if the statements are admissible, they are inconsistent and unclear and fail to establish certainty of intention.

- [99] The respondents further submit that the surrounding circumstances are inconsistent with an intention to create an express trust. They argue that: (a) it is inherently improbable that property owned free and clear by Gurbuchan and Resham, through their own work and from funds arising out of the tragic death of Jagtar, was surrendered shortly after the arrival of their son's second wife; (b) the receipt of rental income at the goodwill of Avtar's parents to support Avtar and Rajwant does not amount to an agreement that Rajwant and Avtar have a beneficial interest in the property, nor does the fact that renovations were carried out by Rajwant and Avtar and paid for from the rental income after 2011; and (c) Gurbuchan's 2018 transfer of half of the property to Manjit and Avtar is inconsistent with a belief or intention by her that she was holding the property in trust for Rajwant and Avtar.
- [100] With respect to the claim of constructive trust, the respondents argue that no action for unjust enrichment was pleaded by Rajwant, and in any event, the evidence does not establish an unjust enrichment. Rajwant and Avtar benefited from being able to reside at the property at essentially no cost, and there was no detriment to them.
3. Analysis
- a) Express Trust
- [101] An express trust is created when the three certainties of intention, subject, and object have been established, and the property has been vested in the trustee: *Hu v. Xu*, 2021 BCCA 2 at para. 12; *Suen* at paras. 45-46. Certainty of intention refers to the clear communication that the settlor intends that the property be held for the benefit of another.
- [102] The onus and standard of proof is on the person asserting an express trust on a balance of probabilities: *Hu* at para. 13.
- [103] Certainty of intention of the settlor is the "critical element" for the creation of an express trust. It is a question of fact and may arise expressly or impliedly from words or conduct. Technical language, or the word "trust" is not required: *Hu* at paras. 14-15.
- [104] The alleged settlor must have intended for the other person to benefit on trust, and not simply benefit. There must be a "clear declaration of trust". The settlor "should have evinced acts which admit of no other interpretation" that the settlor has "ceased to be, and that the other person has become, the beneficial owner": *Hu* at paras. 16-17.
- [105] When there is no formal written trust agreement, the court must consider the "surrounding circumstances, the evidence of what was agreed upon, and how the parties conducted themselves". This is an "objective inquiry to determine whether there is an intention to form an express trust". The court considers what "a reasonable person would discern from the words and conduct of the parties, as well as the surrounding circumstances": *Virk v. Singh*, 2022 BCCA 153 at paras. 46-48.

- [106] The "relevant timeframe when analyzing intention is at the time of the transaction". This is to avoid parties tendering later self-serving evidence or later alleging that they intended something different. If it is necessary to examine conduct that post-dates the alleged creation of the trust, the court "must carefully assess its credibility and admissibility": Virk at para. 51; Pecore v. Pecore, 2007 SCC 17 at paras. 56-59.
- [107] Assuming that Gurbuchan made the statements in 2001, they are hearsay - an out-of-court statement tendered to prove the truth of the statement, where there is no ability for contemporaneous cross-examination of the declarant: R. v. Khelawon, 2006 SCC 57 at paras. 35-41, 56; R. v. Bradshaw, 2017 SCC 5 at para. 20. Hearsay statements are presumptively inadmissible unless they fall within a traditional or the principled exception to the hearsay rule. This is because without cross-examination, it may be impossible or difficult to inquire into the declarant's perception, memory, narration, and sincerity, or to inquire if the statement was accurately heard or recorded by the recipient: Khelawon at paras. 2-3, 35.
- [108] For the following reasons, I conclude that Rajwant has not established that she and Avtar are the 100% beneficial owners of the 1027 Property through an express trust.
- [109] It is not necessary to address the parties' arguments as to whether Gurbuchan's hearsay statements are admissible, because even if they are, in the ultimate reliability analysis, I give them little weight. Assuming that Gurbuchan made the statements, and that she spoke as agent for Resham, Rajwant's testimony regarding the statements does not show a clear intention of Gurbuchan to create a trust. The statements are ambiguous and have an alternative meaning, which is that Gurbuchan and Resham were simply welcoming their new daughter-in-law and granddaughter into their home. Rajwant's descriptions of the statements are also inconsistent. Although Rajwant interprets the statements as creating a trust in favour of her and Avtar only, she testified that Gurbuchan stated that the house belonged to all four of them.
- [110] I have considered that Rajwant gave part of her testimony with the assistance of an interpreter, and whether that may account for the differences in Rajwant's descriptions of Gurbuchan's statements. In my view, the differences are too great and conflicting to be a nuance of interpretation. Further, Rajwant speaks some English, and did not take issue with the interpretations.
- [111] Rajwant's interpretation of Gurbuchan's statements is also not supported by the contemporaneous surrounding circumstances. The only circumstance referred to was the financial arrangements between the parents, Avtar and Rajwant. No bank records were in evidence.
- [112] I find Avtar's evidence more likely, being that at the time of the alleged creation of the trust, Gurbuchan and Resham continued to collect the rent from the downstairs suite and pay the expenses of the home from their own funds. This is consistent with their continued ownership of the property. I find that it was only after Resham suffered the brain injury in 2011 that Avtar and Rajwant began collecting and keeping the rent from the rental suite and

paying for renovations and property maintenance. I find this because by 2001, the parents had already retired and were living on a pension, and likely in need of funds to pay the property taxes, City utilities, and insurance, which on all parties' evidence, they continued to pay, along with their own expenses. In contrast, up to 2009, both Avtar and Rajwant were employed, and they were already living at the property rent free, and in less need of funds than the parents. It makes sense that after Avtar had the malignant tumour removed and no longer had income with a young family, and Resham was seriously injured and was no longer living at nor could manage the 1027 Property, that Avtar and Rajwant took over the collection of rent, management of the rental suite, and upkeep of the property. Gurbuchan continued to live at the property and pay the property taxes and insurance, which she did up to separation. The change in financial arrangements is explained by the intervening events which took place.

- [113] I turn to the subsequent statements and events argued by all the parties. For the reasons below, I put very little, if any, weight on these.
- [114] Rajwant relies on a statement by Gurbuchan in 2005 that Rajwant's parents "will be very happy that their daughter's house is very beautiful", and a statement in 2012 that the property is "your home and you will live there". In my view, these statements suffer the same difficulty as the 2001 statements; they do not clearly support the existence of an express trust, and there are other possible interpretations of these isolated comments.
- [115] The respondents rely on the 2018 transfer of interest by Gurbuchan to Manjit and Avtar as inconsistent with Gurbuchan holding the property in trust. I give no weight to this transfer. I agree that the deed of gift and transfer are inconsistent with the alleged express trust created in 2001. However, as discussed in Pecore and Virk, subsequent events should be scrutinized carefully because they may reflect that the settlor has simply changed their mind. These transfers were 17 years after the alleged creation of the trust. Much had occurred in that time period, including Avtar's illness and cessation of employment, Resham's injury and death, and what I find were family disputes regarding living arrangements. It is entirely possible that Gurbuchan changed her mind on account of changes to the family's dynamic, living arrangements, and needs.
- [116] I note that Rajwant did not plead or argue that the 2018 transfer was a breach of trust or was void, but that would be one possible implication of her allegation that a trust was created in 2001. Rajwant also did not challenge the deed of gift to Avtar and Manjit. Rajwant did not argue that Avtar and Manjit are holding their interests on a resulting trust, and Gurbuchan does not allege that.
- [117] Rajwant relies on the attempted transfer in 2021 to show a consistent intention by Gurbuchan that the property was beneficially owned by Rajwant and Avtar, and to show Manjit's acknowledgement of that trust. I give no weight to this attempted transfer as it relates to the existence of a trust. While I find there are aspects of all parties' evidence concerning this event which are not credible, I do accept Manjit's and Surinder's evidence

as to why the transfer was attempted. As I explain below, I find that it did not relate to an alleged express trust in 2001, but was an attempt by Manjit and Surinder to salvage a marriage and not have Rajwant move out and take the children with her.

- [118] I find that although neither Avtar nor Manjit told Rajwant that Gurbuchan had transferred an interest in the 1027 Property to Manjit, somehow Rajwant discovered that information, and it was upsetting to her. I find that this was one topic of dispute between Rajwant and Avtar leading up to September 2021, and that in the context of the parties' deteriorating relationship, Avtar said at times that he could "kick out" Rajwant and the children. I do not accept Avtar's evidence that he called the police on the evening of September 5, 2021 for advice on how to peacefully separate. He would call a lawyer if that was the advice he wanted. I accept Surinder's evidence that Rajwant complained about title being in Manjit's name, and Surinder's and Manjit's evidence that they decided to transfer an interest to Rajwant to remove a source of tension in Rajwant's and Avtar's relationship and to neutralize any threat by Avtar that he could remove Rajwant and the children from the home.
- [119] In coming to these conclusions, I put weight on Manjit's contemporaneous text and audio messages to Avtar explaining why she transferred the interests to Rajwant. In the messages, Manjit stated that the situation was causing them problems and she did not want things going wrong in her house, that their children would inherit it anyway even if Rajwant was on title, and that she believed Avtar had been acting inappropriately. There would be no other reason for Manjit to make those statements if her interest in the 1027 Property had not been the topic of discussion between Rajwant and Avtar, and if Rajwant had not complained about it.
- [120] I do not accept Manjit's evidence that she did not discuss the proposed transfer with Gurbuchan. I find that she did. In Manjit's text messages she states that "We put" the house in Rajwant's name and it was causing "us" a lot of problems, and "Me and Bebe are free now". In the audio message, she states that "we" took this action "after serious deliberations". Such serious deliberations and thoughts do not support that this was a recognition of a long-existing express trust. I make no determination of whether Gurbuchan was competent at the time.
- [121] Avtar stated that he had no recollection of the text and audio messages and both he and Manjit gave evidence which suggested that the audio messages were never received by him. I do not accept Avtar's or Manjit's evidence on this point. I find it is highly improbable that Avtar did not remember the text and audio messages. The message would be startling to receive. His sister had just told him that she had transferred hers and their mother's interest in the 1027 Property to Rajwant, with whom he was having serious marital difficulties. He stated in his texts that he had consulted property fraud lawyers. I find that he did receive the audio messages, and for some reason (possibly to do with the 1078 Property which I discuss below) decided to distance himself from them in this litigation.

- [122] I have considered Rajwant's argument that Manjit and Avtar have failed to make full disclosure in this action as they did not list or produce the text messages, and that an adverse inference should be made against them. The adverse inference would have to be that there are other written communications which would support the existence of a trust created in 2001.
- [123] In my view, Manjit and Avtar failed to make full disclosure. Whether or not they still have in their possession the text and audio messages, they had them at one point and they were required to list them. I have considered that they may have honestly forgotten about them. It is possible that Manjit did, but in the circumstances, I find it unlikely that Avtar did. Avtar stated that he had already consulted property fraud lawyers, and these are clearly relevant documents to save or at least of which to take note. I find that there was an existing strained relationship between Manjit and Avtar, and so it is possible that they had few or no communications on or after October 6, 2021. However, their failure to make full disclosure casts doubt on their assertions that their only communications were those which Rajwant was able to obtain either surreptitiously, or through what Manjit sent her.
- [124] I also find that Rajwant did not make timely disclosure of the text and audio messages. I do not accept her evidence that she thought the messages with Surinder were not relevant because she is not a party. Her late disclosure also raises concerns about whether she has made full disclosure. As with Avtar and Manjit, I have taken this failure of timely disclosure into account in assessing her overall credibility as well her arguments on an adverse inference.
- [125] In summary, despite the concerns I have regarding disclosure, in the context of the evidence which I do accept, in my view the adverse inference which Rajwant seeks is not one that can reasonably be made. It would be pure speculation to conclude that other communications would reveal for example, that Avtar or Manjit made a statement that indicated that they both knew all along that their mother had created the express trust alleged by Rajwant.
- [126] Finally, Rajwant argues that Manjit resisted production of Mr. Desai's file until the eve of trial, and an adverse inference should be drawn against her. I do not draw any adverse inference against any party, because after hearing Mr. Desai's testimony, I conclude that there was likely some confusion over production of his file when Rajwant and Manjit attempted to obtain it, and the file eventually was produced, although late in the litigation. No party sought a court order for the production of Mr. Desai's file, and they could have sought and likely obtained such an order. However, I do conclude that Manjit was at least initially resistant to producing Mr. Desai's file, and I have taken that into account in assessing her credibility. In her affidavit sworn December 2, 2022, and in the context of her summary trial application, Manjit stated that Mr. Desai's file was "not going to assist" Rajwant, "as the transaction, whatever it was" was not registered and is "now at an end".

