
CANADA / JUDGMENT

C.M. v. N.L.

2020 BCSC 3

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Supreme Court of British Columbia

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2020 BCSC 3 C.M. v. N.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.M. v. N.L.,

2020 BCSC 3

Date: 20200103

Docket: E162203

Registry: Vancouver

Between:

C.M.

Claimant

And

N.L.

Respondent

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

November 19-23, 26-28, 2018

February 19-21, 25-28, 2019

March 1, 6-8, 2019

April 1-5, 23-26, 29 and 30, 2019

May 6-9, 2019

June 24-28, 2019

September 23-27, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 3, 2020

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Introduction

- [1] This case is characterized as a high conflict custody and access case, rife with distrust and negative parental allegations. The claimant alleges that the respondent has sexually, physically, and emotionally abused the children. She also alleges, among other things, that the respondent engages in bizarre rituals, has anger issues, and is overbearing and inattentive. She sought primary care of the two children of the marriage with eventual unsupervised access to the respondent. The respondent denied all allegations and sought primary care of the children.
- [2] Issues of child and spousal support were settled prior to or during trial, with the exception of s. 7 expenses for the children.
- [3] There is a very complicated claim for division of family property with the respondent claiming exclusion of property based upon an elaborate tracing of certain property from 1959 to the present.
- [4] Relevant interim orders were made as follows: restraint of the respondent from disposal or transfer of assets on August 3, 2016; a without notice protection order against the respondent on August 3, 2016; the children to be enrolled at a specific school on September 2, 2016; a forensic interview of the two children of the marriage on December 22, 2016 with the provision that if the expert found no reason why supervised access should not occur immediately, such was to occur immediately; interim child support and interim s. 7 expenses on June 28, 2017; appraisals and valuations of certain assets on August 10, 2018, including the appointment of joint experts for purposes of valuation of the respondent's dental practice; an interim distribution of \$200,000 to each of the claimant and respondent for legal fees on August 10, 2018.
- [5] This trial was originally scheduled for 15 days. It lasted for 44 days over eleven months. It was repeatedly rescheduled because counsel had failed to correctly estimate time required. Because of the ongoing trial and only limited supervised access by the respondent, and after hearing argument and the position of the parties on issues related to the children, this Court made several interim orders on June 28, 2019 related to guardianship of the children and parenting arrangements, the appointment of a parental coordinator, and child support. Supervised access was discontinued.

Preliminary Evidential Issue

- [6] On April 1, 2019, after many days of trial and after the claimant had closed her case, the respondent applied pursuant to Rule 13-4(6) Supreme Court Family Rules, B.C.Reg.169/2009 to lead additional evidence from three new expert witnesses and pursuant to Rule 14-7(28) to lead an additional three lay witnesses, none of whom had been included in the respondent's list of witnesses as disclosed at the trial management conference. The application to introduce new expert witnesses was not brought pursuant to Rule 13-3(2). The respondent was not relieved of the joint expert requirement (*Bartch v. Bartch*, 2017 BCCA 94 at para.29).

The respondent had previously told the Court and the claimant that he wanted to introduce additional witnesses at trial, the specifics being uncertain. The Notice of Application was filed on February 25, 2019. The respondent sought to introduce into evidence three additional expert valuation reports of the respondent's dental practice. Joint experts had been appointed for that purpose: one had already testified and the other's report had been introduced into evidence.

- [7] The claimant had brought an application at the start of trial for the introduction into evidence of a rebuttal expert report to a joint expert report that had been prepared by Henry Doyle pursuant to the order of Master Muir dated August 10, 2018. The claimant's application was not actually heard until February 19, 2019, due in part to delay in presentation of the joint expert report itself and to delay in continuation of the trial after the parties had grossly underestimated the required length of trial. The decision of the Court to allow the rebuttal report was given on February 20, 2019. In reasons for judgment released on March 7, 2019 (2019 BCSC 299), the Court concluded that it would be unfair to the claimant not to allow a rebuttal report pursuant to Rule 13-4(6). The respondent had sought as conditions to allowance into evidence of the rebuttal report that the respondent also be allowed to introduce additional expert reports, the specifics of which were not addressed, which was denied at that time.
- [8] On April 23, 2019, this court denied the respondent's application with respect to the three additional experts and also denied the application for the respondent's accountant to testify about details of a 2011 transaction. The Court did allow the respondent to introduce two other witnesses related to parenting arrangements and allegations of sexual abuse of a child by the respondent. Reasons were to follow. These are those reasons.
- [9] It is important to know that all three additional experts sought to be tendered were to be in reply to the claimant's rebuttal evidence to the joint expert that had been allowed in relation to the valuation of the respondent's dental practice. The reports were not in rebuttal of the joint expert and had not been served as required under Rule 13-4(6). No notice was given as required under Rule 13-6(4). The additional experts were sought because of the wide difference in the valuations provided by the joint and rebuttal experts. No explanation was offered as to why three additional experts were required on the same issue.
- [10] The expert reports as proposed to be tendered represented a fresh opinion on the merits of the valuation of the dental practice. The Rushton reports were valuations of the respondent's two dental practices as at 2005 based upon fair market value and valuations of the respondent's dental practice as at December 31, 2018 based upon current fair market value. The report of ROI Corporation appears to have been completed by Jackie Joachim according to a cover letter but the report itself is not signed by an individual. It represents a current fair market valuation of the respondent's dental practice as at November 20, 2018. Although the instructions included a direction to review the joint and rebuttal expert reports, this was not included in the report and the ROI Corporation report is fresh opinion. The Suffield report was a valuation of the respondent's dental practice as at 2005 and as at January 30,

2019. All reports were extremely lengthy and, while it is impossible to ascertain whether all documents and information referred to were included in evidence, some most certainly were not.

- [11] There were individual problems with the reports. The Rushton reports failed to state qualifications, failed to certify the duty to the court, failed to list documents used to prepare the report, failed to identify the source of information received, referred to information and documents that were not otherwise in evidence, and limited use of the document to exclude court purposes. The Joachim/ROI Corporation reports failed to certify the duty to the court, maintained copyright in relation to use of the report, failed to list all documents that were used in the report, and was not signed by a person but by "ROI Corporation". The Suffield reports failed to state qualifications, failed to certify the duty to the court, limited use of the document to exclude court purposes, failed to state sources of information or data, and was dated January 10, 2019 but not delivered until February 19, 2019. Although Rushton and Joachim later wrote a further cover letter to include acknowledgment of their duty to the court, this was after the fact of the reports and the statements in the reports that the experts would not have to testify in court remained.
- [12] Once a joint expert is appointed, a party does not have the right to have its own expert give evidence (*Bartch v. Bartch*, 2017 BCCA 94 at para.32). Courts should be reluctant to grant leave to introduce additional experts once a joint expert has been appointed so as not to undermine the purpose of Rule 13-3 (*Jansen v. Jensen*, 2013 BCSC 297 at para.46). The claimant was allowed to introduce an additional expert because of the unfairness that would have resulted in the circumstances of the Doyle report (see 2019 BCSC 299). There was no unfairness operating against the respondent. Indeed, the respondent did not suggest it to be unfair except for the simplicity that the claimant had been allowed another expert. However, neither party had been relieved of the joint expert rule under Rule 13-3(2) so a 'tit for tat' argument goes nowhere.
- [13] The respondent framed his application as expert responses to the rebuttal report and not to the joint expert report. However, the reports represented fresh opinion on the valuation of the dental practice and were not purely responsive or critical. They appear intended to buttress the opinion of the joint expert after that expert had been discredited (2019 BCSC 299). Disagreement with an opinion on quantum or methodology does not justify an additional expert once a joint expert has offered an opinion (*Jansen* at paras.44-46). The reports strayed beyond the legitimate purpose after appointment of a joint expert and should not be allowed into evidence in all of the circumstances here (*Janis v. Janis*, 2013 BCSC 116 at para.22).
- [14] There is further the fact that none of the three experts prepared their reports in acknowledgment of his/her duty to the court and maintained either copyright or contractual privilege not to testify in court. A prepared statement of the duty after the fact of the report does not convince this court that these experts understood their duty to the court. Expert witnesses must be aware of and willing to carry out their duty to give fair, objective and non-

partisan opinion evidence as a threshold requirement to admissibility of their evidence (White Burgess Langille Inman v. Abbott and Haliburton Co. 2015 SCC 23 at paras.10, 45-47). This alone is sufficient not to allow each of their reports to be admitted into evidence.

- [15] Introduction of the expert reports would only have added to expense and further delay of a trial that was already 'off the rails' in terms of counsels' estimates of the required length of trial. The application hearing itself took two times longer than the estimated time. The respondent did not proceed with all haste.
- [16] With respect to introduction of evidence from the respondent's accountant, I have considered the factors applicable to the exercise of discretion as described in *Houston v. Kine*, 2011 BCCA 358 at para.12. The accountant was not included on the list of proposed witnesses at trial when she certainly should have been in contemplation at the time of the trial management conference. No explanation was offered for this failure. The witness statement summary is trite - listing topics to be addressed but not actually stating what the witness substantively will say. Counsel for the respondent also candidly added to the 'will say', suggesting a loose approach to the import of a 'will say' statement. At this stage of the trial, after the claimant has closed her case, a will say statement must be full and complete so that the trial judge can fully assess the importance of the evidence to the merits of the case and the effect if such evidence is excluded. Introduction of the account's evidence will necessarily extend an already extended trial and add to costs. This Court declined to exercise its discretion to admit this evidence.

Background Facts

- [17] The claimant is 53 years old. She holds a Bachelor of Science and is a certified general accountant. She was previously married and had a child by that marriage, born in 1994. The claimant has been employed as an accountant since 2002. By 2006, she was employed as an appeals officer with Canada Revenue Agency (CRA) and has maintained employment there despite many periods of leave for various reasons.
- [18] The respondent is 63 years old. He is one of six siblings born in Hong Kong. His mother, Y.L., is 88 years old, disabled, and lives in Hong Kong. The respondent immigrated to Canada in 1972 and was educated in Canada for secondary school and thereafter. He obtained an undergraduate degree in biochemistry, a degree in physiotherapy, and ultimately a degree in dentistry in 1984. He has practised dentistry since 1984 and has maintained a dental practice since 1986. He is an ardent evangelical Christian, having studied theology from 1984-1986. He has participated in countless mission trips as a volunteer dentist since 1989. He reduced his work as a dentist from five to two days per week to accommodate his missionary work and theological studies. After his children of this marriage were born, he performed charitable dental work in 2007 and 2009. His last missionary trip was in 2012. He has a daughter from a previous relationship who was born in 1989 and who resides in Europe.

- [19] The parties met in the fall of 2004. The claimant was 37 and the respondent was 47. The claimant had been living with her parents and son since 1996, but the relationship with the respondent quickly developed with the claimant spending more and more time at the respondent's rented Beach Avenue apartment and going on missionary trips. The claimant was employed full time at the Canada Revenue Agency and the respondent worked two days per week at his dental practice.
- [20] The claimant converted to Christianity in the respondent's church as a pre-condition to marriage. The claimant also signed a marriage agreement on June 27, 2005. The marriage agreement provided for separate property, specifically preserving the respondent's dental practice as his own property. There was no disclosure of assets attached and the claimant testified that there was no disclosure prior to her signature. The claimant signed despite legal advice not to do so. The claimant described that this pre-nuptial agreement quickly became a "bone of contention", an "irritant" between them that "kept surfacing", "getting bigger and bigger". The claimant felt that the respondent was generous to others, but not to her when she had a son to look after. She openly complained about the prenuptial agreement to others. The respondent agreed that tension over the pre-nuptial agreement intensified over the years as well as complaints from the claimant about financial transparency, culminating in 2014.
- [21] The parties married on July 15, 2005. The claimant wanted to be 'a stay at home mom', and was unhappy that she felt that she had to continue to work. The claimant's eleven year old son never resided with the parties but continued residence with his maternal grandparents, except for some weekends. The claimant did not allow the respondent to spend time with her son. The parties resided at the respondent's property at 1311 Beach Avenue (the "Beach Avenue property") that he had owned but had rented when the parties first met.
- [22] In the spring of 2006, the claimant and respondent moved from the Beach Avenue property to a townhouse located at 1430 Arbutus Street (the "Arbutus property") in anticipation of the birth of their first child. The claimant's son did not move with them but remained living with the claimant's parents.
- [23] A daughter, TL, was born on June 9, 2006. The claimant took one year maternity leave, during which time discord over finances continued such that the claimant was reluctant to quit work. A live-in nanny was hired in the first year of the child and the parties retained a live-in nanny until early 2012. The respondent worked two days per week at his dental clinic, a practice that continued throughout the relationship. The claimant became increasingly dissatisfied with the respondent, criticizing his attitude towards religion, child responsibilities, and sex. The claimant did not adjust well to her return to work and took a leave from her employment at the CRA which ended up lasting until 2013 except for eight months in 2008. She worked part time at her brother's physiotherapy office in the meantime. The 2008 return to work did not last because the claimant was dissatisfied with the nanny help and the respondent's child care.

- [24] The respondent was involved in every aspect of the child's care and looked after the child three days per week when he did not work. However, the claimant complained that the respondent brought the child back from the beach all wet one day. He sometimes failed to bring the diaper bag or to buckle the car seat. He took too many pictures of the child. He stayed up too late. She thought that he was generally inattentive and didn't do enough to assist her with cleaning or feeding the child. When the child suffered from a bladder infection which was diagnosed at hospital, the claimant blamed the respondent for not returning home from work on time, stating this as an example of the respondent's lack of parenting skills. She complained that they were always on the respondent's schedule and had to travel to Hong Kong frequently to visit his family. She stated: "I did everything".
- [25] In 2007, the claimant had received a settlement for personal injury suffered in motor vehicle accidents in 1999. She wanted to purchase a home closer to her parents and son in Pitt Meadows. In 2008, the family moved to 19438 Thorburn Way in Pitt Meadows (the "Thorburn property").
- [26] A second child, a son, CL, was born on February 7, 2009. The claimant remained off work for a year and then re-commenced part time work at the physiotherapy office.
- [27] The respondent continued to be involved in all the children's care including feeding, diapers, nighttime attendance, and activities. As the children grew and went to school, he volunteered at the school and regularly picked up/dropped off the children. The children were enrolled in daycare since age 2 and then kindergarten.
- [28] The parties moved to 16856 103A Avenue in Surrey (the "Surrey property") in 2011. It was near the Christian Pacific Academy School that the parties had chosen for their daughter over French immersion in Pitt Meadows. TL started at Pacific Academy for pre-school in 2011 and remained there until 2016. CL also attended Pacific Academy for pre-school and until 2016.
- [29] The claimant remained critical of the respondent's parenting skills. She thought that he was over religious and disliked his anointment of the children with holy oil before they went to sleep. They disagreed on child discipline, with the claimant convinced that the respondent physically disciplined the children, although she never witnessed same. The claimant thought that one of the games that the respondent played with the children was too aggressive and disliked that the respondent favoured giving the children smoothies for breakfast. By 2012, the claimant described their relationship as "chaotic" and was strongly critical of the respondent's parenting skills. She disallowed signs of affection between the respondent and CL, discouraged bed time routines and rough play, and would not allow the respondent to attend to the children in the middle of the night if either called out. She lived in the unfounded fear that the respondent would remove the children to China and kept the children's passports at her parents' house. She did not allow the respondent to sit with the children in the car.

