

CANADA / JUDGMENT

Brazinski v. Brazinski

2022 BCSC 934

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 934 Brazinski v. Brazinski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brazinski v. Brazinski,

2022 BCSC 934

Date: 20220606

Docket: E123673

Registry: Kelowna

Between:

Sviatlana Brazinski

Claimant

And

Zbigniew Ryszard Brazinski

Respondent

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Appearing on her own behalf:

S. Brazinski

Appearing on his own behalf:

Z.R. Brazinski

Place and Dates of Trial/Hearing:

Kelowna, B.C.

February 8-11 and

February 25, 2022

Place and Date of Judgment:

Kelowna, B.C.

June 6, 2022

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Introduction

[1] The parties seek orders regarding the division of property and debts.

[2] The parties were married in 2003, after meeting approximately one month earlier. They separated On April 1, 2019. They were divorced in August 16, 2021.

- [3] The claimant seeks the equal division of property and debts. The respondent advances claims for the exclusion of some property from family property and/or for an unequal division of family property and debts.

Background

- [4] The claimant is 41 years old and works as a registered nurse with the Interior Health Authority. The respondent is 66 years old and was a self-employed painter. He retired from that business and now manages two rental properties in Arizona. Those rental properties comprise a portion of the property at issue in this trial.
- [5] The parties have two children. All issues relating to the children, including parenting and support, have been resolved in the Provincial Court of this Province. The respondent's claim for spousal support was dismissed in the Provincial Court. Neither party seeks any order in respect of those issues in these proceedings.
- [6] Prior to marriage, the respondent acquired two properties in Vancouver, British Columbia. The first was a townhouse at 939 East 8th Avenue ("East 8th"). It was acquired in approximately 1992 for \$189,000. The second was a single-family dwelling at 4512 Earles Street ("Earles Street"). It was purchased in approximately 1997 for \$250,000.
- [7] When the parties married they lived at East 8th. At that time Earles Street was rented out, as it had been by the respondent prior to marriage.
- [8] In early 2007, the parties were expecting their first child. They decided to tear down the existing residence on Earles Street and build a new family home.
- [9] East 8th was sold in August 2007 for \$435,000. At that time there was no mortgage debt. The evidence is that the mortgage had been paid out the year prior to the sale, although the precise balance and the source of funds to do so is not clear.
- [10] There is no evidence of the cost of demolition of the former home or construction of the new family home on Earles Street. At least some of the monies from the disposition of East 8th were used in the construction of the new home on Earles Street, but no details of the funding of the construction were entered into evidence.
- [11] The parties continued to reside in the new Earles Street home, until they moved to Kelowna in 2014.
- [12] The two properties in Arizona were acquired as investments. The first is described as "Watkin Street" and was purchased in 2012 for \$95,100. The second is located on Lydia Lane ("Lydia Lane") and was acquired in January 2013 for \$101,100. Both are single-family dwellings and have been revenue properties throughout the parties' ownership. Both were purchased and remain in their joint names.

- [13] The parties call this investment enterprise "Z & L AZ Properties". Rental revenue and expenses were deposited to and paid from a Bank of America account xxx6171. It was a joint account. Since March 2020, the income and expenses have flowed through a different Bank of America account numbered xxx4371, which is in the respondent's name. The respondent has assumed responsibility for the management of the rentals at his own instigation and has retained any net income.
- [14] The parties use a property management company in Arizona that attends to securing tenants, basic maintenance, and assisting with arrangements for larger maintenance and upkeep expenditures in consultation with the owners. Initially that was with both parties, and more recently is only with the respondent. They prepare statements accounting for the transactions that they are directly involved with.
- [15] The claimant began her education in nursing after the marriage. She incurred some student loan debt in the process.
- [16] By 2014 she had completed that education and accepted a position in Kelowna. The family moved to Kelowna as a result. They sold the Earles Street home for \$1,320,000. At that time there was a mortgage balance of approximately \$116,000.
- [17] They purchased a residence on DeHart Road ("DeHart Road") in Kelowna for \$385,000. That property was registered in the respondent's name.
- [18] In August 2014, the parties also purchased a vacant lot at 399 Stellar Drive ("Stellar Drive") in Kelowna. Neither party provided any evidence as to the purchase price of that lot. Stellar Drive is in the claimant's name.
- [19] In 2015 the parties began construction of what would become the family home on Stellar Drive. At completion and as a result of some relationship issues, the claimant initially moved in with the children. Subsequently, the respondent moved in. They continued to cohabitate in that home as the family home from November 2016 until separation in May 2019.
- [20] The parties have or had a number of bank/investment accounts. These include:
- Scotiabank TFSA xxx6936
 - Scotiabank TFSA xxx8488
 - Scotiabank xxx3416
 - Scotiabank RRSP xxx2667
 - Scotiabank RESP xxx7895
 - RBC xxx6358
 - Scotiabank RESP xxx4403
 - Scotiabank RESP xxx3546 (the respondent's form F8 financial statement lists this as a TFSA)

- Scotiabank Investment xxx5941
- Bank of America xxx6171
- Scotiabank xxx6381
- Scotiabank xxx0275
- Bank of America xxx5371