[127] In summary, Gurbuchan's statements, even if admissible, alone or in conjunction with the contemporaneous surrounding circumstances, do not establish the certainty of intention required for an express trust over the 1027 Property. The subsequent statements or events have little or no weight and do not change that conclusion. Rajwant has not rebutted the presumption of indefeasible title. I find that Avtar's 25% interest in the property was gifted to him in 2018.

[128] The parties jointly obtained appraisal reports of the market value of the 1027 Property on November 8, 2018, the date of transfer to Avtar, and November 3, 2023, a date near the commencement of trial. The 1027 Property was valued at \$1,525,000 on the date of transfer, and \$1,810,000 prior to trial, and there was therefore a \$285,000 increase in value. The increase attributable to Avtar's 25% interest is \$71,250. This sum is family property.

b) Unjust Enrichment and Remedial Constructive Trust

[129] Without pleading material facts, Rajwant sought a "constructive trust". In a brief reference in closing submissions, her counsel claimed unjust enrichment and a remedy of a constructive trust on the basis of Rajwant's contribution to the property through renovations. The respondents correctly argue that unjust enrichment has not been pleaded, but nonetheless addressed the claim. Rajwant did not seek an amendment to her pleadings.

[130] In my view, the failure to plead unjust enrichment is fatal, but given that the respondents addressed this claim as though there was such a pleading, I will similarly briefly address it.

[131] To establish a claim for unjust enrichment, Rajwant must prove: (a) an enrichment of Gurbuchan and Manjit; (b) a corresponding deprivation of Rajwant; and (c) the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at paras. 3, 36-40; *Moore v. Sweet*, 2018 SCC 52, para. 37. A recognized juristic reason includes a contract, or donative intent, or a disposition by law: *Kerr* at para. 41.

[132] In my view, Rajwant has not established an unjust enrichment. Rajwant did not testify as to any enrichment other than her alleged contribution to renovations and maintenance. However, I have found that Rajwant and Avtar did not pay for the renovations and maintenance prior to 2011; and after 2011 the payment of those renovations and maintenance came from the rental income that Gurbuchan and Resham permitted them to receive. Given that I have found that no express trust existed, the rental income was that of Gurbuchan and Resham. It was Gurbuchan and Resham who were paying for those renovations and maintenance. There is neither an enrichment nor a corresponding deprivation.

C. 1078 Property

1. Evidence

a) Purchase of the 1078 Property

- [133] Manjit testified that in 1997, she and her husband purchased the 1078 Property for \$260,088. They obtained a mortgage for \$165,000. The down payment of \$94,244 came from her parents after she asked them for financial assistance. Title was registered in the names of Manjit and her then husband as joint tenants, and Gurbuchan and Resham as joint tenants.
- [134] Manjit testified that \$65,000 of the down payment came from her parents' savings, and the rest from money she already owed them. In 1992 she had borrowed \$30,000 from her father in connection with the purchase of a car and a trip to India, and she had not repaid these funds. However, she also had about \$30,000 saved. She told her father to take the \$30,000 in her account and combine it with the savings her parents had. Her father put all the money together and that was the down payment. In April 1997, Manjit signed a promissory note for \$94,244 payable to her parents at 0% interest. Avtar brought the promissory note to her, and her father asked her to sign while Avtar was present. Avtar and her father arranged for the CIBC bank draft for the down payment. At no point since 1997 had Avtar or her parents asked her to repay the promissory note.
- [135] Avtar denied that he made any financial contribution to the purchase of the property. At the time he was saving to purchase a new vehicle, which he did in 1998. Because he was working at the CIBC, he, his parents, and Manjit and her husband, all had accounts at the branch. None of his money was intermingled with his parents' account or Manjit's accounts. His father asked him to obtain a bank draft and have a promissory note drafted. He prepared the bank draft. His signature is on the cheque. He went to a notary to obtain a promissory note which Manjit signed. The name of the remitters on the bank draft are Gurbuchan and Resham.
- b) Alleged Statements Regarding Investment in the 1078 Property
- [136] Rajwant relies on the following statements as evidence of an intention that Avtar became a beneficial owner of the property on a resulting trust:
- a) A few months after she arrived in BC, she was told by Avtar and Gurbuchan that Avtar had contributed \$65,000 to the down payment of the 1078 Property. Gurbuchan told her that Manjit was unable to buy the house, and that is why she and Resham asked Avtar to give money toward the down payment. Gurbuchan told her "your investment in that house will be 65,000". Both Avtar and Gurbuchan repeated these statements over the years;
 - b) During the visit to Mr. Desai's office in 2021, she and Manjit had a conversation about the \$65,000, and Manjit told her that the down payment had been given; and
 - c) On October 17, 2021, Surinder, Avtar, Rajwant, and one of Manjit's daughters had a discussion in person while all were at the 1027 Property. During the discussion, Avtar said that he paid \$65,000 toward the down payment. She agreed that there was an argument regarding this statement, and Avtar did not state that Manjit should repay him the \$65,000.

[137] Rajwant agreed that Manjit has never said to her that Rajwant and Avtar have an interest in the 1078 Property, or that Manjit is holding such an interest for them.

[138] Avtar denied that he has ever told anyone that he paid any funds toward the purchase of the 1078 Property. The first time Rajwant raised the issue of \$65,000 was after she had "stolen" his text messages in October 2021. Avtar agrees there was a discussion on October 17, 2021 but denies that he said that he paid \$65,000 toward the down payment.

c) Financial Arrangements and Title Transfers in 2004 and 2013

[139] Manjit testified that in 2003, she and her husband separated and later divorced. She purchased her husband's interest in the 1078 Property. In November 2004, title to the property was transferred to her alone. She alone or with her former husband have paid the mortgage, taxes, insurance, and all expenses for the property.

[140] Rajwant agreed that she knew the 1078 Property was in Manjit's and her husband's name, and that after the divorce, Gurbuchan's and Resham's names had been removed from title. At the time, she did not raise that Avtar had given \$65,000 to buy the property because that would have caused arguments.

[141] In 2013, Manjit transferred title of the property to herself and one of her daughters as joint tenants, and placed mortgages on the property. Manjit testified that at no point when the title to the property changed, and up to separation, did Avtar or Rajwant say to her that Avtar had a 25% interest in the property.

d) Text and audio messages

[142] Rajwant relies on text messages sent by Avtar to Surinder, and another audio message sent by Manjit to Avtar just prior to the separation, as admissions that Avtar paid the \$65,000. The admissibility of these messages was the subject of the same mid-trial application. I held that they were admissible.

[143] On October 31, 2021, a text message exchange took place between Surinder and Avtar. A portion of this was referred to earlier when discussing the 1027 Property. These messages were on Avtar's phone, and they were not produced by him in this litigation. He was similarly cross-examined on his failure to list and produce these messages. The text messages are as follows:

At 12:53 pm from Surinder: Tara [Avtar] don't text or phone calls my daughter about this this problem you can call say hello hi because she didn't know anything talk to Mita [Manjit] she lived 15 years that house she know all me and Sabi [Sarbjit] we don't know nothing ok

At 12:58 from Avtar: I'm not done yet.. I know what you 2 said about ne to my downstairs friend..

At 12:59 from Avtar: As for the house..I already spoke to the lawyers and property fraud lawyers .. go ahead .. why don't u 2 keep it .. your sons in law will enjoy it

At 1:02 pm from Avtar: Recall the letter 8 yrs ago? There will be more ..

At 1:03 pm from Avtar: If u have something to say tell mutti [Surinder's daughter] she will pass on the garbage message to me from you ..

At 1:06 pm from Avtar: If I don't get my 65000 and the house back to 50% bebe 25% me 25% meeta .. the way it was .. I have already pursued legal matters

At 1:09 pm: [Avtar sends a photograph of two documents described below.]

[144] The documents sent at 1:09 pm are a letter and the bottom half of the promissory note showing Manjit's signature. Despite attaching photographs of these two documents, Avtar did not list or produce the documents or his pictures of them. He said he did not have them in his possession. No explanation was provided for why he either does not have them, or has not listed them, other than his phone being stolen in January 2024. Avtar also stated that he cannot read the letter as it is too blurry. Some of it is legible, although most of it is not. The letter is from a law firm in 1997 at the time of the purchase of the 1078 Property, and it is addressed to Avtar. The re line references the promissory note.

[145] On the evening of November 2, 2021, Manjit sent the following audio message to Rajwant. It is a recording of Manjit's audio message to Avtar. The parties agree that the word translated as "Eunuch" is an obscenity. The translation states:

Hello Tara, I am receiving messages. Shindo also told me you are asking for 65,000, you Eunuch, you come over here and I'll and give you \$65,000, I have discussed it with brother Mahinder Singh, I will settle your old accounts and your future accounts. I will settle the accounts with you for the past and the future, I shall recover each and every penny off you, change my name if I don't move earth from beneath your feet, you Eunuch, Eunuch, will now show you 65000, I will give you 65000 come, come over, I'll give it to you.

[146] Avtar gave prior inconsistent evidence regarding the audio message. At his examination for discovery (before the text messages were produced by Rajwant) he said that he did not know what the \$65,000 referred to. At trial, he stated that after the text messages were produced, he now recalls that he was trying to collect the \$65,000 debt owing by Manjit to his parents. He denies that this debt was owed to him. He tried to collect this debt after Rajwant told him that 75% interest in the 1027 Property had been transferred to her, she was seeking a divorce, and would remove him from the property. He said the only person he could go to was Manjit. He thought he deserved something and was trying to collect his parents' debt so he could get a roof over his head. His parents had never asked him to collect the debt.

[147] Manjit testified that she was angry when she sent the audio message as Avtar had never paid her anything for the 1078 Property. In the message, she was not saying she would pay him. She was conveying that she would not give him anything because she did not owe him anything. When she stated "settle our accounts" she meant that she had done much for their

parents, and she would do the accounting for that as well. Avtar did not call her back following the message. She was also similarly cross-examined on her failure to disclose this message.

[148] Rajwant agreed at her examination for discovery that Manjit sounded very angry in the audio message. However, at trial, she refused to acknowledge this. Rajwant was similarly cross-examined on her failure to make timely disclosure of the text and audio messages.

e) Other Alleged Contributions to the 1078 Property

[149] In addition to the \$65,000, Rajwant testified that about the time Manjit and her husband separated in 2004, she and Avtar paid money from their joint account to Manjit. One cheque was for \$2,000 and another for \$1,500, and there were other cheques, but she does not have them, or the details. She stated the money was put toward the 1078 Property. She produced a copy of the cheque for \$2,000, which is dated September 24, 2004. She does not have other cheques. She never demanded that Manjit repay these sums to avoid conflict.

[150] Avtar and Rajwant testified that the \$2,000 concerned money their parents had requested to send to family. Avtar gave the money to Manjit, and she sent the money to India. This is why he wrote "loan" on the cheque. Avtar denied that he gave a \$1,500 cheque to Manjit, or any other amount.

[151] Manjit denied that Avtar or Rajwant ever gave her cheques or contributed to the property. At the time, she was working full time at one job and part-time at another, receiving child support for her two daughters, and rental income from the basement suite in the home. She did not need financial assistance.

2. Positions of the Parties

[152] Rajwant's notice of family claim does not plead material facts but alleges that Manjit holds the property "in trust or on constructive trust on behalf of" Rajwant and Avtar. Rajwant's closing submissions were confined to an allegation of a purchase money resulting trust in favour of Avtar.

[153] Rajwant argues that Avtar has a beneficial interest in the 1078 Property proportionate to the monies alleged to have been contributed by him toward the purchase price of that property (being 25%), along with the increase in value since marriage, of that share. Rajwant seeks to have the 25% interest recognized by a monetary award of the equivalent value. Rajwant relies on: (a) the statements of Gurbuchan, Avtar and Manjit; and (b) the text and audio messages. With respect to Gurbuchan's hearsay statements, Rajwant argues that they are admissible as they are necessary and reliable. On the credibility and reliability of Avtar's and Manjit's evidence, Rajwant relies on the same arguments previously discussed with regard to the 1027 Property. She argues that Avtar's lack of memory at his examination for discovery and new recollection is not credible. Alternatively, Rajwant seeks an order that Manjit owes Avtar a \$65,000 debt plus at least \$3,500 for money given by Avtar and her to Manjit for the 1078 Property.

[154] The respondents submit that Rajwant has not proven that Avtar contributed any funds toward the purchase or maintenance of the 1078 Property, and there is no resulting trust. Gurbuchan's statements are hearsay and presumptively inadmissible. Further, the contemporaneous and subsequent events are inconsistent with payment of funds by Avtar and an intention of a resulting trust. These are: (a) if there had been a \$65,000 payment, it would be inconsistent for Avtar to have a promissory note drafted which is payable to his parents; (b) the property was registered in the names of Manjit, her husband, Gurbuchan and Resham, who all contributed to the property, but not Avtar; (c) Rajwant and Avtar never received rental income from or paid any expenses of the property; (d) there was no mention of or claim for the \$65,000 during transfers in title up to 2013; (e) the first mention of a \$65,000 claim was after Rajwant surreptitiously obtained the text messages in October 2021; and (f) the audio message demonstrates Manjit's reaction to the allegation that she owes Avtar \$65,000.