- [30] The respondent testified that matters had come to a head in 2014 when the claimant refused to join the respondent, his mother and his brother on a cruise. The day before the cruise, the claimant had smashed his computer.
- [31] On June 20, 2014, TL was eight years old and CL was five years old. DMac, the claimant's father, told the claimant that he had observed CL touch his soccer coach's "bum inappropriately", "improperly", "it was not right". The claimant later noted her recollection that DMac told her that he told the child to stop but the child did not. The father asked the claimant to give the child "the good touch/bad touch talk".
- [32] DMac testified that he observed CL pat the "bum" and cup from underneath his soccer coach during a soccer practice in June 2014. The child thought that he was playing with the coach. DMac said that he was "aghast" and spoke to the coach that he did not want CL doing this. He then told the claimant that she had to talk to CL about good touching and bad touching.
- [33] The soccer coach, who is a nurse in professional life, testified that he had coached both CL and TL over 3 soccer seasons. He remembered that the grandfather had attended practices once in awhile. The coach said that there had been no inappropriate touching by CL at any time. In particular, he stated that the child had never touched his bum or crotch area at any time. He said that he never had a conversation with anyone from CL's family about inappropriate touching.
- [34] It is concluded that DMac was mistaken in what he thought that he observed. The soccer coach was clear and professional. He would have remembered such an interaction if it had occurred as described by DMac. There was no sexualized touching by CL of his soccer coach. After review of the evidence, it is rejected that DMac must have been referring to another coach. The grandfather had misinterpreted whatever he thought that he saw as sexualized touching.
- [35] The claimant testified that she had not observed anything inappropriate prior to June 20, 2014. She was adamant in direct testimony that she had never suspected that the respondent had a sexual interest in children. However, she told police that incidences prior to this had made her want to ask the question. She told the court appointed expert that she was suspicious of the respondent given his sexual interests and behaviours that she described. Evidence from the respondent and others leads to the conclusion that the claimant was pre-occupied with concerns about the children being sexually abused prior to having the June 20, 2014 conversation with the children. Given the evidence from different sources independently confirming this attitude, I reject the claimant's testimony in response to a leading question in her direct examination that she had never suspected that her husband had a sexual interest in children. The claimant was pre-disposed to find fault with the respondent's behaviour given the acrimony in the home and her attitude towards the respondent's sexuality.

- [36] The claimant had two conversations with both children on the weekend of June 20, 2014. Although her description of the conversations varied in detail between what she later told police, the forensic expert, her notes, and her testimony at trial, it is not contested that these conversations occurred and that the children made certain statements. From all of the evidence, however, it is concluded that the claimant and her father had a predisposition to find sexual abuse and viewed the respondent with animosity prior to these conversations. It is quite likely that the claimant asked leading questions of the children in the conversations around June 20, 2014.
- [37] While in the car with both children returning from her parents' house, the claimant asked TL if she knew what her "private parts" were. TL replied that she did know from school. The claimant made sure that the children knew what "private parts" were and continued to question the children. The claimant asked TL if anyone had touched her private parts and the child responded "no" and then asked what would happen if an adult did so. The claimant said that they would go to jail, at which point TL stated that she didn't want Daddy to go to jail. The claimant then asked CL, in the context of this talk of "Daddy", whether anyone had touched him. CL stated "Daddy touched my penis". The claimant initially said that the child said that it happened when the claimant was at work or at night time, he couldn't remember. However, from later recollection, it is likely that the child said that it occurred at night. The child also stated, in child like terms, that his father touched his "bum". The child also referred to other touching by the father that occurred when playing a certain "zombie" game, a game that the claimant did not like.
- [38] The claimant was disturbed by these revelations but took no action despite neighbourly advice to do so. She allowed CL to go on a fishing trip with the respondent the next day. Two days after the first conversation, she asked the children again if "anyone had touched their private parts". The claimant reported that CL said that his dad had touched his penis, putting his hand down his pull up diapers and squeezing so hard that the child woke up. However, the child also told the claimant that he was "just kidding".
- [39] From the different statements about these conversations at different times to different people, it is concluded that the claimant does not remember exactly what CL said to her in these conversations except to give her the impression that the father had touched the boy's penis and that she understood this to mean that the touching had been sexual in nature. In cross-examination, the claimant specifically could not recall what CL had said such that it is concluded that she has repeated her recollection of statements of sexual touching so many times and conflated the child's statements with interpreted physical demonstrations that she now has no independent memory of these conversations.
- [40] The claimant reported the matter to the Ministry of Family and Child Development who reported to police who attended at the claimant's home. The police informed the respondent about this complaint. The claimant removed the children to her parents' house. The children and the claimant were interviewed by police four days later. The claimant testified that CL's behaviour became sexualized immediately after these events and that he frequently

asked why his father played with CL's penis. During this time, the claimant read a book daily to the children about sexual abuse that had been provided by victims' assistance.

- [41] The ministry interviewed the respondent and investigated but found no protection concerns. The police investigated and apparently recommended charges that the Crown did not pursue. Dr. Herve, an expert appointed by the court in 2016 to assess these allegations, considered the investigation by police to have been so limited as to preclude proper evaluation.
- [42] The respondent did not see the children between June 23, 2014 and August 4, 2014 when he started having supervised access to the children by agreement and arrangement through the ministry. Later, the supervised visits were outsourced to a private agency. When the ministry had concluded its investigation by December 11, 2014, supervision came to an end.
- [43] From subsequent conversations with the child, the claimant realized that CL had not understood the significance of his statement and had not understood that he had been asked whether his father had touched him sexually. She had the "good touch/bad touch" conversation with the child again and continued to use the book provided by victims' assistance to explain the concept to the children.
- [44] By October 2014, the respondent had approached the claimant to get back together. This was before either the ministry or the police had reported on their investigations. The ministry decided in December 2014 to close their file on the matter. The police released the transcript of their interview of CL in November 2014 but it was not until October 2015 that the Crown informed the respondent that the Crown was not pursuing charges. The respondent and claimant visited together after October 2014 but the claimant would not reconcile until her terms of reconciliation were fulfilled.
- [45] In December 2014, CL told the claimant and the respondent when together that he had lied regarding his father touching his penis. The child also said that his father had told him to tell the truth, which the child understood to mean that he was to lie. The child had apparently previously told the claimant that he had lied. Prior to this recantation, all of the respondent's visits with the child had been supervised. From all of this, it is impossible to determine whether the child understood that he was being asked about sexual touching by his father and whether or when he told the truth, either the first time or when he recanted. When the child recanted, the claimant worried that this meant that the respondent would get shared custody. She testified that "deep down" she knew that CL was telling the truth, inferring that the child was telling the truth about the sexual abuse, not about the recantation. However, the claimant reconciled with the respondent and had moved back into the family home by the spring of 2015.
- [46] In late December 2014, the family went on a trip together, followed by a two week trip together in February 2015. The respondent agreed to CL attending counselling. The child was assessed and counselled by Dr. Serena Cot in January 2015. The claimant agreed to reconcile provided that the marriage agreement of 2005 was cancelled, that she receive

\$16,062 as retroactive support, that she get a new vehicle, that her arrears of payment on her pension during maternity leave in the amount of \$50,000 be paid up by the respondent, and that CL attend counselling. The parties exchanged new wedding rings. The claimant, however, had further concerns: she was worried that the respondent would have gotten shared custody of the children if she had fully separated at that time.

- [47] The claimant and respondent signed a written agreement on February 26, 2015 that specifically voided the 2005 marriage agreement. The respondent purchased a new car for the claimant, paid support in a manner that did not attract tax, and paid the claimant the amount that she had demanded for arrears on pension as promised as a condition for reconciliation. The claimant deposited these funds into her account and it was established that only \$28,836 went towards arrears of pension. The respondent agreed to the conditions of reconciliation despite a warning from a friend that the claimant was purposefully acting to get rid of the prenuptial agreement and then planned to bide her time before final separation. The claimant moved back with the children into the matrimonial home on March 1, 2015.
- [48] In June 2015, CL had an incident of exposing his genitals at the school. He saw Dr. Cot for a time afterwards. When the claimant learned of this incident, she reported it to the Ministry of Children and Family Development. The matter was investigated and it was concluded that neither CL nor TL were in need of protection. The claimant was informed of this decision on July 14, 2015. CL attended further sessions with the psychologist, Emily Thompson, in the fall of 2015 to follow up on the 2014 incident. Neither Dr. Cot nor Ms. Thompson testified.
- [49] The claimant had returned to work at the CRA in March 2013, but she was off work frequently for health reasons. It appears that she did not work from July 2014 until she returned for part time work in March 2015. She was off work again on disability by the summer of 2015. In January 2016, she was on disability and remained off work until she returned to part time work in May 2017. She was working three days per week at the start of trial. She took leave from work for the trial and it is not known whether she has been able to return to work at this time.
- [50] In June 2016, another investigation by the Ministry of Family and Child Development occurred as a result of information apparently received by one of CL's teachers who had reported a statement made by CL on June 17, 2016. The respondent testified, and it is accepted, that he and his son had a disagreement the night before over the father's deletion of an app on the child's iPad. When the child did not want to go to school the next day, his father forced him out the back door and the child attended upset and in tears.

- [51] On June 17, 2016, over a year after reconciliation, the claimant received a call from a representative from the ministry, as a result of which she concluded that the respondent was not to be left alone with the children. She left the house with the children. The next day, the claimant told the respondent that he was being investigated by police. The claimant moved the children to her parents' house: but, she personally stayed in the family home "to preserve occupancy", to "keep her stake in the house", while lawyers became involved.
- [52] Police interviewed CL on June 17 and June 21, 2016. The child said that his father had touched his penis while on the trampoline "the day before yesterday" while the claimant and his sister were present. From June 21 onwards, the respondent had no access to the children. He cooperated fully with ministry and police investigations.
- [53] The respondent moved out of the family home by agreement on July 3, 2016. In July 2016, the child told his mother that when he went to Castle Fun Park with his father, his father had held his penis. The claimant commenced these proceedings on August 3, 2016. The claimant obtained a without notice protection order on August 3. She also sought a forensic report related to the alleged sex abuse but did not pursue her application. The children moved back into the family home with the claimant. During the period from June to August, 2016, the claimant took money from the respondent's credit cards in the form of gift cards in anticipation that she would be cut off from credit card use. The respondent paid all of these accounts. When the claimant obtained an order in early September 2016 that the children attend school in Pitt Meadows, the claimant moved with the children from the Surrey family home to her parents' home and eleven acre farm in Pitt Meadows.
- [54] In November 2016, CL again suggested to his mother that he may have lied about his father and expressed concern about where he would live. At this time, the claimant felt that the child was only then beginning to process that the touching had been wrong.
- [55] The respondent brought an application for supervised access to the children in November 2016, which was opposed by the claimant. The respondent had not seen the children since June 20, 2016. On December 22, 2016, Chief Justice Hinkson ordered a forensic report pursuant to s. 211 Family Law Act. The Chief Justice said in his reasons for ordering a forensic report that "the evidence was thin" but he was satisfied that there was some cause for concern about CL's emotional safety, security and well-being if the child was forced to see his father before the child could be assessed. Dr. Herve, the forensic psychologist, was to report the results of his assessment as soon as possible and if there was no reason why the respondent should not have supervised access, then supervised access was to commence immediately.
- [56] Dr. Herve interviewed CL five times. During the fourth session, the claimant was dissatisfied with what the child had told the expert such that she admonished the child later to tell the expert what CL had told her previously. This initiated a fifth interview which was carefully considered by the expert. Dr. Herve reported on March 17, 2017.

- [57] The details of Dr. Herve's report are discussed below. Dr. Herve recommended that supervised access begin. This was the only recommendation that he could make within the terms of the order. It was either to be supervised access or no access.
- [58] Supervised access to the children by the respondent began in March 2017. He had not seen or communicated with the children since June 20, 2016. He visited with the children two times per week for about ten hours under supervision. The claimant initially did not allow the respondent to be in the same car as the children and then did not allow the respondent to drive a car in which the children were in until June 2018. In June 2017, the respondent moved back into the family home but the claimant would not allow supervised visits to occur there. The respondent used the home of a neighbour for the visits until September 2017 when the respondent was allowed to use the former family home.
- [59] The children received counselling to assist with the transition from no contact with their father. Melissa Anders, the counsellor, was a most impressive witness and her observations of the children were acute, professional, and transparent. The counsellor's role was to help the children re-establish a healthy relationship with the father, to manage anxiety symptoms, to establish new boundaries between child and parent, and to establish a new narrative within which to move forward in their lives. She was clearly aligned with the best interests of the children and not with the interest of either parent. The counsellor testified about what she observed in the children over the course of a year and a half, from March 2017 to November 2018, with a hiatus from seeing CL from March 2018 to November 2018.
- [60] The counsellor observed a playful dynamic between father and son and a comfortable relationship between father and daughter. The counsellor advised the claimant about implicit messaging to the children in the situation where the claimant and her children were very connected and the children were acutely aware of their mother's stressors and health concerns. The children were knowledgeable about adult matters such as financial concerns, court dates, and the like, causing the counsellor to have concern for the children's visible emotional distress when speaking about their mother's stress. The maternal grandparents were very involved in the children's parenting, obviously expressing colourful negative views about their father to the children and encouraging disdainful attitudes towards their father. The children faced an incongruity between what they were told by the claimant and the grandparents about their father and their desire to be with their father. The children felt pressure that if they saw their father, they were letting their mother down. CL told the counsellor that "it didn't happen but I can't say that it didn't happen", as he cried about letting his mother down. The child could no longer remember what had happened and the counsellor focused on not promoting a victim narrative by having the child repeat what happened. The child no longer knew what the truth was, a situation leading to anxiety if the trauma narrative continued. Frequently, CL told the counsellor that his mother had asked him to tell her certain things. He talked about the fear of being kidnapped to China and about a celebration that would occur after the court case. Both children said that their father was strict and could be mean and angry at times. CL said that he didn't want his father to

touch him. But both children enjoyed their time with their father, including at Castle Fun Park. Their most consistent concern was that they would lose time with their mother. The children's disdain for their father grew as the sessions with the counsellor went on such that the counsellor felt that the goals of counselling were not being met as the children expressed more agitation, disdain and anger towards their father even though the narrative neither changed nor met the intensity of the emotion. The counsellor concluded that the therapy platform was becoming counter productive as it increased polarization which was potentially harmful. The focus of moving forward, not processing what had already occurred within a trauma narrative, was stymied.

- [61] The counsellor also met with the respondent to improve his parenting style in the context of her focus on the best interests of the children. There was some progress and some slippage as the respondent attended four sessions to improve his parenting.
- [62] Supervised access took place every Thursday from 3:30 - 6:30 pm and every Sunday from 11:30 am to 6:30 pm. The children were initially supervised by Leanne Jones, who testified. Supervision was done by Vivienne Sutherland after December 2018. After review of the evidence adduced from both supervisors and after considering the evidence of the respondent to explain some of the notations, it is concluded that there were no significant issues that arose during supervised access that affect the ability of the respondent to parent. The view of Ms. Jones that the respondent had shown the children inappropriate viewing materials or discussed adult topics is opinion showing disagreement on parenting style in a situation where the supervisor did not appreciate all of the context. The driving habits of the respondent, while needing improvement, did not amount to danger. In any event, the claimant had insisted that the respondent be the driver after June 2018, so negating her perception of a danger.
- [63] Dr. Michael Elterman was appointed by the parties in about March 2018 to prepare a s. 211 psychological assessment concerning the best parenting arrangement for the two children of the marriage. Dr. Elterman reviewed many documents in the file that he described as "huge". His approach was to take a history and interview both parents who had each completed psychological testing. He interviewed both children separately. He also interviewed collateral references. Dr. Elterman reported on October 20, 2018. His report is discussed in detail below. Dr. Elterman recommended that the parties share joint guardianship, that supervised access cease, and that a parenting coordinator be retained to assist with parenting time and other issues as they arose.

Guardianship and Parenting Arrangements

(a) More facts

- [64] The alleged incidents that gave rise to reports of sexual abuse by the respondent towards CL were: bedtime incidents when the child was four years old, an incident while playing ball when the child was five, an incident while playing basketball, an incident while the respondent was driving and reached behind to the child, an incident while playing on a

trampoline, and an incident while on a ride at Castle Fun Park. Not all of these incidents need be discussed in detail because the evidence regarding those lack detail, are inconsistent in narrative and time, the descriptions were confused between statements of the child and physical demonstrations, and some were, quite frankly, impossible to have occurred. All incidents were carefully reviewed by Dr. Herve.