- [21] The parties have modest debt consisting of a mortgage on Stellar Drive of \$114,607.67 and a line of credit of \$147,703.36 as at April 30, 2019. That line of credit was obtained in approximately 2017, and it was used to pay out and consolidate a pre-existing line of credit (also acquired during the relationship), the student loan balance associated with the claimant's nursing education, and a loan that had been obtained to finance the purchase of a Nissan Pathfinder SUV. The new line of credit was also used to assist in the financing of the construction on Stellar Drive. These debts are in a Valley First Credit Union account #xxx9854.
- [22] The parties own three motor vehicles, which are the same vehicles they owned at the time of separation. The first is the 2015 Nissan Pathfinder, which has been retained by the claimant after separation. The second is a 2014 Mitsubishi in the respondent's name, which he has retained since separation. The third is a 1994 GMC, which has also been retained by the respondent.
- [23] The only evidence as to the values at the time of trial is very limited research done by the claimant via the internet and what is in the parties' form F8 financial statements. The latter are not supported in any objective way.
- [24] The Pathfinder was purchased in October 2016 for \$40,654. The full price was financed through RBC. In September 2017, the debt balance of \$37,641.29 was paid out through use of the new line of credit.
- [25] The 2014 Mitsubishi was purchased for \$15,000 in approximately 2016.
- [26] The 1994 GMC was purchased in 2008 for approximately \$11,000.
- [27] The parties have made a number of appearances and obtained a number of orders during the course of litigation. On September 28, 2020, Mr. Justice Crerar ordered that the claimant retain an appraiser to conduct appraisals of the DeHart Road and Stellar Drive properties. On December 15, 2020, Mr. Justice Verhoeven ordered that the respondent select an appraiser for the Stellar Drive property and the claimant select an appraiser for DeHart Road. On January 26, 2021, Mr. Justice Crossin ordered the respondent to provide banking records in respect of the Arizona properties. Specifically, that order provides:

5. By October 28, 2020, the respondent will provide copies of his Royal Bank, Scotia Bank and Bank of America account statements, including investment accounts, for the years 2018 and 2019. The respondent will further provide complete account statements for any other bank accounts or investment accounts that he has for the years 2018 to the present.
- [28] Justice Crossin also ordered the respondent produce property assessment documents for DeHart Road and permitted the respondent to arrange for appraisals of the two properties in Phoenix, Arizona. On December 6, 2021 Madam Justice Brown made an order as follows:
 1. By December 31, 2021, Ms. Brazinski is to file and serve the other party a list of debts represented in the line of credit with amount owed.
 2. Both parties to file and serve the other party all annual statements of RESP and pension accounts from the date of separation to the date of the trial.
 3. Mr. Brazinski is to file and serve the other party current tenancy lease agreements for the two USA properties and copies of all bank statements from the account where rental income deposited and such all monthly statements from the date of separation to the date of the trial.
 4. Costs to be left to the trial judge.
- [29] An appraisal on October 27, 2021 states DeHart Road is valued at \$635,000. A similar appraisal of Stellar Drive placed its value as of October 27, 2021 at \$1,275,000. A second appraisal of Stellar Drive as of December 20, 2021 places the value of that property at \$1,510,000. That appraisal has noted as a qualification: "the property was not personally inspected by the undersigned, however, it was viewed from the front Street on December 21, 2021. As well, a recent appraisal was supplied to the appraiser by one of the litigants for informational purposes only and several photos were provided".
- [30] Appraisals of the Arizona properties as of October 18, 2021 placed the values of Watkin Street at \$315,000 and Lydia Lane at \$345,000.

Issues and Analysis

Excluded Property

- [31] The respondent claims that certain property should be excluded property under s. 85 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The underlying basis for his claim is twofold.
- [32] First, he relies on his ownership of the two Vancouver properties, East 8th and Earles Street, prior to the marriage.
- [33] Second, he says that he was injured in a motor vehicle collision in December 2000. He testified that he received a settlement of his claim from ICBC in the amount of \$160,000 of which he netted, presumably after payment of legal expenses, \$93,957.

[34] Section 85(1) of the FLA includes the following:

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

- (a) property acquired by a spouse before the relationship between the spouses began;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
- (i) loss to both spouses, or
- (ii) lost income of a spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

[35] The claimant acknowledges that both the East 8th Avenue and Earles Street properties were owned by the respondent prior to the marriage.

[36] The claimant says she was completely unaware of the alleged ICBC settlement during the marriage and suggests that it is a fabrication by the respondent.