3. Analysis

a) Purchase Money Resulting Trust

[155] In *Rascal Trucking Ltd. v. Nishi*, 2013 SCC 33 the Court explained the nature of a purchase money resulting trust:

[1] A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution. This is called the presumption of resulting trust.

[2] The presumption can be rebutted by evidence that at the time of the contribution, the person making the contribution intended to make a gift to the person taking title. While rebutting the presumption requires evidence of the intention of the person who advanced the funds at the time of the advance, after the fact evidence can be admitted so long as the trier of fact is careful to consider the possibility of self-serving changes in intention over time.

[156] The transferor must not have paid the money as a loan to the alleged transferee. If the transferor who advanced the money was doing so as a loan to the transferee, their relationship is creditor-debtor, and a presumption of a resulting trust does not apply: *Swanstrom v Wuest*, 2018 BCSC 2299 at paras. 44-45.

[157] The rebuttable evidentiary presumption of a resulting trust does not automatically operate. As explained by Justice Savage in *Namdarpour v. Vahman*, 2019 BCCA 153:

[40] These decisions emphasize that evidentiary presumptions operate only where the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer. In my view, the following principles can be discerned from the case law: (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the

case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those circumstances include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.

- [158] For the following reasons, I conclude that Avtar is not a 25% beneficial owner of the 1078 Property through a resulting trust, and there is no family property associated with the 1078 Property.
- [159] It is again not necessary to address the parties' arguments as to whether Gurbuchan's hearsay statements are admissible, because even if they are, in the ultimate reliability analysis, I give little weight to the critical aspect of those statements. Gurbuchan's statements contain two alleged facts. The first is that Avtar paid \$65,000. The second is that the \$65,000 is Avtar's "investment" in the property. It is only the latter that is critical and could possibly result in family property. If the evidence establishes that this was a loan or gift, then there is no resulting trust. Further, if it is a loan, it would have been made prior to the parties' relationship and is excluded property: FLA s. 85(1)(a). The loan has not increased in value because it is a 0% interest loan. There would therefore be no family property to divide associated with a loan.
- [160] Rajwant interprets Gurbuchan's statement of "investment" as evidence that Avtar's contribution was a 25% beneficial interest in the 1078 Property. There is an alternative meaning, which is that Avtar contributed \$65,000 to the loan his parents made to Manjit. The same reasoning applies to Rajwant's allegation that Avtar repeated Gurbuchan's statements.
- [161] Rajwant also relies on Avtar's text messages. I find that Avtar's message referring to the \$65,000 is an admission that he in some way contributed \$65,000 to the purchase. Avtar refers to "my" \$65,000. However, the text message does not support that Avtar ever had an intention that he was a 25% owner of the 1078 Property, but rather supports that this was at best a loan. In the message, Avtar does not demand that his name be put on title or suggest that he is part owner of the 1078 Property, although I keep in mind that this was a statement made long after the alleged transaction.
- [162] Related to this, I do not accept Avtar's evidence at his examination for discovery (and at trial) that he then did not know what the \$65,000 in the audio message referred to. The text messages which were produced after this indicate that he knew what the \$65,000 was. For the reasons already given for the 1027 Property, I do not accept his evidence that he does not remember receiving or sending the texts or receiving the audio message. Further, he failed to produce the lawyer's letter which he clearly had, and which he had kept in his possession for more than 20 years, along with a copy of the promissory note. I conclude the letter was of importance to him. I have taken this into account, as well as Rajwant's lack of timely disclosure, in assessing the parties' evidence.

- [163] On the other hand, Manjit and Avtar deny any contribution by Avtar, or intention by him that he become a 25% owner of the 1078 Property, and there is support for this in the contemporaneous documents. The \$94,244 down payment is documented as a loan from Gurbuchan and Resham to Manjit. There are no bank records in evidence to show from which account(s) the \$94,244 bank draft was drawn, but the remitters are stated to be Gurbuchan and Resham. The promissory note does not mention Avtar. Avtar was the one who arranged for the promissory note. If Avtar contributed \$65,000, it would have been easy for him to have his name added to the promissory note. Further, the people who did contribute to the property were registered on title. The other contemporaneous surrounding circumstance referred to by the respondents is that Avtar did not receive any rental income or pay the taxes, insurance, or any other expenses for the 1078 Property.
- [164] Finally, Rajwant relies on Manjit's audio message. In my view, the intonation is clear. Manjit is angry and her statement she will give Avtar \$65,000 is not an admission that she owes him that. However, even if it were, it does not support that Avtar is a 25% beneficial owner of the 1078 Property.
- [165] Considering all of the above circumstances and Avtar's admission, I find that Gurbuchan and Resham loaned the down payment, and that it is likely that Avtar contributed in some way to the down payment his parents made. It may have been by giving or loaning \$65,000 to his parents who in turn loaned it to Manjit, or it may have been some other cost/benefit accounting within this family who lived together and where there was financial assistance given to family members. At the time, Avtar was working full-time at the CIBC, was by then in his late 20's, and had been living at his parents' home expense free. However, regardless of how Avtar contributed to the purchase price through his parents, I find that Avtar never had the intention that by doing so, he would obtain a 25% interest in the 1078 Property. If I am in error, and the presumption applies, then Avtar and Manjit have rebutted it. I find that at best for Rajwant, this was a loan that Avtar would some day be repaid by his parents. It is not necessary to determine whether in the interim, he has been repaid by all the benefits he has received from his parents, because even if it was unpaid, as already discussed, it is entirely excluded. There is therefore no family property to divide in connection with the 1078 Property.
- [166] That is sufficient to dispose of the claim, and it is not necessary to address the respondent's other arguments about subsequent events which they argue support that there is no resulting trust.
- b) Other Amounts
- [167] In my view, Rajwant has not established that there is a debt owing to Avtar or her for \$2,000 or \$1,500. I accept Manjit's and Avtar's evidence regarding the \$2,000 cheque, and Manjit's evidence that she has not received any other amounts from Avtar. At the time of these alleged loans, Manjit had several sources of funds available to her. The result is that there is no family property with respect to these other alleged amounts.

D. Other Family Property and Debts

[168] I find the following bank and non-registered accounts are family property, and their values for division:

- a) Rajwant TD account 2827: \$11,789;
- b) Rajwant TD account 3003: \$11,504;
- c) Rajwant TD TFSA 0382: \$0;
- d) Avtar CIBC account 2338: \$1,705;
- e) Avtar CIBC non-registered account 8806: \$68,740. See explanation below; and
- f) Avtar GICs (non-registered account): \$20,043. See explanation below.

[169] Avtar's CIBC non-registered account 8806 contained mutual funds which had a value of \$68,740 at separation. On November 15, 2021, Avtar liquidated these and transferred the proceeds to his sister Sarbjit "to hold for me, in order for me to use". Avtar testified that he has used all the funds, primarily for legal fees. In closing submissions, Avtar argued that if spousal support had been paid this would not have been dissipated, and suggested reducing the amount of any spousal support award in his favour by this amount. I do not agree. This account should be addressed under property division. The issue is the valuation date. Valuing family property or debt at a date that is not the date of trial is effectively a reapportionment: *Kumagai v. Campbell Estate*, 2018 BCCA 24 at paras. 75-76. In my view, it would be significantly unfair to value this property at the date of trial due to Avtar's dissipation of the funds: FLA s. 95(2)(f) and (g); *Blair v. Johnson*, 2015 BCSC 761 at para. 69. The appropriate date is the date of separation.

[170] I also conclude that Avtar had another \$20,043 in GICs which were liquidated by him shortly after separation. The bank statement for Avtar's CIBC account 2338 account shows that on November 8 and 10, 2021 (at about the same time he was liquidating the mutual funds), \$10,019 and \$10,005 respectively were deposited to this account through interbranch banking. Those funds had to come from somewhere, and they have since been spent. Avtar did not explain the deposits specifically. I cannot find any banking statement that explains from where these amounts were obtained, but on Avtar's handwritten notes of his summary of his investments as of October 31, 2021 (tab B1 in evidence), he indicates that he has \$20,000 in GICs, which are in addition to the value he assigned to his CIBC RRSP 9618 (\$262,116) and the mutual funds in his non-registered account (\$68,185). The bank statement for the CIBC RRSP 9618 at October 31, 2021 shows that the \$262,116 figure includes \$21,282 in GICs. However, those GICs were still in the account as of trial. In addition, Avtar testified that the \$20,000 in GICs on his notes at tab B1 were from a non-registered account. I conclude that these deposits came from other GICs held by Avtar at separation, and that statements for this account were not in evidence. I further find that it would be significantly unfair not to value this asset as of the date of separation due to

Avtar's dissipation of the funds post-separation for the same reasons as given above.

- [171] I find that Rajwant's TD account 4038 is not family property. I accept Rajwant's evidence that the money in this account belongs to her mother, and that Rajwant's name is on the account because she assists her mother. Her mother receives pension income and funds from BC Housing. The statements show CPP and Old Age Security, and BC Housing amounts deposited every month. There is nothing to indicate that Rajwant is depositing her own income to this account.
- [172] The parties have four RESPs for a total of approximately \$54,505. These are family property, but the parties do not wish to divide them at this time, but to keep them for the children with an order for division if they are not used by the children. I will make orders accordingly. For identification, these are:
- a) Rajwant RESP 2641: \$21,526;
 - b) Rajwant RESP 9743: \$15,404;
 - c) Rajwant RESP 8792: \$927; and
 - d) Avtar Worldsource Financial RESP 7324: \$16,648 as of September 30, 2021. No current value was in evidence.
- [173] Avtar has a CIBC RRSP ending in 9618, which is family property and will be divided by way of spousal rollover pursuant to the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). The value was \$262,116 as of separation and \$259,570 as of November 30, 2023, and fluctuates with the market.
- [174] Rajwant has a 2011 Toyota Venza she valued at \$6,000 (Avtar says \$7,000). In the absence of any expert opinion, and considering the minimal value, I am cutting the difference in half and valuing the Toyota at \$6,500. Avtar has a 2012 Nissan Altima he valued at \$6,500.
- [175] The parties each had credit card debts as of the date of separation, but the balances were minimal. Avtar suggested that these not be divided by any compensation payment and Rajwant did not disagree.
- [176] Avtar has a CIBC line of credit 2933 under which nothing was owing as of the date of separation. He owes \$49,604 as of the date of trial. This is primarily because a \$45,000 cheque was written in October 2023, three months before the trial commenced. This was unexplained. This is post-separation debt and Avtar did not suggest, nor has he proved, that it was incurred for the purpose of maintaining family property. It is therefore not family debt to be divided. However, as I discuss below, Avtar makes arguments regarding unequal division of property that are in part based on his debt, so I note it now.

- [177] Rajwant has a Canada Post pension, and Avtar has a CIBC pension. Both parties have contributed to CPP. The parties agree to equal division of these. I received lengthy proposed orders from Avtar with respect to the pensions, but no pension documents on which to determine if these are the appropriate orders. While I appreciate the effort of counsel in creating the draft orders, I will make orders for the division of the pensions, with liberty for the parties to reattend if required to put the division into effect.
- [178] Avtar testified that he was not making a claim for jewellery, but the draft orders proposed by his counsel at the end of the trial included return of jewellery that belongs to the other. Avtar testified that he would like to have some of the contents of the 1027 Property, but he did not make a claim for specific items. Given this, I will make different orders for a process to divide the household chattels.

E. Equal or Unequal Division

1. Legal Principles

- [179] As noted previously, s. 81 of the FLA provides the presumptive rule that regardless of respective use or contribution, division is equal. Section 95(1) of the FLA states that a court may order unequal division if it would be "significantly unfair" to divide property and debt equally. "Significantly unfair" is something "objectively unjust, unreasonable, or unfair in some important or substantial sense": *Singh v. Singh*, 2020 BCCA 21 at paras. 129-134.
- [180] The factors the court may consider for the purpose of determining if there should be unequal division are set out in s. 95(2) of the FLA. These are:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or

- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[181] Section 95(2)(i) is limited to the economic characteristics of the spousal relationship. Economic characteristics is a "broad class, but one that is narrower than the general term in s. 95(2)(i)", and which could include "the relative contribution of spouses to the acquisition, preservation, maintenance, or improvement of family property during the relationship.": Singh at para. 139.