- [65] With respect to the bedtime incident, the claimant testified that she put the children to bed most of the time because the respondent was either on his computer or at work. She said that the respondent did not interact with CL at nighttime until the child was three or four. If he did put the children to bed, he would read bible stories whilst under the covers because of the cold. The respondent denied that he ever was under the covers with the child. CL wore pull up diapers under his pyjamas until 2016, at age 7. In the bed time incident, CL said that his father touched his penis. This would have been when CL was four years old and wearing pull up diapers and pajamas to bed. The police interview of CL about this incident is in evidence and has been carefully reviewed, along with the opinion of the expert forensic psychologist appointed to review these allegations, as discussed below. After being prompted to remember by the claimant in January 2017, CL told the expert appointed by the court that his father had massaged his genitals over his clothes many times. This had never been reported to the claimant. The respondent denied that there was ever any sexual touching of the child. He testified that he never grabbed, squeezed, or cupped the child's genitals.
- [66] With respect to the ball game incident, CL told Dr. Herve that the respondent touched his penis during a game. This would have been when the child was five years old and at a time when the respondent had only supervised access. Details of this incident are scant.
- [67] CL said that his father touched his penis when they were at a theme play park called Castle Fun Park. The allegation was that this occurred while father and son were on a go cart. The respondent said that he had gone to the park in February 2015 with both children and rode on the go carts with each child. The respondent identified August 8, 2015 as another date when he and his son alone attended the park, went on the go cart once, and then went home. The respondent was the driver of the go cart on both occasions in the three minute ride. He testified that there were other carts going at the same time and that he could not take his hands off the steering wheel. He denied that he touched the child's penis at these times.
- [68] CL said that his father touched him while they were playing on the trampoline in the backyard of their house. The description was of a brief tapping or hitting motion. The child told police on June 17, 2016 that this occurred on June 15. But, the trampoline had been dismantled for landscaping improvements in June 2016 and the respondent had worked long hours on June 15. The respondent testified that he had often played on the trampoline with his children and that they often collided whilst playing a catching game. The respondent denied that he ever tried to touch CL's penis while on the trampoline. It is highly unlikely, if not impossible in the circumstances, that touching of a sexual nature occurred during play

on the trampoline in June 2016.

- [69] The claimant did not consult with the respondent at any time during separation periods about basic guardianship issues concerning the children including education or health care or children's activities. She obtained his consent for CL tonsil removal, but had not informed the respondent about the matter prior to requesting his signature on the consent form.
- [70] TL is presently in grade eight. She fully meets all academic learning expectations and is known for her positive attitude. She attends dance classes.
- [71] CL is presently in grade five. He fully meets all academic learning expectations and has improved his self regulation since grade three. He is known to be funny and popular. He does jiu-jitsu.
- [72] With the benefit of having heard both the claimant and the respondent testify on parenting issues and having read and heard the testimony of Drs. Herve and Elterman, this court made several orders on June 28, 2019 relating to parenting issues. At that time, the court concluded that the children were not suffering or likely to suffer significant harm if supervised access by the respondent ceased. Both parties had acknowledged that supervision should cease: it was just a matter of when. Both parties also agreed that there should be joint guardianship of the children. A parent coordinator was appointed. These determinations have now been reviewed again in the context of all of the evidence and the applicable law.
- (b) Report of Dr. Herve
- [73] Dr. Herve was appointed by the Court under s. 211 to conduct a forensic interview. He is a psychologist who specializes in forensic psychology, particularly the investigation and assessment of child abuse allegations. He was extremely well qualified to provide an opinion to the court on the allegations of sexual abuse by CL and to provide recommendations aimed at mitigating the risk of child abuse. He reported on March 17, 2017 after conducting five interviews with CL and after collateral interviews with both parents. He did not interview TL because that was not part of his mandate. He was aware of ministry and police interventions and reviewed all relevant materials associated with these investigations. He accurately summarized the information that had been provided to him. He was thoroughly examined, being brought page by page through his report. The claimant also commented in testimony, almost page by page, about Dr. Herve's report.
- [74] The doctor's chronology of events and summary of interviews by police is accepted as accurate. Dr. Herve's assessment was thorough, unbiased, and completely professional in methodology. His considerations were complex, linked and rational. The claimant's suggestion that the doctor assessed the child's disclosures based upon the criminal standard of reasonable doubt is rejected entirely. His assessment and opinion is completely accepted by this Court.

- [75] On September 30, 2018, Dr. Herve supplemented his report with a preamble after a complaint to his professional body that his was not a proper s. 211 custody and access report. The preamble was intended to clarify the limited scope of the report as ordered on December 22, 2016. Dr. Herve was tasked with conducting an allegation focused s. 211 assessment and not a full custody and access report. He was ordered to focus solely on assessing the allegations of sexual abuse by CL and provide recommendations aimed at mitigating the risk of child abuse whilst considering the child's best interests.
- [76] Dr. Herve summarized all of CL's allegations from 2014 and 2016 as they arose in each of five interviews and analyzed them according to accepted criteria. It is not necessary to further detail each allegation here. The expert also thoroughly reviewed and considered prior investigative interviews and found them limited. Dr. Herve carefully considered the disclosures in the context of behaviour during the interviews and motivations. He was respectful of the child's credibility and fully considered the real possibility that there may have been bedtime sexual touching prior to the 2014 disclosure.
- [77] It is significant that the expert considered the claimant's recollection of events of 2014 within the context of pre-existing animosity towards the respondent, pre-occupation with concerns about the children being sexually abused, and predisposition to interpret CL's behaviour as being inappropriately sexualized, all of which I observed and have concluded independently in this case. He considered many factors and found the claimant to be pre-disposed to see sexual abuse, a not uncommon characteristic if one has suspicions and wants to protect her child. She went so far as to have the contents of the respondent's computer forensically analyzed. This meant that it was possible that the claimant's interpretation of CL's statements were misinterpreted and/or influenced by her questioning. As found by Dr. Herve, this did not suggest that the claimant had fabricated the allegations or coached CL into making the statements.
- [78] Dr. Herve found that the claimant and her family had a negative view of the respondent which had been communicated to CL, resulting in a negative stereotyping of the respondent by CL which was not based upon his own experience. This negative view was expressed in evidence by the claimant and her father and the respondent testified that he felt this attitude in the claimant's parental home within her family almost from the beginning of their relationship.
- [79] Dr. Herve considered CL's recantation in December 2014 and, while concluding that it had been influenced by the respondent, also said that this was not evidence that the respondent had sexually abused CL. Dr. Herve also found that the claimant and her family had also influenced CL regarding the allegations, but not to the extent of coaching him. The influence could be as simple as the child overhearing adult talk. In both regards, the expert said that parental influences of these natures can be well meaning and not specifically intended.

- [80] At the end of the fourth interview, Dr. Herve told the claimant in a brief preliminary analysis that there was no clear evidence to suggest that the alleged sexual touching was not accidental and that this might be a case of misinterpretation. As a result of this, the claimant further questioned CL and new allegations emerged, resulting in the need for a fifth interview. The child refused to promise to tell the truth in the fifth interview, a factor that the expert noticed as different. During this fifth interview, the child told Dr. Herve about a bedtime incident for the first time. The expert said that these were exhibited memories that were scripted in the sense of having been repeated so many times that it was the script that was remembered and not the event, making the disclosure undiagnostic. There was a change in the description of previous acts with more concerning behaviour described. Dr. Herve concluded that this description came from someone other than the child and represented external influences at play, most likely the claimant. The doctor clarified that the child had previously described these events, but not in the detail that emerged in the fifth interview, so indicating that the child had been influenced. This was especially so because the claimant told the doctor that she had introduced these behaviours to get clarity after the fourth interview. The child assured his mother after the fifth interview that he had told the doctor everything that he had told her.
- [81] Dr. Herve testified that young boys regularly massage their genitals and engage in other sexualized behaviour. This is not necessarily indicative of abuse, but may be indicative of stress arising from marital discord. This explanation and opinion put the claimant's description of sexualized behaviour of CL into perspective and enunciated the claimant's pre-occupation with sexual abuse by the respondent.
- [82] At the end of the assessment, it is clear that Dr. Herve formed the opinion that, consistent with the child's age, CL no longer remembered any of these incidents. Others had reminded him of incidents or events. The child felt pressured to report. Most of the incidents involved ambiguous behaviours that the claimant had interpreted as sexual in nature and the expert had to put together to come to a conclusion. The bedtime incidents were the only allegations that suggested something other than accidental touching by the respondent. These all occurred prior to 2014. The expert was unable to fully assess what had happened prior to 2014 because the child had difficulty recollecting that time and there had been police intervention.
- [83] Dr. Herve concluded that it was most likely that CL unintentionally made false allegations. The doctor testified that this hypothesis had the most evidence behind it. External influences had lead to non-intentional false allegations. He stated:

[CL] is unintentionally making false allegations due to a combination of specific suggestions made by concerned individuals (e.g., being asked questions about abuse in general and sexual abuse by his father in particular) and non-specific suggestions or comments (e.g., overhearing negative comments about his father) leading to stereotype induction. In this case, if [CL] was repeatedly told that his father was bad and did bad and sexual things, it is possible that he may have come to believe in this stereotype and created a memory of events that is consistent with

this stereotype.

If stereotype induction took place and, therefore, [CL] has come to view his father negatively, it is also possible that [CL] exaggerated the extent of the abuse in order to, for example, keep himself and his family safe. This could explain, at least in part, the changes in his disclosures, particularly in the final interview.

Overall, I view this hypothesis as the most likely given the evolution of [CL's] allegations, the motivational considerations noted above, and all of the evidence suggesting that [CL] has been influenced by others.

[84] Dr. Herve stated that there was no report of physical abuse by the father.

[85] Dr. Herve recommended that the respondent have supervised access to CL. Based upon the most likely hypothesis, supervision was intended to reduce the likelihood of future false allegations. The doctor said that the choice he was given in the court order was supervised access or not. At the time that Dr. Herve wrote the report, he could not rule out that something may have happened prior to 2014 so supervised access was the safest recommendation. Sex abuse prior to 2014 was inconclusive so there was risk. Dr. Herve stated in the preamble written in 2018 that the hypothesis with the most support was that the 2016 allegations were false but he could not rule out that abuse may have occurred prior to 2014. He was not considering other factors related to custody which would be included in a typical custody and access s. 211 report. Such a report was done by Dr. Michael Elterman.

[86] Dr. Herve also recommended that the respondent have supervised access to TL.

(c) Report of Dr. Elterman

[87] Dr. Elterman reported on October 20, 2018 and testified at trial. He was chosen by the parties by agreement to prepare a s. 211 report. He did a thorough job reviewing many documents and interviewing all affected parties, the children, and collateral references.

[88] Dr. Elterman interviewed CL about sexual abuse. It is apparent from the record that CL told Dr. Elterman different versions of events that he had given at other times to other professionals. In the end, Dr. Elterman concluded that CL did not remember any sexual touching by the respondent. He had been asked so many times by so many different therapists, police, parents, and others that he did not remember it anymore. While the doctor did not rule out that it had occurred, he testified that it was not knowable at this time. The trampoline incident, however, was most likely accidental touching. The child was primarily motivated now to prove that he had not been lying. The father was motivated to prove that he had not sexually abused his son. CL knew and appreciated that what he said about his father had impact such that the child now had the power to decide on the relationship with his father, an unhealthy role reversal according to Dr. Elterman. This situation emotionally polarized and undermined the father-son relationship, pushing them apart.

- [89] Dr. Elterman was asked about having been told by the claimant about the incident with the soccer coach as reported to her by her father. As discussed above, this incident did not happen as the grandfather described or interpreted. Dr. Elterman testified that if the event had not occurred, then the grandfather was hyper vigilant towards sex abuse.
- [90] Dr. Elterman stated that it was remarkable for the claimant to have separated from the respondent in 2014 and then to have reconciled in 2015 if she believed that her child had been abused. He concluded that the claimant did not consider the risk to have been so imminent or so serious that she and the children could not live with the respondent. He could not understand how the claimant could have brought the children back to live with the respondent if she truly believed that he had harmed them.
- [91] After his exhaustive analysis, Dr. Elterman testified that these children had been through a lot. He thought that they had developed a sophistication about the positions of each parent and were aware of the implications of their answers to questions. Both children were alive to the dispute and had knowledge and used language about matters that must have come from their mother. Each had been empowered through these developments such that it was the children who were in charge of what happened on supervised visits with their father.
- [92] Dr. Elterman testified that ultimately one had to look at the best interest of the children and ask: at what point are the children old enough not to need supervision? The effect of long term supervision in this case was to empower the children and leave the father/child relationship as perfunctory and formal. Balancing the risk of sex abuse, the expert concluded that the relationship between father and child was so damaged as to exceed the risk. Both children told Dr. Elterman that they did not want to live with their father. They had described that he was short tempered and controlling, aspects of personality confirmed by Dr. Elterman as in need of attention by the respondent.
- [93] Dr. Elterman was clear that neither CL nor TL needed further counselling regarding sexual abuse. Each child was old enough and fully aware of what the boundaries were.
- [94] Dr. Elterman recommended that the parents share joint guardianship and that a parent coordinator be retained to facilitate parenting time. Supervised access was to cease. Parenting time with the respondent was to be on Tuesday or Wednesday after school until after dinner at 7:00 pm plus alternating Saturdays and Sundays from 9:30 am until 6:00 pm. In testimony, he recommended that there be six months of unsupervised access with a re-evaluation after that to see how it had gone.
- (d) Applicable law
- [95] The best interest of a child is the only consideration when making an order respecting guardianship and parenting arrangements (s. 37(1) Family Law Act, S.B.C. 2011, c. 25 (FLA)). An order must protect the child's physical, psychological and emotional safety, security and well-being to the greatest extent possible (s. 37(3) FLA). A child's best interest is to be assessed from the point of view of the child, and not from the perspective of either parent

(Gordon v. Goertz, [1996] 2 S.C.R. 27 at para. 69; D.A.M. v. D.M.T., 2013 BCSC 359 at para.103; L.M. v. L.S., 2013 BCSC 796 at para. 22).

[96] All the child's needs and circumstances are to be considered including these factors:

- (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 his or her 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 his or her 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;

[97] Family violence is a particular consideration, including whether that violence was directed towards the child, whether the violence is evidence of a pattern of coercive and controlling behaviour, how recently and frequently the violence occurred, the harm done as a result of the violence and whether steps have been taken to prevent further violence from occurring (s. 38 FLA).

[98] In terms of conduct that causes harm to the children, alienation of the children causes emotional harm and the same principles apply (D.A.M. v. D.M.T. at para. 112).

[99] In the context of protection of children, allegations of sexual or other misbehaviour by a parent do not depend upon whether specific allegations have been proven, but rather whether, after careful consideration of the whole of the evidence including the credibility of witnesses and the character of the parties, "there arises a real risk to the children if access is given without protection against that risk" (Leveque v. Leveque (1983), 54 B.C.L.R. 164 (C.A.) at para. 13). As stated by Madam Justice Fisher (as she then was) in D.A.M. v. D.M.T., at paras. 108-111:

- [108] In this case, the primary issue involves alleged sexual abuse by D.A.M., which is conduct relevant to his ability to act as a parent. It may be that this court is in a position to determine whether there was in fact sexual abuse. If so, such facts must be proven on the civil standard of proof, a balance of probabilities.
- [109] However, even if it is not possible to make such findings, I must still consider whether there is a real risk that sexual abuse of the children has occurred or might occur in the future: see *Leveque v Leveque* (1983), 54 BCLR 164 (CA); *P.A.M. v A.P.M.*, [1991] BCJ No. 3020 (SC); *G.E.C. v M.B.A.C.*, [1993] BCJ No. 1393 (SC); *L.D.D. v G.D.C.*, 2006 BCSC 1499
- [100] The court must examine all of the evidence to determine whether there is any real risk of harm (*M.H. v. A.M.*, 2016 BCSC 1664 at para. 84).
- [101] Mr. Justice Saunders described the court's role in these circumstances in *N.D.T. v. T.F.T.*, 2016 BCSC 134 at para. 103 as follows:
- [103] It has long been recognized, however, that in cases dealing with the well-being of children a court is not obliged to reach specific factual conclusions as to what has transpired while children have been in their parents' care, in making an order respecting parenting arrangements: see *Levesque v. Levesque*, (1983), 54 BCLR 164 (BCCA) at para. 13. This principle is recognized implicitly in s.37(4) of the Family Law Act, which provides only that the best interests of a child be advanced through an order that protects a child's physical, psychological and emotional safety, security and well-being to the greatest possible extent. This wording contemplates that evidence in family cases is often of a type that may be only suggestive of the truth, and that resists specific conclusions being drawn. The best interests of a child are promoted and protected by making orders that contemplate real and substantial risks to the safety, security and well-being, in respect of both the possibility of a risk apprehended by the court actually existing or becoming manifest, and the risk of potential harm to a child as a result, while at the same time balancing the possibility of a child's interests being harmed by any order that might be too broad.
- [102] The claimant has conceded that the facts regarding proof of sexual abuse of CL do not rise to the civil standard of proof: meaning that this court is not in a position to decide whether sexual abuse did in fact occur. The issue is whether there is a real risk that sexual abuse has occurred or might occur in the future. There must be a real and substantial possibility that the abuse occurred or will occur, and not mere speculation (*D.A.M. v. D.M.T.* at para.111). As is often the situation in family cases of this nature, the evidence is only suggestive of the truth and resists specific conclusions being drawn (*N.D.T. v. T.F.T.*, 2016 BCSC 134 at para.103).

