

CANADA / JUDGMENT

Den Duyf v. Den Duyf

2025 BCSC 2465

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2465 Den Duyf v. Den Duyf

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Den Duyf v. Den Duyf,

2025 BCSC 2465

Date: 20251212

Docket: E240337

Registry: Vancouver

Between:

Nolan Kyle Den Duyf

Claimant

And

Hannah Minke Den Duyf

Respondent

And

Arthur David Den Duyf and Linda Ann Den Duyf

Respondents by way of Counterclaim

- and -

Docket: S250786

Registry: Vancouver

Between:

Linda Ann Den Duyf and Arthur David Den Duyf

Plaintiffs

And

Nolan Kyle Den Duyf and Hannah Minke Den Duyf

Defendants

And

Linda Ann Den Duyf, Arthur David Den Duyf and Nolan Kyle Den Duyf

Defendants by way of Counterclaim

Before: The Honourable Justice Thomas

Reasons for Judgment

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Overview

The Issues

[1] This matter involves two actions and numerous related issues:

- a) A family law petition commenced by Nolan Den Duyf ("NDD") against Hannah Den Duyf ("HDD") for divorce, resolution of family assets and child support. HDD is seeking the same in addition to spousal support and relocation of the child of the marriage (the "Family Petition");
- b) A civil action commenced by NDD's parents, Linda Den Duyf ("LDD") and Arthur Den Duyf ("ADD") for repayment of funds allegedly loaned to NDD and HDD to enable them to purchase the Eagle Drive property (the "ED Property") and build a home thereon (the "Civil Action");
- c) A counterclaim by HDD against LDD, ADD, and NDD in the civil action for civil conspiracy, abuse of process, entitlement to the ER Property, nullification of the alleged loan, entitlement to the farm property located on Urdal Road in Pemberton (the "Urdal Property") and unjust enrichment for work performed by HDD on the Urdal Property; and
- d) A counterclaim by HDD against LDD and ADD in the Family Petition, which essentially seeks duplicative remedies sought in the counterclaim filed in the Civil Action.

- [2] The actions proceeded as a common trial. The parties, through a written agreement filed with the court, request that:
- a) the Civil Action, counterclaims and division of family assets be resolved first;
 - b) followed by the relocation application;
 - c) then, if necessary, the post-relocation application parenting schedule; and
 - d) finally, a determination of spousal and child support.

Chronology of Events

- [3] NDD and HDD met in October 2019 and began a common law relationship sometime between April 2020 and when they signed a lease and moved into a small apartment in an industrial park in July 2020.
- [4] NDD worked at his parents' company, Sabre Rentals ("Sabre"), as a mechanic. HDD was a marketing consultant and bartender.
- [5] In June 2020, NDD's parents LDD and ADD purchased the Urdal Property for \$1,021,138.43. NDD did not contribute to the purchase price, but his name was put on title along with LDD and ADD.
- [6] NDD and HDD wanted to start a business together operating a farm. Neither of them had any experience in farming.
- [7] HDD continued to work as a marketing consultant and bartender, but also began working on the farm. She was at the Urdal Property but also did a lot of research into how to set up a farm and what to grow.
- [8] To assist them, LDD and ADD paid NDD the same salary that he earned as a mechanic at Sabre to assist contractors they had hired to develop the Urdal Property. These improvements were necessary to develop the Urdal Property in general, and would also be necessary to operate a farm on the property. In addition, LDD loaned NDD and HDD \$50,000 in order for them to start up a farm on the Urdal Property.
- [9] In February 2021, NDD and HDD decided to have a child. HDD became pregnant in April of 2021.
- [10] In the spring of 2021, ADD and LDD agreed to provide NDD some money to purchase land and develop a home. A similar arrangement was made with NDD's brother Matthew Den Duyf ("MDD").
- [11] By the fall of 2021, the farm had generated around \$14,000 in gross sales.
- [12] The farm was not profitable. NDD returned to working as a mechanic at Sabre.

