

CANADA / JUDGMENT

C.Y.J. v. R.J.

2022 BCSC 1901

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1901 C.Y.J. v. R.J. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: C.Y.J. v. R.J., 2022 BCSC 1901 Date: 20221031 Docket: E55334 Registry: New Westminster Between: C.Y.J. Claimant And R.J. Respondent Before: The Honourable Mr. Justice Taylor Reasons for Judgment The Claimant, appearing on her own behalf: C.Y.J. Counsel for the Respondent: M.K. Mand Place and Date of Trial: New Westminster, B.C. November 29 - December 3, 2021 and April 13, 2022 Place and Date of Judgment: New Westminster, B.C. October 31, 2022 Table of Contents I. INTRODUCTION.. 3 II. BACKGROUND.. 3 A. The Parties. 3 B. Mr. J's Work and Health History. 4 C. Ms. J's Work and Health History. 5 D. Joint Finances During the Marriage. 6 E. Real Property. 6

1. The Family Home. 6
2. The Burrard Property. 8 III. ISSUES.. 9 IV. ANALYSIS.. 10
 1. Whether the Parties should be Divorced. 10
 2. Whether Ms. J Should Be Granted a Name Change. 11
 3. Findings on Credibility and Reliability. 11
 4. Whether Ms. J Should Be Granted Parenting Time with JJ and Whether a Protection Order or Conduct Order Should Be Granted Against Ms. J. 14
 5. What was the Date of Separation?. 21
 6. Should Spousal Support be Paid?. 24
 7. Whether Child Support Should Be Ordered. 37
 8. How Property Should Be Divided Between the Parties. 43
 - a) Applicable Law.. 43
 - b) Valuation of assets and debts. 45 V. ORDER.. 56 I. INTRODUCTION

- [1] This high-conflict family law trial raised the difficult question of whether a permanent protection or conduct order should be put in place against the mother, and also what ongoing contact, if any, the mother should have with the daughter of the marriage. The other primary issues raised at trial included divorce, division of family property and debts, spousal and child support and a name change. II. BACKGROUND A. The Parties
- [2] The female claimant, CYJ, was 59 years old at the date of trial and the male respondent, RJ, was 65 years old.
- [3] The parties were married on December 14, 1990 in New Zealand. The parties met when Ms. J, who was raised in China, was living in New Zealand and working as a waitress and Mr. J, who was raised in Canada, was travelling from Vancouver to New Zealand for work. Ms. J immigrated to Canada in 1991 and the parties subsequently commenced cohabiting in Vancouver.
- [4] There is one child of the marriage, JJ, who was born in 1994 and was 27 years old at the date of the trial. For many years JJ has had a range of physical and psychological issues, including post-traumatic stress disorder, depression, general anxiety disorder, iron deficiency, migraines, and insomnia. She experiences frequent panic attacks and takes medication to manage her conditions.
- [5] JJ currently lives with Mr. J and has lived with him since the parents separated. For reasons I will discuss in more detail below, the relationship between JJ and Ms. J is very strained. JJ attributes many of her anxiety and depression issues to Ms. J, who JJ alleges has perpetuated a longstanding pattern of family violence against her. JJ testified at trial and very clearly expressed that she wants to have no further contact or relationship with Ms. J. By contrast, Ms. J sought more contact with JJ at trial and an order removing JJ from Mr. J's care.
- [6] The date of the parties' separation (the "Separation Date") was disputed at trial, being either December 18, 2013 (according to Ms. J) or March 1, 2014 (according to Mr. J). Prior to the Separation Date, the parties lived together in a family home in Port Moody, British Columbia. It is common ground that, on December 18, 2013, Ms. J completed the purchase of another house in Port Moody with money provided to her by her brother. Ms. J ultimately vacated the family home on the Separation Date and moved into this new house, which she co-owns with her brother, and where she has lived since that time. B. Mr. J's Work and Health History
- [7] For many years, Mr. J worked as a radio technician and supervisor for a number of private companies in Vancouver. He then obtained employment with BC Hydro in 2008, where he worked until 2018.

- [8] Mr. J has a variety of physical illnesses and ailments which have made him unable to work since 2018. He testified, supported by medical reports adduced at trial, that he has been diagnosed with ankylosing spondylitis, which causes severe pain in his feet and spine, ulcerative colitis, which causes severe abdominal pain, asthma, spondylosis, and damage to his joints, colon and lungs.
- [9] There was no expert evidence supporting Mr. J's medical condition so I am unable to find as a fact that he does suffer from the above specific conditions. However, it is not disputed that Mr. J began to receive disability benefits through his group insurance policy at BC Hydro in 2018 and, on September 11, 2018, Mr. J was advised by the insurer, Sun Life Financial, that he had satisfied the definition of "Totally Disabled & Total Disability". In addition, on September 27, 2019, Mr. J was approved for a CPP disability pension effective June 2018 for a total monthly payment of \$1,366.55 and a retroactive payment of \$21,649.76. Thus, despite the lack of medical evidence concerning his various diagnoses, I am satisfied on all the evidence that Mr. J is physically disabled to the extent that he is no longer able to work.
- [10] Mr. J was employed with BC Hydro until May 1, 2021, which is the date he was mandatorily retired as a result of turning 65 years old. Mr. J's CPP disability pension was converted to a CPP retirement pension when he reached the age of 65.
- [11] As of Mr. J's retirement in 2021, his income sources are his CPP retirement pension, the BC Hydro pension, and registered retirement savings plans ("RRSP"s). He still intends to apply for old age security ("OAS") benefits but has had difficulty completing that application due to a recent incident of identity theft. C. Ms. J's Work and Health History
- [12] Upon arriving in Canada, Ms. J was employed full-time from 1991 to 1994 until JJ was born. She then went on maternity leave and subsequently sought unemployment insurance.
- [13] In 2005, at the suggestion of her brother, she attempted to set up her own sales business, which she stated was ultimately unsuccessful. From 2006 to 2008 she went back to school to improve her English. From 2010 to 2012 she was employed delivering newspapers.
- [14] Since the Separation Date, Ms. J has not held steady employment in any capacity.
- [15] Ms. J alleges that she suffers from a hernia and the after-effects of a hysterectomy performed in 2012, which makes her unable to work, although this was unsupported by any compelling medical evidence at trial. Instead, it appears that she has derived her income substantially from renting out a suite in the house she co-owns with her brother, from her investments and also from various payments she has received from her brother and other unspecified sources since the Separation Date.
- [16] Ms. J admitted on cross-examination that she was offered a job by her brother at some time after 2014 that would have paid her one million Hong Kong Dollars (about \$250,000 CA) but testified that she turned it down because she had health problems and the job required a lot of travel.

[17] In addition, despite claiming that she is unable to work, Ms. J has actively pursued a series of lawsuits as a self-represented litigant against a range of defendants since 2014, including a doctor, a dentist and a hardware store. Between 2014 and 2017, Ms. J commenced five actions in the Provincial Court and Supreme Court against the dentist, even though the matter was settled in 2015. On three separate occasions, Ms. J has been declared a vexatious litigant by Supreme Court order. From 2017 to 2021, Ms. J attempted to appeal these various orders five times to the Court of Appeal. All these appeals were dismissed, refused or denied leave. She testified at trial that she is applying for leave to the Supreme Court of Canada. D. Joint Finances During the Marriage

[18] During the marriage, the parties had one joint chequing account (the "Joint Chequing Account") and one joint registered education savings plan (the "Joint RESP"). Otherwise, the parties kept their accounts, investments (some of which they had held prior to the marriage) and credit cards separate. Mr. J testified that the parties kept their assets separate because Ms. J had always said "her business was her business". E. Real Property

1. The Family Home

[19] In 1991, Mr. J purchased vacant land at 1051 Tuxedo Drive (now 196 Valour Drive) in Port Moody for \$84,000 (the "Family Home"). Mr. J paid for the Family Home with cash, which he stated he had been saving since he started working at the age of 18 and had kept in his personal savings account. The Family Home was registered in his name alone and remains so today.

[20] Ms. J agreed on cross-examination that she did not contribute to the purchase price of the Family Home and was still living in New Zealand at the time.

[21] After the purchase of the Family Home, Ms. J moved to Vancouver and the parties lived in rental accommodation until Mr. J built a house on the then-vacant Family Home property.

[22] In 1994, a \$100,000 mortgage was registered on title for the purpose of building the Family Home (the "1994 Mortgage"). Mr. J testified that, in addition to this mortgage, he also used some money from his savings and took funds out of the RRSP account he had held prior to the marriage to build the Family Home. The Family Home was completed in the spring of 1994.

[23] In 2005, the 1994 Mortgage was cancelled and a revolving line of credit in the amount of \$285,000 was registered against the Family Home (the "Original Line of Credit"). Mr. J stated that the Original Line of Credit was for the purpose of completing further renovations and repairs on the Family Home. After the Separation Date, Mr. J also made substantial payments to pay down the outstanding debt. On December 18, 2013, the amount owing on the Original Line of Credit was \$177,500.00, and on March 1, 2014, the amount owing was \$178,913.33. On November 23, 2017, the amount owing was \$146,693.55, which was rolled into another line of credit (the "Current Line of Credit") and the Original Line of Credit was closed.

- [24] On November 29, 2017, the Current Line of Credit was registered on title. As of October 2021, the amount owing on the Original Line of Credit was \$105,537.02. Since the Separation Date, all payments on the Original Line of Credit and the Current Line of Credit have been made by Mr. J and Ms. J has made no contributions.
- [25] The property assessment roll reports produced by BC Assessment from 2013 to 2021 show the following assessed values for the Family Home: 2013 \$570,000 2014 \$576,000 2015 \$643,000 2016 \$752,000 2017 \$1,000,000 2018 \$1,106,000 2019 \$1,157,000 2020 \$953,000 2021 \$982,000
- [26] In anticipation of the trial, Mr. J obtained an appraisal report of the Family Home as of January 1, 2014. The report was completed by Sean Bartlett of WesTech Appraisal Services on January 19, 2021 (the "Appraisal Report"). According to the Appraisal Report, the value of the Family Home on January 1, 2014 was \$650,000. This Appraisal Report was served on Ms. J on May 3, 2021 and she took no further steps pursuant to the Supreme Court Family Rules [the Rules]. Ms. J did not object to the admissibility of the Appraisal Report at trial.