- [103] The respondent had no access to the children from June 2016 to March 2017. When Dr. Herve found that supervised access was appropriate, supervised access began on March 26, 2017. The respondent had supervised access only from March 26, 2017 to June 28, 2019. Because supervised visits with the respondent were required in the past, consideration should be given as to whether it should continue.
- [104] Supervision orders reflect on the child's best interests. Section 45(3) FLA states that a court may order that parenting time be supervised if supervision is in the best interests of a child. The need for supervision may arise because of a history of violence or uncontrollable behaviour, extreme parental alienation, ongoing denigration of the other parent, child abuse, or the child wishes (Q.B. v. W.I.M., 2014 BCSC 219 at para. 42; M.H. v. A.M. at para. 132; Siebel v. Davis, 2017 BCSC 847 at para. 55). A supervision order may protect a child from risk of harm, promote the parent/child relationship, direct a parent to programming to enhance parenting skills, create a bridge between no parenting and normal parenting, and avoid or reduce conflict (Siebel at para. 56). Indefinite supervision should only be ordered in rare cases as an extreme measure where the interests of the child demand it (Siebel at paras. 56-58). Supervision is not a long term solution in most cases and is not appropriate if its purpose is to provide comfort to the custodial parent (Q.B. v. W.I.M. at paras. 42-43).
- [105] There is no maximum contact principle under the FLA. However, a child should have the benefit of both parents in his/her life for whatever picture those parents represent (Siebel at para. 59; H.H. v. L.H., 2016 ONSC 707 at para. 22).

(e) Conclusions

- [106] TL is now 13 years old and CL is now 10 years old. CL has had extensive counselling about sexual abuse and both children have received adequate education about this issue.
- [107] Supervision of the respondent's parenting time with either child is no longer in either child's best interest. As conceded by the claimant, it is impossible to determine on a balance of probability that sexual abuse occurred in the past. The claimant conceded that the evidence does not meet the balance of probability threshold for past conduct. The likelihood that sexual abuse occurred is diminished by the facts that the claimant never observed any sexualized behaviour by the respondent towards CL, the claimant returned to the family home after the disclosures of 2014, there were investigations by the ministry in 2014, 2015 and 2016 that concluded that no protection was needed, there were police investigations in 2014 and 2016 that did not result in further investigation or charges, there has been intervention and assessment by multiple experts, and CL denied many times that sexual abuse had occurred. After consideration of the whole of the evidence, however, and without reversing the onus of proof, it may also be stated that it is very unlikely that the respondent sexually abused CL.

- [108] The nature, frequency, and severity of the alleged sexual abuse here is, with respect, minimal. Further, the claimant suggested sexual proclivity of the respondent towards children in her evidence, a suggestion that found absolutely no evidential support.
- [109] Given all that has occurred before and since June 2014 including counselling and supervision, and after assessment of all of the evidence, it is concluded that there is no real or substantial risk that sexual abuse might occur in the future. I accept the reports of Drs. Herve and Elterman. It is time for the father's relationship with both children to be normalized. This may be difficult given the claimant's continuing distrust of the respondent and her inclination to perceive his parenting negatively, attitudes that continue to be relayed to both children. It is in the best interest of both children that their relationship with their father be rebuilt. The failings of the respondent are not a bar to his having normal contact with each child. He can improve his parenting by driving more carefully, being less controlling, and being more responsive to the children's interests and perceptions. The claimant can improve her parenting by refocusing her attention away from sexual abuse, abstaining from informing the children of her concerns in relation to these matters, and helping to normalize the father/child relationship. Both parents would benefit from personal counselling directed towards improvement of parenting skills. If the children attend further counselling, its purpose should not be related to sexual abuse trauma.
- [110] The parties shall be joint guardians of the children and shall have joint decision making authority in regard to parental responsibilities as set out in s. 41 Family Law Act. The children shall be permitted to be educated in the religion of the respondent.
- [111] Primary residence of the children shall remain with the claimant. Although the relationship between the respondent and the children has been jeopardized, the appropriate remedy is not to change primary residence in the immediate circumstances here. The actions of the claimant were in perception of the children's best interest and not in pursuit of damaging their relationship with their father. It is not a situation where the claimant refused that the children have a relationship with their father. The long term best interest of these children is that they normalize their relationship with their father free of interference by the claimant by expression directly or indirectly to the children of opinion about the respondent's parenting skills or the parties' financial affairs. Normalization of relationships also refers to the claimant's continued residency with her parents. The grandfather has unreservedly expressed distaste for the respondent and continued residency of the children in this environment is not in their long term best interest. The claimant should become residentially independent of her parents within one year in order to preserve her primary residency with the children.

- [112] The respondent shall have parenting time with the children each Thursday from after school until 8:30 p.m. and, if there is no school, from 10:00 a.m. until 8:30 p.m. The respondent shall have parenting time with the children on each alternate weekend from after school on Thursday, or, if there is no school, from 10:00 a.m. until return to school on Monday morning. If there is no school on Monday, the respondent shall have the children until 8:30 p.m. This parenting time shall commence immediately.
- [113] The spring break period shall be shared equally. In odd numbered years, the claimant shall have the children during the first week of spring break and the respondent shall have the children during the second week of spring break. In even numbered years, the respondent shall have the children during the first week of spring break and the claimant shall have the children during the second week of spring break. This spring break schedule overrides any holiday.
- [114] The parenting schedule shall apply during the summer period break in July and August except that each parent shall have two consecutive vacation weeks with the children during this period. The claimant shall have first pick of her vacation weeks in odd years and the respondent shall have first pick of vacation weeks in even years. The parent with first pick must notify the other parent in writing by April 1 of each year of the chosen dates and the parent with second pick must notify the other parent in writing of the chosen vacation weeks by May 1.
- [115] The Christmas holiday period shall be shared equally. In odd numbered years, the respondent will have the first half of the Christmas holiday period and the period between December 24 at noon and December 25 at noon. The claimant will have the children from December 25 at noon and December 26 at noon as well as the second half of the Christmas holiday period. In even numbered years, the reverse shall follow.
- [116] The claimant shall have the children from 9:00 a.m. to 8:00 p.m. on Mother's Day. The respondent shall have the children from 9:00 a.m. to 8:00 p.m. on Father's Day. This shall apply regardless of whose parenting time is otherwise scheduled.
- [117] Each parent shall have three hours with the children on each child's birthday regardless of whose parenting time is otherwise scheduled unless the time conflicts with school.
- [118] Either parent may attend any of the children's activities including school conferences and health appointments regardless of the parenting schedule.
- [119] The respondent shall pick up the children at the start of each appointed time for his parenting time either at school or at the home of the claimant. The claimant shall pick up the children at the end of the appointed time for the respondent's parenting time at the home of the respondent. This arrangement shall continue unless the parties agree in writing or through digital communication to change the arrangement generally or specifically.

- [120] A parent coordinator is appointed with the responsibilities as set out in ss. 14-19 FLA and s. 6 Family Law Act Regulations 347/2012 (the "Regulations"). The parenting coordinator is given responsibility to make determinations in all respects as set out in s. 6 (4) of the Regulations with the exception of religious education. This includes determinations regarding special expenses, counselling, communication methods, travel outside British Columbia, establishment of start and end times for parenting periods, scheduling vacation or travel, scheduling of children's activities, variations in pick-up or drop-off times, and substitutions of parenting times if the parties are in disagreement. The parties are encouraged to work with their parent coordinator to resolve disputes, certain in the knowledge that the children are not at risk of abuse by either parent. The parenting coordinator is at liberty to apply to the court for further direction, as required. Costs of the parent coordinator shall be shared in proportion 80 to the respondent and 20 to the claimant.
- [121] Neither party shall remove the children from the Province of British Columbia without the written consent of the other party. Failing consent, either party may bring this matter to the parent coordinator for determination. The parent coordinator shall keep secure the children's passports and release them upon agreement of the parties or determination of the parent coordinator. The parties shall authorize travel in writing as required for international or other travel at least seven days prior to travel dates.
- [122] It is further ordered that neither party shall question the children about the personal life of the other parent. Neither party shall speak negatively about the other parent in proximity to the children. Communication between the parties shall be respectful with focus on the children.
- [123] Both parents will ensure that the other parent is listed on any record that requires an emergency contact person. Both parents shall be made aware of any medical or dental or counselling or other health care professional appointments or consultations for the children and shall either agree on such appointments or consultation beforehand or have referred the matter to the parent coordinator.
- [124] It is not in the best interest of either child for this dispute to linger. It is, therefore, appropriate that there be no ordered review.

Child support and s. 7 expenses

- [125] There was an interim order made on June 28, 2017 for payment of child support in the amount of \$3,550 per month based upon the claimant's guideline income of \$47,795 and the respondent's guideline income of \$264,750. By agreement that was exhibited, child support is now ordered to be paid in the amount of \$3,500 per month commencing on February 1, 2019 and continuing on the first day of each month thereafter so long as each child remains a child of the marriage and the claimant has over 60 percent of the parenting time with the children. This order is based upon guideline incomes of \$243,402 to the respondent and

\$58,079 to the claimant.

[126] All claims for retroactive child support are dismissed pursuant to an agreement that is in evidence.

[127] The claimant testified that CL would need special expenditure related to orthodontistry outside of her dental plan, costs related to swim club, and costs related to jiu-jitsu. TL has extra expenses also related to orthodontistry, horse riding, swim club, soccer, and dance. These are reasonable extra expenses that should be shared in proportion to income which is allocated at 80 percent to the respondent and 20 percent to the claimant. I decline to factor lump sum spousal support paid into the allocation formula. In future, the parties may seek assistance of the parent coordinator to approve of special expenses.

Spousal support

[128] The parties have agreed on spousal support and no continuing court order is required. The claimant accepted lump sum spousal support in the amount of \$225,000 and this amount has been paid. Pursuant to the agreement that is in evidence, all claims for retroactive spousal support are dismissed.

Division of Family Property

(a) Background Facts Specific to Division of Assets

[129] At the time of marriage in July 2005, the claimant owned a car, had a small RRSP, had a pension at work, and was in litigation regarding prior motor vehicle accidents.

[130] At the time of marriage in July 2005, the respondent owned, in addition to his dental practices, the Beach Avenue property in his name, a joint tenancy with his mother in the Hatton Road property in Hong Kong and various investments including a loan to Sunny Coast Investments Ltd., Fidelity Investment Funds, Captive Finance Limited funds, a mortgage to Stephen Geisler, a second mortgage to Golden Century A-1 Enterprises Limited, a loan to his cousin, Evan Sahmet, and an RRSP. Many, if not most, of these investments were to or through family and friends. The respondent had also paid the deposit to purchase the Arbutus property on a pre-sale agreement. There was evidence that the respondent held numerous banking accounts, registered and non-registered, at least 15, from 1997 onwards. The HSBC accounts (6) had been closed by 2001; but others were opened. When the other accounts were opened and closed (or not) is not in evidence.

[131] The claimant was aware that the respondent owned his two dental practices and the Beach Avenue property, that he had an RRSP, and that he had lost investments in a mortgage with a relative. She understood that his mother was the sole owner of the Hatton Road property. The claimant was unaware that the respondent had any joint investments with his mother. The respondent generally did not share financial information with the claimant.

- [132] Prior to June 2014, the claimant surreptitiously took the hard drive from the respondent's computer and had it analyzed to disclose personal financial information. Among other things, she learned that he had a trust that he used to pay his family members, that he had bought and sold multiple properties, and that he was in the process of selling the Delta dental practice. The claimant consistently thought that the respondent was trying to hide assets.
- [133] It should be noted here that, in the description of assets and transactions that follows, referral to the "respondent's family" refers only to his mother, sisters, and brother, and does not refer to the claimant who was not included in these transactions.
- [134] The respondent gave evidence of use of a line of credit taken from Scotiabank, number 4358153160796. This line of credit is a personal line of credit in the name of the respondent according to documentation. The respondent insistently described this as the line of credit on the Beach Avenue property described below. However, there is no documentary support for this line of credit being attached to any specific property. The credit application information associated with this personal line of credit is not in evidence and there is nothing except for the respondent's description to tie this line of credit with the Beach Avenue property. It is accepted only that this was a personal line of credit that the respondent used for various purposes, without conclusion that this created a loan as against the Beach Avenue property such that use of the line of credit could be traced back to the Beach Avenue property. In any event, as described below, the respondent ultimately claimed all of the capital gains made upon sale of the Beach Avenue property such that attribution of the line of credit to this property makes no difference in result.
- [135] At the time of separation in June 2016, the assets of the claimant were her employee pension, shares in Dynamic Fund, a 2015 Hyundai car, and cash in a bank account.
- [136] The respondent's assets at separation are discussed more fully below. However, there were two rather strange transactions in June 2016 that should be mentioned. On June 20, 2016, the respondent withdrew \$332,395.93 from his RRSP, resulting in an immediate tax withholding of \$142,455.40. The respondent deposited these funds into his dental corporation account and then into the corporate investment account on July 7, 2016 where it has remained. It was accounted for in the valuation of the dental practice. While it is accepted that the direction to withdraw the RRSP occurred before June 17, 2016, the date of CL's disclosure that led to separation, this is a very uncharacteristic move by the respondent who is generally very conscious to avoid tax and interest rate consequences generally. The claimant did not argue, however, that this represents a dissipation in advance of separation largely because the funds remained in the corporation. The second unusual transaction was the transfer to his sister and niece of \$827,000 on June 20 and 21, 2016. The money came from the respondent's dental corporation into the family trust (discussed below) and then by cheque to the sister and niece. The sister and niece returned the money a month later and the funds were deposited back into the dental corporation account. While the respondent testified that this was a loan for the sister and niece to invest in precious metals

and that they decided against it, there is no loan documented and this explanation is rejected. It is concluded that the respondent went into a sort of financial paroxysm at the time of stress leading to separation, divesting himself of over a million dollars, but then thought better of it.

[137] Each party received an interim distribution of family property in the amount of \$200,000 each by way of an increase in the mortgage by \$400,000 against the Surrey property by consent order of August 10, 2018.

[138] The claimant also received \$35,000 on June 2, 2017. By letters between counsel during May 2017, it was clear that the payment of \$35,000 was to be "characterized at a later date". The respondent characterized the \$35,000 payment as an initial interim distribution but the claimant said that this was payment for foregoing an application for spousal and child support and should be treated as an advance on what was the claimant's retroactive support claim. The parties came to an agreement on child and spousal support, including retroactive claims, on January 2, 2019. There was no mention of the \$35,000 in that agreement. In the circumstances of the evidence, it is accepted that the \$35,000 was an initial interim distribution to the claimant that must be accounted for.

(b) The Respondent's Theory of Joint Investments with YL, his Mother

[139] The respondent claimed that he held various properties and investments with his mother, YL, since 1988. He characterized these casually as a "joint venture" but admitted that the relationship had none of the legal attributes of same. Despite using the language of a "joint venture" or "joint investment" throughout, the respondent chose to call it a "shared investment portfolio" in the end in argument. The respondent engaged this Court in a very complicated and mathematically challenging tracing exercise whereby he tried to establish that he and his mother held a "variable joint venture" since 1988. He had analyzed various transactions and various assets from 1988 through to 2018 to establish that the "joint venture" varied in contribution and draws over the years, with varying percentage interest to each of himself and his mother over the years, ending with his mother having a 90.8 interest and he having a 9.2 interest at the time of separation, so diminishing his interest in any assets available for distribution as family assets.

[140] In the alternative, the respondent suggested that this Court should fix his interest as at specific key dates and work from there. A further alternative was that this was an equal joint venture. Finally, the respondent said that the sole property option assumed all assets were those of the respondent and that the tracing exercise "merely traced the assets that existed at the time of the marriage until the date of separation". None of these alternatives were fully developed in evidence or argument.

