

CANADA / JUDGMENT

C.S. v. K.S.S.

2018 BCSC 1403

COURT

Supreme Court of British Columbia

DECIDED

20 August 2018

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2018 BCSC 1403 C.S. v. K.S.S. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: C.S. v. K.S.S., 2018 BCSC 1403 Date: 20180820 Docket: E160233 Registry: Vancouver Between: C.S., also known as C.J.Y.S., also known as C.J.S., also known as C.F., also known as C.J.Y.F. Claimant And K.S.S. Respondent Before: The Honourable Mr. Justice Ehrcke Reasons for Judgment Counsel for the Claimant: C. Lewis F. Costea, Articled Student Counsel for the Respondent: K.J. Learn Place and Date of Trial: Vancouver, B.C. April 23-27, 2018 May 28-31, 2018 June 4,7,8,20,26 and 28, 2018 Place and Date of Judgment: Vancouver, B.C. August 20, 2018

INTRODUCTION

- [1] The issues before me in this family law trial are the division of assets and debts, claims for spousal and child support, and whether the respondent should be bound by a protection order. The parties do not seek a decision at this time regarding parenting arrangements with respect to their three children.
- [2] Mr. S. and Ms. S. separated sometime around January 30, 1998, although during the ensuing three years, they reconciled and then separated again at least twice. In October 2001, Mr. S. was charged with assault, and in November 2001 Mr. S. and Ms. S. entered into a written Separation Agreement. About a month later, they reconciled and started living together again. Although clause 9.5 of the Separation Agreement states that the agreement shall continue even if the parties live together, both Mr. S. and Ms. S. stated at trial that they do not consider the Separation Agreement to have any continuing applicability.
- [3] The parties separated again in January 2016, and Ms. S. filed a notice of family claim on January 22, 2016. Mr. S. filed his response and counterclaim on March 3, 2016. Although at trial the parties indicated some uncertainty as to the precise date of separation, at their Judicial Case Conference on June 13, 2016 they agreed upon the date of January 15, 2016, and I will proceed on the basis that that is indeed correct as the date of their final separation.
- [4] Mr. S. is currently bound by a Protection Order made under s. 183(3)(a) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] on January 25, 2016 and varied on June 13, 2016.

- [5] At the Judicial Case Conference held on June 13, 2016, Mr. S. consented to an interim order to pay child support for L.S. and I.S. in the amount of \$546 per month commencing June 1, 2016. That was varied to \$605 per month commencing December 1, 2017. He has been making those payments to date, although there were a couple of late payments, apparently due to a bank error.
- [6] In February 2016, the parties agreed that each would receive \$50,000 from Mr. S.'s Investment Account, which would form part of their respective shares when the assets were divided.
- [7] On November 27, 2017, the parties were divorced. The order of Gerow J. provided by consent that Mr. S. would receive a further \$150,000 from his TD Direct Investing account, which would form part of his share on the division of the parties' family property and debts. Due to a bank error, Mr. S. received \$192,000, but after the first week of trial, by agreement, he paid \$42,000 to Ms. S.
- [8] In the result, Mr. S. has received a total of \$200,000 pending trial, and Ms. S. has received only \$92,000. That difference of \$108,000 will have to be taken into account in the final order for property division. TRIAL EVIDENCE
- [9] Although the trial of this matter was scheduled for 5 days, it in fact occupied 15 days. Both the claimant and the respondent testified and were cross-examined at length. Many volumes of documentary evidence, consisting largely of banking and real estate records, were introduced as exhibits.
- [10] I heard the testimony of J.S., the parties' eldest daughter, who testified about incidents of family violence. A family friend, Michael Tam, also testified. Martha Lau, a cousin of the respondent, testified about her role as access supervisor when the respondent visited with the two younger children from June 2016 to January 2017.
- [11] In these reasons, I shall not review all of this evidence in detail. Much of the testimony consisted of detailed questions about the voluminous banking records. Counsel for Ms. S. provided a 24-page summary of the evidence as part of her final written submissions. I invited counsel for Mr. S. to provide his comments on this summary of the evidence, and while he agreed that it was generally accurate, he made a number of specific comments that he set out in his written submissions. I found the summaries and comments of both counsel to be helpful in organizing the evidence for the purpose of these reasons. FINDINGS OF FACT FROM THE EVIDENCE
- [12] From the evidence led at trial, I find the following facts.
- [13] Both parties were born in China in the 1960s. They moved to Canada in August 1991. Mr. S. is currently 57, and Ms. S. is 49. They were married on October 19, 1991, in Vancouver, British Columbia, and shortly thereafter, they applied to sponsor Ms. S.'s parents to immigrate to Canada.

- [14] Mr. and Ms. S. operated various restaurants from 1991 until January 2016. Ms. S. worked as a waitress, and Mr. S. was a cook.
- [15] Their first daughter, J.S. was born in 1994 and is now 24 years old. Their son, L.S., was born in 2002. He is now 15. Their youngest daughter, I.S., was born in 2006 and is now 11.
- [16] Following their son's birth, Ms. S. started to have health problems. In 2004, she had an operation to raise her uterus. It was day surgery, and Mr. S. drove her to and from the hospital. She continues to have related health problems, which make it difficult for her to stand for long periods of time. This has interfered with her ability to work, especially as a waitress. She is currently awaiting another operation.
- [17] Over the years, Mr. and Ms. S. bought and sold various properties.
- [18] At the beginning of their marriage, the couple lived in a condominium apartment that Mr. S. owned jointly with his father at 350 East 5th Avenue, Vancouver ("East 5th Ave"). It had been purchased in October of 1990 for \$91,000. Mr. S.'s father loaned him \$16,250 for the down payment, and Mr. S. contributed some of his own funds to the down payment, although the trial evidence does not establish the amount. Mr. S. testified that there was a mortgage against the property, although he did not know the original amount, the balance owing at the time of the marriage, or the value of East 5th Ave on the date of marriage. Mr. S. agreed that both he and Ms. S. contributed to the mortgage and maintenance payments on East 5th Ave.
- [19] As well, Mr. S. had a one-quarter interest in a house at 445 East 49th Avenue in Vancouver ("East 49th Ave"), which had belonged to his parents. After his mother died, title to the property was put in the names of Mr. S., his two siblings, and his father. Mr. S. was not able to say just when this happened, but he testified that when he received his 25% interest it was worth \$75,000. At some point his interest was reduced from one-quarter to one-sixth. Mr. S. was not able to say exactly when this happened, but he said the property was worth \$280,000 to \$290,000 at that point and there was no mortgage, making his one-sixth share worth approximately \$46,666. No documentary evidence was adduced to support the value placed on the property by Mr. S. or whether there was a mortgage.
- [20] On September 19, 1997, Ms. S. bought a property solely in her own name at 725 East 61st Ave, Vancouver ("East 61st Ave"). The purchase price was \$280,000.
- [21] Ms. S. testified that her aunt Fan Lai Man, and her uncle Kwok Keung Wong, sent her money to buy the property so that her father and mother could live there when they immigrated to Canada. There was no discussion at the time of whether this money would have to be repaid.
- [22] The banking record at Exhibit 35, Tab 1, shows the \$100,000 transfer into Ms. S.'s account on July 25, 1997, which Ms. S. says is money that came from her aunt, Fan Lai Man, who is the sister of Ms. S.'s father, Fan Tang Di.