[37] The evidentiary requirements to prove an excluded property claim were discussed in *C.M v. N.L.*, 2020 BCSC 3 as follows:

[171] The legal test for establishing a claim for excluded property under s. 85 FLA is proof on a balance of probabilities by the party asserting an excluded property interest (*Shih v. Shih*, at paras. 42-44). There must be clear and cogent evidence. If there is no documentary proof, then recollection may establish the exclusion subject to credibility assessment (*Shih* at para. 43). Evidence by oral testimony must still be clear and cogent, not vague and assertive only (*Zellweger* at para. 64). This test was summarized in *Pisarski v. Piesik*, 2019 BCCA 129 at para. 24 as follows:

The onus rested on the appellant to prove her contribution was excluded property pursuant to s. 85. The proper test for establishing a claim to excluded property is proof on a balance of probabilities: *Shih v. Shih*, 2017 BCCA 37 at para. 42. Precision or mathematical certainty is not required, but to discharge the burden, the party seeking to prove property is excluded property must do so with clear and cogent evidence: *Shih* at paras. 40, 43. If documentary evidence is not available, the party seeking to exclude property will need to testify as to their recollection of the disputed transactions and that evidence will be scrutinized for credibility: *Shih* at para. 43. In balancing the evidence as a whole, the judge is permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties: *Shih* at para. 44.

[38] The Count went on to discuss the traceability of claimed excluded property:

- [172] Under s. 85(1)(g) FLA, the court must consider whether presumptively family property was derived from an excluded asset during the relationship. Property purchased after cohabitation is *prima facie* family property: but, excluded property may be traced into the property to support an exclusion claim (Zellweger at para. 64). In other words, excluded property may change forms.
- [173] Excluded property may be traced. The methodology to be applied to the tracing exercise is under debate. While it is unlikely that formal rules of tracing apply, given that a marriage is a joint endeavour and assets may become intertwined as the relationship continues, the principles of formal tracing may guide the analysis (V.J.F. v. S.K.W. at 13 footnote 1; Jaszczewska v. Kostanski, 2016 BCCA 286 at para.59; Zellweger at para. 48). Precise and mathematical tracing runs counter to the simplicity and clarity sought in the exclusion regime (C.P. v. K.W.A. at paras.95-100). The court in Shih approved of wording used by the trial judge that where it is asserted that excluded property has changed character, each "link in the chain" required to trace the property into the currently owned asset must be established (Shih at para.39). The "link" methodology implies a common sense approach to tracing so that if there is sufficient linkage between an excluded asset and an asset existing as at separation, then the character of an asset as excluded remains (Wolfe v. Wolfe, (2003), 43 R.F.L. (5th) 223 at para. 51). A pro rata approach might also be used whereby the ratio of excluded property in relation to other contributions is calculated to achieve a fair result (Wolfe at para. 53; C.P. v. K.W.A. at para.136). A pro rata method may not be appropriate if there are gaps in the evidence or dissipation of the original asset (C.P. v. K.W.A. at paras. 136-138). Practicality suggests that an excluded property need be valued only at commencement and then on the valuation date (Zellweger at para. 48). If there is enough value in an asset at separation to account for excluded property, it should not matter that the excluded property was used for financing (Zellweger at para. 49).
- [174] Overall, the object of the tracing exercise is to balance ease, clarity and simplicity with fairness (C.P. v. K.W.A., at para.97). While the onus is on the party seeking exclusion to prove with clear and cogent evidence that property is excluded, the tracing exercise is not meant to be overly complicated or burdensome (C.P. v. K.W.A., at para. 93).
- [175] Excluded property may lose its character as excluded property or property derived from excluded property if all or part of it is advanced to the other spouse as a gift. The scheme of exclusion under the FLA builds on common law principles such as the presumption of advancement, rather than eliminate them (V.J.F. v. S.K.W. at paras. 74-79; Baryla v. Baryla, 2019 BCCA 22 at para. 33; Namdarpour v. Vahman, 2019 BCCA 153 at para. 31). A gift made to one spouse that was used to buy property in the donee's name or jointly may become the property subject to equal division upon separation, subject to rebuttal of the presumption of advancement. Thus, inter spousal gifts may constitute family property rather than excluded property.

East 8th and Earles Street

- [39] Here there is no evidence of the value of East 8th or Earles Street at the time the relationship began. During the trial, the respondent sought to introduce appraisals of each of the properties. Both were dated February 24, 2022. They were marked as exhibits for identification, but were not accepted as exhibits for consideration as evidence. My reasons were provided at the time, but I will summarize the essence of those here for perspective.
- [40] The trial began February 8, 2022, and was scheduled for three days. An interpreter was engaged to assist the respondent. The trial did not complete within those three days, largely as a result of the respondent's lack of preparation and organization and persistently tangential approach.
- [41] The interpreter was able to make herself available for an additional half day and the court was able to accommodate that on February 11, 2022. A further day was reserved to complete the respondent's case and to hear submissions of the parties. That occurred on February 25, 2022, the day after the appraisals were obtained by the respondent. The respondent did confirm that he had commissioned the appraisals during the adjournment of the trial.
- [42] In the result, there is only evidence of the purchase price of the Earles Street and East 8th properties long before the relationship between the parties began and sale prices long after the relationship began. There is no evidence of their value when the relationship began.
- [43] In respect of the Earles Street property, the sale was of a substantially altered property. After the marriage, the original home had been demolished and a new home and been constructed. No details of the costs of that construction or the source of funds for that construction were presented in evidence.
- [44] Even assuming that funds from East 8th were used in the construction of the new Earles Street home, there is no evidence of any intention to keep them separate or to pool funds with the claimant's funds without an intention to gift that portion that represented the value at the time of cohabitation. I also have no evidence of the claimant's direct contribution if any.
- [45] In *Pisarski v. Piesik*, 2019 BCCA 129, the Court considered an excluded property claim where the relative contribution of each spouse to a property was identified. The property was registered in joint names and mortgage payments were made from a joint account. The trial judge found that the applicant had taken no steps to keep these funds separate or document that the contribution at issue was to be kept or treated as separate, referencing *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 78. The trial judge concluded there had been "a confluence of real property (and proceeds)". The appeal was dismissed.
- [46] *Pisarski* serves as a useful example of an application of the law. Here, I only have the respondent's pre-marriage ownership. Further, the Earles Street property was sold and two other properties were purchased in Kelowna, with a new home constructed on one of them. The specific source of funds for the purchases, construction, mortgage payments, and