- [141] The claimant favoured the last option, stating that the mother had made no appreciable contribution to current assets. The variable joint venture option involved a retrospective analysis of changing percentages over many decades with hundreds of transactions, multiple parties, two jurisdictions, missing documents, and, quite simply, could not be proven. The equal joint venture and fixed venture options were not developed in evidence and lacked realistic basis.
- [142] The mother did not testify, even though video transmission from Hong Kong was used for other witnesses. Much was made of whether statements attributed to her could be admitted into evidence. The respondent, his sister, KF, and his brother, LL, the latter two who live in Hong Kong, testified about the health condition of their 88 year old mother. She has a pacemaker for heart arrhythmia, recently suffered a fracture of her spine resulting in back pain, has liver fibrosis, and is sometimes forgetful. She lives on her own with a caregiver but is largely bedridden. Despite her limitations, the children testified that YL still gives instructions on investments and gifts. There was no medical evidence confirming the mother's inability to testify.
- [143] As will be seen in the discussion below, this Court has accepted certain of the hearsay statements of the mother. Some of this evidence has not been accepted. It is not necessary to detail each hearsay statement that has been accepted or not. It is generally accepted that the state of the mother is such as to meet the test for threshold admissibility (*Children's Aid Society, Region of Halton v. M.(M.)*, 2016 ONCJ 323 at paras. 98-103). However, much of what the respondent attributed to his mother is not corroborated, is not specific as to time or place, and the mother's state of health is not described for each year so to know when the mother reached the state that renders her unable to testify. There is also the reality that when a troublesome explanation was required, it was attributed to the "mother's decision", often without more. This was most obvious in the purchase of a residence for the brother, LL, who had already gone through two divorces. The respondent's family was not about to put any property in his name and so a daughter, KF, was registered as owner. As a result of all of this, some of the statements attributed to her have been given no or lesser weight.
- [144] Overall, after consideration of all of the evidence, this Court rejects the variable joint venture option for many reasons which will now be detailed in no particular order. None of these reasons alone may be enough to dismiss this theory, but the combined factors lead to this conclusion when considered as a whole. Instead, this Court has reviewed the assets as at the date of marriage through to the date of separation, fully prepared to attribute an interest to the respondent's mother if such can be proven.
- [145] There is no documentary evidence whatsoever, including correspondence or formal documentation, that the respondent and his mother were engaged in joint investments. There is no evidence that any of the instructions or discussions that the respondent attributed to his mother were in writing at any time by any means. Only one investment, the Hatton Road property, was in joint names.

- [146] The variable joint venture analysis came after the fact of all of the transactions. It was not until after discovery that the respondent came up with this formula and complicated analysis to support his claim that he does not hold all of the interest in certain properties. Before this time, he could not give specific answers to the interest ratio attributable to either himself or his mother. It was not until days before trial that the respondent could provide any idea as to what percentage of the investments were his or his mother's. He did not, however, update his discovery evidence. There is no evidence that the respondent ever discussed these percentages with his mother or that she was otherwise ever aware of them or any other specific percentage interest, for that matter. There was never an accounting between the respondent and his mother, even to the extent of demonstrating that he had provided his mother with the complicated analysis that he presented to the court. There is no evidence that the mother was informed of specific divestments from the "joint investment" that the respondent had taken for himself from time to time for various purposes.
- [147] The respondent testified that he put or transferred money into his mother's bank accounts from time to time, particularly between 1997 and 2001, but never calculated his interest in these accounts and never described these accounts as joint. The mother's bank accounts in Hong Kong were not evidenced and there was only one account in her name in Canada, managed through her daughter, Anita, who was the respondent's manager.
- [148] The respondent used the words "owed to me and my mother" or "me and my mother" or "joint investment" or "joint fund" or "investment with mother" or "joint venture" or "joint pool partnership" almost as a mantra during his testimony. This was so regardless of the specifics of a transaction such as being in his name or going to his bank account.
- [149] There is no evidence that the mother actually signed or directly participated in most transactions. It is inferred from the details of some accounts that the respondent or one of his sisters always had signing authority on any accounts in the name of his mother in Canada and KF had the authority for any accounts in Hong Kong. Most significant transactions on behalf of the mother were executed for her under power of attorney.
- [150] Supporting witness' evidence as to a joint investment between NL and YL over decades is weak and unspecific. KF referred to "joint investments" of her mother when she transferred money to another sister upon direction of her mother and when she received funds from a bank account in the name of NL or his dental corporation. She had no regard to the actual source of funds and referred to all transfers to her from Canada as her 'mother's investment funds with NL' regardless of the actual origin of the funds. She was unaware of specific involvement of NL's dental corporation. She could only say that NL and his mother had "invested for years", had "bought property together", when asked about specifics. She said that she knew this only because her mother had mentioned it from time to time. LL testified that his mother never mentioned a joint investment and he never saw an account of it even though he saw his mother almost daily. Neither KF nor LL, who live in Hong Kong and attend to their mother's needs, were aware at any time of the size of any pooled

investments or percentage interests between NL and his mother.

- [151] A review of specific investments demonstrates the irregular nature of most of these transactions due to lack of documentation, non arms length transactions, or otherwise. The respondent is responsible to have explained these transactions so to establish probability and has overall failed to do so. It is unnecessary to detail each transaction here: but, other transactions having similar irregularities are addressed elsewhere.
- [152] There are several large financial transactions that are not documented. For example, the respondent testified that he and his mother received \$991,353 in 2007 and that \$673,103 went to his mother (discussed further below). There were a number of loans from the dental corporation, all of which were not documented except sometimes in the financial records of the corporation, the most dramatic of which was \$530,000 loaned to the respondent in August 2013. The dental corporation is said to have purchased a bad loan that the respondent had personally made to Sunny Coast Investments Ltd. in 1997 for \$90,788, but none of this was documented except generally as a loan in the dental corporation financial statement for 2005 and the dental corporation was not named in foreclosure proceedings.
- [153] The respondent controlled all of the many transactions and most bank accounts regardless of the family name or corporation which they were in. He intermingled funds from his dental corporation with his numbered company with his own accounts without any attempt except years after the fact to specifically identify the source of funds. The "notional sale" of the May Road property to his dental corporation and the sale of the Arbutus properties are cases in point of the respondent's manipulation and complication of various financial interests to suit his personal interests. He decided unilaterally to take funds from the "joint investment" for his own investments when he wanted, sometimes in large amounts such as the Sunny Coast Investments Ltd. mortgages for \$560,000 in 1997. Even if it is his mother, there is no evidence that he informed his investment partner of this large transaction. The attribution of this and some other investments to himself alone some 20 years after the fact is arbitrary, contrived, and contrary to his central theory.
- [154] NL and LL testified that the joint investment started with \$100,000 that was transferred by their mother to each of them in 1988 for investment in Canada on behalf of their mother. There is no evidence that there was then or now any documentation of this transfer. Both sons purchased property in each of their own names and obtained mortgages in each of their names. NL testified that the property was purchased and mortgaged in his name because his mother could not obtain a mortgage. LL said the same thing at first but, when pressed, said that it was "her decision". No specific factors were detailed as to why the mother could not have obtained a mortgage. In this regard, it is noted that there was no disclosure in evidence of any accounts of the mother, except for a few in Canada later, and there is little evidence that either NL or LL were aware of their mother's finances otherwise. Neither NL nor LL disclosed the mother's beneficial ownership for banking or any other reason at that time. NL agreed that if he had died while he owned the property, the whole of

the property would have gone to his estate.

- [155] The respondent testified about certain funds being jointly invested in an investment portfolio called "Captive Finance" in 2001. However, the details of this investment is full of gaps. The respondent tried to fill the documentary gaps with his interpretation of money transfers but there are just too many gaps to make his argument probable. The respondent testified that both he and his mother opened accounts at Fidelity Brokerage between 1997 and 2001. There are no documents of these accounts except for one cheque from Fidelity Brokerage payable to the respondent on May 23, 2001 for \$U.S. 188,570.13. There is no documentary evidence that Fidelity ever had an account or received or transferred funds to YL. The respondent referred to an account at an unidentified bank in the name of YL registered to the address of the dental corporation in Canada that showed a transfer of \$U.S. 192,916 to NL on November 19, 1999. The respondent said that these funds "went to Fidelity". But, there is no evidence that these funds went anywhere except to NL. In March 2001, YL appears to have transferred \$U.S. 200,000 from her same account to an account at the Chase Manhattan Bank in New York. The respondent testified that this was "probably his account". But, this account has not been introduced into evidence. The respondent then said that "these funds went to Fidelity". There is no documented evidence of this transaction. On May 28, 2001, NL received a cheque made out to him from Fidelity Brokerage in the amount of \$U.S. 188,570.13. The respondent stated that he deposited this amount into his account at Merrill Lynch HSBC but there is no deposit in that amount shown in evidence. There was, instead, a deposit of \$U.S. 317,610 from HSBC Securities on June 6, 2002. The gap here has not been filled except for the respondent to say that 'this was from the Fidelity Investment'. This is not enough and is not accepted as adequate, given the lack of documentation generally. The respondent then said that he sent \$U.S. 324,682 "to his cousin in Hong Kong", named Johnathan Wong. In fact this is inaccurate. NL sent the money to his sister, KF, through her account at the Wing Hang Bank Hong Kong, on June 12, 2001. A transfer document in evidence, but very hard to read, shows a \$U.S. 300,000 transfer from KF to Johnathan Wong at Captive Finance Singapore on June 18, 2001. There is a deposit of \$300,000 to an unnamed HSBC personal account on June 18, 2001 which the respondent identified as an account of his cousin Johnathan Wong, even though there are no identifying facts on the face of the account. From there, the documentation ends. There is a record that Johnathan Wong transferred \$U.S. 300,000 in his name to another HSBC account possibly under the name of Captive Finance Limited on June 15, 2001. There is no evidence that this money was ever attributed to either NL or YL. There are no records of an account at Captive Finance in the names of either NL or YL. There are no records from Captive Finance whatsoever.
- [156] The respondent testified that this Capital Finance paid out \$HK 7,000,000 (\$C 980,000) which eventually went to his mother. There are no documents to establish that this large sum was transferred. The respondent identified the same HSBC bank account that he said was in the name of Johnathan Wong as having withdrawn \$HK 7,000,000 on April 10, 2007. The respondent said that this money went to his mother. There are no supporting

documents at all for any of this except that an HSBC bank account appears to have noted a withdrawal of that amount on April 10, 2007.

- [157] The respondent could not identify what he had purchased for \$U.S. 300,000. He testified that he "did not pay attention". There are no documents, including correspondence, to support that this investment was ever in the name of the respondent or his mother or, really, that there ever was an investment. The respondent asks this Court to accept that he paid no attention for over 6 years to a \$U.S. 300,000 investment. This is a person who takes large loans from his corporation to avoid a few months interest on a line of credit. It is inconceivable that the respondent would not have followed such a major investment and the lack of documentation within a family transaction is troubling. The ultimate transfer of almost one million Canadian dollars has no documentation whatsoever. Neither NL nor YL ever declared this investment income on any income tax. There never was an accounting of any sort of any monies received or invested. In these circumstances, there are just too many gaps, too many non arms length transactions, and not enough reality to make a tracing exercise possible here.
- [158] The acquisition and sale of property located at Flat B, 19F, No.11 May Road, Hong Kong (the "May Road property") requires specific scrutiny because it is asserted that proceeds from sale of this property were used to purchase assets that existed as at the date of marriage and that a certain percentage ownership of these assets should be attributed to YL. The respondent entered into an agreement for purchase of the May Road property on May 17, 2000 for a purchase price of \$HK 12,300,000 and nominated his mother to be the registered owner the following month. The May Road property was sold in 2003 to a third party for \$HK 9,550,000, according to registration documents. It is what happened in between these dates that is significant.
- [159] The respondent testified that the May Road property was intended originally as a home for his mother, but she never ended up living there. The property was rented throughout, with the rental income providing for all expenses related to the property including the mortgage.
- [160] The respondent said that the dental corporation purchased May Road from his mother for \$C 2,428,502 in 2001. The dental corporation never actually paid any money for the purchase. When the property was sold to the third party in 2003, the proceeds of sale went to the dental corporation. There are no documents of purchase and sale between YL and the dental corporation or between the dental corporation and the third party purchaser in 2003. It was not shown how the proceeds of sale were distributed in 2003 and how the money came back to the dental corporation. The respondent testified that documentation was an unnecessary and expensive step to have taken.
- [161] The dental corporation obtained a "huge loss", losing significant if not all retained earnings in the corporation. The dental corporation also wrote off the mortgage as a liability but there was no proper assumption of the mortgage. The respondent also obtained a

shareholder loan benefit of \$481,134. The combined amount of the mortgage and the shareholder loan did not equal the amount that the dental corporation had paid according to its unaudited financial statements. The respondent had no explanation. The amount of the mortgage then increased in 2003 according to the dental corporation's unaudited financial statements. But, the respondent could not account with any certainty for any new money from the increased mortgage. There is no evidence as to who actually paid the mortgage on the May Road property. The net result of this 'transaction' was that the respondent obtained about \$475,000 tax free.

- [162] The respondent also could not fully account for the sale proceeds from the third party in 2003. There was no documentation of the net proceeds from sale (\$800,000 approximately) or of any transfer to or from the dental corporation. Nonetheless, the respondent testified as to amounts that he said were from this transaction and from the dental corporation that were deposited into bank accounts solely in his name. One of the amounts, \$380,455.09, appears to have come from KF to NL directly. While the respondent testified that approximately \$157,000 was kept by his mother in Hong Kong after the sale, there were no documents to establish either this sum or that it was transferred to the mother. The lack of documentation on this crucial and unusual sale creates a gap that makes tracing impossible regardless of the respondent's testimony about where the money went.
- [163] The respondent testified that the dental corporation purchased the May Road property because the "bubble had burst" on the real estate market and he wanted to protect his mother's investment "so she was not heartbroken". When it was put to him in cross-examination that he had benefited from the shareholders loan and received \$475,000 tax free, the respondent testified that he had only learned that now and that the only reason for this transaction was so as not to break his mother's heart. This evidence is incredible and is not believed. The respondent cannot have it both ways. His dental corporation purchased the May Road property from his mother in an undocumented, unregistered transaction designed to gain a tax advantage for the respondent. Any interest that YL may have had in that property was extinguished in 2001.
- [164] In 2009, the respondent gave \$230,000 as a "gift" to a niece at the same time that he re-mortgaged the Beach Avenue property to reduce his income tax. Such a juxtaposition of transactions does not make sense. The practice of gifting within the family was widespread. For example, LL lives in the 6A property paid for by his mother and the respondent. Another sister lives in the 16H property paid for by the respondent. The respondent bought property on West 11th in Vancouver for another sister to live in and then sold it when she moved. The respondent gifted his interest in the Hatton Road and 6A properties. Yet, when it comes to the claimant, the mother of the respondent's children, he maintains that approximately \$120,000 of the equity in their Surrey property is a joint investment with his mother. This does not make sense and is an after the fact of separation declaration.

(c) Legal Framework

- [165] Family property is property acquired by either spouse during the relationship and which entitles each party to an undivided one half interest upon separation, unless it is found to be excluded property. The issue in this case is the respondent's claim for excluded property and the tracing of that property to property existing as at the date of separation. The parties agree that the increase in value of excluded property is family property regardless of the contributions made by each spouse.
- [166] The definition of family property in s. 84(1) and (2) of the FLA includes property owned or beneficially owned by a spouse at separation and the increase in value of excluded property (*J.D.G. v. J.J.V.*, 2016 BCSC 2389 at para. 142). Because family property includes beneficial ownership and given that there arises assignments by way of gifts in relation to certain property in this case, the law with respect to gratuitous transfers of property should be reviewed. Madam Justice Fleming summarized the principles in *J.D.G.* at paras. 145 and 157 as follows:
- [145] In this case, trust principles are central to determining the nature of the respondent's interest in the Duchess Property. The presumption of resulting trust is a general rule that applies to gratuitous transfers of property, including those between a parent and an adult child (*Pecore v. Pecore*, 2007 SCC 17). Because equity presumes bargains and not gifts, it is presumed that the transferor intended to convey only legal title to a transferee who pays no consideration. The transferee then holds the beneficial interest in the property on a "resulting trust" in favour of the transferor. When a resulting trust arises, the transferee is under an obligation to return the property to the transferor upon request. To rebut the presumption of resulting trust the party asserting a gift, typically the transferee, must prove on a balance of probabilities the transferor intended to provide a gift at the time of the transfer. Because the court examines all of the evidence to determine the transferor's actual intention, the presumption actually operates only in doubtful cases. (*Mawdsley v. Meshen*, 2010 BCSC 1099 at paras. 283-90, *aff'd* 2012 BCCA 91, leave to appeal *ref'd* [2012] S.C.C.A. No. 182).
- [157] To ascertain a transferor's actual intention, the court must weigh all of the relevant evidence, both direct and circumstantial (*Harshenin v. Khadikin*, 2015 BCSC 1213 at para. 44). The traditional rule required evidence of the transferor's intention at the time of the transfer to "'be contemporaneous, or nearly so', to the transaction" (*Pecore* at para. 56). Evidence of intention that arises subsequently is no longer automatically excluded, so long as it is relevant. Such evidence must, however, be approached cautiously with a view to guarding against self-serving evidence or placing undue weight on evidence that may reflect a change of intention (*Pecore* at para. 59).
- [167] The effective dates for purposes here are July 15, 2005, the date of marriage, and July 3, 2016, the date of separation. The parties disagreed on the date of separation with the claimant stating June 17, 2016 as the date because that was the date of CL's disclosure and the date that the children went to live with the maternal grandparents. The respondent stated that it was July 3, 2016, the date that he moved out of the matrimonial home. Because

of the ambiguity as to what was happening prior to July 3, with the claimant remaining in the matrimonial home and the children being away, that date has been decided as the first date when clarity as to separation occurred.