- [23] Mr. S. agreed that the \$100,000 came from Fan Lai Man, and that it was used for the down payment on East 61st Ave, and that he did not contribute any money to the down payment. He said, however, that the \$100,000 was originally intended to purchase shares in a restaurant that he owned, to facilitate the immigration of Fan Lai Man and her husband, but that since he was closing that restaurant, Fan Lai Man gave the money as a gift to himself and Ms. S. to buy a house, so they could live more comfortably.
- [24] The banking record at Exhibit 36 shows a deposit of \$20,982.14 into Ms. S.'s account on July 25, 1997, which she says is money she borrowed from her uncle which, together with the \$100,000 from her aunt, formed the down payment to buy East 61st Ave.
- [25] Mr. S. testified that he was not aware of Ms. S. receiving this \$20,982. Under cross-examination, he said he thought she had taken the money from the restaurant, sent it to China and then had a cousin send it back to Canada. There is no independent evidence of Ms. S. taking money from the restaurant, and I do not accept the evidence of Mr. S. on this point.
- [26] At the time of the two advances, there was no agreement in writing stipulating a requirement to repay the money. However, Ms. S. tendered at trial a piece of paper that was marked as Exhibit 2, which purports to be a receipt for a loan of \$100,000 from Fan Lai Man. The note is dated August 20, 1998, although as Mr. Learn points out, there is no independent corroboration of that date. It states that the money "will be used" as the down payment to purchase a house in Ms. S.'s name so that when her parents come to live in Canada, they can all live together as a family. The note then goes on to say that when that time comes, Ms. S.'s father will be added to title, and the \$100,000 will then be a gift to him.
- [27] In addition to the down payment, Ms. S. took out a mortgage, solely in her name, in the amount of \$141,000 to purchase East 61st Ave. The initial mortgage was transferred to the Bank of Nova Scotia in April 1998, as documented in Exhibit 34, Tab 2.
- [28] Mr. S. agreed that he did not make payments on the mortgage, insurance, taxes or other costs relating to East 61st Ave. He testified that he did renovations.
- [29] Mr. and Ms. S. lived in the East 61st Ave home from 1998 to 2001, although from time to time they moved back to the East 5th Ave condominium so that the East 61st Ave house could be completely rented out.
- [30] Mr. S. and his father sold the condominium on East 5th Ave for \$88,000 on December 18, 2001. Mr. S. testified that he received approximately \$23,900, being half of the net sale proceeds, less the \$16,250 that his father had loaned him for the down payment.

- [31] Mr. S. acknowledged that since the condominium on East 5th Ave had gone down in value, most of the sale proceeds resulted from paying down the mortgage. He agreed that since Ms. S. had been involved in paying down the mortgage and maintaining the property, the \$23,900 was as much hers as his. I am satisfied that this defeats any argument that might have been made that Mr. S. is entitled to claim the proceeds from East 5th Ave as excluded property.
- [32] On March 14, 2002, Mr. S. bought the remaining 5/6 interest in East 49th Ave from his family members. The total purchase price was \$260,000, and he paid them \$216,666. The value of his 1/6th share as of March 14, 2002 was \$43,333. He used the \$23,900 proceeds from the sale of the East 5th Ave condominium along with money from another bank account for the balance of the \$36,727 needed to complete the purchase. He acknowledged that he had been asked at his examination for discovery to provide mortgage documents and records of the funds he provided in addition to \$23,900, but he has not done so.
- [33] On January 9, 2003, Ms. S. sold East 61st Ave for \$293,000. Exhibit 34, Tab 8 is a Scotiabank customer receipt in the amount of \$160,500, which Ms. S. testified represents the net sale proceeds of East 61st Ave.
- [34] Ms. S. testified that she had been looking after a property owned by her aunt in Vancouver, and after selling the property, Fan Lai Man loaned Ms. S. \$19,154 on June 25, 2003. She said she used this money to pay off the balance owing on Mr. S.'s line of credit. This is confirmed by the banking records at Exhibit 34, Tabs 7 and 9.
- [35] No loan document was prepared at the time Ms. S. received this money, but Exhibit 9 contains a note dated October 8, 2016 in which Fan Lai Man states, "You also borrowed twenty thousand Canadian dollars from me in June 2003. You said the money was to help your husband... pay back debts. I will not charge you interest on this twenty thousand dollars.... Please pay back as soon as possible."
- [36] Mr. S. testified this was not a loan. He said that he and Ms. S. had been helping look after Fan Lai Man's property, and so she gave them \$20,000 when she sold the property.
- [37] Ms. S. testified that on July 9, 2003, she had provided \$30,000 from the East 61st Ave sale proceeds to Mr. S., and he then made a payment of \$36,400 to reduce the mortgage on East 49th Ave. This is supported by the banking records at Exhibit 3, and Exhibit 34, Tab 11.
- [38] On cross-examination, Mr. S. was shown Exhibit 3, and he agreed that the \$30,000 going into his HSBC account came from the sale proceeds of East 61st Ave. Asked if he took \$36,400 from his account to pay down the mortgage on East 49th Ave, he answered, "That's what the document says."
- [39] On July 28, 2003, Ms. S.'s name was added to the title on the East 49th Ave property. She said that this was done because she paid for it.