2. The Burrard Property

- [27] On November 21, 2013, Ms. J entered into a contract of purchase and sale as the purchaser of a property at 28 Burrard Crescent, Port Moody for the price of \$1,320,000.00 (the "Burrard Property"). Ms. J testified that the funds used to purchase the Burrard Property were transferred to her by her brother.
- [28] The completion date on the Burrard Property was December 18, 2013 and the possession and adjustment date was December 19, 2013. Subsequently, Ms. J assigned her right, title and interest in the Burrard Property to herself and her brother as joint owners. The Burrard Property is currently registered in the joint names of Ms. J and her brother with no mortgages on title.
- [29] The Burrard Property has a 2-bedroom above-ground basement suite with 900 sq. ft. of living space, 9-foot ceilings, in-floor heating and a 180-degree inlet view. Ms. J has since 2015 periodically rented out the suite and has deposited the rental income, which she admitted she does not share with her brother, in her personal bank account.
- [30] The property assessment roll reports produced by BC Assessment from 2013 to 2021 show the following assessed values for the Burrard Property: 2013 \$1,080,000 2014 \$975,000 2015 \$994,000 2016 \$1,313,000 2017 \$1,511,000 2018 \$1,686,000 2019 \$1,772,000 2020 \$1,542,000 2021 \$1,620,000 III. ISSUES

- [31] In these reasons I will address the following issues:

1. whether the parties should be divorced;
2. whether Ms. J should be granted a name change;
3. an assessment of the credibility and reliability of the witnesses;

4. whether Ms. J should be granted parenting time with JJ and whether a protection order or conduct order should be granted against Ms. J;
5. the date of separation;
6. whether spousal support should be ordered;
7. whether child support should be ordered; and
8. how property should be divided between the parties. IV. ANALYSIS

1. Whether the Parties should be Divorced

[32] The parties seek an uncontested divorce under s. 8(1) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.). The relevant requirements as set out in s. 8(1) - (2)(a) of the Divorce Act are as follows: Divorce 8 (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage. Breakdown of marriage

- (2) Breakdown of a marriage is established only if

- (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding;

[33] I am satisfied on the evidence that there has been a "breakdown of their marriage", specifically due to the parties having lived separate and apart since the Separation Date up to and including the commencement of the trial.

[34] Under s. 10(1) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) I must satisfy myself that there is "no possibility of the reconciliation of the spouses" before granting the divorce sought. Both parties confirmed at trial that there is, in their opinion, no possibility of reconciliation. This was confirmed in my view by ample evidence introduced at trial with respect to the complete breakdown of communication and considerable ill will between the parties. I am satisfied that there is no possibility of reconciliation in this case.

[35] Finally, I find that there has been no collusion in bringing this application for divorce, pursuant to s. 11(1)(a) of the Divorce Act.

[36] On the basis of the foregoing, I am satisfied that there should be an order of divorce which will take effect 31 days from the date of this judgment.

2. Whether Ms. J Should Be Granted a Name Change

[37] Ms. J seeks the removal of the surname J from her name, pursuant to s. 5 of the Name Act, R.S.B.C. 1996 c. 328. This application is not opposed by Mr. J and I see no reason not to grant it, to be effective on the date the divorce takes effect.

3. Findings on Credibility and Reliability

- [38] There were many issues at trial where credibility and reliability of testimony was a key factor. Accordingly, I have set out my conclusions on this issue prior to proceeding to the remainder of the issues in this trial.
- [39] In *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013) at paras. 186-87, Justice Dillon summarized the key elements involved in assessing credibility as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of [their] memory, the ability to resist the influence of interest to modify [their] recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes [their] testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya* *[sic]*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* *[sic]* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB QB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [40] In addition, as noted by Justice Devlin in *Welder v. Lee*, 2019 BCSC 1328 at para. 60, a distinction must be made between credibility and reliability: Credibility is concerned with the veracity of the witness and assessment of reliability involves consideration of the accuracy of the witness' testimony; accuracy engages the ability of the witness to observe, recall and recount: *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal *ref'd* [2015] S.C.C.A. No. 374.

- [41] In this case I found the testimony of Mr. J and JJ to be both credible and reliable. Both witnesses delivered their testimony in a calm, balanced and forceful manner, and I found that their credibility was reinforced by the consistency of their testimony with each other on many of the key issues, and also by the documentary evidence at trial.
- [42] By contrast, I found the testimony of Ms. J to be lacking in credibility and unreliable in many respects. Ms. J was an emotional and volatile witness, prone to making accusations and assertions unsupported by the evidence. For example: · Ms. J alleged that Mr. J had fathered an illegitimate child with a co-worker who Ms. J believes is currently being raised in the Family Home. Ms. J apparently developed this view when a friend told her she had one day seen child-sized shoes outside the Family Home. This accusation was flatly denied by both Mr. J and JJ, who have both lived in the Family Home for years. There was no evidence on this point at all other than Ms. J's bare allegation; and · Ms. J alleged that Mr. J had sexually assaulted JJ. This was fully denied by Mr. J and equally denied by JJ herself. I found JJ's testimony in this regard to be honest and forthright, and consistent with the fact that she has chosen to live with Mr. J after the Separation Date. JJ's testimony revealed no concern whatsoever about her safety with Mr. J (who she described as a "friend") and it appears they have a very solid and trusting relationship. By contrast, I note that this allegation by Ms. J must be weighed in light of the very detailed and emotional testimony given by JJ with respect to a longstanding pattern of family violence perpetrated by Ms. J against JJ (which I will discuss in more detail below). Based on my assessment of all the evidence, my view is that it was Ms. J, not Mr. J, who presented the real physical and psychological threat to JJ throughout her childhood and into adulthood.
- [43] In addition, there were other factors which led me to conclude that Ms. J's testimony was lacking in both credibility and reliability: · Ms. J admitted that she had failed to declare rental income from the Burrard Property to Canada Revenue Agency ("CRA"), which is an indicator of dishonesty; · as noted above, on three separate occasions, Ms. J has been declared a vexatious litigant by Supreme Court order, indicating that she has a pattern of taking positions in court that are unsupported by evidence or otherwise unreasonable; · Ms. J's documentary disclosure, in particular relating to her financial accounts and holdings, was woefully inadequate, raising serious questions about the true nature of her financial position; · despite being presented with documents on cross-examination that clearly demonstrated that Ms. J was using a particular email address, Ms. J repeatedly denied that the email address was hers; · Ms. J asserted three different separation dates while testifying: 2005, 2012 and December 2013. By contrast, Mr. J's position on the Separation Date was consistent and supported by documentary evidence of correspondence between the parties; · Ms. J repeatedly maintained that the Burrard Property was her brother's home, even though the evidence was clear that she has lived alone in that house since 2013, is listed on title to the property, bought furniture for it, hired contractors to do renovations, maintained the property, rented the suites in the property, signed rental agreements as the landlord, collected and kept the rents from it, and paid the property taxes. There were also voice recordings and emails adduced as evidence in court in which Ms. J called the Burrard

Property "my house" or "mummy's house".

4. Whether Ms. J Should Be Granted Parenting Time with JJ and Whether a Protection Order or Conduct Order Should Be Granted Against Ms. J

[44] Ms. J seeks an order for parenting time with JJ, and also an order removing JJ from the care of Mr. J.

[45] Mr. J and JJ seek the opposite. They both applied at trial for an order, pursuant to ss. 183(2), 183(3)(a), and 183(4) of the Family Law Act, S.B.C., 2011, c. 25 [FLA], for a non-expiring protection order that Ms. J not attend at, enter or be found within two blocks of the Family Home, or place of employment or school of Mr. J and JJ. In the alternative, they sought a conduct order having those same terms pursuant to ss. 222 and 225 of the FLA.

[46] The relevant portions of s. 183 of the FLA provide: 183 (1) An order under this section

- (a) may be made on application by a family member claiming to be an at-risk family member, by a person on behalf of an at-risk family member, or on the court's own initiative,
 - (2) A court may make an order against a family member for the protection of another family member if the court determines that
 - (a) family violence is likely to occur, and
 - (b) the other family member is an at-risk family member.
 - (3) An order under subsection (2) may include one or more of the following:
 - (a) a provision restraining the family member from (ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place
- [47] The factors to be considered in determining whether to make a protection order under s. 183 are set out in s. 184. The relevant portions of s. 184 provide: 184 (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:
- (a) any history of family violence by the family member against whom the order is to be made;
 - (b) whether any family violence is repetitive or escalating;
 - (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
 - (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;

- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
- (f) the at-risk family member's perception of risks to his or her own safety and security;
- (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

[48] Family violence is defined in s. 1 of the FLA as follows: "family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property, (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy, (iii) stalking or following of the family member, and (iv) intentional damage to property

[49] In my view there was sufficient evidence of an ongoing pattern of family violence perpetrated by Ms. J against both JJ and Mr. J in this case to justify a protection order.

[50] In very forthright, emotional and credible testimony at trial, JJ described a "toxic" relationship with her mother that clearly involved family violence perpetrated by Ms. J both before and after the Separation Date. JJ testified that, before the Separation Date: · Ms. J would tell JJ how ugly and annoying she was and that no one would want to be with her or be seen with her; · Ms. J would constantly swear at JJ and tell her: "I don't want to be your mother anymore"; · Ms. J would periodically scream, yell, throw objects, and kick and slam the door when JJ was in the same room; · JJ had a lock on her bedroom door but Ms. J figured out how to unlock the door and once threw an object at JJ's face in her bedroom, which JJ was able to dodge. Ms. J would also try to physically grab JJ in her bedroom, and JJ would hide under her bed where Ms. J could not reach her; · When JJ was younger, she took piano lessons. Ms. J would get frustrated and mad if JJ made a mistake. Ms. J would often get a kitchen knife and start slamming it against the counter while JJ was practicing; · When JJ was younger, Ms. J took her to Hong Kong. On a shopping trip, Ms. J abandoned JJ alone in the city, even though JJ could not read, speak or understand the native language and had no cellphone. Miraculously, JJ managed to get back to the apartment on her own by retracing her steps from memory. When JJ arrived at the apartment, Ms. J was there, expressed no

concern about JJ's being lost and said "good job you're all grown up" (indicating that she had likely orchestrated the whole incident intentionally).