[168] The point in time at which family property and exclusions therefrom are determined is the date of separation (*V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 69). Valuation is at the date of trial (*Zellweger v. Zellweger*, 2018 BCSC 1227 at para. 35).

[169] The excluded property regime under the FLA allows spouses to keep as theirs property that they bring into the relationship, if that property still exists or can be traced to other property at separation (*Yousefian v. Jafarmadar*, 2018 BCSC 855 at para. 23). An interest in excluded property is limited to the value of the property as at cohabitation or as at the date that it is received but does not provide an interest in that specific value should the value diminish (*C.P. v. K.W.A.*, 2018 BCSC 332 at para. 100). Excluded property claims are limited to the value of the original exclusion (*Zellweger* at para. 37). The excluded property regime was intended to make the law simpler, clearer, easier to apply, and fairer (*Shih v. Shih*, 2017 BCCA 37 at para. 45). Fairness underlies the whole of the exclusion regime (*Zellweger* at paras. 57 and 60.).

[170] The relevant sections of s. 85 FLA in this proceedings are:

Excluded property

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

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b.1) gifts to a spouse from a third party;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[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.

[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.

[176] But, evidential presumptions such as the presumption of advancement must be put in their place within the property division scheme under the FLA (Namdarpour at para. 33). Evidence of intention to make a gift must be considered first and, if intention cannot be determined, only then does the presumption apply (Namdarpour at paras. 40-41). Mr. Justice Frankel stated in Namdarpour at paras.40-41:

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.

In this case, the judge first applied the presumption of advancement and then, in the alternative, considered the evidence regarding intention (RFJ at para. 73). That reverses the order in which he should have considered the matter. When he considered intent, the judge found cogent evidence of an intention to make a gift, consisting of "the way that both parties' settlement funds were used" (RFJ at para. 73). The resort to an evidentiary presumption was therefore unnecessary.

[177] The consequence of categorization of property as excluded property is that it is not subject to division upon separation unless it would be significantly unfair not to divide it having regard to the duration of the relationship and any direct contribution by a spouse to the preservation or maintenance of the property (s. 96(b) FLA; Parton v. Parton, 2016 BCSC 1528 at paras. 36-41 (aff'd 2018 BCCA 273); V.J.F. v. S.K.W. at para. 10; Pisarski v. Piesik, 2019 BCCA 129 at para. 23).

[178] As in C.P. v. K.W.A., I will generally make findings of fact based upon documentary evidence, but also taking into account what is likely probable given all of the circumstances. Clear and cogent evidence is most readily obtained through documentation which is critical to the assessment that the court is to perform (Asselin v. Roy, 2013 BCSC 1681 at para.106). The importance of documentary evidence is especially crucial if a party testifies contrary to cogent evidence on the face of a document. Credibility of the respondent will be critical if documentary proof is lacking or non-supportive. In the case of irregular dealings, as in non-arms length transactions involving transfer of large sums, documentary evidence is especially important.

(d) The claimant's pension

[179] The claimant's pension with the Government of Canada was valued at \$135,366 for the period from July 15, 2005 to July 1, 2016 according to documents in evidence. The claimant, however, could not verify whether this amount was the total value for that period or the transferable amount due to the respondent upon marital breakup. Therefore, the claimant could not agree on the value of the pension. The respondent wanted the pension to be divided under Part 6 FLA.

[180] In these circumstances, the pension is ordered to be divided pursuant to Part 6 FLA.

(e) Shares in Dynamic Fund

[181] The claimant had received a settlement from her motor vehicle accidents in March 2007 in the amount of \$45,325.00. She had previously received \$117,066.08 but the exact date is uncertain. The claimant used these funds in September 2007 to purchase rental property located at 21801 River Road, Maple Ridge (the "River Road" property) in her sole name for a purchase price of \$360,000. The claimant sold this property in 2012, receiving net proceeds of \$121,788.19 which she invested in her sole name in various funds, ending up in a fund called Dynamic Fund.

[182] The claimant cashed in \$97,211.88 worth of Dynamic Funds after separation in 2016 and declared the amount on her tax return. The claimant claims this as an excluded asset under s.85(1)(c) FLA. Based upon the evidence, this fund is readily traced to the settlement proceeds and is accepted as an excluded asset, the value of which at separation had decreased below the original amount.

(f) Dental practice

(i) General Facts

- [183] The respondent opened his first dental practice in North Delta in 1986 (the "Delta practice" or "Delta clinic"). The respondent worked at the Delta clinic until 1994 when he moved his practice to the Lansdowne Mall in Richmond but maintained ownership of the Delta clinic. The Delta practice was sold in 2013 for \$530,000.
- [184] The respondent started a dental practice at the Lansdowne Mall in Richmond in 1994 (the "Richmond practice" or "Richmond clinic"). The respondent initially worked four days per week, leaving the rest of the time for missionary work. In 1999, the respondent switched to two days per week and has maintained his practice at two days per week ever since. There is no doubt that the respondent is underemployed. The respondent took very little in salary from the dental practice but took what he wanted to pay any loans that he incurred. If he needed money, he borrowed from the corporation. He preferred to have retained earnings and was conscious at all times of his tax situation.
- [185] The Richmond practice is a large, urban, walk-in, multi-discipline practice with three dentists, four hygienists, and other health disciplines who pay rent to the dental corporation (discussed below). Throughout relevant periods, the dental practices and dental corporation were managed by the respondent's sister, Anita, who did the banking and assisted in transactions for the respondent, whether for the dental corporation, his numbered company, her mother, or otherwise. She did not testify.
- [186] The current lease for the Richmond practice at the Lansdowne Mall is dated April 11, 2018. The term of the lease ends on August 31, 2021, with a right of renewal for a further two years, to August 31, 2023. The landlord is presently providing renewal leases to December 21, 2025, and, although each lease is reviewed on an individual basis and the landlord solely decides whether a lease will be renewed, the manager of leasing for the mall testified that NL would likely be able to renew until 2025, dependent upon agreement. The lease did not contain a demolition clause to allow the landlord to terminate the lease due to redevelopment. The leasing manager said that plans for redevelopment of the mall are not at all certain, are subject to approvals that have yet to be finalized, and the phase involving the Richmond dental practice is not presently scheduled to start any time before 2026 assuming all goes as planned.
- [187] The Richmond practice is owned by Dr. N.L.K. [L] Corporation (the "dental corporation"). All of the shares of the dental corporation are owned by the Family [L] Dentco Trust (the "Dentco Trust"). The Dentco Trust was established on May 26, 2010. The respondent is the sole trustee of the Dentco Trust. The beneficiaries of the trust in 2010 were the claimant, the two children of the marriage, the respondent's mother, the respondent's sisters and brother, and the respondent's niece. By a document of exclusion dated November 18, 2015, prior to separation of the parties, the respondent as trustee excluded the claimant from being a beneficiary of the trust.

- [188] The trust paid dividends to the respondent's sister, DL, and niece in 2013 as a form of income splitting from the dental practice. The trust paid dividends to the same sister and to the numbered company, 0882005 B.C. Ltd. (described further below), in 2014 and in 2015. Aside from being a beneficiary under the Dentco trust, there is no financial reason for this sister to have received dividends, except that she lives at the 16H property which is mortgaged (described below). When this court asked counsel for the respondent why the numbered company received dividends when it was not declared a beneficiary of the trust, the court was informed that counsel "did not have access" to those documents. The respondent tried but could not explain why the numbered company received these dividends.
- [189] The parties have agreed that the shares of the dental corporation shall be treated as an asset of the respondent.
- [190] The increased value of the dental practice since 2005 is a contested issue. By consent order, Henry Doyle ("Doyle") and Kiumars Ghanavizchian ("Ghanavizchian") were jointly appointed by the parties to work together to value assets of the practices and the shares of the dental corporation. Upon application of the claimant, this court allowed an additional expert, Ronald MacKenzie ("MacKenzie"), to testify about the asset valuation of the dental practices. The additional report of MacKenzie was introduced into evidence. The report of Ghanavizchian was introduced into evidence by consent.

(ii) Henry Doyle testimony and report

- [191] Henry Doyle is a licensed real estate agent who has specialized in the evaluation and sale of dental practices across Canada since 2006. Doyle was to perform an asset valuation of the dental practice of the dental corporation, both historically and at present. Although aware of the court order that appointed him as a joint expert, Doyle was under the impression when he wrote the report of October 2018 that he had been engaged only by the respondent. As a result, he engaged only with the respondent in preparation of his report. Doyle testified that he was aware of his duty under Rule 13-2 Family Rules when he wrote his report. However, he had not included a written acknowledgment of the duty in the report when it was written. He explained that it had not been his practice to do so and he was not directed to do so. He signed a certification of knowledge of his duty the day before he testified, several months after the report was completed. He testified that he fully understood his duty to be impartial.
- [192] On October 26, 2018, Doyle estimated the fair market value of the Richmond dental practice in 2005 to be between \$370,000 and \$442,000. He testified that this value was based upon information received from NL. On October 29, 2018, Doyle increased this valuation for 2005 to be between \$850,000 and \$920,000 after having sent a draft of the valuation to the respondent only and receiving a request from the respondent to increase the 2005 value.

- [193] On October 26, 2018, Doyle estimated the fair market value of the Delta dental practice in 2005 to be between \$234,000 and \$289,000. On October 29, 2018, Doyle increased the value to between \$490,000 and \$550,000, again based upon information received from the respondent seeking a higher evaluation based upon the 2013 sale price of the Delta clinic.
- [194] Doyle explained the increases in the 2005 valuations as based upon information received from the respondent after he had been sent drafts of the reports. The claimant was not sent drafts of any Doyle reports. Doyle explained that these reports were not "full" evaluations, but opinion. He could not remember what data he relied upon for these 2005 values but agreed that it was probably better to evaluate for 2005 based upon earnings.
- [195] Doyle had previously been engaged by the respondent in October 2014 to prepare a valuation of the Richmond dental practice. He evaluated the practice at \$1,100,100 as at November 27, 2014. He updated this evaluation in 2015 and did not change the value of the goodwill even though the revenues were higher because he had not received the financial statements and NL told Doyle that the figures were basically unchanged. In 2016, Doyle valued the practice at \$1,557,110 based, in part, upon goodwill of \$1,025,000 after consideration that there was a seven to ten year lease for the mall premises. He downgraded the 2016 evaluation in October 2018 after hearing from the respondent that the leased building for the practice was to be demolished. As a result, Doyle reduced leasehold improvements to nil and goodwill to \$800,000, resulting in a value of \$1,111,110.
- [196] On October 24, 2018, Doyle evaluated the Richmond dental practice at \$878,838 representing a decrease in the value of the dental equipment and furniture to \$278,838, nil value to leasehold improvements, and a further reduction in goodwill to \$600,000. The goodwill was stated to be "severely compromised by the demolition clause being exercised in this retail mall". This information came from the respondent after the respondent had reviewed the first draft of the Doyle report that had been sent only to the respondent in August 2018. The respondent had asked that the goodwill be reduced to \$600,000 to \$700,000. While Doyle acknowledged in his testimony that the demolition information was inaccurate, that there was no such clause in the lease, he further explained that the lease could not be renewed past 2023 or 2025 at the latest and he had been unable to sell other dental practices in the mall.
- [197] Upon further examination, however, Doyle could remember neither the name nor the timing of the other practices that he had been unable to sell. He was mistaken that a right of renewal had only been inserted into the last version of the lease. The manager of leasing at the mall, with whom Doyle had not spoken, testified that assignment of lease upon sale of the practice is only negotiated at the point of official sale and assignment and also said that the particular practice seeking sale wanted to expand the premises, not leave the mall. Doyle said that, in any event, the optimum financing for purchase of a dental practice required a lease of seven to ten years. NL's dental practice had been very stable and more efficient than most.

(iii) Ronald MacKenzie testimony and report

- [198] MacKenzie was qualified as an accountant who has specialized in dental practice evaluations since 1976. He reviewed and commented upon the Doyle reports and evaluated the Richmond and Delta practices as at 2005 and the Richmond practice as at November 15, 2018. He reviewed relevant lease documents and spoke with the manager of leasing at the mall, the same manager who testified. MacKenzie was aware of the development concept for the mall.
- [199] MacKenzie evaluated the dental practices in 2005 based upon percentages of between 2/3 and 3/4 of gross billings, an evaluation method used in 2005. He estimated the fair market value of the Delta practice in 2005 as between \$335,552 and \$377,497. He estimated the fair market value of the Richmond practice in 2005 as between \$502,032 and \$564,783. This was based upon figures for 2004, 2005 and 2006. However, 2006 had an unusually low gross because of incorporation in that year. When asked in cross-examination if the valuation for the Richmond practice would have been higher if the years 2003, 2004 and 2005 only had been used, MacKenzie agreed with the figures but disagreed with this methodology, regardless of incorporation.
- [200] MacKenzie was critical of Doyle's 2005 revised evaluations because they came after NL had requested that the amounts be higher and that the Delta practice be evaluated closer to what the practice had sold for in 2013. The revised figures were closer to 110% of gross billings, a figure that MacKenzie testified did not match the ratio for selling practices in 2005. He explained why the 2013 market could not be equated with the 2005 market. He also testified that it made no difference to his evaluation whether the practice was a sole proprietorship or incorporated, the figures would be the same.
- [201] MacKenzie was critical of the 2016 Doyle evaluation of the Richmond practice which had been downgraded supposedly because of the length of the lease. MacKenzie confirmed that the lease at that time met the seven year lease criteria for evaluation and testified that there should not have been a downgrade in the evaluation for that reason. MacKenzie said that there were seven years left on the lease at the time of the 2018 evaluation so there should not have been a downgrade at that time either. MacKenzie was also aware that there had been no demolition clause included in the lease and knew that the Richmond practice's leasehold premises were included in phase 3 of the redevelopment project which was not yet scheduled and so most likely would be past 2026.
- [202] MacKenzie evaluated the Richmond practice as at November 2018 in the amount of \$1,965,294. This was composed of equipment etc. at \$230,622, leasehold improvements at \$174,900, and goodwill at \$1,559,772 [note: there was a calculation error in the MacKenzie report that totalled these figures at \$1,962,326, a error that has been corrected]. The goodwill was calculated based upon average billings over three years, 2015- 2017, and then multiplied by 1 ½ . MacKenzie testified that a broker would ask for more upon listing for sale. He did not discount the value because of the lease. MacKenzie was not aware that

another dental practice in the same mall was for sale but testified that this would not influence his opinion because there were so many components upon sale that one could not compare without more information.