- [40] Sometime in 2003, the mortgage on East 49th Ave became a joint debt of the parties, as shown in Exhibit 34, Tab 4. The amount borrowed was \$140,130.24, and both parties signed the document, but the date is incomplete, stating only the year, 2003.
- [41] Ms. S.'s parents did not immigrate to Canada as expected, and on September 9, 2003, she sent \$136,500 to her father by telegraphic transfer. She said she sent him the money because the original money used to buy East 61st Ave had been intended to provide housing in Canada for him. She testified that she told her parents that this was a gift from her aunt, although she had not discussed this with her aunt.
- [42] Mr. S. testified that the \$136,500 belonged to himself and Ms. S., and that it was sent to China to be invested. He said an excavator had been purchased and rented to Ms. S.'s brother.
- [43] When asked on cross-examination why he and Ms. S. had not kept the \$136,500 if it belonged to them, Mr. S. said that Ms. S. sent the money back secretly, without his knowledge. He said he felt she was trying to hide the money.
- [44] Ms. S. testified that in June of 2004, she borrowed \$44,919 from her mother. There is no contemporaneous document stating that this is a loan, but banking records at Exhibit 34, Tabs 5 and 14, show that on June 2, 2004, \$44,919.50 was transferred into an HSBC Performance STMT account, and on June 7, 2004 \$36,400 was transferred from that account to a mortgage account, reducing the balance on the East 49th Ave mortgage to \$98,247.03. Previously, as of May 14, 2004, the balance had been \$135,183.66.
- [45] Mr. S. acknowledged that \$44,919 was deposited, but he said the money came from the East 61st Ave sale proceeds that had been sent to China. He denies that it was a loan and says the money belonged to Ms. S. and himself.
- [46] Ms. S. says she received a note from her mother, dated February 18, 2015, stating "I want you to pay me back the Cdn \$36,400 that I lent you in June of 2004." This note is at page 6 of Exhibit 9. As counsel for Mr. S. points out, this amount is different from the alleged loan of \$44,919.
- [47] Exhibit 34, Tab 5 shows that by June 14, 2005, the amount left owing on the HSBC East 49th Ave mortgage was \$91,709.73. Ms. S. testified that on June 28, 2005, the HSBC mortgage on East 49th Ave was transferred to a TD account with a number ending ...394.
- [48] Ms. S. testified that on November 22, 2005, she received a Bank of China draft in the amount of \$15,749.12 which she used to pay down the mortgage on East 49th Ave. She testified that she borrowed the money from her mother, although there was no written evidence of the terms of a loan. Banking records at Exhibit 34, Tabs 15, 16 and 17 appear to show the \$15,749.12 draft being deposited to account number ...394 at the end of December 2005 or the beginning of January 2006.
- [49] Mr. S.'s position is that the \$15,749.12 was part of the East 61st Ave sale proceeds that had been sent to China to be invested. He says this was their money and not a loan.

- [50] Ms. S. testified that in February of 2006, she borrowed \$14,900 from her mother that she used to pay down the East 49th Ave mortgage. There is no written evidence of the terms of a loan, but the bank draft is at Exhibit 34, Tab 12. On cross-examination, Mr. S. agreed that this amount was deposited to the mortgage account by Ms. S.
- [51] Ms. S. testified that she borrowed \$42,099 from her mother, in August 2006, which was sent to her via four friends or relatives, because of currency regulations in China. There is no contemporaneous loan document. Ms. S. testified that she deposited this amount to reduce the mortgage against East 49th Ave. Exhibit 34, Tab 17 shows that on August 4, 2006, the balance owing on the mortgage was \$131,506.35. On August 8, 2006, \$42,099.60 was credited to the account, reducing the balance to \$89,406.75.
- [52] Mr. S. testified in direct that the \$42,099 was part of the East 61st Ave sale proceeds that had been sent to China to invest.
- [53] Ms. S. testified that she borrowed a further \$40,000 from her mother in October of 2006, which she used to pay down the East 49th Ave mortgage. There is no contemporaneous loan document, but banking records at Exhibit 37, Tabs 2 and 17 show a credit of \$40,000 going to account ...394, reducing the balance owing on the mortgage from \$89,445.18 to \$49,445.18.
- [54] Mr. S.'s evidence on direct was that this \$40,000 was also part of the East 61st Ave sale proceeds which had been sent to China, but on cross-examination he was not sure about this.
- [55] Mr. S. was asked why he claimed that the various monies received by Ms. S. amounting to over \$142,000 were attributable to the money that had been sent to China, when that amount was only \$136,500. He said this was due to currency fluctuations.
- [56] The home at East 49th Ave was sold on December 20, 2006 for \$645,000, and the same month, they bought a house on Ontario Place, Vancouver ("Ontario Place") for \$595,000. They did not need a mortgage to buy Ontario Place, but they did obtain a Bank of Montreal line of credit, in joint names, secured against Ontario Place, with a credit limit of \$680,000 (the "Readiline" account).
- [57] The Ontario Place property has four bedrooms in its basement, which they rented out from time to time.
- [58] Mr. S. acknowledged in his evidence that he withdrew \$300,000 from the Readiline account in December 2008, another \$300,000 on March 16, 2009, and a further \$100,000 on June 23, 2009, which he transferred to his TD Direct Investing account number ...190 ("Mr. S.'s Investment Account"). He said in his examination for discovery that at one point, he had almost \$2,000,000 in this account (Exhibit 25, Q 199).
- [59] A family friend, Mr. Tam, testified that he had advised Mr. S. not to borrow against the house to invest, since if something happened, they could lose their home.