carrying costs is not in evidence. Without at least some accounting to trace the route of funds from Earles Street or East 8th, or to even know the amount of funds, it is difficult for the respondent to demonstrate his intention to keep these funds separate from family property.

- [47] The respondent has not presented documentary evidence to support a claim under s. 85(1)(g). The respondent offers little in his testimony except the fact of his prior ownership. He was at best vague, and there was nothing approaching the clear and cogent evidence required to support the excluded property claim.

The ICBC Settlement

- [48] The respondent testified that he was injured in a motor vehicle collision on February 21, 2000. He also indicated that the claim was settled, resulting in a settlement to him of \$93,000. The claimant testified that she had no knowledge of the motor vehicle collision or the claim and questions the validity of the assertion.
- [49] The only additional evidence provided by the respondent to support his testimony is a photocopy of two emails. The emails are hearsay, but the plaintiff's testimony is that the content of the emails reflect what actually occurred. One appears incomplete in that it is unclear who it was directed to. It contains the following, in part:

Based on the client ledger in PC Law:

- o his file settled for \$160,000
- o he received two payments totaling \$93,957

- [50] That email appears to be dated "11/3/2021".

- [51] The other email is directed to the respondent from a sender identified as "Van Horlick, Susan and SusanVanHorlick@ICBC.com" and is dated November 3, 2021. It references payment to Slater Vecchio on December 23, 2002 with a breakdown as follows: \$60,000 general damages; \$20,000 past wage loss; \$13,000 special damages; \$20,000 third-party costs and disbursements; and \$47,000 future wage loss.

- [52] Leaving aside the complainant's question as to whether the respondent even had such a claim, only a portion of the amount could be excluded. Section 85(1)(d) excepts any portion of the payment which is for lost income. In this case, that would include the \$20,000 for past wage loss. Future wage loss is not included by s. 85(1)(d).

- [53] There is no evidence as to how the net recovery of \$93,957 was determined from the gross settlement. I infer that it would not include the \$20,000 for third-party costs and disbursements. The net recovered by the respondent as a percentage of the gross payment, less the third-party costs and disbursements, represents 67% (\$93,957 is approximately 67% of \$140,000). Applying that percentage to the past wage loss implies that approximately \$13,400 of his net recovery was for that lost income, leaving \$80,575 as potentially excluded

property.

- [54] The respondent suggests that the settlement was kept separate and used to assist with his sponsorship of the claimant when she entered Canada just prior to their marriage. This is inconsistent with his evidence that the monies were received in 2015. I do note that the payout to his apparent counsel, according to the emails, was in 2002 so I treat the reference to 2015 as a misstatement.
- [55] The respondent says that the ICBC settlement monies were retained separately in an account by him. The only record produced in support is a bank statement for an account ending in 5941. The statement begins in December 2014. The first transaction that it shows is a purchase of some kind of investment on December 8, 2014 for \$60,051.56 USD. There is no information as to where that money came from. Of concern is that this account was not disclosed in the respondent's F8 financial statement sworn November 17, 2021 or apparently at any time prior.
- [56] In sum, if I accept that the respondent received the settlement in 2003 and if approximately \$80,000 of that net settlement was capable of being excluded property, the evidence to show the use of the funds between 2003 and separation is entirely lacking. Similarly, if the funds were held in some fashion as of the date of the marriage, there is nothing to link those funds to the previously undisclosed bank account in 2014. The respondent's non-disclosure of the account information until presented at trial raises serious questions about the credibility of his assertion.

Conclusions Regarding the Excluded Property Claims

- [57] Considering the respondent's evidence on this subject as a whole, it is apparent that he himself does not know exactly where the funds have gone. In such circumstances, there is no basis to support an intention to keep any amounts separate.
- [58] It is my conclusion that the respondent has not established an excluded property claim associated to East 8th or Earles Street or the alleged ICBC settlement.

Unequal Division

- [59] The respondent indicated that he is seeking an unequal division of family property. Although not clearly articulated, this appears to be advanced as an alternative to the excluded property claim and is based on the same evidence and assertions in respect of the pre-marriage ownership of the East 8th and Earles Street properties as well as the ICBC settlement.