- [13] NDD bought the ED Property for \$392,170.54. MDD bought an adjacent property ("MDD's Property").
- [14] On December 1, 2021, Olive Den Duyf ("ODD") was born.
- [15] In March 2022, ADD and LDD hired HDD to provide marketing consultation work for Sabre.
- [16] At the end of March 2022, NDD signed a contract to build a house on the ED Property with an estimated build price of \$2,600,000. On March 28, 2022, NDD and HDD signed a memorandum of understanding ("MOU") stating that the money used to purchase the ED Property and the money used to build the house on the property was a loan and would have to be paid back to ADD and LDD.
- [17] HDD says the funds were a gift; in the alternative, she disputes the validity of the MOU.
- [18] On September 10, 2022, NDD and HDD were married.
- [19] On April 23, 2023, ADD arranged for a distribution from his family trust to enable NDD to pay down some of the money provided to him to build the home on the ED Property. NDD paid ADD and LDD \$80,000. HDD says that this distribution was to be used to pay ADD and LDD for a Rivian vehicle that had been provided to her by ADD.
- [20] On October 18, 2023, NDD obtained a \$500,000 mortgage on the ED Property and home. He paid \$430,640.98 to ADD and LDD as partial repayment of the amount provided to him to build the home on the ED Property.
- [21] Towards the end of September 2023, NDD and HDD moved into the home constructed on the ED Property. The home was over 4,000 square feet and had an adjoining two-bedroom rental suite.
- [22] Adjusted for the purchase price and partial repayment mentioned earlier, the total amount provided by ADD and LDD to build the home was \$3,110,314.31. The current fair market value of the ED Property is \$2,058,000. The registered mortgage is currently at \$487,494.98. This leaves a debt of \$1,539,809.29
- [23] NDD and HDD separated on December 6, 2023. NDD moved into the rental suite attached to the main home. HDD stayed in the main home. ODD moves between the two homes on the ED Property.
- [24] The actions were commenced in early 2024.
- [25] Shortly thereafter, NDD placed a mortgage for the amount of money provided by ADD and LDD for the ED Property.
- [26] HDD's employment with Sabre was terminated and ADD insisted on the return of the Rivian vehicle from HDD.

The Civil Action

The Urdal Property

Finding of Facts

Purchase of the Property

- [27] HDD did not have any discussions with ADD and LDD about the purchase of the Urdal Property in 2020.
- [28] ADD and LDD had been looking for a rural, undeveloped property for some time and had considered several properties over the years. On May 28, 2020, a realtor advised ADD and LDD that there were a number of such properties available and that one potential property was right in Pemberton on Urdal Road. However, this property was not listed anymore.
- [29] LDD knew the owner of the Urdal Property and contacted her directly. They agreed on a purchase price on June 4, 2020. LDD was able to refer to a text that she sent ADD to confirm the date.
- [30] While this was occurring, ADD was involved in some estate planning with his mother and learned about certain tax advantages that accrue if land is transferred to a beneficiary through ownership on title as opposed to through a will. ADD had been put on title for some of his mother's property at this time.
- [31] On June 9, 2020, ADD and LDD discussed with NDD the possibility of putting him on the title for the Urdal Property so it could be transferred to him directly instead of through a will upon their death. NDD signs documents for the conveyance that same day. NDD did not contribute any money to the purchase of the Urdal Property.
- [32] NDD knew that he was on title but that he had no authority to make any decisions about the property while ADD and LDD were alive. He acknowledged that the Urdal Property belonged to ADD and LDD, not him. Although he had no decision-making authority with respect to the property, NDD believed that ADD and LDD would allow him to use the Urdal Property while they were alive. In my view, despite the fact that NDD was given no assurances that he would be given the Urdal Property, he expected that the property would eventually be his. This was not entirely untrue, as he was given a right of survivorship.
- [33] HDD did not know the details of how or when NDD would obtain ownership of the Urdal Property, and did not press for more information as she did not believe it was her place to do so.
- [34] In my view, NDD was vague and did not provide any details to HDD or her family about how this might occur in the future. The reason for this was that NDD expected the property to be gifted to him in the future, but had received no firm commitment that this would be done by ADD or LDD. The communications to him about the Urdal Property were that he had a current right of survivorship and would be allowed liberal use of the property while his parents were alive. If he wished to obtain the property while his parents were alive, further discussion would have to occur first.