- [60] Ms. S. also used money from the Readiline account for investing. She said she took approximately \$90,000 for that purpose.
- [61] Ms. S. testified that she continued to have health problems resulting in a second day surgery in 2009, and she could not lift heavy objects. She was off work for about one month during which time J.S. took her place at the restaurant. Ms. S. testified that although she had not recovered after a month, she returned to the restaurant because she did not want J.S., who was then in high school, to have to continue working.
- [62] On August 27, 2010, Mr. S. purchased a house in his name at Hampstead Way, in Calgary, Alberta, for \$710,006.04 ("Hampstead"). Mr. S. was the only borrower on the mortgage. Mr. S. wrote a cheque for \$711,000, but the law firm also received \$600,000 from the Bank of Montreal.
- [63] At his examination for discovery, Mr. S. said that this was a mistake, and asked why he would borrow money if he already had \$700,000. On direct, Mr. S. said that he had a problem with the mortgage, and the law firm asked him to pay the entire purchase price. On cross-examination, he explained the difference between his evidence at discovery and at trial by saying that he had looked at the documents and recalled what had happened.
- [64] On September 3, 2010, \$600,000 was deposited to Mr. S.'s TD Canada Trust account ...946. On the same date, Mr. S. transferred \$200,000 to his Investment Account. He also transferred \$399,000 to his TD account numbered ...527. Mr. S. acknowledged in cross-examination that he initially told his lawyer that account ...527 was not his account, and that he had verified this with the bank, but counsel has confirmed with the bank that in fact it was Mr. S.'s account.
- [65] On November 9, 2010, Mr. S. purchased a home on 2nd Avenue NW, Calgary, Alberta, ("2nd Ave") for \$542,000, with a mortgage in the amount of \$406,500. Mr. S. testified that he paid the difference between the purchase price and the mortgage with money that came from his Investment Account.
- [66] Around this time, Mr. and Ms. S. operated the Lucky Star Restaurant in Vancouver through a corporation named Fita Health Inc. ("Fita"). Ms. S. testified that Mr. S. incorporated Fita with Ms. S. as the only shareholder because Mr. S. previously ran a restaurant and did not file tax returns. Mr. S. acknowledged that he had incorporated Fita, but claimed that Ms. S. was the main operator of the company and he was just an employee.
- [67] Around August 2011, the Lucky Star Restaurant was closed, and the family went to live in the Hampstead property in Calgary. Mr. S. returned to Vancouver and spent time renovating Ontario Place.

- [68] On April 2, 2012, Mr. S. bought the Capital Hill Restaurant in Vancouver for \$150,016.83. Ms. S. testified that half of the price came from the sale of the previous restaurant, and the rest from a TD account belonging to Mr. S. Mr. S. testified that \$123,000 of the price come from his Investment Account.
- [69] In July 2012, Ms. S. and the children returned to live at Ontario Place in Vancouver, while she and Mr. S. worked at the Capital Hill Restaurant, operated by Fita.
- [70] On August 29, 2012, Hampstead was sold for \$785,000, with net sale proceeds of \$171,584, which was deposited in a BMO joint account.
- [71] On September 24, 2012, the parties made a \$158,000 payment to the Readiline line of credit.
- [72] On November 16, 2012, House Wise Construction Ltd., dba Segal Disposal ("Segal") sued Fita for alleged failure to pay for waste disposal services. On April 24, 2013, Segal obtained an order for seizure and sale in the amount of \$3,362.50.
- [73] On January 30, 2013, there was a purported sale of Fita's corporate assets to Kin Hung Wang. The first page of this document is at Tab 13, Exhibit 35. Ms. S. testified that she filled in the handwritten portion of the sale document. Ms. S. testified that Mr. Wang was a friend of Mr. S. She gave evidence that this transaction was not her idea. She testified that they all signed the document, but no money changed hands. Ms. S. said that Mr. S. told her that he did this to avoid having to pay a court order to Segal. When asked on cross-examination if it was his idea to sell Fita's assets to Mr. Wang, Mr. S. said, "Are you saying I forced her to do it?"
- [74] On February 21, 2013, Mr. S. incorporated 0962981 BC Ltd. (the "Numbered Company"), with Ms. S. as the only shareholder. Ms. S. testified that this was Mr. S.'s idea, and that he ignored her objections to him using her personal information.
- [75] On March 1, 2013, the Numbered Company bought the assets of Fita for \$68,000. Ms. S. said that this was Mr. S.'s idea, and that he was trying to avoid a fine from the court. She said that there was no discussion about this, and that Mr. S. ordered her. She testified that if she did not listen, he hit her, scolded her and gave trouble to the kids. She testified that she was afraid of him, and even if she was not willing, she would do what he said.
- [76] On March 28, 2013, Mr. S. filed a notice of change of directors of the Numbered Company, from Ms. S. to Kin Hung Wang. Ms. S. testified that Mr. S. did this to avoid the court order.
- [77] The parties both testified that the debt to Segal was not paid. Ms. S. said that Mr. S. did not want to pay it. Mr. S. said that Ms. S. should have paid it, but if it was still an outstanding debt he was willing to pay half.

- [78] Ms. S. testified that despite a promise from Mr. S. that he would not use the Hampstead sale proceeds, he used it to pay for a number of withdrawals from the Readiline line of credit. This prompted her, on September 13, 2013, to withdraw funds from joint accounts, and move the money around. Both Mr. S. and Ms. S. said they used the money for family purposes.
- [79] Mr. Tam testified that, at the end of 2015, Ms. S. called him and said she suspected Mr. S. was going to take the money and leave, because the house in Calgary was in his name. Mr. Tam told her he could not give advice without hearing the other side of the story. He met then with Mr. S., who said that he had been planning to leave for over two years.
- [80] Ms. S. testified that while working at the restaurant on January 2, 2016, Mr. S. scolded her, using bad language. She wanted to leave the restaurant and take the children, but Mr. S. said if they left, they would be sleeping on the street. He said that they owed the landlord of the restaurant \$100,000.
- [81] Mr. S. testified that he told L.S. that the restaurant was their livelihood and he asked L.S. to convince his mother to keep operating the restaurant. He said that they owed the landlord \$100,000 over the total duration of the lease.
- [82] On January 22, 2016 Ms. S. filed a notice of family claim seeking an order for divorce, orders respecting children, an order for spousal support and orders relating to property, including an order pursuant to s. 89 of the Family Law Act for interim distribution of family property. On January 25, 2016, a Protection Order was made, and an order restraining Mr. S. from disposing of assets except by further court order or written agreement of Ms. S. Mr. S. moved out of Ontario Place after being served on January 26, 2016. The children stayed with Ms. S. in Ontario Place.
- [83] Currently, Ms. S. and the children are residing in the home at Ontario Place. Mr. S. is living in rented accommodation.
- [84] The Lucky Star Restaurant ceased operating after Mr. S. was served with the notice of family claim, and the parties stopped making payments on the lease. The landlord asked that the \$18,772.08 owing be paid by March 31, 2016, failing which the contents of the restaurant would be put toward the outstanding monies. The parties' evidence was that they had not paid the landlord. Neither knew whether there was any money still owed to the landlord.
- [85] Ms. S. did not work again as a waitress after the restaurant closed. She worked briefly as a housekeeper at a hotel. She gave evidence that she was let go after three months.