- [51] After the Separation Date, the pattern of family violence continued and even escalated. JJ testified that: · JJ had a dog named Norbert who provided her with comfort - they were inseparable. Ms. J decided she wanted the dog, but JJ refused. One day when JJ was at school Ms. J took the dog to her house and never gave him back. In 2017, Ms. J decided to euthanize the dog, which JJ did not understand because Norbert was not old or sick. Ms. J located a vet who would euthanize without an examination and insisted that JJ accompany her, which JJ found traumatizing and said caused her great emotional distress; · Ms. J had a key which provided her access to the Family Home until 2017, and frequently visited the house. At the request of JJ, who did not want Ms. J entering the house uninvited, Mr. J changed the locks in 2017 and installed cameras around the property; · Commencing in 2017, after the locks to the Family Home were changed, Ms. J would repeatedly come to the Family Home and walk around the property, bang at the door and start kicking and yelling outside, sometimes taking pictures. One time, Ms. J grabbed a metal trolley and used it to slam the back door (which was captured on camera). JJ testified that this behaviour scared her; · One day, Mr. J opened the door and Ms. J was standing outside and tried to get inside. Mr. J and JJ had to push her out, which was upsetting for both JJ and Mr. J.
- [52] In addition to the foregoing, the following police reports have been made against Ms. J by Mr. J and JJ, relating to Ms. J's unwanted attendance at the Family Home on a continuing basis after he changed the locks and up until very recently: · September 5, 2017 (PO 2017-5634); · October 9, 2017 (Thanksgiving); · December 31, 2018 (PO 2018-7472); · February 25, 2019 (PO 2019-988); · March 29, 2019 (PO 2019-1610); · December 24, 2019 (PO 2019-7567); · October 8, 2020 (PO 2020-5948); and · August 12, 2021 (PO2021-4568).
- [53] In her direct examination at trial, Ms. J admitted to walking around the Family Home in 2018 and 2019 and looking into windows and to specifically coming to the Family Home on Christmas Eve on December 24, 2018, following which the police were called. Ms. J also admitted to getting angry and kicking the door of the Family Home on December 15, 2019.
- [54] Under cross-examination, Ms. J also admitted to the following: · regularly arriving at the Family Home and looking into the windows of the Family Home and banging on the doors and yelling; · being arrested on December 24, 2019 by the RCMP for causing a disturbance; · going to the Family Home in August 2021 and being asked to leave because of the disturbance she was causing (banging and accusing); and · being told by the police a few times not to come.
- [55] Finally, Ms. J made two unsubstantiated allegations in February 2020 and June 2021 that Mr. J had sexually assaulted JJ: · February 11, 2020 (PO 2020-849): Ms. J called the police to report JJ's alleged sexual assault by Mr. J. There was no further police follow-up or involvement in this matter and the report stated that JJ "is 25-years-old, and there is currently no formal evidence to substantiate" the allegations; and · June 18, 2021 (PO 2021-3207): Ms. J called the

police to make a typed statement of the suspicions she had about Mr. J sexually assaulting JJ between 1996 and 2003. Police attended the Family Home and spoke to JJ. Police reported that they "did not have any safety concerns" and they advised that JJ "did not wish to report any historical sexual abuse".

- [56] Given that the above sexual assault allegations were unsupported by any credible evidence at trial and fully denied by both JJ and Mr. J, I find that they were false (or possibly delusional) allegations and formed a part of the pattern of family violence perpetuated by Ms. J, as they have had the effect of harassing both JJ and Mr. J.
- [57] JJ testified that she and Ms. J had a "toxic relationship" and expressed her desire that they should "go their separate ways". JJ testified that Ms. J's departure on the Separation Date from the Family Home was a "favour" for her because she "finally knew what peace and quiet was like". JJ said that living together with Ms. J was "absolute hell" and expressed the view in her testimony that it is better that she and Ms. J move on separately with their lives.
- [58] JJ insisted that her decision not to spend time with Ms. J was her decision alone and clearly and credibly expressed that her view on this was not coerced by Mr. J. JJ expressed her desire to live independently of Ms. J without fearing further violence and harassment.
- [59] On the basis of all the foregoing, I find that a protection order is appropriate in this case, as there is clear and continuing evidence of a pattern of family violence, including intimidation and harassment, stalking and damage to property and pets. As I will discuss in more detail below this family violence is particularly problematic in this case due to JJ's challenged physical and psychological condition, which makes JJ vulnerable to anxiety and panic attacks as a result of Ms. J's actions.
- [60] Regarding the duration of the protection order, and whether it should be permanent, the Court in *Williams v. Williams*, 2022 BCSC 517 at para. 91 stated that a permanent protection order is a "very rare remedy" that is "usually made to address an ongoing threat that would warrant such an order". Justice Walkem concluded in that case that it was not necessary to make the protection order permanent, as the Court did "not believe there will be an ongoing threat once the parties are divorced and the assets divided" (para. 97).
- [61] In *Primeau v. L'Heureux*, 2018 BCSC 740, Justice Winteringham found that there was an ongoing risk of family violence perpetuated by the respondent, yet declined to make the protection order permanent. In that case, the Court issued an 18-month protection order on the expectation that, by the time it expired, the respondent would have "gained greater insight into the cause and effect of [their] actions" (para. 97).

- [62] In my view, taking into account the principle in the authorities that it is a "very rare remedy", a permanent protection order is not merited at this time. In reaching this conclusion, I take into account the fact that Ms. J has not recently perpetrated a pattern of actual physical (as opposed to psychological) violence against JJ or Mr. J which could put them in imminent danger and also Ms. J's emotional testimony at trial that she does indeed love JJ and wishes the best for her.
- [63] Instead, my view is that an 18-month protection order is appropriate in this case on the expectation that, following the conclusion of this contentious litigation and the calming of emotions, Ms. J will be able to gain greater insight into the impact of her actions on Mr. J and JJ. and to adjust her behavior in order to respect their privacy. If she is unable to do so, and the pattern of family violence continues, Mr. J and JJ will of course be at liberty to return to court to have the protection order extended.
- [64] Given that I find a protection order to be appropriate in this case, there is no need for me to address the question of a conduct order at this time.
- [65] With respect to Ms. J's request for a parenting time order and an order removing JJ from Mr. J's care, these are denied. Given the testimony of JJ about her own preferences, and the long history of family violence, it is clear that spending time with Ms. J is not what JJ wants nor is it in JJ's best interests. JJ clearly stated at trial that she wants to continue to live with Mr. J and to have no contact with Ms. J. In my view, this choice should be respected.
5. What was the Date of Separation?
- [66] As noted previously, a live issue at trial was whether the Separation Date was December 18, 2013 or March 1, 2014. Ms. J takes the position that the Separation Date was December 18, 2013 when she purchased the Burrard Property. Mr. J takes the position that the Separation Date was March 1, 2014 when Ms. J actually moved into the Burrard Property.
- [67] In *S.A.H. v. I.B.L.*, 2018 BCSC 544, Justice Shergill summarized the applicable analysis with respect to determining the date of separation:
- [52] In *McGrail v. McGrail*, 2016 BCSC 104, Mr. Justice Verhoeven held that intention is key to the analysis of a date of separation. It need not be a mutually shared intention; a unilateral abandonment of the matrimonial relationship is sufficient: see *Dhillon v. Dhillon* (1998), 78 A.C.W.S. (3d) 963, [1998] B.C.J. No. 823 (C.A.), affirming the decision at trial of Bauman J., as he then was, citing *Lachman v. Lachman* (1970), 2 R.F.L. 207 (Ont. C.A.).
- [53] In *Nearing v. Sauer*, 2015 BCSC 58, Madam Justice Fleming elaborated at para. 56 on the need for the court to focus its analysis on the generally accepted characteristics of marriage, as evidencing whether the parties had separated: In *Sachdeva v. Sachdeva*, 2013 BCSC 313 [Sachdeva], this Court took a similar approach, relying primarily on *Rose v. Guiguet*, 2008 BCSC 1225, where Madam Justice Dorgan looked at both the husband's intention to live separate and apart and his actions. Typically when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage

including the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events: Sachdeva at para. 87. The court will also consider a range of other factors, including a clear statement by one of the parties of his or her desire to terminate the relationship. Sexual involvement, or lack thereof, is not conclusive: Newth v. Booth, 2011 BCSC 317 at para. 17. []

[55] As is evident from the case authorities, the determination of the parties' date of separation is a very fact specific exercise. I have found the following questions, framed in the form of a test, useful to determining the date of separation here:

1. Did at least one spouse have the intention to separate?
2. Was the intention to separate communicated to the other spouse?
3. Was the intention to separate acted upon? In other words, using generally accepted characteristics of marriage, did one or both spouses take action that is consistent with the separation, such as:
 - a. changing how they behaved with each other in public; and
 - b. changing how they behaved with each other in private.

[68] Taking into account the foregoing factors, I conclude that the date of separation was March 1, 2014. It was apparent from the testimony that, for a period dating back several years even before the Separation Date, the parties had been in fact been living separate lives and had ceased sharing a bedroom and being sexually intimate. However, despite this fact, they maintained the outward appearances of a marital relationship up until the Separation Date by living together in the Family Home and sharing parenting and domestic duties. It was only at the Separation Date that these outward appearances changed.

[69] Although Ms. J's testimony was that she had a subjective intention to leave the Family Home and move to the Burrard Property as early as December 18, 2013, I am satisfied that she did not communicate this intention to Mr. J, nor did she decisively act in accordance with it, until March 2014.

[70] Mr. J testified that he accompanied Ms. J on the date she signed the purchase documents with the realtor in December, 2013 for the Burrard Property but Ms. J did not raise the issue of separation then. It appears he understood at the time that she was merely facilitating this purchase for her brother. Further, after the close of the purchase of the Burrard Property, there were extensive renovations undertaken, which precluded Ms. J from moving into the Burrard Property until March, 2014. Indeed, the evidence was that Ms. J predominantly lived in the Family Home after December, 2013 and spent very few overnights at the Burrard Property until March, 2014.

[71] However, the situation changed in March, 2014 when Ms. J made her intentions expressly and dramatically known to Mr. J. Mr. J testified that on March 1, 2014: · Ms. J told him that she was going to live at the Burrard Property because her "house was ready", and "your

house is a crappy house" and she did not want to live there. Ms. J said she was going to live in the "luxury house"; · Ms. J proceeded to pick up her stuff including but not limited to three suitcases and left the Family Home. Ms. J testified that she said: "I don't need anything", "I don't need money", "you can keep it all", and "I need the keys so I can pick up some personal stuff". Mr. J testified that he did not argue; and · Ms. J also informed Mr. J on that same day that she "did not want to come back and [she] did not want support" as she was "fine".

[72] Ms. J's testimony at trial on the issue of the Separation Date was confused and not compelling. Ms. J initially suggested the Separation Date was 2005, then 2012 and then finally 2013. Further, she did not testify that she ever had a discussion with Mr. J in 2013 about separation but relied solely upon the fact that this was the closing date on the Burrard Property. I conclude that she did not clearly communicate her intent to separate from Mr. J, and did not act decisively in accordance with that intent, until March 1, 2014 and that this was therefore the Separation Date.

6. Should Spousal Support be Paid?

[73] Mr. J discontinued his claim for spousal support against Ms. J on the first day of trial. Ms. J sought both forward-looking and retroactive spousal support against Mr. J at trial.

[74] In my view, an order for spousal support payable by Mr. J is not merited in this case because Ms. J has not demonstrated any entitlement in principle to compensatory, non-compensatory, or contractual support, taking into account all of the objectives of spousal support: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715 (SCC) [Bracklow]; *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC ref'd, 33002 (28 May 2009).