[182] While the FLA does not abolish the consideration of unequal contributions to a marriage, the discretion to do so is "much constrained": Jaszczewska v. Kostanski, 2016 BCCA 286 at para. 44.

[183] Cases in which unequal contributions have resulted in a finding that equal division would be significantly unfair have involved "marked, prolonged, and intentional or unexplained disparities in contribution to family burdens": Khan v. Gilbert, 2019 BCCA 80 at para. 32; Hammond v Holtz, 2024 BCSC 447, at paras 37, 40; and Chang v. Chang, 2020 BCSC 1783 at paras. 110-115.

[184] The court must first "notionally divide the family property, taking into account the exclusions, in accordance with the provisions of the FLA", and then determine whether equal division is significantly unfair: Remmem v. Remmem, 2014 BCSC 1552 at para. 47.

2. Evidence

[185] At the time the parties married, Avtar was working full-time as a branch manager at the CIBC. Rajwant began working part-time soon after her arrival in BC. She worked in the evenings at various entry level jobs. While Avtar was working during the day, she was at home caring for their daughter, and when she went to work, Avtar was at home except for when he was playing sports. The parties' evidence was consistent with respect to these arrangements up to 2008, except Rajwant put more emphasis on the assistance Avtar received from Gurbuchan in the evenings, and Avtar put less emphasis on it.

[186] Rajwant testified that in 2008, Avtar had a benign tumour removed from his pancreas. After a few months off work, he recovered and returned to work for almost a year. Then, in 2009, Avtar told her was going to quit his job. He did not explain why. She denied that Avtar told her he was not keeping up with his duties and he got fired. Rajwant testified that in 2010 Avtar got a job at Envision Financial, but only worked a month and then quit again. After that, Avtar went daily, all day, to an intercultural services office to use a computer, which

they did not have at home. This routine stopped when Resham fell and suffered the head injury. Thereafter, Avtar spent his days with his father in the hospital.

- [187] Rajwant testified that after Avtar's father was discharged from rehabilitation, Avtar spent his days watching TV, on the computer, then having lunch which she made, and having a nap. He played softball three or four times per week and played tennis two or three times per month. This continued until their separation. Rajwant told Avtar that he was capable of going back to work, and he told her it was none of her business. Rajwant agreed that after the surgery in 2008, Avtar had to return to hospital a couple of times per year for various lengths as a result of stomach pain.
- [188] In 2010, Rajwant obtained part-time employment at Canada Post, again always on an evening shift, and eventually gained seniority and hours, until she obtained a full-time afternoon shift position in 2016. In 2013, the parties' son was born. At the time, Rajwant was working 24 hours per week. She took a six-month maternity leave. She told Avtar he should try to get a job because they were having financial difficulties because she was only receiving maternity benefits. Avtar prepared a resume, but he did not get a job.
- [189] Rajwant testified that when she returned to work in 2014, she was still working the evening shift. She was home until 6:30 pm, and then would go to work. She testified that from the beginning of their marriage, all of the responsibilities of the children and household fell on her. These included bringing the children to school, making lunches, picking them up, preparing dinner and doing the housework. Despite her requests of Avtar that he help, he rarely did, and he did not have an interest in their children's activities. She agreed Avtar drove their daughter to school, but it was only for six weeks immediately after their son was born.
- [190] Avtar testified that in 2008 he was diagnosed as having a malignant tumour on his pancreas. He had surgery and was in hospital for a month, was discharged with tubes, and home care nurses visited him after that for several months. He entered a return-to-work program in 2009 at the CIBC. He started "making mistakes all over" and eventually he was terminated from his job in late 2009. He went on employment insurance for a year and decided to focus more closely on his health.
- [191] He testified that he has had chronic stomach pain since the surgery. His symptoms have taken a toll on his mental health, energy, motivation, and ability to concentrate. He has to be careful what he eats and when. He has been hospitalized at times because of the pain. He takes medication for his kidneys and heart, and more recently diabetes. He and his family adjusted to his health condition and his unemployment was not a point of conflict. After his father's head injury, he went to the care home every day until 4:00 pm with his mother and was a companion to him. Prior to his 2008 surgery, he was active with softball and tennis. However, his ability to play both sports diminished after the surgery, although he continued to do them.

[192] Avtar testified that after their son was born, and Rajwant returned to work, he cared for their son when Rajwant was at work. He described looking after their children as the "best job". He also cared for their daughter who was by then 13 years old. He drove their daughter to and from school and was involved if she needed anything for extracurricular activities.

3. Preliminary Issue

[193] I pause to describe events at the trial. Both Rajwant's and Avtar's pleadings seek unequal division. During opening submissions, Rajwant claimed unequal division. That position remained throughout the trial. Evidence was tendered by both Rajwant and Avtar that was relevant to reapportionment. During initial closing submissions, Rajwant's counsel submitted there should be equal division. Toward the end of Rajwant's reply submissions, counsel stated that if Rajwant was not successful in the trust claims, she was seeking unequal division. Avtar then opposed Rajwant seeking unequal division because he had decided to seek equal division in his closing submissions based on Rajwant's initial closing submissions seeking equal division. Otherwise, he wished to seek unequal division as well. I directed that the parties provide written submissions on: (1) whether to permit this change in submissions; and (2) unequal division, noting that they would not be bound by their previous submissions accepting equal division.

[194] I allow both Rajwant and Avtar to make submissions on unequal division. In the absence of any case authorities from counsel, I rely on the principles in *Lam v. Chiu*, 2012 BCSC 677 at para. 10, which concern amendments to pleadings mid-trial or after the close of evidence, something which has more potential for prejudice. The positions of the parties are not inconsistent with their pleadings. Permitting further submissions is not unfair to Avtar as there is no non-compensable prejudice to him. The trial proceeded on the basis of each party claiming unequal division. It was only in closing submissions that Rajwant initially changed her position, and then reverted to her pleadings. Avtar was permitted to make amended submissions. The only possible prejudice is the extra cost to prepare further submissions. In my view, allowing these amended submissions permits the court to determine the real issues between the parties.

4. Positions of the Parties

[195] Rajwant seeks an order for 100% reapportionment of family property (except the pensions, RESPs and chattels) in her favour. Relying on s. 95(2)(a) and s. 95(2)(i), she argues that this was a long marriage of 22 years, during which there was a significant disparity between the parties' contributions to the marriage. There are three bases of disparity: (a) financial contributions; (b) child-care and household responsibilities; and (c) contributions to the 1027 Property through maintenance and management of renovations.

- [196] Rajwant makes two other arguments. First, she submits there has been a lack of disclosure by Avtar, but does not suggest that he has hidden assets. Second, she argues that there should be a substantial retroactive child support award, and as Avtar has not paid any child support to date, a reapportionment from the property could be used to satisfy that expected award.
- [197] Responding to Rajwant's arguments, Avtar argues that there was no significant disparity in their contributions to the marriage. He argues: (a) both he and Rajwant worked outside the home until 2009; (b) after his pancreas surgery and failed return-to-work, he was unable to work outside the home and Rajwant did not take any issue with this during the marriage. He relies upon the expert opinion of his current family physician, Dr. Manpreet Narwal, concerning his ability to work; (c) he stayed at home and cared for the children, allowing Rajwant to work to support the family; (d) he and Rajwant were able to build savings because they lived at the 1027 Property rent free as a result of Avtar's parents; and (e) the increase in value in the 1027 Property since 2018 is a result of market factors and is not attributable to any maintenance by Rajwant.
- [198] Avtar submits that there should be unequal division in his favour because: (a) he currently has a considerable debt load resulting from the breakdown of the marriage, and (b) he is unable to work. In contrast, Rajwant has little debt, has long term employment with Canada Post, and is capable of earning a significantly greater income than him to meet her financial needs.

5. Analysis

- [199] The total of all family property to be divided, not including the \$54,404 in RESP's, the four pensions, and household contents is:

Rajwant

Avtar

1027 Property

\$71,250

TD account 2827

\$11,789

TD account 3003

\$11,504

TD TFSA 0382

\$0

Avtar CIBC account 2338

\$1,705

CIBC non-registered 8806

\$68,740

Avtar GICs

\$20,043

Avtar RRSP

\$259,571 (approx.)

Two vehicles

\$6,500

\$6,500

Total

\$29,793

\$427,809

Notional Equal Division

\$228,801

\$228,801

[200] For the reasons below, I find that neither Rajwant nor Avtar have established that equal division would be significantly unfair. As a result, there will be equal division.

[201] Turning first to Rajwant's arguments, there is nothing in the circumstances existing up to 2008 that supports that equal division would be significantly unfair. As a full-time bank branch manager, Avtar financially contributed more than Rajwant who was working part-time at entry-level jobs. Rajwant was the primary care-giver for their young daughter and looked after their home. Avtar looked after their daughter while Rajwant worked, with some assistance from Gurbuchan. Both parties contributed to the family inside and outside of the home.

[202] With respect to the time period after 2009 to separation, there are aspects of the evidence of both Rajwant and Avtar which indicate that it should be approached with caution.

- [203] Rajwant's evidence concerning Avtar no longer being employed came out in an odd way. When first asked about the circumstances of Avtar no longer working, she said only that he told her he was quitting and did not tell her why, painting a very different situation than what was later revealed. It was only after directed questioning by her counsel that the evidence came out regarding Avtar's serious diagnosis, which Rajwant then challenged. The tenor of Rajwant's evidence also showed some animosity.
- [204] Avtar tendered little evidence of his ability or inability to work at any job (as opposed to the CIBC) from 2009 onward. Avtar described continuing symptoms after he recovered from the surgery, but his evidence lacked detail. None of it was corroborated by the CIBC, or an opinion from a physician who treated him at the time, or any clinical records. I accept that after he recovered, he had visits to the hospital, but no details were given of how often this was, or for how long. He was active in sports including being the pitcher for his softball team. Dr. Narwal does not opine on his ability to work during this period.
- [205] I find that Rajwant did shoulder the majority of household tasks and did more of the child care. Avtar did not testify to doing any the many tasks that are required to run a household, nor did he describe specific activities with the children other than driving and supporting some extra-curricular activities, nor did he challenge Rajwant's evidence of the specific tasks she said she did. However, I do not accept that Avtar did almost nothing, as portrayed by Rajwant. I find that Avtar did look after their children when Rajwant was at work and while Rajwant was at home as well. Avtar likely had assistance from his mother and their daughter when she was older, but I do not accept that they were the primary caregivers. By the beginning of 2018, Gurbuchan was living with Manjit so would not have been there to assist, and by then Rajwant was working full-time, so Avtar was home alone with their son in the evenings, and their son was in school during the day.
- [206] There was little evidence of any dispute between Avtar and Rajwant during the marriage regarding Avtar not being employed, and the roles they assumed within the household. Rajwant's only evidence challenging Avtar's lack of employment during these years was that in 2009 she told him he could work, and again in 2014 when they faced financial difficulties while she was on maternity leave, she asked him to look for a job. Rajwant did not testify that Avtar's unemployment was a significant issue in the marriage. Avtar testified that Rajwant and his family were supportive of him not working, and him making his health a priority. Rajwant agreed that Avtar's symptoms required trips to the hospital at times. For part of this period, Avtar devoted himself daily to assisting his father. Rajwant took no issue with this.
- [207] I conclude from the above, that irrespective of the degree to which Avtar's symptoms may have affected his ability to work, his unemployment outside the home and the roles the parties assumed within the home, were not a point of contention during the marriage until after their relationship deteriorated. I find the disparity is not as significant as Rajwant argues. I do not find that Avtar's unemployment was intentional in the sense that he was shirking his family responsibilities or that it is unexplained. Rather, I find that part at least

is explained by his serious diagnosis and symptoms, and the events which unfolded after that, including Resham's serious injury, the parties' decision to have another child, and their receipt of rental income from Gurbuchan and Resham. I find that either Rajwant accepted that Avtar's health was such that he was unable to work, or in the context of the various events which took place that both Rajwant and Avtar were content to have Avtar stay home while Rajwant worked outside the home, or a combination of both. Regardless of the rationale, this was how the parties chose to arrange their lives without much dispute about it. As for contributions to the management and renovations of the 1027 Property, I do not find Rajwant's description of her contributions to be significant. Nor is there evidence that the increase in value of the 1027 Property is attributable to anything she did.