- [60] The FLA includes the following:

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
 - (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.
- [61] Other cases have considered whether unequal division is appropriate after excluded property claims have been rejected. They include: *Venables v. Venables*, 2018 BCSC 1736 [Venables]; *Salman v. Astifan*, 2021 BCSC 1395 [Salman]; and *Hopson v. Hannon*, 2020 BCSC 794 [Hopson].
- [62] In *Venables*, the husband claimed an inheritance he had received during the marriage was excluded property. The Court found that he had gifted the inheritance, making it family property. The parties did not plead unequal division, but did state in their notice of family claim "such further and other relief as to this Honourable Court may seem meet and just" and "such further and other relief as may be available pursuant to the Family Law Act". The Court found that this permitted it to consider whether unequal distribution was appropriate.
- [63] In considering the unequal division claim, the Court examined what each party brought into the relatively short relationship of seven years. The husband brought into the relationship a house, savings, and investments. The wife brought no savings, a car loan, and some personal property of unknown value. Equal division would result in the husband receiving only \$33,000 more than when he came into the relationship. It was unclear what exact amount the wife came into the relationship with, but the equal division of family property would result in her receiving \$236,345.50, considerably more than what she had brought in. The Court unequally divided the family property, so that the parties were roughly equally better off than when they came into the relationship. The husband received \$134,302 more than what he had at the start of the relationship.
- [64] In *Salman*, the wife came into the marriage in a better financial position than the husband. She sought to exclude property on separation. Most of the property was found to have been gifted during the marriage. In addition to her exclusion of property claim, the wife argued for the unequal division of family property. The Court found there would be a significant unfairness if the family property was divided equally, but to a smaller degree than in *Venables*. The property was divided 57.5% to the wife, and 42.5% to the husband, largely based on the amounts that were claimed as excluded property.
- [65] In *Hopson*, the husband sought exclusion of assets, but the Court found these assets had become family property. A claim for unequal division of family property was also advanced. The wife had brought no property into the relationship, and the evidence of what the husband had brought into the relationship was lacking. While it seemed the husband had brought one property into the relationship, there was not a marked disparity between the financial positions of each party at the beginning of the relationship. The relationship was 14 years in length, during which more property was acquired. Although the contributions of each party were uneven, it did not warrant unequal division.

- [66] Here, the respondent testified that he sponsored the claimant's immigration to Canada, but no evidence regarding her financial situation on arrival was provided. There is no evidence of what assets or debt she brought to the marriage.
- [67] As indicated, I do not have evidence of the value of East 8th or Earles Street at the date of marriage. I do not know what the cost of the demolition of the original home or the costs of construction of the new home on Earles Street were. I do not have evidence of the source of the funds for the construction and specifically if any of the sale proceeds from East 8th were used.
- [68] The parties purchased the Arizona properties in 2012 and 2013 for \$95,100 and \$101,100, I presume in US dollars. The respondent stated that proceeds from East 8th were used for those purchases. He also suggested that his ICBC settlement funds were used to purchase the Arizona properties. He also indicated that the ICBC settlement funds were in the account xxx5941, during the period 2014 to 2020 as evidenced by the bank statement for that account. All of these propositions cannot be true and reflect poorly on the respondent's reliability.
- [69] Generally, I did not find the respondent to be a credible witness. He stated bare propositions without any supporting evidence. As noted above, he does not appear to know where funds from different sources went. His testimony was assertive of propositions but vague and unsupported by evidence.
- [70] In any event, the evidence that he did give would not support a finding of substantial unfairness in the equal division of family property.
- [71] Here, as described above, the respondent did bring East 8th and Earles Street into the marriage. He argued that the Arizona properties were purchased with the sale proceeds of East 8th. While it is possible, there is simply no evidence of it. It was also suggested that the East 8th proceeds were used in the construction of the new home on Earles Street. The Arizona purchases came years after the sale of East 8th and after the construction on Earles Street. There is nothing from the respondent by way of documents or testimony to indicate how much of the East 8th sale proceeds went to the Earles Street construction or to these purchases. It is a bare proposition.
- [72] There is simply not a sufficient basis to make a finding that equal division would be substantially unfair.
- [73] It is my conclusion that there should be an equal division of family property and family debts.

Valuation and Distribution of Family Property and Family Debts

- [74] This leaves for determination the valuation of the family property and family debts. Where applicable I will identify who is in possession of it.

[75] The process of how to achieve the equalization will require further submissions from the parties. I will return to this at the conclusion of these reasons.

[76] The FLA deals with valuing property and debt as follows:

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

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

[77] Section 97 of the Act provides a broad suite of powers to the court to give effect to the division of property.

97 (1) For the purposes of giving effect to a division of property or family debt under this Part or Part 6 [Pension Division], the Supreme Court may

- (a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and
 - (b) despite sections 94 (2) [orders respecting property division] and 215 (2) [changing, suspending or terminating orders generally], and subject to subsection (3) of this section, make any order that is necessary, reasonable or ancillary to give effect to the division.
- (2) Without limiting subsection (1), the Supreme Court may make an order to do one or more of the following:
- (a) declare who has ownership of, or right of possession to, property;
 - (b) require that title to a specified property granted to a spouse be transferred to, held in trust for, or vested in the spouse, absolutely, for life or for a term of years;
 - (c) require a spouse to pay compensation to the other spouse if property has been disposed of, transferred, converted, or exchanged into another form, or for the purpose of dividing the property;
 - (d) require partition or sale of property and payment to be made out of the proceeds of sale to one spouse or both in specified proportions or amounts;
 - (e) require property forming all or a part of the share of either or both spouses to be transferred to, held in trust for, or vested in a child;
 - (f) require a spouse to give security, in any form the court directs, for the performance of an obligation imposed by an order under this section, including a charge on property;