[75] Section 15.2 of the Divorce Act sets out the factors and objectives that should be considered in the spousal support analysis: Factors

(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
- Objectives of spousal support order

(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.

[76] In this case the parties had no agreement on spousal support and therefore contractual support is not an issue.

[77] The Court in Bracklow stated that "compensatory support should be awarded where it would be just to compensate a spouse for his or her contributions to the marriage or for sacrifices made or hardships suffered as a result of the marriage" (para. 18). With respect to compensatory support, although it was a 23-year marriage, Ms. J adduced no evidence that she sacrificed educational opportunities or gave up employment opportunities as a result of her relationship with Mr. J or her role as a joint caregiver to JJ. The evidence was that during the marriage, the parties shared the responsibilities for raising JJ and maintaining the Family Home. There was no evidence that Ms. J made sacrifices with respect to her own career to facilitate Mr. J's career.

[78] To the contrary, the evidence was that the parties maintained separate finances (including investment accounts) during the marriage, and each gave the other substantial freedom to pursue their own career and financial interests (with Ms. J telling Mr. J that "her business was her business"). Moreover, the evidence was also that Ms. J apparently chose not to pursue a career because this was not of interest to her either during the marriage or since the Separation Date. Indeed, she admitted at trial that after the Separation Date she turned down a lucrative job offer to work for her brother because she did not want to travel and had health issues. Ms. J alleged that she suffers from various medical conditions which prevent her from working but adduced no compelling medical evidence in support of that allegation. I conclude that she has not justified an award of compensatory support.

[79] The Court in Chutter at para. 54 stated that "[w]here compensatory principles do not apply, [means and] need alone may be sufficient to ground a claim for spousal support". With respect to non-compensatory entitlement, the evidence at trial was that Ms. J's lifestyle and financial well-being actually improved after the Separation Date and was in fact superior thereafter to that of Mr. J and JJ.

- [80] The Burrard Property (which she described as the "luxury house") is considerably more valuable in terms of assessed value than the Family Home (which she described as the "crappy house"). Ms. J has lived alone in the Burrard Property since 2013 and clearly treated it as her own (in addition to being registered as a co-owner on title). There is no mortgage on the Burrard Property, she pays no rent, and she has also collected rental income for that property over the years.
- [81] It is also noteworthy in my view that, since the Separation Date, JJ has lived with Mr. J and Mr. J has paid entirely for the costs of caring for JJ, including her schooling costs, without any contribution from Ms. J.
- [82] Further, despite her claims of having no income, Ms. J's bank account balances have increased substantially since the Separation Date. For example, while she had an account balance of \$190,285.52 at Toronto Dominion ("TD") on September 3, 2013, this account balance had increased to \$325,474.15 by October 13, 2021.
- [83] In addition, the evidence was that Ms. J has received a series of wire transfers since 2011 from mysterious sources (undisclosed by Ms. J during the discovery process or at trial) which, even after deducting the \$1,346,033.37 for the purchase of the Burrard Property (which she testified was transferred to her by her brother), indicates net incoming cash of \$336,974.82: Date Amount From To Ms. J January 25, 2011 \$40,000.00 Unknown Joint TD Account with JJ - Passbook January 12, 2012 \$9,977.00 Unknown Joint TD Account with JJ - Passbook November 14, 2013 \$199,982.50 Envision Holding Limited TD Account #148 November 29, 2013 \$1,149,982.50 Envision Holding Limited TD Account #148 December 10, 2013 \$99,982.50 Unknown TD Account #148 December 11, 2014 \$73,292.28 Mr. Zeng Peng TD Account #148 March 21, 2016 \$29,969.50 Lu Yu Fei TD Account #148 August 21, 2017 \$29,939.90 General Technology and Service TD Account #148 May 9, 2019 \$29,940.13 General Technology and Service TD Account #148 March 18, 2021 \$19,941.88 General Technology and Service TD Account #148 Total \$1,683,008.19 Less Burrard Property Purchase Price (\$1,346,033.37) Net \$336,974.82
- [84] On the basis of the foregoing, it is clear in my view that Ms. J is financially self-sufficient and has apparently been so since the Separation Date.
- [85] The decision of Justice Jenkins in *Larochelle v. Larochelle*, 2018 BCSC 1347 is persuasive authority in this context. In that case, the parties had a 29-year relationship, during which the husband was the primary income earner. At separation, the wife moved out of the family home and the husband remained in the family home with the three children (ages 17, 20 and 22). Justice Jenkins did a thorough review of entitlement and concluded that the wife was not entitled to spousal support, as there was no evidence before him that the wife sacrificed educational opportunities nor that she gave up employment opportunities as a result of her relationship with the husband or her role as primary caregiver to their children. He found that she continued to have the same standard of living after the relationship as she did during it, had achieved a degree of self-sufficiency and was in a

relatively comfortable living arrangement.

- [86] That said, even if I had found that Ms. J had established a basis for compensatory or non-compensatory entitlement to spousal support, I would nonetheless find on the facts of this case that no support should be ordered on a moving forward basis due to the current relative incomes and circumstances of the parties, and in particular Mr. J's low income.
- [87] The summary of Mr. J's income tax returns from 2013 to present is as follows: Year Line 150 Income Guideline Income Notes from Income Tax Return 2013 \$101,321 \$97,446 · Employment Income: \$85,230 · Dividends: \$10,066 · Interest and Other Income: \$1,898 · Net Partnership Income: \$16 · Taxable Capital Gains: \$2,966 · Other Income: \$1,145 · Less Union Dues: \$1,344 · Less Carrying Charges & Interest Expenses: \$2,531 2014 \$95,382 \$91,431 · Employment Income: \$84,122 · Dividends: \$8,072 · Interest and Other Income: \$2,102 · Capital Gains: \$105 · Other Income: \$979 (Cumulative Net Investment Loss (CNIL) re: investment income as per Form T3936) · Less Union Dues: \$1,459 · Less Carrying Charges & Interest Expenses: \$2,490 2015 \$101,692 \$97,186 · Employment Income: \$88,939 · Dividends: \$5,642 · Interest and Other Income: \$1,424 · Capital Gains: \$4,950 · Other Income: \$735 · Less Union Dues: \$1,487 · Less Carrying Charges & Interest Expenses: \$3,017 2016 \$89,968 \$85,534 · Employment Income: \$88,101 · Dividends: \$1,500 · Interest and Other Income: \$367 · Less Union Dues: \$1,488 · Less Carrying Charges & Interest Expenses: \$2,946 2017 \$94,029 \$92,175 (RRSP not included) · Employment Income: \$91,619 · Dividends: \$2,005 · Interest and Other Income: \$405 · Less Union Dues: \$1,854 · RRSP Contribution Made: \$6,270 2018 \$89,105 \$88,551 · Employment Income: \$68,506 o Disability Starts · Dividends: \$408 · Interest and Other Income: \$13,973 · Taxable Capital Gains: \$6,217 · Less Union Dues: \$553 2019 \$84,388 \$83,970 (RRSP not included) · Employment Income: \$58,639 · Other Pensions: \$25,749 o CPP Disability effective June 2018 so includes a retroactive payment for 2018 and 2019 · RRSP Income: \$0 · Less Union Dues: \$418 · RRSP Contribution Made: \$35,000 2020 \$68,141 \$57,901 (RRSP not included) · Employment Income: \$41,431 · CPP Disability Benefits: \$16,710 · RRSP Withdrawal: \$5,000 · Less Union Dues: \$240 · RRSP Contribution Made: \$15,000 2021 To be confirmed ("TBC") once income taxes filed \$39,208.76 (Estimated) · Employment Income and payouts at end of employment to May 2021: \$17,380 · CPP disability before April and now regular CPP: \$1,193.15 per month · As of May 2021, BC Hydro Pension of \$952.73 per month · Less Union Dues: \$110.88 Current Income \$25,750.56 + RRSP + Old Age Security (TBC in future) \$25,750.56 + RRSP + Old Age Security (TBC in future) · CPP disability before April and now regular CPP of \$1,193.15 per month = \$14,317.80 per annum · BC Hydro Pension of \$952.73 per month = \$11,432.76 per annum · RRSP: Unknown - TBD
- [88] Although Mr. J maintained a consistent income from 2013 to 2020, his income dropped substantially in 2021 due to his disability and retirement. As of Mr. J's retirement, his income sources are now limited to his CPP retirement pension, BC Hydro pension, and RRSPs. He still needs to apply for OAS benefits but he claims that he has been unable to complete that process due to an unfortunate incident of identity theft.

- [89] The summary of Ms. J's income tax returns from 2013 to present is as follows: Year Line 150 Income Notes from Income Tax Return 2013 \$0 · No Income 2014 \$549 · Taxable Dividends: \$228 · Interest and Investment Income: \$42 · Other Income: \$279 2015 \$4,942 · Taxable Capital Gains: \$142 · Net Business Income: \$4,800 2016 \$0 · No income 2017 \$1,069 · Taxable Dividends: \$331 · Interest and Other Investment Income: \$605 · Taxable Capital Gains: \$133 2018 \$358 · T5 Investment Income: \$358 2019 \$458 · Interest and Other Investment Income: \$458 2020 \$633 + RRSP · Dividends: \$384.34 · Taxable Capital Gains: \$319.65 · Interest and Other Investment Income: \$89.93 · RRSP Withdrawal: \$5,000 (Note: income tax return and assessment was incorrect in that a \$500 RRSP deduction was claimed which did not occur as it was in fact an RRSP withdrawal.) 2021 \$0 · As per Financial Statement 2022 Unknown · Eligible for CPP as of February 6, 2022 at age of 60 years old (TBC in the future)
- [90] As of 2021, Ms. J alleges an income of \$0, while Mr. J alleges an income of \$25,750.56 moving forward from 2022.
- [91] The courts have made it clear that a payor spouse's ability to pay is one factor to consider in the entitlement analysis: Bracklow at para. 60. In this case, Mr. J's income of \$25,750.56 is just above the \$20,000 "floor" discussed in the Spousal Support Advisory Guidelines [SSAG] at 11.2: There should generally not be any amount of spousal support payable until the payor's gross income exceeds \$20,000 per year. A minimum wage or poverty line income would be too low for a floor, providing too little incentive for the payor to continue working, given prevailing tax rates. A review of the case law suggests that judges almost never order spousal support where payors make less than \$20,000, or even slightly more. According to child support database information, where dependent children are involved, if the payor's income is below \$20,000 gross annually, spousal support is only ordered or agreed upon in less than 2 percent of cases and the percentages for incomes of \$20,000 to \$29,000 are only about 2.5 percent.
- [92] The SSAG at 11.4 also discuss the applicability of the formulae where the payor is making just above the floor (i.e. between \$20,000 and \$30,000): There is a second related concern for those payors whose incomes are more than \$20,000 but less than \$30,000. For these payors, assuming entitlement, consideration should be given to the percentages sought under the applicable formula, the net disposable income left to the payor spouse, and the impact of a spousal support payment upon the work incentives and marginal gains of the payor. For example, under the without child support formula, a shorter marriage would mean a smaller percentage and hence a smaller bite of the payor's income, in contrast to our 25-year marriage examples above. Or, to take another example, for a payor with an income in this \$20,000 to \$30,000 region and whose shifts, overtime hours or seasonal work are changeable, there are realistic concerns about disincentives to work. This flexibility will also avoid a "cliff effect" for payors just above the \$20,000 floor, where a payor would suddenly go from zero spousal support to a formula amount simply because of making a few dollars more per year. As these cases are just above the income floor, these are situations that could be treated as "exceptions" to the operation of the formulas, unlike those cases where the payor's income is

below the floor. But the concerns in these two situations both arise from the operation of the floor, so we have dealt with them here together.