[86] Ms. S. has continued to collect rental income of approximately \$2,800 per month from the bedrooms in the basement of Ontario Place. She testified that her health continues to be poor. She cannot stand for more than an hour and a half without feeling faint, and she is unable to pick up heavy objects. She is waiting for surgery which has not yet been scheduled. She anticipates a three-month recovery period. She said she will try to work as a waitress or cleaner after she recovers from her surgery.

ISSUES

[87] A number of issues arise on this trial.

[88] First, I am asked to identify the family property and family debts existing at the date of separation, and to value the property as at the date of trial. This involves two subsidiary considerations: how to characterize the monetary advances made by members of the claimant's family, and a determination of whether either the claimant or the respondent has any excluded property.

[89] The next issue is to determine whether there should be an equal or unequal division of the property and debts.

[90] There needs to be an accounting for monies paid out prior to trial.

[91] There must be a determination of the amount of child support.

[92] There must be a decision whether an order should be made for spousal support.

[93] Finally, I am asked to decide whether there should be a continuation or a variation of the Protection Order. DIVISION OF PROPERTY UNDER THE FAMILY LAW ACT

[94] Both parties seek an order for the division of property. The jurisdiction of the Supreme Court to make such an order is found in s. 94(1) of the Family Law Act. Property division is dealt with under Part 5 of the FLA, which includes ss. 81-109.

[95] "Family property" is defined in s. 84 of the FLA. Except for excluded property, all real and personal property that on the date of separation is either owned, or in which there is a beneficial interest held, by at least one spouse, is included in family property. Property acquired after separation and derived from family property may also be family property. Family property may include, among other things, shares in a corporation, money in a financial account, pension entitlements, and property owing to a spouse.

[96] Section 81 provides that subject to certain exceptions, upon separation, each spouse has a right to an undivided one-half interest in all family property as a tenant in common, and is equally responsible for family debt, regardless of their respective use or contribution.

[97] Certain property is excluded from family property. Section 85 provides: 85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
 - (b) inheritances to a spouse; (b.1) gifts to a spouse from a third party;
 - (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or (ii) lost income of a spouse;
 - (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or (ii) lost income of a spouse;
 - (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
 - (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and (ii) that is settled by a person other than the spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.
- [98] Section 84(2)(g) provides that family property includes any increase in the value of excluded property since the spouses' relationship began, or the date the excluded property was acquired, whichever is later.
- [99] Family debt is defined in s. 86 as follows: 86 Family debt includes all financial obligations incurred by a spouse
- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
 - (b) after the date of separation, if incurred for the purpose of maintaining family property.
- [100] Section 87 provides that subject to certain exceptions, the value of family property or family debt is based on fair market value on the date of the court hearing or agreement.
- [101] While equal division of family property and family debt is the general rule, s. 95(1) provides that the Court has a discretion to order an unequal division if necessary to prevent significant unfairness. The factors to be considered are set out in ss. 95(2) and (3): 95 (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;

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

[102] Section 96 deals with the division of excluded property. That section provides: 96 The Supreme Court must not order a division of excluded property unless

- (a) family property or family debt located outside British Columbia cannot practically be divided, or
 - (b) it would be significantly unfair not to divide excluded property on consideration of
 - (i) the duration of the relationship between the spouses, and (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.
- IDENTIFICATION AND VALUATION OF THE PROPERTY AND DEBTS TO BE DIVIDED

[103] The parties agreed at the Judicial Case Conference that they separated on January 15, 2016.

- [104] Subject to a discussion of excluded property and the characterization of monies advanced by the claimant's family, the most significant items of family property existing at the date of separation are the home at Ontario Place in Vancouver and the home at 2nd Ave in Calgary. The former is currently in joint names and the latter is in the respondent's name. The most recent appraisals of those properties, which I accept as a sufficiently reliable indicator of their value at the time of trial, show the Ontario Place property to be worth \$1,870,000, and the 2nd Ave property to be worth \$556,000.
- [105] Other assets in the claimant's name include a 2011 Sienna vehicle worth \$14,000, and bank accounts totalling \$33,045.
- [106] There is one BMO joint chequing account with a value of \$2,525.
- [107] Other assets in the respondent's name include a 2002 Mercedes Benz vehicle worth \$6,000, a Dodge Caravan worth \$300, bank accounts totalling \$5,069, and a TD Direct Investing Account with a value of \$451,481.
- [108] Debts in joint names include the Readiline line of credit registered against Ontario Place with \$643,455 owing, and City of Vancouver property tax of \$11,438.
- [109] Debts in the claimant's name include \$20,259 for 0852981 Ltd. G.S.T., \$18,722 to 989238 BC Ltd. regarding rent for the Lucky Star Restaurant, and \$3,362 for the judgment obtained by Segal Disposal against Fita Health Inc.
- [110] Debts in the respondent's name include \$312,336 owing on the Calgary mortgage.
- [111] The total of all these assets is \$2,938,420, and the total of all these debts is \$1,009,572. The net difference between these assets and debts is \$1,928,848. EXCLUDED PROPERTY AND MONIES ADVANCED BY CLAIMANT'S FAMILY
- [112] Each party asserts, for different reasons, that this list of family assets and debts is not completely accurate. The respondent asserts that he is entitled to credit for excluded property, and the claimant asserts that certain monies advanced by her family constitute family debts.
- [113] Pursuant to s. 85(2) of the FLA, the responsibility for demonstrating that property is excluded is on the spouse claiming the exclusion.
- [114] The value of the condominium on East 5th Ave went down between the time it was acquired in 1990 and when it was sold in 2001. The respondent agreed that since the claimant had been involved in paying down the mortgage and maintaining the property, the sale proceeds were as much hers as his. I am satisfied, therefore, that the respondent cannot claim the proceeds from the sale of East 5th Ave as excluded property.