(iv) Conclusions on valuation of assets of the dental practice as at 2005 and as at October/November 2018

- [203] Doyle did not fundamentally disagree with MacKenzie's method of valuation for 2005 and could not clarify exactly how he came to his own 2005 evaluations, especially the revised figures. Doyle's association with the respondent generally and revision of his figures for both the 2005 and 2018 evaluations based upon intervention of the respondent, and without first disclosing the draft reports to the claimant, give cause for concern. The revisions were based, in part, upon the sale price of the Delta practice in 2013 for the 2005 figures and upon an error about the demolition clause for the 2018 figures. MacKenzie's criticism of Doyle's 2005 figures are well founded. I accept MacKenzie's evaluations of the Delta and Richmond practices for 2005. Particular consideration has been given to MacKenzie's inclusion of the unusually low 2006 figures for the Richmond practice, explained as the incorporation year. The problem here is that the respondent did not ask MacKenzie for revised figures based upon exclusion of this year and MacKenzie disagreed that the figures should be revised because of incorporation.
- [204] The most significant differences in the 2018 evaluations between MacKenzie and Doyle was goodwill and leasehold improvements. MacKenzie identified the difference as based upon the misconception of Doyle that the leasehold premises were under a demolition clause and that the lease was to be for less than seven years as at the date of evaluation. As discussed above, these assumptions in the Doyle report were inaccurate. On this basis alone, the MacKenzie report is preferred. Upon review of the whole of the evidence regarding the leased premises, including the evidence of the leasing manager, the various leases themselves, and the potential for sales of dental practices in that mall, the goodwill evaluation of MacKenzie is preferred. Doyle's evidence of his inability to sell another practice in the mall was weak and can be discounted without the specific comparison as suggested by MacKenzie. It might further be noted that the discrepancy between the original Doyle 2016 evaluation and the MacKenzie 2018 evaluation of the Richmond dental practice is not so great (\$1,557,110 vs \$1,965,294).
- [205] It should be mentioned here that the respondent threatened that he would sell his dental practice if the valuation of Mr. Mackenzie was accepted. Aside from this argument, there was no specific evidence about the respondent's ability to pay or the tax consequences of sale of the dental practice. He also said that the court should order the sale of the practice pursuant to s.97 FLA "as the Court has done" in *Rochon v. Rochon*, 2018 BCSC 1899. However, in *Rochon*, the issue was whether to approve a propose agreement for sale in particular circumstances where the agreement for sale was in evidence. The parties here have not established that jurisdiction exists for this court to order the liquidation of an ongoing business in order to facilitate the distribution of assets to divorcing spouses (see

Balic v. Balic, 2006 BCCA 335 at para.26 in relation to sale of a company).

(v) The Ghanavizchian reports

- [206] Kiumars Ghanavizchian was appointed as a joint expert to prepare a report as to the fair market value of the issued and outstanding shares of the dental corporation. His first report dated November 13, 2018 was based, in part, upon the appraised value of assets in 2005 as determined by Doyle in his report of October 29, 2018 and upon the current market value for the assets of the dental practice as determined by Doyle in his report of October 24, 2018. When the court allowed the MacKenzie report to be introduced into evidence, Ghanavizchian provided alternative conclusions of value with respect to the dental corporation shares based upon the appraised values as provided by MacKenzie in his report of November 15, 2018. Ghanavizchian's supplemental valuation conclusions report, the second report, was dated February 21, 2019.
- [207] Both Ghanavizchian reports were introduced into evidence by consent and Ghanavizchian was not called to testify. Both parties agreed with Ghanavizchian's valuations based either upon the Doyle or MacKenzie asset evaluations. It should be noted that the valuations included calculation of tax disadvantages arising both in 2005 and in 2018. The only question was whether to rely upon the Doyle or upon the MacKenzie figures.
- [208] The first Ghanavizchian report, which had relied on the Doyle evaluation, included a specific limitation on the opinion based upon the statement in the Doyle report that the value of the goodwill of the practice was "severely compromised by the demolition clause being exercised in the retail mall". Ghanavizchian could find no such demolition clause in the lease, nor could he determine that redevelopment of the mall would interfere with operations of the dental corporation. He stated: "We raise [this] matter to clarify for the Court that any changes to Mr. Doyle's appraised values would have a direct impact on our share value conclusions as set out herein and those changes could be material". Based upon the Doyle valuation of assets, the fair market value of the shares in the dental corporation had increased in value from 2005 to 2018 by \$860,000 (\$2,710,000 - \$1,850,000). The valuation conclusions did not recognize any personal income taxes that might be incurred should assets be redistributed out of the company to make a compensation payment with respect to a division of family assets because it was impossible to make a meaningful calculation.
- [209] The second Ghanavizchian report, which had relied upon the MacKenzie evaluation, did not include any specific limitations. Based upon the MacKenzie valuation of assets, the fair market value of the shares in the dental corporation had increased in value from 2005 to 2018 by \$2,400,000 (\$3,780,000 - \$1,380,000).

[210] There is a large discrepancy between acceptance of the Doyle versus MacKenzie reports given the valuation of Ghanavizchian. However, the MacKenzie report is preferred for the reasons as set out above. Accordingly, the increase in value of the dental corporation shares between 2005 and 2018 is established at \$2,400,000.

(g) Hatton Road property

[211] The respondent's mother and the respondent purchased property located at 2F, No. 2 Hatton Road (the "Hatton Road" property) in Hong Kong in about 1990. Both are registered as joint tenants on title. Her son, LL, had power of attorney over this property since inception. According to NL and KF, the respondent's sister, a mortgage was obtained on the property for a short time before it was paid off from funds from sale of their mother's previous home. NL testified that his name was on title because his mother could not qualify for a mortgage on her own at that time. The mother otherwise paid all expenses related to this property.

[212] On July 17, 2015, NL assigned his interest in the Hatton Road property to his mother as a gift. KF and NL both testified that NL gave up his interest in the property at that time because the property was to be rented to obtain funds for needed repairs and he did not want to have to declare rental income. Both KF and LL otherwise said that NL never had an interest in the Hatton Road property, despite the joint tenancy. The respondent and his siblings assisted the mother in the purchase of this property; but, it was the mother who retained control, lived at the property, and had paid all expenses related to the property throughout. The respondent always intended that his mother would have the benefit of this property and the gift was intended to effect that intention.

[213] The Hatton Road property was valued at HK\$6,300,000 as at July 15, 2005 and at HK\$16,700,000 as at September 17, 2018.

[214] It is concluded that the Hatton Road property is excluded property because it was acquired before July 15, 2005. In any event, any interest that the respondent may have had in the property was validly assigned as a gift in 2015. It was at that time that NL was in Hong Kong and the respondent's family obviously followed through further on decisions made in 2011 about settling homes for family members. From the distribution of funds from sale of the Arbutus property in 2011 to the numbered company (discussed below), it can be inferred that it was the intention of the respondent and respondent's family that homes would be provided for family members. In the case of Hatton Road, the mother no longer planned to live there and she wanted to rent the property. The respondent had never made a financial contribution to the property and his concerns for tax liability arising from the rental legitimately gave rise to the intention to gift the property to his mother.

(h) Beach Avenue property - Arbutus property - Thorburn property - Surrey property

[215] The claimant and the respondent lived at four properties during the marriage: 1802-1311 Beach Avenue, Vancouver, 1430 Arbutus Street, Vancouver, 19438 Thorburn Way, Pitt Meadows, and 16856 103A Avenue, Surrey. The ownership, funding, and use of these properties is complicated. The Surrey property was the home of the parties as at the date of separation and is owned by both parties. I have grouped these properties together for discussion and tracing. Regard is primarily had to documentation of the various transactions in order to understand these complicated dealings, without first attribution of ownership based upon commentary by the respondent.

i. The Beach Avenue property

[216] NL purchased the Beach Avenue property in October 2004. NL paid the purchase price of \$900,000 in full. The respondent testified that the funds for purchase came from his taking a loan from the dental corporation after the dental corporation received funds from sale of property on May Road in Hong Kong. This transaction has been addressed above.

[217] The Beach Avenue property was intended as a home for the respondent who had lived in rental properties since 1996. The claimant and the respondent lived together at the Beach Avenue property from July 2005 until about June 2006. By the end of November 2005, the respondent had taken a mortgage on the Beach Avenue property and used the funds to purchase the Arbutus property. Rental income from the Beach Avenue property covered the mortgage and all expenses after the claimant and the respondent moved out. The respondent declared all of the rental income on his personal income tax.

[218] In 2009, the respondent took out another mortgage against the Beach Avenue property to give \$230,000 to his niece as a gift. There is no documentation of this gift; but the respondent purchased Toronto real estate with his niece. This property was sold in 2013 and some of the proceeds used to purchase the 16H property discussed below.

[219] The Beach Avenue property was sold in April 2014 for \$1,445,000. After payment of the mortgages, the respondent received \$1,007,238. He used these funds to pay off a personal line of credit that he had used for various purposes and to pay the dental corporation \$700,000 loan that had been used to purchase Beach Avenue. The respondent paid all of the capital gains associated with the sale of this property.

[220] It is concluded that the respondent's mother had no interest in the Beach Avenue property. This is determined most simply by the respondent claiming all of the capital gains on his personal income tax. He also had solely directed and solely used all of the funds at all times, with no accounting to his mother or to anyone else.

ii. The Arbutus property

[221] Along with purchase of the Beach Avenue property in October 2004, LL entered into a contract of purchase and sale for the Arbutus property. Payment of the purchase price of \$840,900 came from deposit payments of \$126,135 from NL's bank account, funds from the dental corporation, and the respondent taking out a mortgage on the Beach Avenue

property. However, when the transaction completed in December 2005, after the parties had married, YL was registered as owner. This was the first time that the respondent's mother had been registered as the owner on any property except for her own home on Hatton Road in Hong Kong discussed above. YL had assumed no liability on purchase of this property and had not transferred any funds towards purchase of the property. The claimant had always understood, however, that the Arbutus property was purchased with funds from the respondent's mother's account.

- [222] NL and the claimant had moved into the property by the time that their first child was born in June 2006 and lived there until 2008. There had been a window of only a few months before the respondent and claimant had moved into the Arbutus property. The claimant and respondent paid all expenses related to this property while they lived there and rental income covered all expenses after they had moved on.
- [223] In May 2008, a mortgage was taken on the Arbutus property. The mortgage itself is not in evidence but the mortgage statement at the Royal Bank of Canada was in the name of the respondent's mother only with the statements being sent to Anita's address. The funds of \$592,000 were used to purchase the Thorburn Way property discussed below.
- [224] NL and LL testified that the Arbutus property was intended to be a home for YL and LL's son, YL's grandson, when he went to school in Vancouver. LL said that the property was purchased by his mother as a joint investment with NL, but also said that NL had no interest in the property. YL never lived at the property, never was resident in Canada, and never declared any income, either positive or negative, from rental of this property. The grandson died in December 2010. By 2011, LL was in the process of divorce and needed a home. The respondent's family did not want a home to be in LL's name. NL testified that it was his "notion" that the Arbutus property was his mother's based upon his tracing of proceeds of sale of May Road discussed above. These funds were really from the respondent's dental corporation which had purchased May Road.
- [225] In 2011, the respondent set up a numbered company, 088205 B.C. Ltd. (the "numbered company"), to purchase the Arbutus property from his mother. It is not really clear why this happened. There is no documentation of a contract of purchase for this sale and there is no evidence that this sale was ever registered. The numbered company was wholly owned by the Family [L] Holdco Trust (the "Holdco Trust"). The Holdco Trust had been established by the respondent in May 2010. It was really a 'ghost' trust because the settlor was an employee of the dental corporation with no interest whatsoever in the transaction. The respondent testified that he established the trust because "his [dental] colleagues were doing that". As soon as the Dentco Trust was established, the respondent appointed his sisters and niece as beneficiaries. The Dentco Trust purchased the numbered company for \$20. The parties agreed that the shares of the numbered company shall be treated as an asset of the respondent.

- [226] The purchase price for the Arbutus property to the numbered company was \$1,650,000. This was paid by the numbered company taking a mortgage for \$781,253 (mortgage itself not in evidence), the respondent loaning the numbered company \$231,000 that he obtained from his personal line of credit, and the dental corporation loaning the numbered company \$643,933. There is no documentation to establish these transfers except for journal entries of the numbered company. The respondent explained that documentation was "unnecessary".
- [227] The respondent testified that the proceeds of the sale to the numbered company "went to his mother". However, as is the case with all of these transactions, it is not so simple. Neither the mother nor NL declared proceeds from this investment on either of their personal income tax returns nor did the numbered company hold back any funds because the mother was non-resident. The dental corporation, through its bookkeeper, the respondent's sister Anita, kept track of the transactions which must have gone through the numbered company and the dental corporation. First, the mortgage on the Arbutus property in the amount of \$523,955 was paid off. The balance of \$1,126,000 was not advanced to the mother. Instead, \$800,000 was transmitted from the respondent's bank account to his sister, KF, on March 23, 2011 under a transactions entitled "sending money to the family". The intention was that these monies were to go towards the purchase of Flat A, 6th floor, Sham Wan Towers, No. 3 Ap Lei Chau Drive, Hong Kong (the "6A Property"), a property that was intended by the respondent and his family as a home for LL. \$120,045 was used to purchase the Surrey property, which was intended by the respondent and his family as a home for NL and the claimant. The balance of \$206,000 was used as part of the purchase price for Flat H on the 16th floor, Tower 3, Sham Wan Towers, No. 3 Ap Lei Chau Drive, Hong Kong (the "16H property"), a property that was intended by the respondent and his family as a home for his mother at the time of purchase.
- [228] By October 15, 2011, NL had purchased the Arbutus property from the numbered company. He executed a trust whereby he, on behalf of himself and on behalf of the numbered company, declared that he had purchased the Arbutus property as a bare trustee for the numbered company.
- [229] The Arbutus property is presently held in the name of the respondent and his name is on title. Because the numbered company is agreed to be an asset of the respondent, the value of the numbered company has been included in the division of assets. If the respondent's mother had any interest in the Arbutus property, it was extinguished when the property was purchased by the respondent's numbered company. The parties have agreed that the value of the numbered company is \$543,354.74. There is an outstanding loan to the company from the respondent of \$37,577.82 which should also be included for purposes of division of assets.

- [230] The parties have agreed that the value of shares and the loan to the numbered company are to be considered family assets pursuant to s. 84(2) and (3) FLA. However, the respondent argued that the capital gains and other tax must be taken into account in any compensation payment. The claimant sought distribution based upon value of \$580,932.56 (\$543,354.74 + \$37,577.83).
- [231] There is no evidence that a sale of the Arbutus property is contemplated. There is no evidence as to what the tax or other consequences of such a sale might be. It is the respondent's decision to sell the property or not at this point. The respondent suggested that the appropriate solution here was to divide the shares in the numbered company or order the sale of the property with the net proceeds to be paid to the parties after deduction of payment of corporate debt and taxes. These were argued to be the only solutions to avoid double counting because Ghanavizchian had included the receivable in his valuation of the dental corporation. Unfortunately, Ghanavizchian was not brought to this inclusion in his evidence and the specifics were not otherwise pointed out to this court. The effect on valuation was not in evidence. In these circumstances, this court is not in a position to devalue the dental corporation and other circumstances make it unfair not to include the value in the compensation order.
- [232] The problem with the respondent's proposal is that, given the respondent's control over financial matters and his unnecessarily complicated dealings, and given that it is the respondent who manipulated this property into this holding pattern, fairness suggests that the claimant should not have to face the hardship of a joint venture with the respondent.
- [233] This is a unique situation. While it may be that generally tax consequences may be taken into account, there is no absolute rule (*Maguire v. Maguire*, 2016 BCCA 431 at paras. 22, 38-39). The circumstances of each case will dictate what the best course for payment of compensation is. Here, there is no evidence of a proposed sale and no evidence of what the tax or other consequences might be.

iii. The Thorburn Way property

- [234] The Thorburn Way property had been purchased in May 2008 in the names of the respondent and his mother. The respondent paid the deposit and the balance of \$553,113 was paid from a mortgage taken on the Arbutus property. The claimant had refused the opportunity to purchase the property with the respondent's mother and instead had invested her settlement money in the River Road property. The claimant was under the impression that the property had been purchased solely by the respondent's mother until after separation in 2016.