- [93] In *Nadim v. Hakim*, 2018 BCSC 1999 at para. 46, Justice Myers found no support was payable where the payor earned roughly \$20,500 annually and held that, given that the \$20,000 floor dates to 2008 and the fact of inflation, the "suggested floor of \$20,000 may therefore be viewed as a conservative figure".
- [94] On the basis of Mr. J's income being close to the floor, the medical costs associated with his disabilities and other health challenges, and the costs of caring for JJ, I have great difficulty concluding that spousal support is payable, simply considering his situation alone.
- [95] However, before I reach a conclusion on the issue of spousal support, a further relevant consideration is whether I should impute income to Ms. J in accordance with the Spousal Support Advisory Guidelines. In this case, I conclude that income should be imputed to Ms. J for the following reasons: · Ms. J admitted at trial that she was able to rent the Burrard Property in 2015 and 2016 and that the rental income went directly into her bank account (although she did not declare this as income on her tax returns), but that she made the decision not to continue renting because she did not enjoy dealing with tenants. In *M.E.S. v. L.A.P.*, 2019 BCSC 1526, Justice Crerar imputed rental income to a payor for failing to charge market rent for a Vancouver property, notwithstanding the time commitment in managing a rental property, on the basis that there is an onus on a party to generate reasonable income from available assets: see also *J.R. v. N.R.*, 2017 BCSC 455; · in her financial statement dated June 28, 2019, she stated that she was receiving rental income in the gross and net amount of \$1,450 per month in 2015 and 2016 which extrapolates to \$17,400 per annum. In her financial statement on October 22, 2021, she stated that rent, if and when payable, would be appropriately payable at the amount of \$4,000 per month, which would extrapolate to an income of \$48,000 per annum. The midway point between these two numbers is \$2,725 per month, which I conclude is a reasonable expectation for rental income, which corresponds to \$32,700 annually; · Ms. J has not worked at all since the Separation Date and there was no evidence at trial that Ms. J has made any efforts since the Separation Date to look for employment. I see no reason, given her past work experience, training and skills, that she should not be able to obtain work that pays her a minimum wage, in addition to the rental income for the Burrard Property. This would place her imputed income well above the level of Mr. J's income (although he is not seeking spousal support from her); · Ms. J admitted under cross-examination that she had a job offer from her brother which would have paid her one million Hong Kong Dollars but she decided not to take the job because she had health problems and it involved too much travel; · Ms. J alleges that she suffers from various medical conditions which prevent her from working but adduced insufficient medical evidence in support of that allegation. Further this testimony does not appear consistent in my view with the substantial amount of energy and effort she has clearly devoted to representing herself in various lawsuits despite her alleged medical conditions; · Ms. J clearly has been earning an income since the Separation Date. This is reflected in the

increase of her bank account balance from \$190,285.52 on September 3, 2013 to \$325,474.15 by October 13, 2021. However, Ms. J failed to disclose during the discovery process or at trial what the source of that income has been; and · Ms. J's disclosure of financial and banking records during the discovery process and at trial was woefully inadequate, leaving the court with an opaque picture concerning the source of the many wire transfers she has received and essential details concerning her banking balances and activities. On August 26, 2020, Master Elwood (as he then was), ordered updated lists of documents for both parties, which were to include income and banking documents from 2010 to present to the best of their abilities (the "Elwood Order"). On the evidence Mr. J complied with the Elwood Order but Ms. J did not. The courts have stated on many occasions that non-disclosure or delayed disclosure of financial information is a costly impediment to the timely and just disposition of family disputes. It has been described as the "cancer of matrimonial property litigation": *Cunha v. Cunha* (1994), 1994 CanLII 3195 (BC SC), 99 B.C.L.R. (2d) 93 (S.C.). In light of Ms. J's inadequate disclosure, I make the adverse inference that Ms. J has been earning considerably more income than her tax returns reveal: *S.K. v. S.M.*, 2021 BCSC 241 at para. 20.

- [96] In *J.R.G. v. J.C.K.*, 2021 BCSC 616, Justice Schultes took judicial notice of the fact that working 35 hours per week at the minimum wage of \$14.60/hr (at that time) would yield an annual income of \$26,572. He stated at para. 113: As it was explained by the authors of *Spousal Support Advisory Guidelines: The Revised User's Guide* (2016) [User's Guide]: Where a spouse is not employed, but should be working part-time or full-time under s. 19(1)(a)[of the Federal Child Support Guidelines], it is straightforward to impute a minimum wage income, as a court can take judicial notice of the minimum wage in the jurisdiction. To prove that a spouse could earn more than the minimum, evidence will be needed
- [97] Since that decision, the minimum wage in British Columbia was raised to \$15.20 at the date of trial, which would raise the annual wage to \$27,664, based upon the number of hours used in *J.R.G.* Taking into account the above, in my view it is fair and reasonable to impute income at the level of \$60,364, which corresponds to a minimum wage income plus her mid-point achievable rental income of \$2,725 per month from the Burrard Property (\$32,700 annually), as set out above. This imputed income exceeds Mr. J's income and substantially reinforces the conclusion that no support should be payable.
- [98] Having addressed the issue of spousal support moving forward, I must also address the question whether retroactive spousal support is payable in this case on the basis that Mr. J's income would have exceeded Ms. J's imputed income during the period between 2013 and 2020. In my view, no retroactive spousal support is payable in this case, despite the difference in income between the parties, for the reasons that follow.
- [99] Justice Groberman of the Court of Appeal in *Reis v. Bucholtz*, 2010 BCCA 115 [Reis] at paras. 66-68 (cited more recently in *Willms v. Willms*, 2020 BCCA 51 at para. 30), set out the analysis to be applied with respect to retroactive orders for spousal support as follows:

- [66] Retroactive orders for child support, while not exceptional, are also not automatic. In *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, 31 R.F.L. (6th) 1, the Supreme Court of Canada discussed the factors that a court must consider in making an award retroactive. While *D.B.S.* dealt specifically with retroactive awards for child support, a similar analysis applies to determine whether an award of spousal support should be made retroactive: *Kerr v. Baranow*, 2009 BCCA 111, [2009] 9 W.W.R. 285, 66 R.F.L. (6th) 1, leave to appeal to S.C.C. granted [2009] S.C.C.A. No.193.
- [67] While it is not mandatory for a court making a retroactive order to explicitly refer to *D.B.S.* or expressly discuss each of the factors discussed in the case (see *E.R.H. v. B.W.H.*, 2009 BCCA 573, [2009] B.C.J. No. 2505 at para. 38), some discussion of the reasons for a retroactive award is to be expected. In the case before us, the trial judge did not discuss her reasons for making the awards of child and spousal support retroactive.
- [68] In *D.B.S.*, the Supreme Court set out four factors to be considered in determining whether a retroactive award is appropriate . . .
- [100] As directed by the Court of Appeal in *Reis*, I will now consider each of the four factors from *D.B.S. v. S.R.G.*, 2006 SCC 37 [*D.B.S.*] at paras. 100-116, which are as follows:
1. reasonable excuse for why support was not sought earlier;
 2. conduct of the payor parent;
 3. circumstances of the child; and
 4. hardship occasioned by a retroactive award. Reasonable excuse why support not sought earlier
- [101] Ms. J did not provide a reasonable excuse why she did not seek spousal support earlier.
- [102] Since the Separation Date, Ms. J has never made an application for interim spousal support. Ms. J did not claim spousal support in her notice of family claim filed May 17, 2018 nor in her amended notice of family claim filed May 25, 2018. She has only recently claimed spousal support in her amended notice of family claim filed January 28, 2021, which was filed without consent after the notice of trial was filed and served and without leave of the Court as required by Rule 8-1 of the Rules.
- [103] It is apparent from all the evidence that Ms. J has been aware for many years that she could claim spousal support but chose not to claim it. For example, on October 12, 2017, before she had even commenced her family claim, Ms. J sent Mr. J an email that said: I have consulted my lawyer. She told me that I am entitled to claim from you:
- a. Common property 50%
 - b. CPP 50%
 - c. Pension plan 50%

- d. RRSP 50%
- e. Medic care plan
- f. spousal support Due to our daughter living with you, I can drop the f: spousal support. If you agree on this, please provide the details of the information for the above b, c and d, please. My lawyer needs [this] information to work out the details of the [separation] agreement for us. Thanks! [Emphasis added.]

[104] On July 5, 2018, Ms. J also sent an email to Mr. J that said: "[i]f you continue after me for the rest of the RESP, I will demand the court ask you pay for the spouse support [sic]."

[105] In direct examination, Ms. J initially testified that she did not make a claim for spousal support sooner because she did not have the knowledge and that the two lawyers she had retained previously had not mentioned spousal support to her. However, this testimony was not consistent with the emails referenced above and I do not find it to be credible. Further, under cross-examination, Ms. J admitted that she in fact had spoken to a lawyer and knew she could get spousal support but confirmed that she did not ask for spousal support at that time as she did not want it then. Thus, it appears that she only sought spousal support at a very late date immediately prior to trial because she had simply changed her mind.
Conduct of the payor parent

[106] There was no issue with the conduct of Mr. J in this case. Ms. J never previously asked for spousal support, he never refused and there was therefore never any issue with arrears. Further, the evidence was clear that, after Ms. J left the Family Home, JJ continued to live with Mr. J exclusively and Mr. J was the parent who paid JJ's expenses and provided for her. Ms. J did not contribute to these expenses. Circumstances of the parties

[107] As stated above, Ms. J's lifestyle appears to have improved since the Separation Date and was, at minimum, equivalent and arguably superior to the lifestyle she enjoyed prior to the Separation Date, and also to the lifestyle of Mr. J and JJ. The evidence was also that she has ample income and cash flow (although her documentary disclosure was deficient, so this was difficult to verify). Hardship

[108] In my view, given Mr. J's disability, high medical expenses, and substantially reduced income following retirement, in addition to the fact that he still pays all expenses relating to JJ, a retroactive award of support would amount to a hardship on Mr. J that is not justified. By contrast, I note that Ms. J's financial position is comparatively superior, as she lives rent and mortgage free in a more valuable house and has considerable funds in the bank and in investment accounts (which will be substantially increased as a result of the division of property in this case).