- [35] The first time HDD discussed any ownership or entitlement that NDD might have in the Urdal Property with either ADD or LDD was in the spring of 2021 with LDD.
- [36] In my view, HDD's testimony amounts to the proposition that LDD told her that some or all of the Urdal Property would be gifted to NDD and her at some time in the future.
- [37] LDD does not recall any such conversation. She denies that she would have said such a thing because she had her own plans for the Urdal Property.
- [38] In my view, at best there was a casual, vague conversation between HDD and LDD about what might happen to the Urdal Property. No substantive details were provided to HDD, and she did not press for any. At best, the fact that NDD had a right of survivorship may have been conveyed in general terms to HDD. HDD did not feel it was her place to obtain detailed information or certainty on this issue.

Development of the Urdal Property

- [39] ADD and LDD had been looking to purchase some undeveloped rural land. They liked the Urdal Property because it was a large, untouched acreage. Initially, they wanted to use the land to grow their own garden, have some animals and perhaps build a house. In the future, they talked of living in a house on the property and running a hobby farm.
- [40] NDD enjoyed rural property, was an acreage guy was a heavy-duty mechanic, and enjoyed building things. ADD and LDD were encouraging NDD to learn and try different things. They had been trying to encourage NDD to take an interest in Sabre, but NDD was only interested in hands-on activities like machinery, not spreadsheets or management.
- [41] ADD and LDD wanted to do some initial basic development of the property, and hired contractors to do so. The first thing that they wanted to do was to put in a road, culvert and driveway access to ensure they had the best chance of getting their access points and roads on the property grandfathered and then approved by the regional district. They also wanted to put in some basic necessities, such as power and water and to build a barn/shop so that they could do some farming and have animals in the future.
- [42] LDD made all of the decisions with respect to the development of the Urdal Property and paid for them, with ADD's approval. ADD kept detailed spreadsheets indicating all expenditures made in developing the Urdal Property.
- [43] LDD welcomed and received input from NDD, HDD, and a number of other people about these decisions.

Cold Creek Acres

- [44] At the time that the Urdal Property was purchased, NDD was working as a heavy-duty mechanic. HDD had lost most of her marketing clients due to COVID and was only working sporadically as a bartender due to COVID shutdowns.

- [45] After the Urdal Property was purchased, NDD and HDD began formulating plans to operate a farm on the Urdal Property. They did a lot of research and determined what they would need to plant so that they could sell produce the next year. They called their business Cold Creek Acres and incorporated it in September 2020. Both NDD and HDD were passionate about starting the business. I reject the assertion that HDD was told to work on Cold Creek Acres by NDD, ADD, or LDD. HDD was passionate about farming and decided that she wanted to start up Cold Creek Acres with NDD.
- [46] NDD and HDD presented enough planning and research to convince LDD to lend NDD and HDD the money to finance Cold Creek Acres. LDD believes that she was told that the hope was that Cold Creek Acres would generate \$50,000 to \$100,000 in revenue. The farm would grow produce and flowers. Initially, it was felt that flowers would be very profitable.
- [47] HDD denies that she and NDD ever presented firm revenue numbers of how much the farm would generate.
- [48] LDD was impressed by the research that NDD and HDD had done but ultimately concluded that she "fell for their dream of working on a farm," and agreed that she would financially assist them with the start-up and operation of Cold Creek Acres. LDD noted that NDD and HDD had no money and would not be able to pursue their dream without this assistance.
- [49] ADD and LDD told NDD that they could use the infrastructure that they were installing on the Urdal Property to facilitate Cold Creek Acres farming operation. They received input from NDD and HDD to ensure the installed infrastructure would be compatible with Cold Creek Acres' operations.
- [50] ADD and LDD decided to pay NDD the wage he was earning at Sabre to assist the contractors with developing the Urdal Property. ADD and LDD had used employees of Sabre to work on personal property that they had owned in the past. This arrangement would allow ADD and LDD to get the infrastructure placed on the property and allow NDD to pursue Cold Creek Acres when not working for them on the infrastructure.
- [51] ADD and LDD moved a variety of equipment from Sabre onto the Urdal Property to be used in its development. NDD and HDD also utilized this equipment free of charge for Cold Creek Acres.
- [52] NDD and HDD provided their receipts for expenditures that they made on Cold Creek Acres to LDD. LDD tracked the expenditures, reimbursed them for the expenditures and also loaned them money for operating the company.
- [53] HDD says it was her understanding that they would have to reimburse ADD and LDD for the capital costs of the property and expenditures paid for to support Cold Creek Acres, but that the Urdal Property would be gifted to NDD and her at some point in the future. This information was relayed to her through NDD.