- [235] The respondent and his mother took a mortgage on the Thorburn property in November 2009 in the amount of \$399,999, which the respondent used to pay a personal loan that the respondent owed the dental corporation for monies advanced. The mortgage was in the names of NL and YL at the Royal Bank. At all times, the respondent paid for all mortgage and other expenses related to this property.
- [236] The claimant and the respondent lived at the Thorburn property until September 2011 when NL and his mother sold the property for \$588,000. After payment of the \$399,999 mortgage in full, the balance of sale proceeds was payable to NL and YL. However, NL transferred the balance of the sale proceeds (\$201,184) to pay down the personal line of credit that he had assumed in April 2011. It is significant here that the order to pay upon sale was approved and accepted by NL both personally and under attorney for his mother. The mother was not shown as a non-resident on the documentation and no taxes were paid by her. All of the funds, went to the respondent. There was no accounting to the mother and there is no evidence that she was ever specifically informed of this transaction.
- [237] It is inferred that NL had his mother's power of attorney for most of these transactions as there is no evidence that documents were forwarded to Hong Kong for signature at any time. It also is noted that Anita signed for the mother at times. KF signed for her mother under a power of attorney in 2013. There is no evidence of any specific communication with the mother throughout these transactions. It might also be noted that while bank statements and corporate financial records are given as proof of mortgages and other transactions, the mortgages themselves are not in evidence and it is inferred that NL signed these under the power of attorney also.

iv. The Surrey property

- [238] The Surrey property was purchased by the claimant and the respondent in joint names in August 2011 for \$753,000. The purchase price was paid by down payment of \$37,500 paid by the respondent through the dental corporation, a mortgage to the claimant and to the respondent for \$600,000, and the balance of \$128,870 paid by the respondent through the dental corporation. The funds from the dental corporation were characterized either as draws or a loan, the details not provided. The claimant was told that the balance of funds came from the respondent's dental practice. However, the respondent described that the balance of funds came from proceeds of sale of the Arbutus property to the numbered company in the amount of \$120,045 (the figure given was also \$120,070). These funds, however, would have come from the numbered company to the dental corporation and then taken from the dental corporation by the respondent towards purchase of the Surrey property.
- [239] The respondent has argued that the \$120,045 is excluded property because it came from the sale of the Arbutus property. He testified that his mother, therefore, had an interest in the Surrey property. However, it has been agreed that the numbered company and the dental corporation are assets of the respondent. If there was any claim to excluded property, it

was extinguished when the respondent transferred the Arbutus property to his numbered company and then used his dental practice for financing the business of the numbered company. The funds to purchase the Surrey property came from the dental corporation and are deemed to be the funds of the respondent.

- [240] In any event, the presumption of advancement applies. The respondent testified that he never intended to gift the Surrey property to the claimant to the extent of the funds that came from the Arbutus property, that is, \$120,045. This is, of course, after the fact of separation. However, the respondent's family regularly gifted homes one way or the other for another family member to live in. It is noted that the funds from Arbutus were otherwise used to purchase homes for LL and the mother. It has been concluded that the respondent's family wanted to use the proceeds from the sale of the Arbutus property to purchase homes for LL, NL, and the mother. In 2015, the respondent gifted his interest in two homes, the 6A property for LL through KF and the Hatton Road property for his mother. While it could be inferred from these facts that the respondent also intended to gift his wife the \$120,045 interest in the Surrey property to the claimant when the Surrey property was purchased, there is some ambiguity given his favouritism towards the respondent's family and his financial secrecy with the claimant. At the same time, the claimant was never told that the respondent's mother had an interest in the property. The claimant had refused to invest in a home with the mother at Thorburn Way and it is concluded here that the respondent never suggested to the claimant that his mother had a beneficial interest in their home, else she would not have agreed to a joint tenancy. The mortgage and other expenses were paid by the claimant and the respondent, not ever by the mother. If the real intention of the respondent is unclear, then the presumption applies. The respondent has not proven otherwise. The Surrey property is wholly a family asset.
- [241] The value of the Surrey property as at August 30, 2018 was \$1,375,000. The mortgage before the parties added \$400,000 as an equal partial distribution to each was \$344,963.31. The mortgage was \$746,455.91 as at October 23, 2018. The equity in the Surrey property is \$628,544.09.
- [242] The respondent has stated that he wants to keep the Surrey property for himself rather than have the property ordered for sale. The claimant does not object.
- (i) 16H Property
- [243] Flat H on the 16th floor, Tower 3, Sham Wan Towers, No.3 Ap Lei Chau Drive, Hong Kong (the "16H property") was purchased in the name of the respondent's mother on March 18, 2013. The purchase price was HK\$12,800,000. There was a mortgage for HK\$6,400,000 obtained in the mother's name by KF under power of attorney and guaranteed by the respondent.
- [244] KF testified that she arranged this transaction for her mother because the mother wanted to live in the same building as LL. KF testified that her mother arranged for funds to be sent for the purchase from Canada. KF stated that the funds came from her mother's investment

funds. However, when bank and email documentation about the source of funds was put to her in evidence, it appeared that the directions and funds came from the respondent and the dental corporation. The respondent had emailed KF on March 14, 2013 to discuss the funds needed for the purchase and indicated the funds that "he" had available in the bank for the purchase, which was the amount needed except for mortgage proceeds. There was no mention of funds coming from the mother.

- [245] NL sent \$65,108 to KF in October 2014 to "manage [the] property". Because there was no specific direction regarding these funds, it is not improbable that they were applied towards payment of the mortgage. These were the only monies that the respondent acknowledged that he paid towards maintenance of the property. However, he paid the sister who resides at that property dividends from the Dentco trust in the following amounts: \$40,000 in 2013, \$50,000 in 2014, and \$40,000 in 2016. The respondent said that this distribution was for that sister's "living expenses". That most probably includes the mortgage on the premises in which the sister otherwise lives gratuitously. The respondent also testified that his mother had contributed a total of \$149,000 towards the mortgage in 2014 and 2015: but, there is no documentation whatsoever of these payments. KF did not mention these payments in her evidence and she had testified that it was she who wrote cheques on behalf of her mother.
- [246] In the end, the mother never did live at the 16H property but the respondent's disabled sister lives there. The mother now lives at 12H in the same building, an apartment owned by KF.
- [247] The respondent has acknowledged that he has a beneficial interest in this property, the only issue being the percentage. This court has gone through the exceedingly complex, after the fact tracing exercise of this investment as proposed by the respondent. The following observations are made. All of the payments came from accounts under the sole control of the respondent including the dental corporation account and the Scotiabank personal line of credit (discussed above). It is not clear how the actual payment after receipt of mortgage funds was made, aside from after the fact attribution by the respondent. The sum of \$206,000 may have come from the sale of the Arbutus property to the numbered company through the dental corporation but there are no banking records of the numbered company to detail this transaction; and, by transfer through three separate entities without full documentation and in the absence of clear participation by the respondent's mother financially or otherwise, any association with the respondent's mother was dissolved as too remote. Any proceeds received from sale of the Toronto real estate in August 2013 (which was completely controlled by NL and the proceeds all going to him even though in the name of his niece) are after the fact of purchase of the 16H property and banking records to support transfer for purchase of the 16H property are not in evidence. The sum of \$30,000 is said to have been from "extra mortgage funds" arising in 2005, but these funds have not been clearly traced to 2013. A large balance came from the respondent's personal line of credit which increased over time during the marriage. A

small balance of \$13,065 came from the dental corporation.

- [248] Although this property is in the name of the respondent's mother, it is clear that the respondent's family put property into various family names for various family purposes at various times. It is also clear that the respondent's mother was not involved directly in the purchase of the 16H property. Any financial contributions that might be considered to have been made by her were at least 13 years prior to this purchase and there are so many gaps in between as to be improbable to be traced back to her. After consideration of all of the evidence and the financial machinations of the respondent, it is concluded that all of the non-mortgaged funds used to purchase the 16H property came from the respondent. The 16H property is a family asset.
- [249] The 16H property was valued at HK\$14,400,000 as at September 17, 2018. The mortgage is about HK\$4,910,000, representing reduction of HK\$1,490,000 (about \$C 253,026). The equity in Canadian dollars is \$1,624,527.
- [250] The claimant recognized that some mortgage payments had not been paid by either party and that the mortgage had been reduced by \$253,026 from the date of purchase. Based upon the evidence, the respondent paid \$65,000 towards this property. The claimant accepted this reduction from the mortgage balance so that the accepted equity in the 16H property was reduced to \$1,436,501. The claimant did not seek to attribute a greater payment based upon the dividends that were issued. Therefore, the equity of \$1,436,501 is accepted.

(i) 6A Property

- [251] On March 31, 2011, the respondent's sister, KF, purchased the 6A Property in Hong Kong for HK\$6,800,000 (C\$ 847,721). NL said that, although the property was registered in the name of KF, his mother had purchased the property with funds from sale of the Arbutus property. These, however, were the \$800,000 funds advanced from NL personally after purchase of the Arbutus property by his numbered company. The respondent's mother supposedly advanced a further \$130,960 or \$157,000 (the figure changed at times) for the purchase of the 6A property. The respondent testified that his mother had retained these funds for 8 years after sale of the May Road property and then wrote a cheque for this amount. Neither the cheque nor the bank account of the mother are in evidence.
- [252] This property was intended by the respondent and his family as a home for the respondent's brother, LL, after his second divorce. LL has lived at the property since purchase and, although he did not contribute towards the purchase price, he pays all expenses related to the property.

- [253] KF testified that her mother wanted KF to hold the property in her name because LL was in the process of divorce. She also testified that no other sibling put money into the property. But, she also said that money to purchase the property came from NL's account in Canada, which she described at one point as "NL and mother's investment funds" and at another point as money "from NL". KF also said that "a few years ago" her mother had "totally gifted" the property to her but there is no document regarding same.
- [254] The respondent testified about where he received the funds to advance for purchase of the 6A property. He said that some came from the sale of May Road back in 2003 that his mother had held. However, KF testified that all of the funds that she received for the purchase came from NL's bank account, consistent with the declaration in the July 2015 assignment discussed next. The respondent's designation of funds coming from his mother through the May Road or Arbutus properties and KF's description of the funds coming from joint investments is an after the fact analysis or commentary that is contrary to the documentation. There are many gaps in the transition from the sale of May Road in 2003 to purchase of the 6A property in 2011. There is no clear and cogent evidence tracing purchase of the 6A property back to these funds. The May Road property has been discussed elsewhere.
- [255] An assignment dated July 17, 2015 between NL and KF declared first that KF held the 6A Property in trust for NL after he had paid the full purchase price in March 2011. The trust was stated to have been dated March 31, 2011 but no such trust deed has been introduced into evidence, although KF testified that she could probably find it and NL said that he didn't know where it was. The assignment went on to provide that NL gifted all of his interest in the property to KF. The assignment document was prepared by a lawyer.
- [256] There was no mention of the mother or LL in the assignment by gift from NL to KF. KF testified that her mother wanted to gift the property to her so that LL could be assured that he would permanently live there. She considered the gift to have been from her mother even though her mother's name is not on the assignment documentation and the document states that all of the funds for purchase came from NL. NL testified that he thought that the statement that he had paid the full purchase price was true only because he had 'forwarded' all of the money from the sale of Arbutus. This is not accepted. The respondent is very savvy financially and knew exactly what he was saying and doing.
- [257] From this document it is concluded that the respondent paid all of the monies required to purchase the 6A property as stated in the signed assignment document and acknowledged by the respondent and KF.
- [258] However, it is concluded that this assignment was not made in contemplation of separation. The parties had reconciled in early 2015. The marriage agreement had been voided by the respondent and payments had been made on behalf of or to the claimant as a term of reconciliation. The respondent showed every intention of continuing his marriage in good faith. However, by November 2015, the respondent had also excluded the claimant

as a beneficiary under the Dentco Trust. While it could be inferred that the respondent contemplated separation after the June 2015 incident and the report of the ministry on July 15, 2015, that he felt vulnerable after the marriage agreement was voided, and then took actions in July and November 2015, this is not an inference that is made here. The testimony of the respondent is accepted that he wanted to keep his marriage intact and still loved the claimant.

[259] The 6A property was valued at HK\$ 9,300,000 (Can\$ 1,592,002) as at September 17, 2018.

[260] Regardless of the documentation and the unusual nature of the transaction generally and particularly after consideration of the 2015 assignment, it is concluded that the respondent had no beneficial or other interest in the 6A property as at the date of separation. Any interest that the respondent may have had in the property was validly assigned as a gift in 2015. This conclusion is reached after consideration of the changing profile for the 6A property in the respondent's Form F8 financial statements. It was always intended by the respondent's family that the funds from the sale of the Arbutus property would be used to purchase homes for the mother, for LL, and for the respondent, regardless of how the properties were legally owned. The respondent's family had decided that KF was to control this property for the benefit of LL and NL's gift reflected this common intention. Continuing in the family tradition of providing homes for family members to live in, the respondent is currently residing in Vancouver premises that are owned by his disabled sister who actually lives at the 16H property in Hong Kong.

[261] It is not significantly unfair within the meaning of s. 95(2)(g)(ii) FLA that the respondent gifted his interest in this property to the respondent's family. This argument was not fully advanced before me and the circumstances do not jump out as significantly unfair.

(k) Taels of gold

[262] When the Toronto real estate was sold in 2014, the respondent transferred his proceeds from the sale to his dental corporation and then to his sister, KF. She used some of these funds to purchase taels of gold for the respondent, which she placed into a safety deposit box in Hong Kong in her name. The documents exhibiting these transfers and purchase are not in evidence save for KF's banking records, the transfer from the dental corporation to KF, the respondent's personal Hong Kong banking records, and the purchase records for 25 taels of gold on March 12, 2014. It is strange that the respondent transferred the proceeds of sale of the Toronto real estate first to his dental corporation and then to KF, and then KF transferred funds to the respondent's Canadian dollar account at his bank in Hong Kong for his personal use and to purchase the gold and he then transferred the funds to his Hong Kong dollar account at his bank in Hong Kong. Why? There is no answer to this unnecessarily complex set of transactions.

[263] The tael of gold are agreed to be valued at \$85,480. The funds used to purchase this gold cannot be traced back to anything other than possibly the Toronto real estate and to the respondent. It is family property available for distribution.

(l) Savings

[264] As at the date of separation, the respondent had savings accounts including a Scotiabank investment account, a Vancity chequing account, a RBC chequing account, a RBC RESP account, and a RBC TFSA account. The total amount held in these accounts was \$252,268.75.

[265] The respondent said that the Scotiabank investment account that had \$211,919.45 represented the proceeds of sale of the Beach Avenue property and so should be considered to be an investment with his mother. This argument has been rejected so that these funds are attributed solely to the respondent and are family assets available for distribution.

(m) Vehicles

[266] The claimant owns a 2015 Hyundai Santa Fe vehicle valued at \$45,000. The respondent owns a 2004 Volkswagen Jetta valued at \$2,000. Each party intends to keep the vehicle that is registered in his or her name.

Conclusions on Family Property

[267] The family property is valued at \$5,430,726.40 and includes the following:

1.

Dental practice increased value

\$2,400,000.00

2.

0882005 B.C. Ltd.

\$543,354.74

3.

Shareholder loan to 0882005 B.C. Ltd.

\$37,577.82

4.

Surrey property (net value)

\$628,544.09

5.

16H property

\$1,436,501.00

6.

Taels of gold

\$85,480.00

7.

Savings and liquid assets of respondent

\$252,268.75

8.

Vehicles

\$47,000.00

[268] The claimant's pension is also family property to be divided according to Part 6 FLA.

[269] Excluded property is the Dynamic Funds, the value of the dental practice as at July 2005 in the amount of \$1,380,000.00 and Hatton Road.

[270] Because there is no reapportionment issue, the claimant is entitled to a compensation payment of \$2,715,363.20 minus the \$35,000.00 advanced and minus her vehicle at \$45,000 for a final compensation payable to the claimant of \$2,635,363.20. The claimant shall transfer her interest in the Surrey property to the respondent and be relieved of all mortgage responsibility upon payment of the compensation ordered.

Costs

[271] The parties sought leave to make submissions on costs following final judgment. There may be circumstances of which this court is unaware that may warrant further submissions. However, based upon the results and division of success here, and in appreciation of the manner in which this trial was conducted, the parties should be aware that this court is inclined to make no order as to costs so that each party shall be responsible for her/his own costs. If the parties agree that further submissions are required, the submissions should first be made in writing of no greater than 5 pages, with the claimant's submissions first and the respondent's submissions two weeks afterwards. Written reply must be within one week. All submissions must be received within one month of the date of this judgment. The court will decide whether further oral submissions are necessary after review of the written submissions.

[272] In any event, the matter of disbursements, including expert costs, shall be referred to the Registrar.

"Dillon J."

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