[109] I conclude that a retroactive spousal support award is not merited in this case.

7. Whether Child Support Should Be Ordered

- [110] Mr. J seeks a child support award against Ms. J on the basis that I should treat JJ as a child of the marriage even though she is 27 years old.
- [111] Section 2 of the Divorce Act defines a child of the marriage as "a child of two spouses or former spouses who, at the material time, (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life".
- [112] Regarding child support for an adult child of the marriage, s. 3(2) of the Federal Child Support Guidelines states the following: Child the age of majority or over
- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [113] Mr. J has the burden of proof to establish that JJ remains a child of the marriage on a balance of probabilities. In support of this argument, Mr. J relied upon testimony from JJ, himself and also Ms. J.
- [114] JJ testified to a range of serious physical and emotional limitations which can in my view fairly be characterized as disabilities or illnesses, including PTSD, depression disorder, and general anxiety disorder, severe insomnia, low iron (requiring an iron transfusion on one occasion), migraines and frequent panic attacks. She takes two different courses of medication for anxiety and depression and consults with a psychiatrist. Based upon a report prepared by her psychiatrist (adduced at trial as documentary evidence but not admitted as an expert report), JJ is intending to submit an application to the government to be designated a person with disability in order to obtain funding for psychotherapy.
- [115] As a result of her various physical and psychological issues, JJ testified that she has had great difficulty establishing a life independent from the care of her father. JJ attended university from 2012 to 2019, paid for by Mr. J, but did not complete her degree due to health issues. JJ secured a job in 2017 but has been unable to work consistently since then and is currently not working due to her health and therefore has no income. She has one bank account with about \$23,000 in it, which has money she received from her father and \$10,000 from her mother.
- [116] Mr. J testified he has paid JJ's expenses since the Separation Date, including for school, food, clothing and medical and dental costs. He adduced evidence of paying \$19,666.68 toward JJ's university tuition, in addition to other expenses such as textbooks, although he did receive a tax credit for these expenses.

- [117] Mr. J also helped JJ set up a bank account at age 19, gave her between \$15,000 and \$20,000 in 2016 to 2018, and helped her apply for a credit card. He testified that JJ has tried to work but could only work for three to four hours at a time, due in large part to her iron deficiency, and then would have to sleep for 16 hours.
- [118] While the courts have generally required expert evidence to justify child support for an adult child of the marriage, this case is different because both parents agreed in their testimony that JJ has physical and mental disabilities - this was not a point of dispute in the litigation. In addition to the clear testimony of Mr. J that JJ is unable to care for herself independently due to her various disabilities, Ms. J also agreed under cross-examination that JJ has severe anxiety, severe depression, generalized anxiety disorder and major depressive disorder. She testified that she has been aware of JJ's diagnosis since separation, stating: "she had always had that problem - from the knowledge I have now, she's always had that problem." Further, in her response to counterclaim, filed when she was represented by counsel on June 28, 2019, she stated that she knew JJ was either in school or suffering a disability.
- [119] I am satisfied on all the evidence that JJ should be considered a child of the marriage. In *C.A.W. v. K.C.S.*, 2018 BCSC 298, Justice Murray found the 19-year-old child to be a child of the marriage and unable to obtain the necessities of life due to illness. Justice Murray found that the adult child was not well, lived with and was financially supported by the recipient, and had been diagnosed with general anxiety disorder and recurrent major depressive disorder. In this case, the evidence is equally persuasive in my view that JJ is unable to obtain the necessities of life due to illness, despite JJ's more advanced age.
- [120] Accordingly, I find that Ms. J should contribute to child support moving forward based upon Mr. J's income of \$25,750.56 and Ms. J's attributed income of \$60,364. The Guidelines indicate that a monthly payment of \$571 is appropriate and I order Ms. J to pay this amount on the last day of every month commencing November 30, 2022, in addition to making a contribution to s. 7 expenses in accordance with the ratio of the two parties' incomes.
- [121] I also find that Ms. J should pay retroactive child support dating back to May 31, 2016. Mr. J filed his Counterclaim on May 31, 2019 in which he demanded child support. The Supreme Court of Canada in *D.B.S.* and the British Columbia courts have stated that a three-year period of retroactivity prior to formal notice is generally appropriate, absent blameworthy conduct. In my view the *D.B.S.* factors clearly favour a retroactive child support award in this case. I will now consider each of the four factors in turn. Reasonable excuse why support not sought earlier
- [122] Mr. J did not seek child support until he filed his counterclaim in 2019. However, in my view, Mr. J had a reasonable excuse for not seeking child support earlier.
- [123] Mr. J's excuse was that he understood that he and Ms. J had entered into an oral separation agreement in 2015 and possibly earlier (the "Separation Agreement") that Ms. J would not make any property claim against Mr. J as long as he agreed to give his property to JJ (which

he testified he has done in his will). The Separation Agreement was confirmed by email from Ms. J to Mr. J on April 19, 2015 at 4:22pm entitled "separation agreement" that stated as follows: Official separation agreement I, [Ms. J] agree to terminate my 23 years marriage with [Mr. J] under the agreements made as follows:

1. All the property, possessions (including 196 Valour Dr. Port Moody home and land, the possessions inside or on the property, the camp car and the two trucks) that own by both sides together in the past years must go to our biological daughter [JJ]
2. All the life insurance beneficiary must under our daughter's name [JJ]
3. All the bank savings from the separated parties must go to our daughter [JJ] after the principal owner deceased.
4. Whenever the current in title owner Mr. [Mr. J] wants to put above mentioned property possessions for sale, he must gain my permit. I have the legal rights to know the direction of the sale money and I have the right to stop the sales if any violation involve in this agreement. All the sale's gains must go to our daughter [JJ's] account. If Mr. [Mr. J] consents this agreement, I am willing to terminate this marriage without property claim issue.

[124] Although the Separation Agreement was never apparently signed or formalized, Mr. J testified that he adhered to the terms of this agreement (as he has left all his assets to JJ in his will) and that Ms. J also adhered to it until 2017, when Mr. J changed the locks on the Family Home.

[125] Mr. J testified that he relied upon the Separation Agreement in paying for JJ's expenses (even though the Separation Agreement did not expressly address the issue of child support), as he understood the trade-off to be that he could afford to incur these expenses on his own because Ms. J would not be making a property claim against him. However, after he changed the locks on the Family Home, Ms. J changed her position with regard to division of assets and, despite the terms of the Separation Agreement (which she had confirmed in her email), filed a notice of family claim which included property claims. Conduct of the payor parent

[126] There were very serious issues with Ms. J's conduct in this case, including the following: · Ms. J's failure to comply with the Separation Agreement, as described above. Even though the Separation Agreement was never formalized, this displayed at a minimum a lack of good faith on the part of Ms. J; · the evidence was that Ms. J removed all the funds in the Joint RESP account of which JJ was the beneficiary and also removed all the money in the joint GIC accounts she held with JJ Ms. J adduced no evidence that she ever replenished these funds and I make the adverse inference (taking into account her inadequate documentary disclosure) that she never did replenish those funds. Thus, in addition to taking no steps to contribute to JJ's care, Ms. J actually took steps to appropriate funds which would otherwise have been saved for JJ's benefit. This in my view was serious misconduct; · I also cannot ignore the long and troubling history of family violence

perpetrated by Ms. J against both JJ and Mr. J, and in particular her pattern of harassing them in the Family Home, which has materially reduced their quality of life. Circumstances of the parties

- [127] As stated above, Ms. J's lifestyle appears to have improved since the Separation Date and is, at a minimum, equivalent to the lifestyle she enjoyed prior to the Separation Date. The evidence was also that she has ample income and cash flow (although her documentary disclosure was inadequate, so this was difficult to verify). By contrast, Mr. J has become disabled and his income has been substantially reduced. Hardship
- [128] In my view, given Mr. J's very compromised health, high medical expenses, and substantially reduced income, in addition to the fact that he still pays all expenses relating to JJ, it is fair under the circumstances that Ms. J be required to make a retroactive contribution to child care. In so ruling, I have also taken into account the fact that this retroactive award will be an offset against the payment that Mr. J will have to make to Ms. J on asset division and therefore will not impair Ms. J's cash flow by requiring her to secure the necessary funds.
- [129] A retroactive child support order dating back to May 31, 2016 equates to a total of 77 months up to and including October, 2022. Based upon the Guidelines monthly payment of \$571, Ms. J shall make a payment to Mr. J of \$43,967. While I note that JJ did testify that, after the Separation Date, Ms. J sent JJ a cheque directly for \$10,000, which JJ deposited in her bank account, the evidence in my view was that this was clearly a gift and not intended as child support. Accordingly, it would not be fair to set this amount off against the child support award.
- [130] It is also appropriate in my view to make an award for retroactive s. 7 expenses. Ms. J adduced evidence that he paid \$12,059.32 toward JJ's university tuition dating back to 2015, which did not include textbooks and student activities. In addition, there were many other expenses that Mr. J testified he paid on JJ's behalf since 2015, including in particular the psychology, medical and pharmaceutical expenses relating to her various conditions. However, there was no evidence adduced on these specific expenses at trial so I am not in a position to make an award. That said, in light of these many other expenses which remain uncompensated, in my view it is fair that Ms. J at a minimum pay half of these tuition costs (despite the difference in income between the parties) in the amount of \$6,029.66.

8. How Property Should Be Divided Between the Parties

- [131] Mr. J seeks an equal division with respect to family property on the assumption that property is divided at the Separation Date. In the event that property is divided at the trial date he seeks an unequal division, including a share of the Burrard Property. This is opposed by Ms. J, who seeks an equal division at the trial date. In my view an equal division at the Separation Date is appropriate under the circumstances.

a) Applicable Law

- [132] Section 81 of the FLA provides that, subject to an agreement or order which provides otherwise, spouses have a presumptive entitlement to an equal interest in all family property, and are equally responsible for family debt.
- [133] Section 84 of the FLA broadly defines family property to include all real and personal property that is owned by at least one spouse on the date of separation, or in which at least one spouse has a beneficial interest, that is not excluded property under s. 85.
- [134] Section 85 of the FLA states that the categories of excluded property include property acquired by a spouse before the relationship began. Family property includes the amount by which the value of excluded property has increased since the later of when the property was acquired or the relationship began.
- [135] Section 86 of the FLA defines family debt to include all financial obligations incurred by a spouse during the relationship, and also after separation if it is incurred for the purpose of maintaining family property.
- [136] Section 87 of the FLA states that the value of family property or family debt is to be determined as of the date of an agreement dividing family property and debt or as of the date of the hearing before the court regarding the division of property and debt. Section 87(a) provides that the value of family property must be based on its fair market value.
- [137] Section 95 of the FLA provides that a court may order an unequal division of family property or family debt, or both, if an equal division would be "significantly unfair". Section 95(2) enumerates factors that may be considered by a court in ordering an unequal division:
- (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.