- [54] In my view, it is likely that NDD would have reassured HDD that the farm would eventually be theirs but would have been vague on details. I say this because of my earlier findings about his expectations after being placed on title by ADD and LDD.
- [55] ADD and LDD allowed NDD and HDD to handle everything on their own, even when they were skeptical of the decisions that NDD and HDD made or the approach that they took. ADD and LDD wanted Cold Creek Acres to be NDD and HDD's business and a learning experience.
- [56] ADD attempted to review Sabre's financial records with NDD and HDD to provide them with a general idea of how to organize and manage a business. However, these opportunities were generally not pursued by NDD and HDD.
- [57] NDD and HDD completed a business plan for Cold Creek Acres with the assistance of HDD's father in July of 2021. The business plan was ambitious and predicted what could only be characterized as unrealistic growth and expansion expectations. They clearly envisioned as a large enterprise that would occupy all of their time.
- [58] In my view, the business plan was aspirational as it did not have any reference to any standard metrics such as: what was planted, what the cost of producing various products were, the price that they could sell products for, what products sold well, what products did not sell, what went to waste, what was profitable, and what was not profitable.
- [59] It was apparent by the summer of 2021 that Cold Creek Acres was not financially viable. The business plan demonstrates that NDD and HDD had totally unrealistic expectations for their company. In my view, this is also evidence that they were in no way capable of managing a business of the size and complexity of Cold Creek Acres.
- [60] The business plan also noted:
- How much is available for converting this land [the Urdal Property] into your vision for the future? The purchase was made by [ADD and LDD] and we plan on purchasing the land from them at a later date.
- How much is available for converting this land into your vision for the future? We need to discuss with [ADD and LDD] to get a more accurate answer.
- [61] HDD and her father testified that this was a mistake in the business plan and that NDD had clarified that the Urdal Property would be gifted to them at some time in the future and that they would have to pay the costs of the money put into the Urdal Property after the purchase by ADD and LDD.

[62] HDD told her family and friends that the Urdal Property was theirs and had (already) been given to them by ADD and LDD. Her sister testified that it was amazing that NDD and HDD had been given a farm as she had never heard of such a thing. HDD knew that the farm had not been given to her and NDD (at least at this time); but clearly wished that it were so and told people that it was theirs.

Time Spent on Cold Creek Acres

[63] NDD spent the majority of his time on the Urdal Property working with the contractors to set up the infrastructure. The first things that they completed were installing the entrance and driveway and mowing the grass on the property to see the topology. Power and water were installed along with a farmhouse. HDD also assisted, to a minor degree with these tasks. She learned how to drive a loader and knocked down trees, moved soil and dug trenches. She did not do heavy work but enjoyed operating the heavy equipment, as did NDD and LDD. NDD and HDD installed the greenhouse. The greenhouse was for Cold Creek Acres, but also had a section for LDD to have her garden.

[64] HDD was more focused on researching plants and crops for Cold Creek Acres and ordering seeds and a greenhouse. HDD did a lot of soil samples to determine what would grow well and plotted out areas where crops could be grown. She continued to work as a bartender at Pemberton Brewing.