- (g) require a spouse to waive or release in writing any right, benefit or protection given by section 23 of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, section 19 of the Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373, or section 58 or 67 of the Personal Property Security Act;
 - (h) subject to subsection (3), declare that one spouse is responsible for payment of an item of family debt and must indemnify the other spouse for the item of family debt;
 - (i) require the sale of property for the purposes of paying an item of family debt;
 - (j) transfer property to a spouse.
- (3) An order in relation to family debt applies only as between the spouses and does not affect an agreement between a spouse and any other person.
- (4) Nothing in this section permits the Supreme Court to divide excluded property unless permitted under section 96 [division of excluded property].

Real Estate

1. Stellar - There are two appraisals of this property. The October 27, 2021 appraisal places the value at \$1,275,000. The December 2021 appraisal is based on a street view only together with a review of another unidentified appraisal. It does not specify what value the other appraisal had placed on the property, when it was carried out or any other information except that it was "supplied to the appraiser by one of the litigants for informational purposes only and several photos were provided". This lack of information does not provide a sound foundation to scrutinize the opinion. I reject this appraisal in favour of the October appraisal which was based of a full viewing.

This property is currently in the possession of the claimant and is her principal residence.

2. DeHart - There is one appraisal in evidence which is also dated October 27, 2021. It places the value at \$635,000. This is the principal residence of the respondent. The respondent indicated that renovations have been done to the property since separation but the evidence of what they were and the cost or value of them is again very vague. I make no adjustment on the basis of the respondent's assertions.
3. Lydia - This is rented and was appraised as at October 18, 2021 at \$345,000 USD.
4. Watkin - This is also rented and was appraised October 18, 2021 at \$315,000 USD.

Vehicles

- [78] There is no objective or reliable evidence as to the values of the vehicles at the date of trial. The claimant presented some cursory research from the internet, but there is no evidence from the parties to indicate how meaningful those comparisons are. Both parties attached values to the vehicles in the financial statements, but neither had a clear foundation for those values.

- [79] Each party has placed values that favour their positions. I infer that this supports a conclusion that the actual values fall somewhere in between. I will fix the values at the average of the values placed by the parties in their form F8 financial statements:
1. 2015 Pathfinder - This is held by the claimant. I have no independent or reliable evidence of its value. In her form F8 financial statement the claimant places the value at \$16,000, while the respondent says it is \$20,000. I fix the value at \$18,000.
 2. 2104 Mitsubishi - This is held by the respondent. In her form F8 financial statement the claimant values this at \$12,000, while the respondent says it is \$6,000. I fix the value at \$9,000.
 3. 1994 GMC - This is also held by the respondent. The claimant indicates a value of \$4,000 while the respondent indicates \$1,000. I fix the value at \$2,500.

Bank Accounts and Investments

- [80] The evidence regarding the amounts in the various bank accounts is incomplete. Each party put some values in their financial statements, but the evidence revealed that those amounts are not necessarily the balances at the time of trial.
- [81] The claimant's form F8 financial statement was filed November 3, 2021. The respondent's F8 financial statement was filed November 17, 2021.
- [82] Statements for some of the accounts were introduced into evidence. As an example, Exhibit 11 is a collection of three pages. Each is the first of a multi-page document summarizing multiple accounts with Scotiabank. The accounts include xxx2667, xxx4403, xxx3546 and xxx5139. I note that account xxx5139 does not appear to have been otherwise referenced by either party and this document shows a balance of \$0.16. I will not deal with it further. They are for the periods ending March 31, 2019, December 31, 2019 and March 31, 2020.
- [83] The testimony of the parties did not meaningfully clarify the state of each account at the time of trial. There is no clear comprehensive evidence as to what changes or activity occurred between separation and the date of trial.
- [84] Taken as a whole, the evidence is far from complete or comprehensive. The result is that determining the balances at the time of trial for purposes of applying the provisions of the FLA and my conclusion that there should be equal division is difficult.
- [85] What follows is a summary of the evidence with my preliminary conclusions as to the balances to be used in the division of property. These conclusions are based on the available evidence and the objective of achieving fairness in the application of my broader conclusions regarding equal division.
- [86] On the issue of the balances and list of the accounts, it is my intention to address the parties further and thus there is the prospect that my final conclusions will vary:

1. Scotiabank TFSA xxx6936 - The claimant's F8 financial statement shows a balance of \$13.09. The respondent's F8 financial statement does not list the account. I find \$13.09 to be the value for purposes of division of family assets.
2. Scotiabank TFSA xxx8488 - The claimant's F8 financial statement shows a balance of \$22.90. The respondent's F8 financial statement does not list the account. I find \$22.90 to be the value, for purposes of division of family assets.
3. Scotiabank xxx3416 - The claimant's F8 financial statement shows a balance of \$ \$2.67. The respondent's F8 financial statement does not list the account. I find \$2.67 to be the value for purposes of division of family assets.
4. Scotiabank RESP xxx7895 - The claimant's F8 financial statement shows a balance of \$ \$17,144.54. The respondent's F8 financial statement does not list the account. I find \$17,144.54 to be the value, for purposes of division of family assets.
5. RBC xxx6358 - This is in the respondent's name. There is a single statement showing balances between December 31, 2017 and December 2, 2019. At the latter the balance was \$59,000. The last balance shown before that was \$56,006.48 (on January 2, 2018). The claimant's F8 financial statement shows a balance of \$59,000. The respondent's F8 financial statement shows a balance of \$802.79. The claimant's assertion that the respondent withdrew the majority of the funds January 31, 2019, just prior to separation, appears to have substance. The respondent testified that the funds were transferred to xxx5941. That is discussed below. I have no other evidence as to the possible disposition of the funds. On the evidence presented, the balance for division is \$802.79.
6. Scotiabank RESP xxx4403 - This is in the respondent's name. The claimant's F8 financial statement shows a balance of \$18,224.70. The respondent's F8 financial statement shows a balance of \$27,248.40. I accept the respondent's valuation, as he is in control of the account and is in the best position to provide accurate evidence. There is no evidence from the claimant beyond what is in her F8 financial statement to support a different balance.
7. Scotiabank RESP xxx3546 - This is in the respondent's name. The respondent's F8 financial statement lists this as a TFSA and shows a balance of \$29.23. The claimant's F8 financial statement shows a balance of \$16,427.47. There is a statement in evidence showing a balance on March 31, 2019 of \$18,224.70. The respondent offered no evidence to support what is in his F8 financial statement. I prefer the only objective evidence of the balance, even though it predates the trial. I attach the value of \$18,224.70.
8. Scotiabank Investment xxx5941 - This is in the respondent's name. In evidence is a transaction history for the period 2014 to 2020, but it does not show balances at any point. This was entered as an exhibit by the respondent. The claimant's F8 financial statement shows a balance of \$100,532.25. The respondent's F8 does not list the account. The respondent gave evidence that monies from xxxx6358 were deposited to this account January 31, 2019. The transaction history is somewhat consistent with this. Xxx6358 is a

Canadian dollar account from which \$57,006.68 was withdrawn on January 31, 2019. On the same day deposits of \$57,000 USD and \$18,000 USD were made to xxx5941. Also on that day a \$75,000 USD GIC was purchased. No other transactions were recorded until July 2019 when the GIC was redeemed and \$50,000 USD was withdrawn. Another \$25,796.74 USD was withdrawn January 31, 2020. None of these transactions are explained by the respondent in the evidence.

Given the respondent's disclosure obligations, his failure to provide explanations for the use of the funds post-separation, and his testimony that at least \$57,000 CDN came from xxx6358, I attach a value of \$75,796.74 USD to this account.

9. Bank of America xxx6171 - This is in the parties' joint names. I understand this to be the account used for the Arizona properties. There is a statement showing a \$0 balance as at April 22, 2020. Another statement ending March 20, 2020 shows a withdrawal of \$8,968 on March 3, 2020, leaving a balance of \$18.69. Yet another shows a balance on April 20, 2019 of \$10,449.23, a withdrawal on May 6, 2019 of \$9,900 and a balance on May 21, 2019 of \$2,543.52. The claimant's F8 financial statement shows a balance of \$ 10,449 USD in March 2020.

The claimant testified that she made the March withdrawal and the respondent made the May 6 withdrawal.

In my view, the most equitable manner to deal with this must be determined in the context of my other conclusion that the parties should share the net revenues from the rental properties post-separation. I will therefore deal with this account below in my discussion regarding the rental income specifically.

10. Scotiabank xxx6381 - The respondent's F8 financial statement and the claimant's F8 financial statement show a balance of \$83. I find this to be the value for purposes of division of family assets.
11. Scotiabank xxx0275 - The respondent's F8 financial statement and the claimant's F8 financial statement show a balance of \$2,015. I find this to be the value for purposes of division of family assets.
12. Bank of America xxx5371 - The respondent's F8 financial statement and the claimant's F8 financial statement show a balance of \$6,085.53. I find this to be the value for purposes of division of family assets.
13. Bank of America xxx4371 - This is in the respondent's name. The statement for April 2020 shows transactions in April and May of 2020, but it appears incomplete with no opening or closing balance information. Given my conclusions regarding the distribution of the income from the Arizona properties I find it unnecessary to address this further.

Pensions and RRSP

1. Scotiabank RRSP xxx2667 - This is the respondent's RRSP. The claimant's F8 financial statement shows a balance of \$32,076.49. The respondent's F8 financial statement shows a balance of \$21,414.77.
 2. The claimant's municipal pension statement shows a value of \$36,739.50 as at December 21, 2019 and \$28,995.67 as at December 31, 2018.
 3. The claimant's CPP statement shows a value unadjusted before division as of May 19, 2020 of \$55,900.
 4. The respondent provided no evidence as to his CPP pension status and made no disclosure pre-trial.
- [87] The claimant proposes that each party simply retain their pensions. The respondent advanced no position. In these circumstances, I accept the claimant's proposition and order that each party retain their respective RRSP, CPP or other pension entitlements. As a result, I will not reference this further in the valuation and distribution analysis. Further, the account xxx2667 will not be included in the assets being considered in the respective parties shares of assets and debts.