[138] In *C.K.M. v. H.R.M.*, 2021 BCSC 1297, Justice Jackson summarized the proper approach to unequal division of property under the FLA:

[57] Determining whether an equal division of family property would be significantly unfair involves a two-stage analysis: *Polard v. Polard*, 2017 BCSC 1963 at para. 19. First, the court determines the extent of family property in accordance with ss. 84-86 of the FLA and undertakes the notional exercise of dividing the family property (and any family debt) equally. Second, the court determines whether the equal division would be significantly unfair, taking into account the factors set out in s. 95(2) of the FLA

[58] Significant unfairness requires something objectively unjust, unreasonable, or unfair in some important or substantial sense having regard to the factors set out in s. 95(2) of the FLA: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 41-42. The threshold for establishing significant unfairness is a high one: *N.R. v. N.P.*, 2018 BCSC 2318 at para. 162.

b) Valuation of assets and debts

[139] The assets to be divided between the parties are the following: · Mr. J's BC Hydro pension; · the parties' Canada Pension Plan credits; · vehicles; · the Joint Chequing Account; · the Family Home; · the Burrard Property; · the parties' investment accounts and bank accounts in their sole names; · the Joint RESP; and · a joint GIC with JJ and Ms. J.

[140] The debts to be divided between the parties are the following: · the Current Line of Credit (or Original Line of Credit if I find that the Separation Date is the appropriate valuation date); and · personal debts accumulated since the Separation Date.

[141] I will address each of these in turn. BC Hydro pension

[142] Based on the 2015 and 2017 BC Hydro annual pension statements, Mr. J commenced employment with BC Hydro on September 11, 2008 and was enrolled in the BC Hydro Pension Plan as at December 19, 2008. The retirement pension vesting date is May 1, 2021, which is the first day of the month following or coincident with Mr. J turning age 65. Ms. J is the beneficiary of 100% of this pension.

- [143] Pursuant to Parts 5 and 6 of the FLA, Mr. J's BC Hydro pension from the date of marriage to the Separation Date is family property and should be divided accordingly. There is no dispute between the parties on this issue. The parties' Canada Pension Plan credits
- [144] The parties' Canada Pension Plan credits from the date of marriage to the Separation Date are family property pursuant to the FLA and should be divided according to the Canada Pension Plan, R.S.C., 1985, c. C-8. There is no dispute between the parties on this issue.
- Vehicles
- [145] The following are the parties' vehicles: Vehicle Registered Owner Value 1996 Toyota Tacoma Ms. J \$100.00 as per F8 2011 GM (pending class action lawsuit for CP4 failure) Mr. J \$10,000.00 as per F8 2013 Camper Mr. J \$5,000.00 as per F8 2003 Toyota Corolla Ms. J \$300.00 as per F8 2015 Toyota Rav4 Ms. J \$20,000.00 as per F8
- [146] Mr. J proposes that each party keep their own vehicles. Since the value of the vehicles is comparable (and indeed the value of Ms. J's vehicles marginally exceeds the value of Mr. J's) this is a reasonable and fair result. I order that the parties keep their own vehicles. Joint Chequing Account
- [147] The Joint Chequing Account was closed on January 16, 2015 when Mr. J withdrew the remaining \$1,020.21. There was evidence at trial that both parties used the Joint Chequing Account about equally after the Separation Date. In light of that fact, Mr. J argued that the Joint Chequing Account should not be divided any further. I agree and order no further division. The Family Home, Burrard Property and investment accounts The Valuation Date
- [148] With respect to these assets, a preliminary issue to be resolved is the date of valuation. Mr. J argues that the Separation Date, not "the date of the hearing before the court" as per s. 87 of the FLA, should be the valuation date for family assets and debts in this case. Under the unique circumstances of this case, I agree.
- [149] In *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 35, the Court of Appeal stated that family property should be valued at the date of trial absent compelling evidence and that the court retains a discretion to choose a different date. In *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76, the Court of Appeal confirmed that "[a] departure from the presumptive date for valuations of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA."
- [150] Consistent with the above direction from the Court of Appeal concerning the presumptive date, there is ample legal authority for using the date of separation as the valuation date where using the trial date would be significantly unfair, in accordance with s. 95 of the FLA. For example, in *Johnson v. Korol*, 2019 BCSC 111, the parties were married for approximately six years. Justice Meiklem ordered that the date of separation be used as the valuation date because if the trial date were to be used it would be significantly unfair to the husband and would provide the wife with an unearned windfall if she was to share the equity increase due purely to market forces in the circumstances of the case. Justice

Meiklem found that the improvements done post-separation to the home likely increased market value, and reasoned as follows:

- [58] Examples of other cases where the separation date valuation was determined to be appropriate, notwithstanding significant post-separation increases in value, inclusive of market forces, on the basis that only the owner spouse had made contributions to the excluded property are: *Slavenova v. Rangelov*, 2015 BCSC 79; *Davie v. De Mark*, 2017 BCSC 872 and *A.J.E. v. T.B.W.*, 2017 BCSC 1657. I have been referred to no case authorities that come to an opposite conclusion on similar facts.
- [59] In my view, varying the valuation date is to be preferred over the reapportionment alternative on the facts of this case and is more consistent with the excluded asset model established by the FLA, on the analysis that I have set out.
- [151] Similarly, in *MacFarlane v. Ponds*, 2019 BCSC 1518, the respondent entered the relationship with various investments and savings and made significant contributions of \$187,187 to his financial investments after the date of separation. At the time of the trial, it had been almost four years since the end of the relationship. Justice Douglas exercised discretion and valued family property as of the date of separation and not the date of trial, as allowed by s. 87 of the FLA, finding that it would be significantly unfair not to do so in this case. See also: *B.M.P. v. S.L.B.*, 2015 BCSC 448 at para 146.
- [152] Taking into account these authorities, it is my view that there is compelling evidence that the Family Home, the Burrard Property and the investment accounts should be valued at the Separation Date, and that a valuation at the trial date would be significantly unfair to both parties. I have reached this conclusion for the following six reasons.
- [153] First, there was evidence at trial that the parties agreed in principle, if not formally, to the Separation Agreement in 2015. Mr. J testified that he has adhered to the spirit of this agreement (as he has left all his assets to JJ in his will) and that Ms. J also adhered to it until 2017, when Mr. J changed the locks on the Family Home. It was only after that time that Ms. J took steps to file a notice of family claim and changed her position with regard to division of assets.
- [154] Since the Separation Agreement was not formalized, it would not be fair in my view to enforce its terms strictly against Ms. J, since to do so would result in her being entitled to no share of the Family Home or the investment accounts. However, at a minimum, this agreement is an indication that both parties intended to settle their property division (including any associated valuation) at an early stage after the Separation Date, and not to leave it to a distant trial date.

- [155] Second, the gap between the Separation Date in 2013 and the trial date in 2022 is very long. The two parties have been acting independently with regard to their respective assets for many years (as they had during the marriage even prior to the Separation Date), and a tracing exercise with respect to their contributions to asset values during the nine-year period after the Separation Date would be very complex.
- [156] Third, Mr. J testified that after the Separation Date, and relying on the understanding under the Separation Agreement that Ms. J had relinquished any claim to the Family Home, he did substantial renovations on the Family Home, which added significant value, and also made payments to reduce the value of the Original Line of Credit and Current Line of Credit. It would be unfair, in light of the understanding arising from the Separation Agreement, for Ms. J to benefit from the increase in value of the Family Home due to the renovations and the reductions in the Original Line of Credit and Current Line of Credit debt.
- [157] Fourth, both parties testified that they held their investment accounts separate even during the marriage. After the Separation Date they both made many contributions and withdrawals to these accounts, in addition to cancelling and transferring assets between accounts. Consequently, it would be unfair to both parties, and require a complex tracing exercise, to value these accounts as of the trial date.
- [158] Fifth, valuing the real property at the Separation Date (which is the approach advocated for by Mr. J) is not unfair to Ms. J and indeed actually provides a benefit to her. This is because Ms. J purchased the Burrard Property prior to the Separation Date. Although I accept Ms. J's testimony that she purchased the Burrard Property with funds provided by her brother (which makes the Burrard Property excluded property), she has remained on title to that property since and Mr. J would therefore be entitled to an equal share of the growth in value of the Burrard Property up to the date of trial (based upon 2021 assessed value the increase in value is \$300,000). If the timing of the valuation is the Separation Date as opposed to the trial date, Ms. J escapes having to share any of the increase in value of the Burrard Property with Mr. J since the evidence was that there was no increase in market value between the date of purchase and the Separation Date.
- [159] I note in passing that Ms. J also argued at trial that she holds the title to the Burrard Property in trust for her brother and is not the beneficial owner even though she is registered on title. However, pursuant to s. 23(2) of the Land Title Act, R.S.B.C., 1996, c. 250 there is a statutory presumption that the person who is registered as the titleholder holds both the legal and beneficial interests in the property. The burden of proof was on Ms. J to establish that the statutory presumption should be set aside and she failed to meet that burden. Specifically, she failed to produce any evidence of the alleged arrangement at trial (either in the form of relevant documents or testimony from her brother), or to establish that any of the equitable principles that could offset the statutory presumption were operative in this case. This finding would have had significant negative implications for Ms. J if I had found that the valuation date was the trial date (since the value of the Burrard Property had increased substantially since 2013 and Mr. J would be entitled to share in that

increase). However, since I am valuing the property as at the Separation Date, this issue is rendered essentially moot in terms of the property division analysis.