- [115] With respect to the East 49th Ave property, the respondent initially held a 25% interest, but this was subsequently reduced to a one-sixth interest. The respondent was not able to say what the value of his interest was at the time of the marriage, and no documentation was presented to support a finding of the value. The respondent has not satisfied his responsibility for demonstrating that he is entitled to claim this as excluded property.
- [116] I turn, then, to the monies advanced by the claimant's relatives, which she claims as family debts.
- [117] The evidence shows that the claimant received advances from her relatives totaling \$297,803 during the parties' married cohabitation: July 4, 1997 - \$100,000 from her aunt Fan Lai Man; July 25, 1997 - \$20,982 from her uncle Kwok Keung Wong; June 25, 2003 - \$19,154 from her aunt Fan Lai Man; June 2004 - \$44,919 from her mother; November 22, 2005 - \$15,749 from her mother; February 2006 - \$14,900 from her mother; August 2006 - \$42,099 from her mother; October 2006 - \$40,000 from her mother.
- [118] She also received a total of \$44,000 after the parties' separation in January of 2016: \$16,000 from her mother in April of 2016; \$9,000 from her mother in 2017; \$9,000 from her sister in 2017; \$10,000 from Mr. Kin Hung Wang.
- [119] Should these gratuitous advances be considered as loans or gifts? This question is to be determined by reference to the intention of the person who made the advance, at the time of the advance: *Cabezas v. Maxim*, 2016 BCCA 82, para. 41.
- [120] The Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17, reviewed the law relating to the presumption of advancement and the presumption of resulting trust as applied to gratuitous advances of money between family members, and held that although the presumption of advancement applies between parents and their minor children, that is not the case in respect of adult children. The presumptions are a guide for resolving disputes where evidence of the transferor's intent is unavailable or unpersuasive.
- [121] The presumption of resulting trust was explained at para. 24 of *Pecore*: 24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and *E. E. Gillese and M. Milczynski, The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
- [122] This approach was adopted by our Court of Appeal in *Beaverstock v. Beaverstock*, 2011 BCCA 413 at para. 9:
- [9] The correct approach to the resolution of this dispute is not in dispute. It is set out in *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795. Whether the transfer was a loan or a gift depends on the actual intention of the appellant when she made the advance, which is a question of fact. As the advance was gratuitous, the onus was on the respondent to demonstrate that the

appellant intended a gift, since equity presumes bargains, not gifts (para. 24). This equitable principle gives rise to a presumption the son received the money on a resulting trust, which is a rebuttable presumption of law. The trial judge was therefore required to presume the advance was not a gift and to determine whether the respondent had satisfied the burden of rebutting the presumption of resulting trust on a balance of probabilities (para. 44).

[123] As the presumptions are rebuttable, one must still consider the facts of each case. A useful list of relevant factors was set out in *Locke v. Locke*, 2000 BCSC 1300 at para. 20:

1. whether there were any contemporaneous documents evidencing a loan;
2. whether the manner for repayment is specified;
3. whether there is security held for the loan;
4. whether there are advances to one child and not others, or advances of unequal amounts to various children;
5. whether there has been any demand for payment before the separation of the parties;
6. whether there has been any partial repayment; and
7. whether there was any expectation, or likelihood, of repayment. This list of factors was referred to by our Court of appeal in *Kuo v. Chu*, 2009 BCCA 405, at para. 9.

[124] In the present case, there is no contemporaneous documentation evidencing a loan with respect to any of the pre-separation advances, although the claimant has referred to subsequent documentation of many of them. There was no manner of repayment specified at the time of the advances, nor was any security taken. There is no evidence of advances to other children. There have been a few subsequent demands for repayment, but some of them came after the date of separation.

[125] The evidence is somewhat confusing as to whether there has been any partial repayment. As set out above, on September 9, 2003, Ms. S. sent a telegraphic transfer of \$136,500 to her father in China. It might be contended that this amounted to repayment of the advances in July 1997 from her aunt and her uncle. However, the transfer from Ms. S. in September 2003 was not to either her aunt or her uncle, and Ms. S. testified that she did not discuss the transfer with either of them. I therefore do not infer that this amounted to repayment of the amounts advanced in July 1997. Nor do I accept the various other theories suggested by Mr. S. in his evidence, for example, that Ms. S. was stealing money from the restaurant, or that she was secretly trying to hide money from the Canada Revenue Agency, or that she was sending money to China to invest, which her parents later sent back to her. The evidence as a whole does not support any of those theories on a balance of probabilities.

[126] While in this case the Locke factors do not provide strong evidence that at the time of the advances the transferor had formed the intention that they would be loans, neither is there any real evidence that they were intended to be gifts to Mr. and Ms. S.

- [127] With respect to each of the advances, I find, to use the words of Pecore, that evidence of the transferor's intent at the time is either unavailable or unpersuasive, and I therefore turn to the presumptions as a guide. The presumption of advancement does not apply, as these were gratuitous transfers and were not from a parent to a minor child. Rather, the presumption of resulting trust applies, and I find that each of the transfers must be considered as a loan to the claimant which, by virtue of s. 86(a) of the FLA, is a family debt for those transfers that occurred before separation.
- [128] As to the transfers after the date of separation, s. 86(b) of the FLA provides that they may be considered family debts if they were incurred for the purpose of maintaining family property. Ms. S. testified that they were. I am satisfied on the evidence that without the advances, the claimant would not have been able to make the payments required to maintain the Ontario Place home where she was living with the three children, and I therefore find that they are family debts.
- [129] My finding that these advances by family members are family debts is limited to the principle amounts only, and not to the interest claimed. Ms. S. seeks a finding that the amount owed to Fan Lai Man should include \$92,250 in interest payable at 3.5%, in addition to the principle amount of \$100,000. She also submits that the amount owing to Kwok Keung Wong should include \$5,092 in interest, in addition to the principle amount of \$26,075. I do not agree that the interest claimed constitutes a family debt. There was no discussion of a requirement to pay interest at the time the monies were advanced, and on the facts of this case, the presumption of advancement applies only to the principle amount, not to interest. THE DIVISION OF PROPERTY
- [130] The claimant wishes to continue living in the house at Ontario Place with the three children. I agree that that would be in the best interests of the children, if it can be accomplished consistently with a fair division of the family assets and debts. The two younger children are still in school, and it is desirable to subject them to as little disruption of their lives as reasonably possible.
- [131] This objective can be achieved if Ms. S. makes a compensation payment to Mr. S. to arrive at an equal division of assets and debts. I do not find it necessary in this case to order an unequal division of property under s. 95(1) of the FLA as in my view, fairness can be achieved with an equal division.
- [132] Set out below is a modified version of the Scott Schedule that was attached to the claimant's written submissions. I have changed it to take into consideration the respondent's submissions, and in particular, to remove any claim for interest on the family debts. The assets and debts of the parties, along with their value as at the time of trial, is as follows:
- | ASSETS AND DEBTS WITH VALUES AT DATE OF TRIAL | Assets in Joint Names | Value at Trial Date |
|---|-----------------------|------------------------------|
| Debts in Joint Names | Value at Trial Date | Ontario Place, Vancouver, BC |
| | | \$1,870,000 |
| Readiline | \$643,455 | BMO Chequing |
| | 372 | \$2,525 |
| City of Vancouver property tax | | \$11,438 |
| SUBTOTAL: | \$1,872,525 | SUBTOTAL: \$654,893 |
| Assets in Claimant's Name | | Value at Trial Date |