- [208] In summary, the circumstances described above do not support that unequal division would be significantly unfair. The evidence does not establish that there were marked, prolonged, intentional or unexplained disparities in Rajwant's and Avtar's contributions to family burdens.
- [209] Turning to Rajwant's other arguments, in my view, they do not establish significant unfairness. First, although Rajwant argues that Avtar has not made full disclosure, she does not allege that he has not disclosed assets. While I have concerns regarding the disclosure from all parties, this is with respect to communications regarding the 1027 Property and 1078 Property. This is not a situation where the court makes an unequal division of known property to account for what it finds are likely undisclosed assets. Second, Rajwant argues that there should be unequal division to account for what she argues should be a large retroactive child support award. She is seeking security for payment, and as will be discussed below, there is not a large retroactive child support award.
- [210] Turning to Avtar's arguments as to why there should be unequal division in his favour, in my view, they do not establish significant unfairness. Avtar argues that he has substantial debt. I accept that some of Avtar's current debt is because spousal support has not been paid, and because he has had to pay legal fees for his criminal defence and for these proceedings. I will be making an award of retroactive spousal support, and Rajwant undoubtedly has also incurred legal fees. However, this was not family debt incurred during the relationship and the amount of family debt does not exceed the value of family property: FLA ss. 95(2)(d) and (e). There is no family debt. Avtar submits that Rajwant is in a better financial position as he is disabled and cannot work while she works fulltime. This is more a spousal support argument and is close to an argument under s. 95(3) which provides for unequal division in certain circumstances where when making an award for spousal support, the objectives of spousal support are not met. In my view, the order I will be making for spousal support does meet the objectives of spousal support. More importantly, for both of these arguments, for reasons I discuss later under the section on spousal support, I do not agree with Avtar's assessment of his financial position.

- [211] Finally, Avtar's submissions briefly referenced the fact that Rajwant and the children have lived at the 1027 Property rent free since separation. Occupational rent between spouses is not a stand alone claim and is usually addressed, if it is argued, in property division. Without pleading occupational rent, Avtar's closing submissions also sought \$700 per month (25% of the market rental value of the upper suite) since separation as Rajwant and the children have continued to live there.
- [212] I am not persuaded that the fact that Rajwant and the children have lived at the 1027 Property since separation results in any significant unfairness if there is equal division. Assessment of this argument would also have to consider that, as I find below, Avtar has also effectively received free housing since separation, although not in the 1027 Property. However, for the reasons I will explain more fully under the spousal support section, I have considered these facts when considering Rajwant's and Avtar's conditions, means, needs and circumstances in determining the quantum of spousal support. In my view, doing so results in a transparent determination of the economic consequences of the breakdown of the marital relationship. I also note that if I were to have acceded to Avtar's argument claiming \$700 per month rent, I would have imputed another \$700 per month in his income.

V. Guidelines Income

A. Legal Principles

- [213] The Guidelines provide the framework for determining income for the purpose of child support. The relevant provisions are set out in ss. 16 to 20. Pursuant to s. 16, the calculation commences with total income from line 15000 of a spouse's personal tax return and is adjusted in accordance with Schedule III: *Brown v. Brown*, 2014 BCCA 152 at para. 16; *Vincent v. Vincent*, 2012 BCCA 186 at para. 35. The Court must then consider if the circumstances in ss. 17 to 20 are present and whether there should be an adjustment to arrive at the fairest determination of income available for support, keeping in mind the objectives in s. 1 of the Guidelines: *Brown* at paras. 23, 29.
- [214] Pursuant to s. 19(1)(a) of the Guidelines, a Court has a discretion to impute income to a spouse if the spouse is "intentionally under-employed or unemployed" other than where this is required by the "health needs of the spouse". It is not necessary to show that there was an intent to evade or minimize child support; what matters is whether the parent is earning what the parent is capable of earning: *Barker v. Barker*, 2005 BCCA 177 at paras. 18-19.
- [215] In determining whether a party is intentionally underemployed, the Court must consider whether the spouse has taken reasonable steps to obtain employment commensurate with their age, health, education, skills and work history: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37. Parents who are healthy and can work have a duty to seek employment, and persistence in an un-remunerative employment will not be an excuse: *Fong v. Fong*, 2011

BCSC 42 at para. 82. The onus is on the person seeking to impute income to show an evidentiary basis on a balance of probabilities: Marquez at para. 36.

B. Rajwant's Income

[216] I find Rajwant's Guidelines annual income to be:

- a) 2021: \$75,101 (line 15000 adjusted for taxable dividends (subtract \$52), taxable capital gains (add \$1,683), and union dues (subtract \$1,097));
- b) 2022: \$55,526 (line 15000 adjusted for union dues (subtract \$1,118));
- c) 2023: \$64,304 (extrapolation from pay stub (\$2,517.07 x 26 pay periods) adjusted for union dues (subtract \$1,140 union dues)); and
- d) 2024: \$64,304.

[217] I have estimated Rajwant's 2024 income as it is nearly the end of the year, and unless something unexpected has taken place while this decision is on reserve, Rajwant's income is predictable and should be very close to the above estimate. I have done this in an attempt to avoid further disputes between the parties. In the event my estimate is materially in error, I will remain seized of this issue for 2024 income and the parties may speak to the matter at 0900 hours at a time arranged with through Supreme Court Scheduling.

C. Avtar's Income

[218] Rajwant seeks to impute income to Avtar of \$74,874 per year, being his employment and investment income in 2008 when he was working as a bank manager. She argues that Avtar has been deliberately under-employed and has failed to provide sufficient evidence to justify his inability to work. He is able to do volunteer work and is now working part-time.

1. Evidence

[219] Avtar testified that on November 6, 2021, the date of separation, he had a mental breakdown. In addition to his physical symptoms from the surgery, he is depressed and has anxiety. A sequela of the pancreatic surgery is that he has become diabetic, and now takes insulin. Since separation he has been on anti-depressants and has had counselling but has not seen a counsellor since October 2023. He has not played softball since 2021.

[220] Avtar testified that volunteering helped him move forward. He has volunteered with the Canadian Mental Health Association since 2023 and occasionally volunteers at his temple. In May 2023, he began working with Connective, a non-profit social services organization. He is a peer steward and is paid \$20 per hour and has been working six to nine hours per week. He stated that this is "low barrier" employment, meaning that there are low expectations. Avtar stated that he did not receive a T4 because this was an "honorarium" and not employment income.

[221] Last year Avtar applied for CPP disability, and the application is pending. He is in receipt of social assistance benefits of \$1,060 since March 2023, and during the adjournment of the trial effective March 2024, was approved for persons with disability social assistance which gives him extra funds, being a total of \$1,535 per month. There is no admissible evidence of the basis for these benefits, and I draw no conclusions about his future ability to work from this. Avtar does not feel he is physically or mentally fit to work more due to his ongoing health issues.

[222] Avtar relies on the expert report and testimony of Dr. Narwal, who has been his family physician since 2019. Dr. Narwal's report addresses two conditions. First, Dr. Narwal states that in 2009, prior to his involvement, Avtar had a Whipple procedure for a pancreatic mass. In testimony, Dr. Narwal said he had seen the pathology report, and the tumour was malignant. A Whipple procedure removes the head of the pancreas, a small portion of the small intestine, the gallbladder, and a small portion of the bile duct. Avtar developed insulin dependent diabetes and has recurrent abdominal pain and pancreatitis. Avtar was awaiting evaluation by a gastroenterologist for management of recurrent abdominal pain. Second, Dr. Narwal states that since separation, Avtar has reported anxiety and depressed mood. Dr. Narwal opines that this may have started one to two years prior to Avtar's hospitalization. Avtar was diagnosed with possible adjustment disorder, and prescribed an anti-depressant which had a positive effect.

[223] Much of Dr. Narwal's report is a recitation of Avtar's subjective complaints to him, which is not admissible for the truth, but only to show the basis of his report. Dr. Narwal opined that these symptoms "interfere with [Avtar's] vocation", and "may persist into the future, but it is difficult to say due to his legal proceedings, as well as pending evaluation by gastroenterology". The pancreatic issues and diabetes are permanent and "will continue to impact his future endeavours". However:

At present the factor that is affecting his vocational goals and general health are his ongoing court proceeding and trial preparations which appear to have taken a significant toll on his mental health as well as his physical health. He is not living in his own home due to displacement and he is financially strained.

[224] Dr. Narwal could not definitively state that Avtar could not work, and acknowledged the possibility that Avtar could work to some extent. He was unable to opine whether Avtar was fit to work from 2010 to 2019. Avtar's future health is difficult to predict, and he would anticipate that once the current legal issues have resolved, his anxiety and depression may improve, but it may become a chronic condition. He would have a clearer prognosis once all of Avtar's legal proceedings have completed and he has a home and financial stability.

2. Analysis

- [225] In my view, Rajwant has not established that Avtar has been intentionally under or unemployed since separation. Although provided with an opportunity to do so during the break in this trial, Rajwant did not serve any expert opinion that Avtar was capable of working full-time, or is capable of earning the amount she asks the Court to impute.
- [226] I accept Dr. Narwal's opinion and find that Avtar's mental health has been the primary factor impacting his ability to work since separation. It is unclear if and how his pancreas-related symptoms have impacted his ability to work since then. Based on Dr. Narwal's opinion, Avtar's mental health has already improved. Dr. Narwal expects that Avtar's mental health will improve although that is not certain, and the degree to which it will improve is not known. Avtar's counsel suggested, and I agree, that the circumstances are such that there should be a review of Avtar's income in the future to assess his ability to work.
- [227] Avtar's 2021 and 2022 tax returns do not report any rental income. His 2021 return reported a capital gains of \$12,979. The gain arose from him liquidating the mutual funds shortly after separation. This gain should not be included in his Guidelines income as the proceeds of disposition have been divided as part of property division. Avtar's 2023 tax return was not in evidence.
- [228] As I will discuss below, immediately after separation, Manjit unilaterally took over collecting the \$1,600 rent from the downstairs suite in the 1027 Property. Avtar's tax returns do not report any portion of the \$1,600 per month revenue that Manjit collects and which I find she effectively gives to him every month by paying his rent, legal expenses, and giving him spending money. This is tax-free income and should be included in Avtar's line 15000 income up until the present. Avtar is a 25% owner of the property, yet for 10 years prior to separation, he received 100% of this revenue, and this has effectively continued unabated after separation. His tax returns for 2018 to 2020 show that he did not declare any rental income despite being on title to the property and receiving all the income.
- [229] In my view, the rental income that Avtar effectively receives every month should be available for the support of his son. I have considered whether the amount included should be 25% of the \$1,600, reflecting his interest in the property, or all of the \$1,600. Given that Avtar has received all of the revenue, I am tempted to impute all of the \$1,600 less property expenses properly attributable to the downstairs suite. However, I reluctantly impute \$400 only, being 25% of the \$1,600 revenue which reflects his ownership. There was no evidence of any rental expenses, but Manjit gave evidence of renovation expenses and the property taxes and insurance which have always been paid by Gurbuchan and Resham. Given that Avtar did not declare this income from 2018 to 2022, it is reasonable to infer that he also did not declare it in 2023, and it will be included as income on which no tax is being paid.

[230] In the absence of the 2023 tax return and based on Avtar's evidence of an average of six to nine hours of work per week, I impute additional income of \$600 per month from Connective, calculated as an average of 7.5 hours per week at \$20 per hour for 48 weeks divided by 12 months. Given that a T4 is not issued and Avtar's view that this is an honorarium, I also assume that it was not declared. I find that Avtar is capable of working at least these hours.

[231] I therefore find Avtar's Guidelines incomes are:

- a) 2021: \$4,800 (imputed rental income);
- b) 2022: \$4,800 (imputed rental income);
- c) 2023: \$18,050 (imputed income, consisting of \$4,800 imputed rental income + \$8,480 (\$1,060 x 10 months, social assistance) + \$4,800 (\$600 x 8 months, imputed employment income)); and
- d) 2024: \$29,470 (imputed income, consisting of \$4,800 imputed rental income + \$17,470 (\$1,060 x 2 months + \$1,535 x 10 months = \$1,470, social assistance) + \$7,200 (imputed employment income)).

[232] For the same reasons I have estimated Rajwant's 2024 income, I have imputed Avtar's 2023 and 2024 incomes. I expect them to be very close to the above figures. In the event my imputation is materially in error, for example, Avtar has been approved for CPP disability payments, I will similarly remain seized of this issue.

VI. Child Support

[233] Rajwant seeks retroactive child support from the date of separation and future child support for their son. Avtar does not dispute this based on his income.

[234] The Guidelines provide the framework for determining the amount of monthly child support payable. When there is no shared parenting (each parent has at least 40% of the parenting time), s. 3 states that the quantum is the applicable table amount.

[235] Based on the parties' Guidelines income, I find that Avtar owes retroactive child support from separation until December 31, 2024 of \$5,424, calculated as follows:

- a) Nov. to Dec. 2021: \$0;
- b) 2022: \$0;
- c) 2023: \$142 x 12 months = \$1,704; and
- d) 2024: \$310 x 12 months = \$3,720.