- [160] Sixth, there was a significant evidentiary void at trial with respect to asset values, withdrawals and contributions of either party (and Ms. J in particular) after the Separation Date. As a result, there was simply little or no evidence upon which this Court could make any ruling on asset values as of the trial date. The only option left to the Court under the circumstances would be to order an accounting and tracing, which would be very expensive for the parties and would have the unfortunate consequence of prolonging this very contentious and drawn-out litigation, which would in its own way in my view be a further form of unfairness. Valuing the assets as of the Separation Date enables the court to render a final decision and to enable the parties to go their separate ways, which achieves justice and finality under these difficult circumstances.
- [161] On the basis of the foregoing I conclude that March 1, 2014, the Separation Date, should be used as the valuation date for all family assets and family debts. Family Home and Current Line of Credit
- [162] The Appraisal Report valued the Family Home at \$650,000 as of 2014, and there was no contrary evidence. Ms. J did not object to the Appraisal Report. Although 13-3(2)(a) contemplates a joint expert report, in *Li v. Liang*, 2020 BCSC 141, Justice Horsman (as she then was) found that the court had a discretion to relieve a party from this requirement where an expert report has been properly served, the other party has had the opportunity to prepare an alternative report and where that party has declined an opportunity to cross-examine on that report. The same considerations are applicable in this case.
- [163] The balance owing on the Original Line of Credit as of the Separation Date was family debt, as it was incurred during the relationship for the purposes of building and improving the Family Home. The original purchase price of \$84,000 paid by Mr. J is excluded property because it was paid with funds from a separate account which he proved at trial that he had accumulated before the marriage.
- [164] The calculation for the division of the Family Home and the Original Line of Credit at the Separation Date is therefore as follows: Date March 1, 2014 Value of Home (Appraisal Report) \$650,000.00 Less March 1, 2014 balance on Original Line of Credit owing (TD) (\$178,913.33) Sub-Total \$471,086.67 Less Excluded Property (\$84,000.00) Total Equity \$387,086.67 /2 /2 Each party's share \$193,543.34
- [165] Thus, subject to the other offsets I have ordered in this decision, if Mr. J decides to continue to live in the Family Home (as he testified he wants to), Mr. J shall make payment to Ms. J of \$193,543.34, less the offsets relating to child support and other items discussed below, within 90 days of this decision. He shall retain sole title to the Family Home, and the Certificate of Pending Litigation shall be removed.

- [166] If Mr. J decides to sell the Family Home he shall notify Ms. J within 90 days of this decision, and shall thereafter shall take reasonable steps to list and sell the property within nine months of notifying Ms. J. Mr. J shall pay Ms. J \$193,543.34, less the offsets relating to child support discussed below, within seven days of the closing of the sale of the Family Home.
Burrard Property
- [167] I find on the evidence that the Burrard Property was purchased by Ms. J with money gifted to her by her brother. It is therefore excluded property pursuant to the s. 85(1)(g) of the FLA.
- [168] As noted above, since the Burrard Property was purchased prior to the Separation Date, Mr. J would in the ordinary course be entitled to a share of any increase in value of the Burrard Property. However, since I have decided to value the property as of the Separation Date, no share is payable from Ms. J to Mr. J because the Burrard Property had not increased in value as at the Separation Date. Investment and joint bank accounts
- [169] The total value of the six investment and bank accounts in Mr. J's name as of March 1, 2014 was \$738,428.92.
- [170] The total value of the 19 investment and bank accounts in Ms. J's name as of March 1, 2014 was \$119,701.39. However, due to seriously inadequate documentary disclosure from Ms. J, the account balances from 16 of those accounts were unknown and untraceable as of the date of trial, despite the Elwood Order. Further, I note that there was evidence that, with respect to the few accounts where she did disclose balances, these accounts had much higher balances prior to the Separation Date of \$188,786.62 on September 4, 2013 and \$217,106.07 on December 18, 2013 than the March 1, 2014 balance of \$119,701.39. Ms. J did not provide an adequate explanation at trial as to why her balances in these accounts were so suddenly reduced over a short time-frame, nor as to why she was unable to provide the account balances for the other 16 accounts. Mr. J testified that he believes Ms. J took steps to reduce and hide her financial holdings in anticipation of their coming separation, although this could not be proved due to the missing documents. However, given the serious lack of disclosure by Ms. J, it is in my view appropriate to make the adverse inference that she did take steps to reduce her financial holdings and also that she had considerably more funds in her accounts than she disclosed at trial. It would in my view be significantly unfair to Mr. J to enable Ms. J to hide behind her non-disclosure of documents, when Mr. J fully disclosed all his banking information.
- [171] In *Laxton v. Coglon*, 2008 BCSC 42, Mr. Justice Kelleher clarified that where the non-disclosing party has not satisfied the court that full disclosure has been made, the court may infer the value of the undisclosed assets is at least equal to the value of the disclosed assets. The inference simply operates to ensure equal division between the parties and is not a reapportionment: *Bamford v. Mulyati*, 2017 BCSC 945 at para. 43. Applying that principle, I infer that Ms. J had financial assets at the Separation Date of at least \$239,402.78 (which I note is only marginally above the \$217,106.07 she admitted she actually had in three

accounts on December 18, 2013, but does not take into account the other 16 accounts, and is therefore likely generous to Ms. J).

- [172] In addition, Mr. J was able to establish with documentary evidence that, at the date of the marriage, he had \$73,203.65 in RRSPs. Accordingly, I conclude that this amount is excluded property.
- [173] Ms. J claimed \$123,443.52 in excluded property. However, she was only able to support \$25,000 of that amount with documentary evidence, which was a cheque relating to her medical malpractice lawsuit settlement. Ms. J also claimed \$25,000 as excluded property based on a claim from a dental malpractice lawsuit settlement. However, the evidence was that this money was paid towards the 2003 Toyota, which she continues to own. Ms. J also claimed that she received a \$50,000 inheritance from her mother but this claim was completely unsupported by any evidence, such as a will, correspondence of any kind, or a bank transfer. The remaining \$23,443.52 claimed by Ms. J was unexplained and unsupported by evidence.
- [174] I conclude that \$25,000 should be excluded property for Ms. J with respect to the asset division.
- [175] Subject to the excluded property I have referenced above, the parties will divide the remainder of the investment and joint bank accounts equally as follows: Total value of accounts \$977,831.70 Mr. J's excluded property (\$73,203.65) Ms. J's excluded property (\$25,000) Total: \$879,628.05 Equal shares: \$439,814.03 Minus Ms. J's holdings (\$239,402.78) Payment owing to Ms. J \$200,411.25
- [176] Mr. J shall select at his discretion investment and joint bank holdings in the amount of \$200,411.25 and transfer these to Ms. J within 90 days of this decision. Joint RESP
- [177] The parties held a Joint RESP for the benefit of JJ
- [178] Ms. J admitted on cross-examination that she redeemed the sums of \$15,550 and \$4,326 from the Joint RESP account on September 10, 2012. She alleged that the funds went into a separate TFSA account but she was unable to prove that the funds were ever repaid. Given her lack of adequate documentary disclosure, I make the adverse inference that she kept the funds and never repaid them.
- [179] I find that Ms. J should repay these amounts, in the total amount of \$19,876, to be set off against the amount payable by Mr. J on the asset division. Joint GICs between Ms. J and JJ
- [180] At the Separation Date, Ms. J had six separate GIC accounts held jointly with JJ. As of September 4, 2013, the balance of the accounts was \$18,600.80. Due to inadequate document disclosure, the balance of these accounts was unknown as of the Separation Date and thereafter. The evidence at trial was clear that Ms. J redeemed these funds and kept them for herself, even though they were jointly held with JJ. I find, due to lack of documentary disclosure from Ms. J, that she never repaid the funds.

- [181] I find that Ms. J should repay these amounts, in the amount of JJ's share of half of \$18,600.80 (\$9,300.40), to be set off against the amount payable by Mr. J on the asset division. Other debts
- [182] During the marriage and since the Separation Date, the parties have had no jointly held debts, apart from the Current Line of Credit associated with the Family Home. Since the Separation Date, both parties have accumulated nil or nominal debt individually. Thus, it is appropriate to order that each party be responsible for debts in their own name. Household Goods
- [183] Ms. J seeks the return of certain household goods from Mr. J.
- [184] Mr. J has testified that he is not aware of any additional items of hers in the Family Home (and notes that she had a key to the Family Home until 2017 so had plenty of time to retrieve any outstanding items). Nonetheless, Mr. J agreed at trial, and I order, that he undertake a further search for any outstanding items and, if he locates them, that he notify Ms. J of any items located within 30 days of this decision, and she shall have 30 further days thereafter to retrieve them. In order to ensure compliance with the Protection Order, Ms. J shall arrange at her expense for a commercial courier or moving company to pick up the items. V. ORDER
- [185] In summary, I make the following orders:
- a) The parties' request for a divorce under the Divorce Act is hereby granted, taking effect 31 days from the date of this judgment;
 - b) Ms. J's request for the removal of the surname J from her name pursuant to the Name Act is hereby granted, taking effect on the date the divorce takes effect;
 - c) Ms. J's claim for spousal support is dismissed;
 - d) Ms. J's claim for parenting time is dismissed;
 - e) commencing on the date this judgment is published and for a period of 18 months thereafter, a protection order pursuant to s. 183(2) of the FLA shall take effect as against Ms. J who shall not attend at, enter or be found within two blocks of the Family Home, or place of employment or school of Mr. J and JJ;
 - f) Mr. J's claim for retroactive child support in the amount of \$43,967 and forward-looking child support in the amount of \$571 per month (payable on the last day of the month commencing November 30, 2022) for JJ is granted;
 - g) Mr. J shall select at his discretion investment and joint bank holdings in the amount of \$200,411.25 and transfer these to Ms. J within 90 days of this decision;
 - h) If Mr. J decides to stay in the Family Home, Mr. J shall make payment to Ms. J of \$114,370.28 within 90 days of this decision (being \$193,543.34 for the equal division of the Family Home minus the amounts to be reimbursed by Ms. J for her withdrawals from the Joint RESP

account in the amount of \$19,876, the GIC account repayment in the amount of \$9,300.40, the retroactive child support amount of \$43,967 and the retroactive s. 7 expenses of \$6,029.66). Once payment is received by Ms. J, the Certificate of Pending Litigation shall be removed and Mr. J shall retain sole title to the Family Home;

- i) If Mr. J decides to sell the Family Home he shall notify Ms. J within 90 days of this decision, and shall thereafter shall take reasonable steps to list and sell the property within nine months of notifying Ms. J. Mr. J shall pay Ms. J \$114,370.28 within seven days of the closing of the sale of the Family Home;
- j) there shall be no further division of the Joint Chequing Account;
- k) each party shall be responsible for debts in their own name that have been accumulated since the Separation Date;
- l) The parties' Canada Pension Plan credits from the date of marriage to the Separation Date are to be divided pursuant to the Canada Pension Plan;
- m) Mr. J's BC Hydro pension from the date of marriage to the Separation Date is to be divided pursuant to Parts 5 and 6 of the FLA;
- n) Mr. J shall undertake a further search of the Family Home for any outstanding household goods belonging to Ms. J and, if he locates any, shall notify Ms. J of any items located within 30 days of this decision. Ms. J shall have 30 further days thereafter to retrieve them. In order to ensure compliance with the Protection Order, Ms. J shall arrange at her expense for a commercial courier or moving company to pick up the items; and
- o) the parties shall keep their vehicles registered in their respective names.

[186] The parties have leave to speak to the issue of costs. "M. Taylor J."

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