[65] In the winter and spring of 2021, NDD and HDD spent most of their time on the Urdal Property. NDD worked with contractors on the infrastructure. HDD provided some assistance with this but mainly was focused on Cold Creek Acres, which consisted of preparing and setting up for farming. She continued to work at Pemberton Brewing in 2021.

[66] By late spring and summer of 2021, HDD was spending increasingly less time at the Urdal Property. She was very pregnant, engaged to be married and had been taken off guard by the unexpected death of her brother, which was understandably traumatic for her.

Cold Creek Acres Fiscal Year

[67] NDD and HDD had hoped that they would sell produce and flowers through the following areas:

- a) boxes prepaid by consumers, which would be delivered weekly to Whistler;
- b) farmers' markets;
- c) they hoped to attract people to the farm to purchase products through events; and
- d) an honour stand set up on the rural road bordering the Urdal Property. This was an unattended stand where products would be placed and people could then take the products and pay for them by leaving cash or e-transfer at the stand.

[68] Cold Creek Acres did not do well. It generated \$14,830 in sales in 2021. The reasons for this were as follows:

- a) NDD and HDD only attended a couple of farmer markets. The markets were difficult for them to manage, and they did not manage to sell much product.
- b) They had one event at the farm with a band, food trucks and beer. Although this event was enjoyable and well attended by NDD and HDD's friends, it did not appear to be profitable.
- c) The honour stand did not do as well as they had hoped. Flower sales, which they thought would be very profitable for them were not.
- d) They only sold a small number of boxes. It appeared that 12 people were interested in obtaining boxes for the next year (2022).

[69] Neither NDD nor HDD were aware of what aspects of Cold Creek Acres generated revenue, what was profitable, what was not profitable, what products were sold and what went to waste. When questioned about this, HDD replied that:

Cold Creek Acres was something I loved; it was more about growing things, being outside, feeding the community and being part of the community, as opposed to making money.

[70] The capital expenditures invested in the property, which were utilised by NDD and HDD in operating Cold Creek Acres, totalled \$414,946.72. LDD paid \$59,294.85 in expenses directly for Cold Creek Acres. NDD and HDD paid \$17,796.62 in expenses but received \$29,000 in cash advances for expenses from LDD that were to be used solely for farm expenses.

[71] Therefore, despite incurring no costs for rent, fixed capital, machinery, or wages, it cost \$77,091.47 to establish Cold Creek Acres. Additionally, \$11,203.38 of the advances are unaccounted for, bringing the total expenditures to \$89,294.85. After generating \$14,830 in sales in 2021, Cold Creek Acres total sales barely managed to cover the costs of seeds and compost.

[72] As I noted earlier, it is clear that neither NDD or HDD know how to properly manage and run a business the size of Cold Creek Acres.

[73] Cold Creek Acres was solely financed by ADD and LDD. Although NDD and HDD did use their own funds for some expenditures, the receipts were submitted to LDD, who compensated them for their expenditures. In addition, LDD loaned them cash for the company, much of which remains unaccounted for.

September 2021

- [74] By September, the infrastructure was finished on the Urdal Property. ADD sent an email to NDD telling him that if he wished to continue earning wages from Sabre, he would have to return to work at Sabre. In my view, although ADD was being paid an hourly wage to install the infrastructure, by the summer of 2021 a considerable amount of time that he was being paid to install the infrastructure was actually spent on tasks solely related to Cold Creek Acres.
- [75] ADD told NDD that he would be flexible with respect to scheduling NDD's hours that he spent working at Sabre, as long as the schedule was somewhat consistent, so that NDD could continue to work Cold Creek Acres as a hobby farm if he wished.
- [76] At this time, NDD did not know how Cold Creek Acres could be profitable and could function as more than a weekend hobby farm. He had to earn money to support his family, especially with ODD expecting to be born in a few months. He decided to return to work at Sabre.
- [77] HDD was very upset that NDD would not work full-time on Cold Creek Acres. In my view, the different perspectives stemmed from the fact that she and NDD held contrasting views on the need for Cold Creek Acres to be profitable and how they would earn money to support their family.