[236] The monthly child support payable as of January 1, 2025 is \$310. No claim was advanced for the monthly support of the daughter. She is attending post-secondary education part-time and works about 20 hours per week. Rajwant has used money from the RESPs to help pay for the daughter's post-secondary expenses.

[237] Rajwant seeks an order that Avtar pay retroactive and ongoing Guidelines s. 7 expenses proportionate to their incomes. Since separation, Rajwant has paid all of these expenses. I find the retroactive s. 7 expenses which are proven are \$3,164. The average proportionate split since separation is 65/35 for special expenses, and Avtar's portion is \$1,107.

VII. Spousal Support

A. Legal Principles

[238] In determining whether there is entitlement to support, the court must consider the objectives of spousal support in s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. That section states:

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

[239] If entitlement is established, in determining the amount and duration of support, the Court must also consider the factors in s. 15.2(4) of the DA. That section states:

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

- [240] There are three bases upon which a spousal support award may be made: compensatory (economic advantage and/or disadvantage); non-compensatory (needs-based); and contractual: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 49, 1999 CanLII 715. In determining if there is entitlement to support, the Court begins with the objectives of spousal support. No objective is paramount and all must be considered: *Bracklow* at paras. 35-37; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-852, 1992 CanLII 25.
- [241] Compensatory support is intended to provide for an equitable sharing of the economic consequences of the relationship or its breakdown. Both economic advantage and disadvantage are considered. The longer the relationship, the greater the presumptive claim to an equal standard of living upon its breakdown: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50-52, leave to appeal to SCC ref'd, 33002 (28 May 2009); *Bracklow* at paras. 34, 39; *Moge* at 861-863, 870.
- [242] Non-compensatory support is intended to provide needs-based support where compensatory principles do not apply. Its goal is to narrow the gap between the needs and means of spouses upon marital breakdown. Need is a relative concept, and goes beyond the basic necessities of life. It is informed by the circumstances of the parties, including the length of the relationship and the standards of living enjoyed during and after the relationship: *Chutter* at paras. 54-59; *Bracklow* at paras. 36, 41.
- [243] The "means" of a spouse includes all pecuniary resources, capital assets, employment income and earning capacity, and "other sources from which the person receives gains or benefits": *Leskun v. Leskun*, 2006 SCC 25, at para 29.

B. Positions of the Parties

- [244] Avtar sought needs-based support. He specifically did not advance a claim for compensatory support. Avtar argued that the duration of support should be indefinite, and that the quantum should be in the high range to more evenly distribute the net disposable income ("NDI") in the two households.
- [245] Rajwant argues that Avtar has not established any entitlement to support.

C. Analysis

- [246] For the reasons below, I find that Avtar has established needs-based entitlement to spousal support, but it is not as extensive as alleged. I do not agree with Avtar's submissions regarding the parties' relative financial positions. While I agree that Avtar's employment income is less, and may remain less than Rajwant's for the future, the "condition, means, needs and other circumstances" of the parties are very different. I find that Avtar's financial position is much better than he submitted. I find that support should be awarded in the mid-range, and that there should be a review when Rajwant moves from the upstairs suite of the 1027 Property as I find there will be a material change in the parties' circumstances at that time.

- [247] At the time of separation Avtar had not worked outside the home for 12 years. I find that Avtar's mental health in the time period immediately after separation prevented him from working, but since his mental health has improved, he now has some capacity to work. His prognosis is uncertain. He is 54 years old. Since separation, and for the immediate time-being, he needs financial support.
- [248] As for the condition, means, needs and other circumstances of the spouses, I consider the following four points regarding Avtar. First, Avtar currently owns substantial excluded property that is income-generating. He has a 25% interest in the 1027 Property that is worth \$1.81 million, 50% of which is held in joint tenancy with Gurbuchan.
- [249] Second, as explained below, since separation Avtar has effectively received, through Manjit, 100% of the revenue from the rental suite. For the 10 years prior to separation, he and Rajwant received 100% of the rental revenue, less some small expenses, even after Manjit was transferred an interest in the property in 2018. I find that Avtar will likely continue to receive all, or at least 25%, of the income from the 1027 Property in the future.
- [250] Third, as a corollary to the above, I find that Avtar does not owe a large debt to Manjit as he claims, although he may owe a much smaller amount. At trial, Manjit tendered evidence of cheques supporting "loans" to Avtar of more than \$83,000. The components of this alleged debt are Manjit paying some of his legal fees, all of his rent, and giving him spending money since separation. For almost all this time, Avtar's rent has been \$1,100 per month, and when Manjit gives cheques directly to Avtar, they are for \$500 per month. Manjit also includes all of the property taxes for the 1027 Property in this amount alleged to be owing by Avtar. The major source of the funds that Manjit has used to pay Avtar's expenses is the \$1,600 per month rent from the downstairs suite which Manjit began collecting from the tenants at the 1027 Property after separation. Manjit testified that she used the rental revenue to pay Avtar's expenses. Manjit and Avtar call it a loan or debt, yet Manjit never attempted to collect this alleged debt on behalf of her parents for the 10 years prior to separation, or after part of the title was transferred to her in 2018, nor did the parents ever treat it as debt. Avtar testified that this was his parents' generosity allowing him and Rajwant to keep the rent. I do not accept that immediately after separation, the rental income that Avtar and Rajwant had received for 10 years, suddenly changed its character from gift or income, to debt. I find that Avtar will never be expected to repay at least this portion of the alleged debt which has been funded from the rental income of the 1027 Property since separation. It is not actual debt.
- [251] I note again that Avtar did not tender in evidence any bank statements showing the \$68,000 in mutual funds he liquidated and gave to Sarbjit, and which he testified he had spent, or explain the \$45,000 cheque written on the line of credit.
- [252] Fourth, Avtar wishes to move back into the 1027 Property and live in the downstairs suite. Manjit seeks vacant possession of the upstairs suite. There was no evidence that Manjit was opposed to Avtar's plan. I will be making an order for vacant possession of the upstairs

suite, and I find that once that takes place, Avtar will move into the downstairs suite and the upstairs suite will be rented, or vice versa. Avtar will therefore have free housing and rental income, just as he and Rajwant have had for many years. An expert report filed at trial, opined that the rental value of the upstairs suite is \$2,800 per month.

- [253] In contrast, Rajwant has no excluded property, has had both children living with her although their adult daughter helps buy groceries, has had primary care of her son, and has worked full-time. She will have incurred legal fees as well. While she has what appears to be secure employment, she has little capital compared to Avtar. If she and the children do not live in the upstairs suite, she will incur a rental cost of about \$2,800 per month. However, until then, in considering the quantum of past spousal support, I also consider that Rajwant has had a significant benefit of free housing in the upstairs suite of the 1027 Property since separation.
- [254] As the marriage was over 20 years, the SSAG indicate indefinite support. Indefinite does not mean forever. It simply means that support continues until a court order or agreement otherwise, and may be varied upon a material change in circumstances or an ordered review.
- [255] As for quantum, based on the Guidelines incomes findings above, and without taking into account the parties' effective income or free housing, the SSAG ranges (low to high) are as follows:
- a) 2021: \$1,601 to \$2,135, with household NDI of 68% to Rajwant for the low range and 62% for the high range;
 - b) 2022: \$1,155 to \$1,540, with NDI of 70% to Rajwant for the low range and 64% for the high range;
 - c) 2023: \$1,255 to \$1,673, with NDI of 61% to Rajwant for the low range and 57% for the high range; and
 - d) 2024: \$1,173 to \$1,564, with NDI of 58% to Rajwant for the low range and 54% for the high range.
- [256] Rajwant and the children have received \$2,800 per month in free housing, and Avtar has effectively also received free housing or benefits through an additional \$1,200 per month (\$1,600 per month downstairs rental revenue less \$400 per month I have already included in his income). Those must be factored into the above figures. When I do, at mid-range, this results in an average NDI split of about 65/35 over the three years since separation in favour of Rajwant. The 2024 split is 60/40.

- [257] I do not accept Avtar's argument that the high range is appropriate because the NDIs for each household should be equal. There are three people living in Rajwant's household, only two of whom have been included for the above calculations, as no child support claim is made for the daughter. However, in my view, the daughter would have a difficult time attending post-secondary education if she did not receive subsidized housing by living with Rajwant.
- [258] Considering all of the above, I find that support in the mid-range is appropriate up until the time Rajwant and the children move from the upstairs suite of the 1027 Property.
- [259] As the retroactive support for 2021 to 2023 will be paid as a lump sum, I have calculated the mid-point after-tax figures from DivorceMate calculations to account for the tax deduction that Rajwant otherwise would have had, and the taxes Avtar would otherwise have had to pay. I have not used after-tax figures for 2024 as the payments can be claimed and reported next year when filing tax returns. To be clear, the order for 2024 is a monthly periodic order retroactive to January 1, 2024. The total is retroactive spousal support owing by Rajwant to December 31, 2024 is \$48,372 calculated as follows:
- a) 2021: \$3,084 (\$1,542 x 2 months);
 - b) 2022: \$13,800 (\$1,150 x 12 months);
 - c) 2023: \$15,060 (\$1,255 x 12 months); and
 - d) 2024: \$16,428 (\$1,369 x 12 months).
- [260] The monthly amount of spousal support payable by Rajwant to Avtar as of January 1, 2025 is \$1,369.
- [261] Avtar and Rajwant were able to live on a single modest employment income and have good housing in Vancouver because they were provided with free housing and given the rental income from the 1027 Property. They received an approximate \$4,600 after-tax benefit (\$2,800 + \$1,600 current value) every month for about 10 years prior to separation, and now only Avtar will receive likely all or at least most of that substantial benefit. This was a long marriage, and their son is only 11. To the extent possible there should be a comparable standard of living in both households. The economic consequences to Rajwant and the son of the breakdown of the marriage are significant, and more than those to Avtar of no longer receiving the benefit of Rajwant's income.
- [262] To be clear, my orders for past and continuing support assume that Rajwant and the children will continue to live at the 1027 Property rent free, and that there is no shared parenting. I am making an order for a review of child and spousal support once Rajwant moves from the 1027 Property, as that will be a material change. I am reluctant to do this after a long trial, but given the uncertainty of Avtar's health conditions and his capacity to work, where Rajwant and the children will live, and the possibility of shared parenting discussed below (unlike s. 3 child support, the condition, means, needs and other

circumstances of the parties are considered under s. 9 of the Guidelines when there is shared parenting: *Lozinski v. Lozinski*, 2017 BCCA 280), in my view, such an order must be made.

VIII. Parenting arrangements

[263] The parties agree on a number of parenting arrangement orders. The issues are parenting time and parental responsibilities. They seek orders under the FLA.

A. Legal Principles

[264] When making orders for parenting arrangements, the court must consider the best interests of the child only: FLA, s. 37(1). All the child's needs and circumstances must be considered, including the factors set out in s. 37(2). Those factors are:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

[265] An order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being: FLA s. 37(3). In making a parenting order, the court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor: FLA s. 37(4).

B. Evidence

- [266] Currently, Avtar has parenting time with their son three times a week for four hours (Wednesdays, Saturdays and Sundays). Rajwant testified that both their daughter and son attend the parenting time. Sometimes they come back within an hour. The parenting time takes place at fast food restaurants. Sometimes their son is a little upset when he returns, and he has told her it is a waste of time to go because they just eat. He has reported that Avtar is angry, has not changed, and does not like to talk. Sometimes their son refuses to go and tells his sister to go, but Rajwant encourages their son to go and he does.
- [267] Avtar testified that he is living in a basement bachelor suite. It is small, sparsely furnished, and not conducive for parenting time. This is why he usually has parenting time at restaurants, which is what their son chooses. Once he moves to more suitable accommodation, he wants to have equal parenting time. As noted previously, he plans to move into the downstairs suite of the 1027 Property.

C. Positions of the Parties

- [268] Rajwant seeks an order that the current parenting time arrangement remain in place. She is not opposed to an increase in parenting time for Avtar in the future if their son is comfortable with it, but opposes such an order at this time. Further, she seeks an order that she have sole parental responsibilities while maintaining shared guardianship with Avtar. She argues she has always been the primary care giver, and that since separation she has been solely responsible for the care of their son. Although Rajwant is seeking sole parental responsibilities, at her examination for discovery and at trial, she agreed that if Avtar wants to make joint decisions with her as to what is best for their son, she was agreeable to that.
- [269] Avtar is content to have the current parenting schedule remain in place, but submits that there should be a prospective order made now for increased, nearly equal, parenting time once he notifies Rajwant that he has obtained more suitable accommodation. He opposes Rajwant having sole parental responsibilities.