Debts in Claimant's Name Value at Trial Date 2011 Sienna \$14,000 0852981 Ltd. G.S.T. \$20,259 CIBC 137 \$53 Debt to Landlord \$18,722 TD Waterhouse CAN Cash 495 \$2 Segal \$3,362 TD Waterhouse US Cash 495B \$26,714 Fan Lai Man \$100,000 \$19,154 TD Waterhouse TFSA 495J \$1,191 Kwok Keung Wong \$20,982 TD Every Day Savings 178 \$103 Zhong Lian Tai \$44,919 \$15,749 \$14,900 \$42,099 \$40,000 \$16,000 \$9,000 TD US Daily Interest Chequing 140 \$3,007 Fan Gui Qiong \$9,000 TD All Inclusive Chequing Account 773 \$1,975 K.H. Wong \$10,000 SUBTOTAL: \$47,045 SUBTOTAL: \$384,146 Assets in Respondent's name Value at Trial Date Debts in Respondent's name Value at Trial Date 2nd Ave, Calgary, AB \$556,000 Mortgage \$312,336 2002 Mercedes Benz E320 \$6,000 2005 Dodge Caravan \$300 TD Direct Investing 190 \$451,481 Coast Capital 058 \$1,531 Coast Capital 770 \$5 TD Chequing 946 \$3,533 SUBTOTAL: \$1,018,850 SUBTOTAL: \$312,336 TOTAL ASSETS: \$2,938,420 TOTAL DEBTS: \$1,351,375 Assets less Debt = \$1,587,045 Equal Distribution = \$793,522.50

[133] If title to Ontario Place in Vancouver is put into the claimant's name and she assumes responsibility for the property taxes and the Readiline line of credit on Ontario Place, as well as responsibility for the debts in her name, and if the respondent keeps the home at 2nd Ave in Calgary with responsibility for its mortgage, and if the money in the joint BMO account is given to the respondent, then an equal distribution of \$793,522.50 to each would require a compensation payment from the claimant to the respondent in the amount of \$84,483.50, as set out in this table: EQUAL DISTRIBUTION WITH COMPENSATION

PAYMENT	Claimant	Respondent
Ontario Place, Vancouver	\$1,870,000.00	
Other Assets in Claimant's Name	+\$47,045.00	
2nd Ave, Calgary, AB	\$556,000.00	
Other Assets in Respondent's Name	\$462,850.00	
Debts in Claimant's Name	-\$384,146.00	
Mortgage 2nd Ave	-\$312,336.00	
Readiline Ontario Place	-\$643,455.00	
Joint BMO 372	+\$2,525.00	
Property Taxes	-\$11,438.00	
SUBTOTAL:	\$878,006.00	\$709,039.00
Compensation Payment	-\$84,483.50	+\$84,483.50
TOTAL:	\$793,522.50	\$793,522.50

[134] There is one further detail that must be dealt with. As set out above, monies were advanced to each party in advance of the trial, with the agreement that these would form part of each of their share of the property division at trial. The amounts advanced were not equal. Mr. S. received a total of \$200,000, whereas Ms. S. only received \$92,000. The difference is \$108,000. To account for the additional benefit that Mr. S. received pending trial, and to equalize the amounts, half of that \$108,000, that is, \$54,000 must be deducted from the \$84,483.50 compensation payment.

[135] Accordingly, the net amount of the compensation payment that Ms. S. must make to Mr. S. is \$30,483.50 to achieve an equal division of family property and family debt, which when rounded up, is \$30,484.

- [136] It is unrealistic to expect Ms. S. to make that payment immediately, as she is currently awaiting an operation for her medical condition, and she will not be able to resume regular employment until she recovers from that operation. Accordingly, the compensation payment is to be made within one year from the date of this judgment. MISCELLANEOUS PROPERTY MATTERS
- [137] In addition to the debts that were specifically dealt with in the property division above, there may be some further debts arising out of the operation of the restaurants that have not been accounted for. The evidence at trial left some uncertainty about these debts, and whether they will ever become payable. The parties are in agreement that if Ms. S. is required to pay any of those further debts arising out of the operation of the restaurants, Mr. S. will compensate her for half the amount.
- [138] As well, Mr. S. referred at trial to some expense that was involved in withdrawing the \$292,000 that was advanced to the parties pending trial. He was uncertain of the amount, but he thought it was about \$4,000. When he can document the exact amount, Ms. S. will be required to compensate him for half. CHILD SUPPORT
- [139] For the purpose of this trial, the parties are agreed that support may be calculated on the basis that the respondent's income is \$75,000 and the claimant's income is \$16,939.
- [140] Based on these incomes, the Child Support Guidelines set the basic amount of support payable by Mr. S. to Ms. S. for the two younger children at \$1,164 per month. I order that he pay basic child support in that amount on July 1, 2018 and on the first of every month thereafter.
- [141] As well, there will be an order that the parties share extraordinary expenses under s. 7 of the Child Support Guidelines, with Mr. S. paying 80% and Ms. S. paying 20%. This will include the expenses already incurred for L.S. totalling \$2,370 per year for camp, badminton, piano lessons, and swimming. In the future L.S. may need a tutor. For I.S. the past expenses include \$8,079 for orthodontics and dental surgery, and \$2,440 for camp, badminton, piano lessons, and swimming. SPOUSAL SUPPORT
- [142] Section 15.2(4) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) sets out a list of factors to be considered in determining whether a spouse should be found entitled to an order for spousal support. That section provides: 15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

[143] The objectives of an order for spousal support are set out in s. 15.2(6): 15.2(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[144] This was a marriage of approximately 25 years duration. Although both parties worked outside of the home in restaurants, Ms. S. assumed the primary responsibility of raising and caring for the children, and this is a significant factor: see *Chutter v. Chutter*, 2008 BCCA 507, at paras. 50-51. Ms. S. has only a very basic ability to communicate in English, and her job skills and experience are limited. She now has health problems that interfere with her ability to work, and that will continue for at least some time after she has a needed operation.