Ongoing Operations of Cold Creek Acres

- [78] After NDD returned to working in the shop at Sabre, NDD and HDD continued to operate Cold Creek Acres. HDD would work during the day and NDD would work after his shifts at Sabre; however, the scale of their activities was significantly reduced.
- [79] They decided to plant garlic as it required little work once it had been planted. They also continued with other crops on a reduced scale. HDD researched trees and investigated putting in an orchard as a way to maintain farm status with minimal or no sales.
- [80] They planted saplings in the spring of 2023. Although they built fences to protect the trees, many of the saplings were eaten by deer. They also purchased a chicken coop along with 15 chickens. HDD was primarily responsible for looking after the chickens and feeding them each day.
- [81] Ultimately, their efforts were insufficient to even maintain farm status on the property, and they used the farm to grow produce solely for their personal use.

The Legal Status of the Urdal Property

What is the Nature of NDD's Interest in the Urdal Property

[82] I accept the evidence of ADD, LDD, and NDD that placing NDD on title of the Urdal Property was done for estate planning purposes and provided NDD with a right of survivorship. This finding is similar to that made by Justice Fleming in *McManus v. McManus*, 2019 BCSC 123.

[83] In *McManus*, the husband purchased the former family home in 1995, and the parties began living together in a marriage-like relationship in 2007. The husband transferred his interest in the former family home to the wife during the marriage-like relationship. The husband provided the following reason for transferring title to joint tenancy:

[55] Mr. McManus' evidence of what he intended is this:

With the Transfer, it was not my intention to make an absolute gift to Nancy. My reasoning for the Transfer was to reflect our use of the Family Residence as a married couple, to take advantage of the joint tenancy right of survivorship and for estate planning purposes.

[84] The husband argued that the wife held her joint interest in the property on a resulting trust, and that the former family home was therefore his excluded property. The wife argued that the husband's exclusion to the former family home was lost when he transferred ownership to their joint names.

[85] Justice Fleming noted as follows:

[58] A principle characteristic of joint tenancy is the right of survivorship (*Zeligs Estate v. Janes*, 2016 BCCA 280 at para. 2). When one joint tenant dies, his or her interest is extinguished and passes to the surviving joint tenant. The cost and trouble associated with the property passing through the estate is avoided. In *Pecore*, Justice Rothstein determined the right of survivorship can be gifted along with a resulting trust in a joint asset during the life time of the transferor. This is the very intention Mr. McManus' describes. His evidence on this point is uncontradicted. The fact he did not communicate this view to Ms. McManus at the time of the transfer, is as I have indicated, not a reason to disbelieve him, nor is my preference for Ms. McManus's evidence on some points of conflict.

[86] In my view, the intention of ADD and LDD when they put NDD on title was clear, they did it for estate planning purposes and only intended for him to receive a right of survivorship.

[87] This arrangement has the legal effect set out by Justice Jackson in *Kennedy v. Smith*, 2022 BCSC 1622:

[86] in this province there is clear Court of Appeal authority for the proposition that one consequence of a transfer of legal title into joint tenancy is that an immediate, inter vivos gift is made of the right of survivorship in property, with the donor of the gift retaining all remaining right and interest in the property during their lifetime: *Herbach v. Herbach Estate*, 2019 BCCA 370 at para. 39. These are the circumstances that have arisen in this case. Mr. Smith did not create a true joint tenancy when he gratuitously placed Ms. Kennedy on title as a joint tenant. He made an immediate inter vivos gift of the right of survivorship.