D. Analysis

- [270] There was little evidence regarding the son's health and emotional well-being or views other than Rajwant's hearsay testimony. The son's reluctance to have parenting time at a fast-food restaurant is understandable. Both parents have had a role in their son's life up to separation, but I have found that Rajwant had greater involvement. The son has lived solely with Rajwant for the past three years. There was little evidence of the nature and strength of the relationships, other than it is clear that both parties love their son. There was no evidence to suggest that either Rajwant or Avtar were not capable of being good parents. Avtar did have MCFD involvement when the parties separated and he was charged, but that file was closed and there was no evidence of any capacity concerns in the two years since then, or any before the events of the separation and Avtar's mental health crisis.

- [271] In my view, there is no present established risk of family violence. Avtar has had regular parenting time since it was ordered two years ago. Rajwant testified about one historical (more than five years ago) isolated event of Avtar throwing a water bottle toward their son, and use of bad language. She also testified that prior to the parties separating, Avtar made comments which she interpreted as a veiled threat that Avtar would harm her and the children. Avtar denies any family violence on his part, or threats of violence, and said he would never hurt his children, and has never threatened to do so. He denied the charges against him. The fact that Rajwant is agreeable to parenting time leads me to conclude that she has no present concerns about a risk of family violence. There are currently no civil or criminal proceedings relevant to the safety, security and wellbeing of their son.
- [272] As stated in *K.D.P. v. A.R.K.*, 2011 BCSC 1085, at paras. 1-2, no parents are perfect. The court must not lose sight of the strengths that a party brings to the parent-child relationship. In my view, it is in the son's best interest that the relationship with Avtar be fostered and that Avtar have a strong presence in his son's life. Given that it has been over three years since the parties separated and Avtar has had limited parenting time, any increase will have to be gradual. There is considerable uncertainty about where Rajwant and the children will end up residing. Where Rajwant ultimately finds accommodation will affect how any increase in parenting time is structured. In my view, the order Avtar proposes (immediately proceeding to overnights and shared parenting once he gets accommodation) should not be ordered at this time as it is not in the son's best interest. Rather, I will make an order for a continuation of the present schedule, and once Rajwant vacates the 1027 Property, and by no later than June 30, 2025, the parties may bring an application without the need to prove a material change in circumstances, if they cannot agree on a new schedule. I expect that they will be able to agree, as the clear focus of this trial was on property division and support and not parenting arrangements.
- [273] Finally, I note that in closing submissions, Avtar sought a number of orders concerning holiday parenting time, travel with their son, and pick up responsibilities and locations. In the absence of any notice that these orders were being sought, any evidence concerning them, and no consent from Rajwant, I decline to make such orders. Avtar can make an application, on notice, if he seeks such orders.

IX. Manjit's Counterclaims

A. Tortious Abuse of Process

- [274] Manjit's counterclaim seeks damages against Rajwant for "wrongful filing" of a CPL against the 1078 Property and Manjit's interest in the 1027 Property. The cause of action is the tort of abuse of process. In argument, Manjit abandoned the claim for abuse of process regarding the CPL on the 1027 Property, submitting that it was subsumed within her claim for occupational rent.

1. Legal Principles

- [275] The elements that must be established for the tort of abuse of process are: a collateral and improper purpose; an overt act in furtherance of a collateral and improper purpose; and damages as a result of the wrongful use of the legal process: *Oei v. Hui*, 2020 BCCA 214 at paras. 5-6.
- [276] The filing and maintenance of a CPL may be a tortious abuse of process where it was done knowingly for an improper purpose and which is collateral to the ostensible purpose of the underlying proceeding. It is not sufficient to show only that the plaintiff was ultimately unsuccessful in the underlying action: *Phoenix Homes v. Takhar*, 2023 BCSC 184, at paras. 540-541.
- [277] The filing of a CPL is an extraordinary remedy. In *601 Main Partnership v. Centura Building Systems (2013) Ltd.*, 2024 BCCA 76, the Court addressed the tort of abuse of process in connection with a claim of builder's lien, and in doing so referenced abuse of process in connection with CPLs:
- [128] All of these provisions evidence the fact that the filing and maintaining of a builders lien is conduct which is outside the underlying debt or enforcement action. In that respect, liens resemble certificates of pending litigation, the filing of which for an improper purpose may amount to an abuse of process, even without specific evidence of an ulterior motive. For example, in *Feng et al v. Chan and Woo*, 2007 BCSC 251, the alleged abuse of process consisted of the wrongful filing of a certificate of pending litigation by a party who knew he had no claim in law or at equity to do so. D. Smith J. (as she then was) held that the filing of a certificate founded upon a misleading allegation amounted to an abuse of process.
- [129] To use the words employed by Macintosh J. in *Atlas Painting*, liens are "powerful pre-judgment weapons". Their use should be carefully scrutinized. As noted in *Guilford* at 405-406: "mechanics' liens, lis pendens and garnishing orders are sometimes, though not often, used by unscrupulous persons to achieve results which could not otherwise be obtained".
- [278] The essential pre-condition for the filing of a CPL is a claim to an interest in land: s. 215(1) of the LTA; *Bilin v. Sidhu*, 2017 BCCA 429 at para. 55.

2. Evidence

- [279] Manjit briefly testified that she was not able to access the equity in the 1078 Property as she had hoped to do when her daughter was to be married, but did not quantify any damages.
- [280] Rajwant denied any improper purpose in filing the CPLs and rejected the suggestion that she filed the CPL on the 1078 Property because the attempted transfer to her of an interest in the 1027 Property failed.

3. Positions of the Parties

[281] Manjit argues that Rajwant had no legitimate claim to an interest in the 1078 Property. She submits that Rajwant filed a CPL against the 1078 Property with the intent to tie it up as a revenge tactic for the failed transfer of interest in the 1027 Property. Manjit submits that there is no compelling evidence that would have allowed Rajwant to file a CPL against the 1078 Property. This is supported by the fact that at trial, Rajwant allegedly claimed compensation rather than an order declaring that Avtar is a 25% owner of the 1078 Property.

4. Analysis

[282] For the reasons below, I find that Manjit has not established the tort of abuse of process and this claim is dismissed.

[283] As I have already indicated, Rajwant's pleadings are lacking. With respect to the two properties, they do not plead material facts which support her trust claims. However, prior to trial, the respondents did not apply to strike her pleadings. I conclude that counsel understood amongst themselves the basis of the claims being advanced, despite the lack of material facts in the pleadings. Nor was there evidence that Manjit brought an application to have the CPL removed on the basis of hardship.

[284] I do not agree that the CPL was filed for an improper purpose. Rajwant claimed a resulting trust in the 1078 Property based on the alleged statements of Gurbuchan, Avtar and Manjit, and the text and audio messages. Although Rajwant did not succeed, her claim was not completely baseless. Given that I found that Avtar did contribute in some way to the purchase price, there was some basis to her allegations. Contrary to Manjit's submissions, Rajwant did seek a declaration that Avtar was a 25% beneficial owner of the 1078 Property. I find that Rajwant did not advance a claim when she knew she had no claim in law or in equity, or that she was using the CPL improperly as a bargaining tool. Further, Manjit's testimony regarding not being able to access the equity in her property was very brief and not supported by any corroborating evidence. My impression is that was more in the nature what she is hoping to do one day.

B. Occupational Rent and Vacant Possession of the 1027 Property

[285] Manjit claims rent against Rajwant for occupation of the 1027 Property since separation. Manjit claims \$2,800 per month, but submits that she is prepared to consider some set-off because there are other owners and Rajwant would be entitled to one half of Avtar's interest. Gurbuchan is not making a claim for occupational rent, yet Manjit claims rent for more than her 25% interest in the property. Manjit also claims vacant possession of the 1027 Property. This is so the Bath family can decide what to do with the property, free of having to deal with Rajwant.

1. Legal Principles

- [286] In family law proceedings, where one spouse leaves the matrimonial home after separation, a claim for occupational rent is not treated as a stand alone claim. Manjit's claim is different from the usual situation. Although brought within the family law proceedings, she seeks occupational rent as a stand alone claim because she is not a party to the marriage. In *Storey v. Terry*, 2020 BCCA 30, the Court approved a passage which highlights the differences between the two situations:
- [27] The proper approach to considering claims for occupational rent where one spouse leaves the family property was accurately summarized by Justice Fleming in *J.D.G. v. J.J.V.*, 2016 BCSC 2389:
- [226] At common law, a co-tenant is entitled to claim occupation rent when he or she has been ousted from property. Absent an ouster from the property, there is no claim. However, if the tenant in possession seeks to recover property expenses from the departed tenant, the court retains a discretion to set off occupation rent against the expense claim. There is no absolute right to such a claim or set off. Occupation rent is an equitable remedy (L.M.R. at paras. 27-29, 31, 32).
- [227] In *Stasiewski* the Court of Appeal held that in family proceedings occupation rent is not a stand-alone claim but should be considered in deciding whether to order an unequal division of family property. In *Shen v. Tong*, 2013 BCCA 519, Justice Smith in concurring reasons identified the objective of an award for occupation rent as doing what is "'just and equitable' between the parties, albeit within the parameters of s. 65(1) of the FRA" (at para. 94).
- [287] Manjit's claim falls more into the former situation, although there are aspects of both situations here. In either situation, awarding occupational rent involves the exercise of judicial discretion to do what is just and equitable, and the court should take a cautious approach: *Lennox v. Lennox*, 2022 BCCA 44 at paras. 46, 49-50.

2. Evidence

- [288] Once Rajwant and Avtar separated, Manjit unilaterally took over management of the tenants in the downstairs suite of the 1027 Property and collected all the rent. There was a dispute with the existing tenants at the time of separation, and Avtar brought proceedings in his name (or Manjit brought them in his name) under the Residential Tenancy Act, R.S.B.C. 1996 c. 78 [RTA]. The tenants moved out in February 2022. Manjit testified that once the tenants moved, she hired contractors to clean and repair the suite, and it was re-tenanted in April 2022.
- [289] On December 22, 2021, Manjit served Rajwant with a "Two Month Notice to End Tenancy for Landlord's Use of Property" (the "Notice"), requiring Rajwant and the children to move out of the 1027 Property by March 1, 2022. This notice was issued pursuant to the RTA. The reason stated in the Notice for termination of the "tenancy" was that the rental unit will be occupied by the "father or mother of the landlord or landlord's spouse".

- [290] On January 14, 2022, Rajwant's counsel notified Manjit's counsel that Rajwant had commenced an action that day claiming that the 1027 Property is family property and that Rajwant was not a tenant. Rajwant's counsel demanded that the Notice be withdrawn. Manjit refused. It is unclear what happened to the RTA proceeding.
- [291] Manjit testified that prior to separation, she did not consider her brother or Rajwant to be tenants of the 1027 Property. She issued the Notice because Avtar was no longer residing in the house, and not allowed to go there, and her mother could not go into the house because of her health. She either needed to rent the property so the family could give Avtar expense money without dipping into their own pockets, or sell the property, although she had no intention of selling it. Manjit agreed that Avtar was collecting the rent from the 1027 Property prior to separation, and she had never asked for a share of the rent. She said she did not request this previously because her brother was sick and not employed.
- [292] About the time that Manjit served the Notice, disputes also arose between Manjit and Rajwant regarding Manjit's access to the downstairs rental suite to carry out the cleaning and repairs. Rajwant had a number of complaints that Manjit was disturbing their enjoyment of the property. Manjit denied this.
- [293] Manjit testified that, through her counsel, she asked Rajwant to pay rent for the upstairs suite. On March 15, 2022, Manjit's counsel wrote to Rajwant's counsel, demanding that Rajwant enter into a rental contract for \$2,800 per month for the upstairs suite, and advising that Manjit will be renting out the downstairs suite for \$1,600 per month, and will account for one quarter of this to Avtar. Rajwant did not enter into a rental agreement, and has not paid rent since separation.
- [294] On May 11, 2022, Associate Judge Krentz ordered that Rajwant have exclusive occupancy of the upstairs suite of the 1027 Property and contents, and made other orders to address the disputes between Manjit and Rajwant regarding access to and peaceful possession of the property.

3. Analysis

- [295] For the following reasons, I dismiss Manjit's claim for occupational rent.
- [296] In my view, there was no ouster of Manjit from the 1027 Property. Manjit has not lived at the 1027 Property since 1992. There was no evidence she attended the property between 2018 when a 25% interest was transferred to her, and the separation. Rather, I find that Manjit attempted to oust Rajwant from the property by serving the Notice.
- [297] In addition, in my view, the circumstances weigh against granting such an order. Manjit served the Notice to end a tenancy when she agreed that she had never considered Rajwant and Avtar to be tenants, and the Notice gives a reason that is not true. Gurbuchan was not capable of moving back to the 1027 Property because of her health. From 2018 when Manjit was transferred an interest in the property and up to separation, Manjit had not requested or received any rental income from the 1027 Property, and at trial Gurbuchan did not seek

an order for occupational rent. Finally, for Rajwant and Avtar, the people who actually had been in receipt of the rental income for the past 10 years, I have already taken into account the benefits both received since separation in the way of free housing and rental income.