[145] I find that following the breakdown of their marriage, Ms. S. is entitled to spousal support pursuant to s. 15.2 of the Divorce Act, on both a compensatory and needs-based approach, as set out in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. Taking account of the length of the marriage, the order shall be for an indefinite period.

[146] Using the "with child support" formula, and based on an income of \$75,000 for the respondent and an income of \$16,939 for the claimant, the Spousal Support Advisory Guidelines show a range of spousal support from a low of \$162 to a high of \$565, with a mid-range of \$362 per month. In the circumstances of this case, support in the mid-range is appropriate. The respondent is ordered to pay the claimant spousal support in the amount of \$362 per month commencing July 1, 2018, for an indefinite period.

[147] I do not agree with the claimant's position that there should be an order for lump sum support. Mr. S. has a good history of making the interim child support payments that were ordered by the Court. There were only a few glitches in making the required payments on time, and I accept Mr. S.'s evidence that they were due to errors by the bank. There is no basis in this case for ordering lump sum support or for otherwise ordering security for the payments. Similarly, I do not accept the claimant's position that there should be an order binding the estate of Mr. S.

- [148] Mr. S. has agreed to designate the children as irrevocable beneficiaries of his life insurance policy, and I so order.
- [149] As well, there shall be an order that both parties exchange tax returns, notices of assessment and pay cheque slips showing current year to date earnings annually by June 15, commencing June 15, 2019. RETROACTIVE SUPPORT
- [150] The claimant seeks an order both for retroactive child support and for retroactive spousal support.
- [151] I do not agree that the circumstances of this case justify an order for retroactive spousal support.
- [152] Child support, however, is a different matter. Typically, when an interim order for child support is made, it is based on incomplete information about the parties' income. Where the amount of interim child support is shown on the trial evidence to have been below the level required by the Child Support Guidelines, it may be appropriate to make an order at trial for retroactive child support to make up the difference.
- [153] The difference between the interim child support paid, and the shortfall based on the Guidelines amount, is set out in the following table: Year Mr. S.'s Income Amount of Interim Child Support paid Guideline Amount of Child Support due Difference Cumulative 2016 \$43,555 \$546 x 7 = \$3,822 \$687 x 12 = \$8,244 \$4,422 \$ 4,422 2017 \$75,000 \$546 x 10 = \$5,460 \$605 x 2 = \$1,210 Total: \$6,670 \$1,164 x 12 = \$13,968 \$7,298 \$11,720 2018 \$75,000 \$605 x 6 = \$3,630 \$1,164 x 6 = \$6,984 \$3,354 \$15,074
- [154] There shall be an order that Mr. S. pay Ms. S. \$15,074 in retroactive child support. That amount is payable at the same time as the compensation order of Ms. S., namely, one year from the date of this judgment.
- [155] The two orders may be set off against each other, so that the actual amount that Ms. S. must pay to Mr. S. would be \$30,484 minus \$15,074, that is, \$15,409 payable by Ms. S. to Mr. S. within one year from the date of this judgment. FAMILY VIOLENCE AND NEED FOR PROTECTION ORDER
- [156] Mr. S. is currently bound by a Protection Order that was granted by Master Taylor on January 25, 2016. He is also bound by a twelve-month Recognizance ordered by Provincial Court Judge Senniwi on January 19, 2018.
- [157] The claimant now seeks an order at trial that Mr. S. be bound by a Protection Order under s. 183 of the FLA. She asks that the order be for an indefinite period.
- [158] "Family violence" is defined in s. 1 of the FLA as including physical, psychological, and emotional abuse, including intimidation, threats, stalking and unreasonable restrictions on a family member's financial or personal autonomy. It is also defined to include direct or indirect exposure of a child to family violence.

- [159] Considerable evidence was led at this trial, documenting the physical, psychological, and emotional abuse that Mr. S. inflicted, particularly on Ms. S. and J.S., and the exposure of the younger children to violence. I need not recite that evidence in detail in these reasons. The parties are well aware of the evidence that was led at trial. J.S. in particular, testified in detail about the physical and emotional violence of Mr. S., and I accept the accuracy of her account without reservation, despite the denials of Mr. S.
- [160] I agree that the evidence justifies the making of a Protection Order under s. 183(1) of the FLA. The order shall have the same terms as the order of Master Taylor, with the exception that the references to the Lucky Star Restaurant may be removed. As well, there shall be a clause that the order does not prevent Mr. S. from being in contact for the purpose of Court attendance, mediation, or family counselling.
- [161] I do not agree with the claimant's position that the order should be of indefinite duration. Section 183(4) of the FLA states: 183(4) Unless the court provides otherwise, an order under this section expires one year after the date it is made.
- [162] The Protection Order shall be for a period of 12 months from the date of this judgment.
- SUMMARY AND COSTS
- [163] The net effect of the orders made above is that title to the home at Ontario Place is to be placed in the sole name of Ms. S., and within one year of the date of this judgment, she is to make a compensation payment to Mr. S. in the net amount of \$15,410.
- [164] Mr. S. is required to pay basic child support in the amount of \$1,164 per month for the two younger children plus 80% of extraordinary expenses. He is also required to pay spousal support to Ms. S. in the amount of \$362 per month starting July 1, 2018.
- [165] Although the claimant was successful in obtaining some of the relief she requested, in many respects, the relief is different from or less extensive than what she had sought. As well, she was unsuccessful on some contested evidentiary issues relating to the admissibility of affidavit evidence and a doctor's letter.
- [166] On some issues, the trial was simplified by concessions made by the respondent, for example, his concession that the figure of \$75,000 could be used as his income for support purposes.
- [167] I am of the view that this is a case in which there has been divided success, and accordingly, I order that each party shall bear his or her own costs. As agreed by counsel for the respondent, both parties shall share the hearing fees. The Honourable Mr. Justice W.F. Ehrcke

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Prepared on 29 October 2026 · Esheria