Debts

- [88] The two debts consist of the line of credit and mortgage referred to above. The only documentary evidence as to the balances is from a statement ending April 30, 2019. It is my understanding that this is joint debt although the statement indicates it is in the claimant's name only. There is no evidence as to the amount of the debt at the time of trial from either party.
1. Line of credit \$147,703.36
 2. Mortgage \$114,607.67

Income from Arizona Properties Post-Separation

- [89] The claimant says that the respondent has received and retained the net revenues from the Arizona properties since separation save her withdrawal of \$8,968 USD on March 3, 2020. These represent the amounts available after the management company's deductions for its fees and expenses paid by it.
- [90] The monies flowed through account xxx6171 until the respondent opened a separate account and assumed control and management of the properties and the income and expenses. The evidence shows a balance of \$10,449.23 in xxx6171 at April 20, 2019.

- [91] Statements from the property managers show revenue paid to the respondent after management company expenses for the period January 2019 to January 2022 to be \$59,169.33. Adjusting this to the period May 1, 2019 to January 2022, the net income is \$52,702.
- [92] The claimant conceded that the respondent may have paid some expenses directly, although the respondent's evidence of what those may have been is very limited. She also conceded that he has paid property taxes and insurance premiums. Documents introduced into evidence do not clearly identify which of the two properties they are connected to and are incomplete. I have no evidence of insurance premiums for 2019 and property tax information for only one of the properties in each of 2019 and 2021. The property tax and insurance expenses for which I do have evidence are as follows:

2019 taxes for one property \$1,288.40

2020 taxes of \$1,144.46 and \$1,248.30; and insurance of \$606 and \$613

2021 taxes for one property \$1,315.20; and insurance of \$640 and \$653

Total: \$7,508.36

- [93] Given the claimant's concession that these expenses have been paid, I will afford the respondent an opportunity to provide evidence of the missing payments if I am satisfied as to the authenticity and subject to any submissions of the claimant.
- [94] Although not supported by direct evidence of expenditure, the respondent says he paid an expense of approximately \$4,300 to replace an air conditioner. The claimant did not challenge this proposition. I am prepared to accept that he did so.
- [95] What will occur is that the net income of \$52,702 will be further adjusted for those expenses. Each party will be entitled to one-half of that amount, added to the \$10,449.23 that was in account xxx6171 on April 20, 2019. That must then take into account the withdrawals each party made from the joint account referred to above.
- [96] The claimant seeks to attach an additional value to this venture as a business. I see no basis for doing this.

Conclusions

- [97] Below is a chart setting out the values of the parties' property and, where applicable, who is in possession of it. I have included a line for the income from the Arizona properties (subject to adjustment) as that must be accounted for in the distribution of assets.

Description

Value

In Possession of Claimant

In Possession of Respondent

Real Estate

399 Stellar Dr

1,275,000

1,275,000

654 DeHart Rd

635,000

635,000

1603 W. Lydia Ln USA-USD

345,000 USD

6414 W. Watkin St USA-USD

315,000 USD

Total Real Estate

2,570,000

1,275,000

635,000

Vehicles

2105 Nissan Pathfinder

18,000

18,000

2014 Mitsubishi RVR

9,000

9,000

1994 GMC Suburban Truck

2,500

2,500

Total Vehicles

29,500

18,000

11,500

Bank Accounts (DOS)

Scotia TFSA #6936

13.09

Scotia TFSA #8488

22.90

Scotia Savings #3416

2.67

Scotia RESP #7895

17,144.54

RBC Cash #6358

802.79

802.79

Scotia RESP #4403

27,248.40

27,248.40

Scotia TFSA #3546

18,224.70

18,224.70

Scotia Investment #5941-USD

75,796.74 USD

75,796.74

Scotia #6381

83

Scotia #0275

2,015

Bank of America #5371

6,085.53

Total Bank Accounts

147,439.36

0

122,072.63

* Income from US Properties

52,702.00

Debts (DOS) Valley First Credit Union #9854

Line of Credit

-147,703.36

Mortgage

-114,607.67

Total Debts

-262,311.03

TOTALS:

2,537,330.33

1,293,000

768,572.63

*To be adjusted in accordance with para. 95

[98] I will hear from the parties as to the method by which equalization should occur, including which assets and debts will be retained by each party and the process for sale of any assets if that is to occur. That is scheduled to occur during the week of June 13, 2022.

[99] In addition, at that hearing I will accept from the respondent evidence of the payments referenced in paragraph 93 above.

[100] As to the bank accounts, I will hear from the parties as to who the account holder is and any further comments as to the balances to be used for distribution. To be clear, any comments must be based on exhibits in evidence. This is not an invitation for any new evidence and none will be accepted.

[101] I will also hear from the parties and address the issue of costs during that same hearing the week of June 13, 2022.

"Betton J."

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