[298] Finally, I make an order for Rajwant to vacate the upper suite of the 1027 Property no later than June 30, 2025. Rajwant's interest in the property through Avtar is satisfied by a compensation order. In making this order, I have considered that the son is only 11 years old and a move mid-way during the school year, may mean that he has to change schools, and will at a minimum disrupt his school year. No rent will be payable during this time. Of course, nothing prevents the parties from coming to an agreement that would allow Rajwant and the children to remain in upper suite of the home.

X. Divorce

[299] Rajwant and Avtar meet the requirements for a divorce.

XI. Costs

[300] Each party seeks costs, however, asked the court to delay making an order for costs until the results of the trial are known.

XII. Orders

[301] I make the following orders:

A. Divorce

1. Subject to section 12 of the DA, Rajwant and Avtar, are divorced from each other, the divorce to take effect on the 31st day after the date of this order.

B. Property and Debt Division

2. The restraining orders made January 18, 2022 and April 26, 2022 pursuant to s. 91 of the FLA, are terminated as of the date of this order.
3. Rajwant's claim that Gurbuchan and Manjit hold the 1027 Property in trust or on a constructive trust for the benefit of Avtar and Rajwant, is dismissed. The value of the family property in the 1027 Property is \$71,250, which shall be equally divided between Rajwant and Avtar, by Avtar making a compensation payment to Rajwant of \$35,625 within 90 days of this order.
4. Rajwant's claim that Manjit holds 25% of the 1078 Property in trust for the benefit of Avtar as a result of an alleged resulting trust is dismissed. The 1078 Property is not family property, and any alleged debt of \$65,000 owing to Avtar arising out of the purchase of the 1078 Property, is excluded property. Rajwant's claim that Manjit owes Rajwant and Avtar a debt of \$3,500 which is alleged to be family property, is dismissed.

5. The following bank and non-registered accounts are family property, which shall be equally divided between Rajwant and Avtar, by Avtar making a compensation payment to Rajwant of \$33,597 within 90 days of this order. Thereafter, each party will keep the respective bank accounts in their own name:

Rajwant

Avtar

TD account 2827

\$11,789

TD account 3003

\$11,504

TD TFSA 0382

\$0

Avtar CIBC account 2338

\$1,705

CIBC non-registered 8806

\$68,740

Avtar GICs

\$20,043

Total

\$23,293

\$90,488

Equalization payment

\$33,597

6. The TD account 4038 in the name of Rajwant, her mother, and sister is not family property.
7. Avtar's RRSP is family property, and shall be equally divided between Rajwant and Avtar, by Avtar making a spousal rollover of one half of the value at the time of rollover, pursuant to s. 146(16)(b) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp), within 90 days of this order.
8. The RESP accounts in Rajwant's and Avtar's names are family property. Within 90 days of this order, they shall each add the other as a subscriber to the accounts. Rajwant and Avtar shall continue to manage and hold the RESPs to be used for the post-secondary education expenses of their daughter and son. Upon the youngest child completing post-secondary

education or by the son's 22nd birthday, whichever is earlier, any remaining funds within the RESPs will be divided equally between the parties. Except that if either party has made contributions to these accounts after the date of this order, and they have not been used for post-secondary expenses, those funds shall not be divided, but returned to the party who made the contribution. Payment of post-secondary expenses shall first be paid from RESP amounts in existence at the time of this order. Any tax consequences shall be paid in proportion to the amount received by each party. For greater clarity, the RESPs which are family property are Rajwant's accounts ending in 2641, 9743 and 8972, and Avtar's account ending in 7324. Rajwant and Avtar shall make all decisions relating to the RESPs jointly. Neither party will draw down any funds without the express consent of the other.

9. By consent, the two vehicles owned by the parties are family property and shall be equally divided by Rajwant retaining for her sole use and ownership the Toyota Venza in her name, and by Avtar retaining for his sole use and ownership the Nissan vehicle in his name.
10. Within 90 days of this order, Avtar shall provide Rajwant with a written list of household chattels he would like to receive from the 1027 Property, and within two weeks, Rajwant will either provide those chattels or respond as to why she will not do so. If the Rajwant and Avtar, cannot agree on division of household chattels, they have liberty to apply.
11. The balances owing on the credit cards of Rajwant and Avtar at the date of separation are family debt. As between Rajwant and Avtar, this family debt shall be divided by each being responsible for the debt on the credit cards in their own name. Any further credit card debt that has been incurred by Rajwant and Avtar post-separation is not family debt. If either Rajwant or Avtar is a secondary card holder on the credit card of the other, within 90 days of the date of this order, they shall remove the secondary card holder from that account.
12. Avtar's CIBC line of credit 2933 is not family debt.
13. By consent, except as otherwise provided in this order, as between Rajwant and Avtar, each party will be solely responsible for all other debts in their own name, whether disclosed to the other party or not, and shall indemnify and keep harmless each other against all claims, costs and expenses in respect of those debts.

C. Pensions

14. By consent, Rajwant's and Avtar's unadjusted pensionable earnings under the Canada Pension Plan are family property and shall be equalized under ss. 55, 55.1 and 55.2 of the Canada Pension Plan, R.S.C. 1985, c. C-8 with entitlement dates from October 17, 1999, to November 6, 2021. Either party may apply for equalization of the other's unadjusted pensionable earnings.

15. By consent, the benefits of the Canada Post Pension accrued to Rajwant under the Canada Post Corporation Registered Pension Plan, B.C. (OFSI Registration Number 57136) are family property and Avtar is entitled to a one-half share of the Canada Post Pension that accrued during the relationship of the parties, determined and divided in accordance with Part 6 of the FLA, with the entitlement dates from October 17, 1999, to November 6, 2021.
16. By consent, the benefits of the CIBC Pension accrued to Avtar under the CIBC Pension Plan (OFSI registration Number 55069) are family property and Rajwant is entitled to a one-half share of the CIBC Pension that accrued during the relationship of the parties, determined and divided in accordance with Part 6 of the FLA, with the entitlement dates from October 17, 1999, to November 6, 2021.

D. Guidelines Income

17. Rajwant's current Guidelines income for the purpose of determining child support is \$64,304.
18. Avtar's current Guidelines income for the purpose of determining child support and s. 7 expenses is \$29,400, consisting of \$4,800 imputed rental income, \$17,470 social assistance, and \$7,200 imputed employment income.

E. Child Support

19. Within 90 days of this order, Avtar shall pay to Rajwant retroactive child support of \$5,424 for the period from separation until December 31, 2024.
20. Pursuant to s. 15.1 of the DA, Avtar shall pay to Rajwant monthly child support in the sum of \$310 per month commencing January 1, 2025, and continuing on the 1st day of each month thereafter for so long as their son remains a child of the marriage as defined by the DA. Should the parties move to a shared parenting schedule, the parties shall adjust the amount of child support payable pursuant the Guidelines either by written agreement or further court order.
21. By consent, Rajwant and Avtar shall share their son's s. 7 expenses in proportion to their Guidelines income, such expenses to include their son's:
 - a) necessary medical and dental expenses, not covered by either Rajwant's or Avtar's insurance, including orthodontic treatment, professional counselling, prescription drugs, hearing aids and glasses;
 - b) reasonable, agreed costs for post-secondary education, including tuition books, mandatory school/university fees, less any RESPs, scholarships, bursaries, grants, or similar third-party funding;
 - c) extraordinary expenses for extracurricular activities that are agreed upon by the parties in advance in writing from time to time, which currently includes soccer;

- d) other expenses arising in the future that the parties agree qualify or, failing agreement, are determined by a court to qualify as special or extraordinary expenses within the meaning of the Guidelines.

(the "Special Expenses")

22. The amount of retroactive s. 7 expenses owing by Avtar to Rajwant to January 31, 2024 is \$1,107. Avtar shall pay this amount to Rajwant within 90 days of this order.
23. Commencing February 1, 2024, the current proportionate share of Special Expenses is Rajwant paying 65% and Avtar paying 35%. Rajwant and Avtar will provide the other with copies of any receipts claimed relating to Special Expenses within a month of incurring the expense, and within 7 days the other shall pay their proportionate share.
24. By consent, Rajwant shall maintain their son on her extended medical and dental benefit plans available through her employment for so long as the son is eligible and as such coverage is available under her plans.
25. By consent, the parties shall exchange their income tax returns with all attachments, notices assessments/reassessments and their most recent paystubs annually by June 1st each year so long as they have a child that remains a child of the marriage, as defined by the DA.
26. By consent, Rajwant and Avtar shall review child support annually, commencing in 2025, and revise child support, commencing July 1 each year, in accordance with the Guidelines.

F. Spousal Support

27. Within 90 days of this order, Rajwant shall pay to Avtar retroactive spousal support in the amount of \$48,372 covering the period from separation to December 31, 2024. This includes lump sum spousal support from separation to December 31, 2023, and monthly periodic spousal support from January 1 to December 31, 2024.
28. Commencing January 1, 2025, Rajwant shall pay Avtar monthly spousal support in the sum of \$1,369 per month on the first day of each and every month until further order of the court or written agreement between the parties.
29. Upon Rajwant vacating possession of the 1027 Property as ordered below, either party may seek review of spousal support. Rajwant and the children moving from the 1027 Property is a material change in circumstances.

G. Parenting Arrangements

30. By consent, Rajwant and Avtar are each guardians of their son pursuant to s. 39 of the FLA. If either guardian dies, the remaining guardian will be the guardian of their son.
31. Rajwant and Avtar shall each have the parental responsibilities of their son listed in s. 41 of the FLA: [counsel may insert the s. 41 responsibilities in the final order]

32. Rajwant and Avtar shall equally share parental responsibilities as follows:
- a) for the exercise of any parental responsibilities, both guardians must consult each other by email about any important decisions that must be made by using their best efforts to try to reach agreement concerning these important decisions;
 - b) during parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting their son provided they must advise the other parent of any matters that may be of a significant nature affecting their son; and
 - c) "important" or "significant" decisions or matters will include but not be limited to those regarding medical, dental, cultural, educational, religious, and the physical and mental and well-being.
33. In the event that the Rajwant and Avtar cannot reach agreement on a significant decision despite their best efforts, either may apply to court, pursuant to s. 49 of the FLA, with respect to any decision that they consider contrary to the best interests of their son.
34. Rajwant and Avtar shall communicate by email relating to matters pertaining to their son, including the sharing of information, consulting with one another, parenting time, scheduling communication times, child support and s. 7 expenses. Rajwant and Avtar may agree in writing to cease communicating by email.
35. By consent, Rajwant and Avtar will both encourage their son to maintain a strong and loving healthy relationship with each parent. Neither Rajwant nor Avtar will speak negatively about the other parent in their son's presence nor permit anyone else to do so.
36. Avtar shall have parenting time with their son as follows, and such additional times as agreed to by the parties in writing including email:
- a) every Wednesday from 3:30 p.m. to 7:30 p.m.;
 - b) every Saturday from 3:30 p.m. to 7:30 p.m.; and
 - c) every Sunday from 10:00 a.m. to 2:00 p.m.
37. Upon Rajwant vacating the upper suite of the 1027 Property, and by no later than June 30, 2025, the parties shall review the parenting time schedule. If the parties cannot agree on a new parenting time schedule, the parties are at liberty to bring an application for parenting time of their son, without the need to show a material change in circumstances.
38. By consent, the son may call Avtar using the home phone line at Rajwant's residence whenever he wishes to call and Rajwant will encourage the son to call weekly.

H. Manjit's Counterclaims

39. Manjit's claim against Rajwant for tortious abuse of process for filing of CPLs is dismissed.

40. Manjit's claim against Rajwant for occupational rent for the upstairs suite of the 1027 Property is dismissed.
41. By no later than June 30, 2025, Rajwant shall provide vacant possession of the upstairs suite of the 1027 Property. The order of Associate Judge Krentz dated May 11, 2022, continues until she vacates possession, after which it terminates. No rent is payable by Rajwant during this period.

I. Other Orders

42. By consent, Rajwant and Avtar shall each do all things reasonable or necessary to bring into effect the terms of these orders, and either party is at liberty to apply to this court for such directions and orders as may be necessary to facilitate and enforce the terms of these orders.
43. The style of cause of this proceeding is forthwith amended to reflect that Gurbuchan is represented in this litigation by her litigation guardian.
44. All other claims in the Notice of Family Claim and the Counterclaims are dismissed except as to costs.
45. If the parties cannot agree on costs, they may make arrangements to speak to the matter through Supreme Court Scheduling.

"Norell J."

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Prepared on 27 October 2026 · Esheria