- [87] The nature and value of a survivorship interest was aptly described by Justice Dickson in *Zeligs v. Janes*, 2016 BCCA 280:
- [41] The principal and distinguishing characteristic of joint tenancy is the right of survivorship, the *jus accrescendi*. When one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant(s). The right of survivorship is, however, a revocable expectancy that manifests only upon success in the so-called "ultimate gamble" - survival - and then only if the joint estate has not been previously destroyed by an act of severance: *Estate of Propst*, 788 P.2d 628 at 631 (Cal. Sup. Ct. 1990). When given *inter vivos*, a gift of survivorship rights is to what is left, if anything, when the gamble is won: *Simcoff v. Simcoff*, 2009 MBCA 80 at para. 64.
- [88] Therefore, in my view, NDD has a right of survivorship in the Urdal Property. He has no right of possession or access to the Urdal Property. His right of survivorship can be extinguished should ADD and LDD choose to do so.

Was the Urdal Property an Enforceable Gift

- [89] HDD takes the position that ADD and LDD promised to gift the Urdal Property to NDD (and thus her) at some unspecified time in the future. In my view, this belief was based on what NDD told her. As I have set out, this is an oversimplification of what actually occurred.
- [90] However, even if ADD and LDD did make a promise to gift the Urdal Property to NDD at some unspecified time in the future, such a promise would not be enforceable at law and would not provide NDD (and through him HDD) a claim to title. This legal principle was explained by our Court of Appeal in *McKendry v. McKendry* 2017 BCCA 48:
- [31] A gift is a gratuitous transfer made without consideration. Two requirements must be met for an *inter vivos* gift to be legally binding: the donor must have intended to make a gift and must have delivered the subject matter to the donee. The intention of the donor at the time of the transfer is the governing consideration. In addition, the donor must have done everything necessary, according to the nature of the property, to transfer it to the donee and render the settlement legally binding on him or her: *Kooner* at 79-80; *Pecore* at para. 5.
- [32] A gift may be delivered in various manners. For example, a donor may choose to transfer property directly to a donee or a trustee, or may retain possession and make a declaration of trust. Once a gift is given, the donor cannot retract it. If it is incomplete, however, the court will not perfect a gift. Accordingly, where the gift rests merely in a promise or unfulfilled intention, the court will not compel an intending donor to follow through with making the gift: *Kooner* at 79-80; *Pecore* at para. 56.
- [91] Although HDD feels strongly that she is entitled to the Urdal Property, the basis for her entitlement is, at best, a promise of a gift, which is unenforceable at law. As noted earlier, I have found that this was not the case. ADD and LDD provided NDD a right of survivorship. Although one could characterize this as a gift involving land, it is very different than the gift

of the Urdal Property. However, it is understandable how confusion might arise on this issue in the circumstances given that HDD and her family essentially only obtained indirect information about the nature of the agreement between ADD, LDD, and NDD with respect to the Urdal Property.

Unjust Enrichment

[92] HDD says that ADD and LDD have been unjustly enriched by NDD and her through the creation and operation of Cold Creek Acres on the Urdal Property, and from her efforts to assist with the installation of infrastructure on the property.

[93] To succeed in a claim for unjust enrichment HDD must establish:

- a) an enrichment to ADD and LDD;
- b) a deprivation to HDD; and
- c) an absence of juristic reason for the enrichment.

See *Kerr v. Baranow*, 2011 SCC 10 at paras. 31-32 [Kerr].

Enrichment to ADD and LDD

[94] Kerr describes this first element as follows:

[38] For the first requirement -- enrichment -- the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (Peel, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

[95] Although NDD was paid for his work on improving the infrastructure on the Urdal Property, HDD provided some assistance in installing the infrastructure that was not paid for. In addition, both NDD and HDD worked on Cold Creek Acres without direct payment.

[96] HDD says that her efforts benefited the Urdal Property in the following ways. She contributed directly through her activities in Cold Creek Acres as follows:

- a) she assisted in establishing a working farm to generate farm profits;
- b) she researched and helped to assemble a greenhouse;
- c) she assisted in installing and maintaining the chicken coop; and
- d) she planned and assisted in planting 95 fruit saplings.

[97] She contributed directly to the infrastructure on the Urdal Property in the following ways:

- a) assisting with the installation of the road and driveway;
- b) assisting with the clearing of the land which was a hay field to begin the planning and development of the property;
- c) helping dig trenches and move earth;
- d) assisting with the planning and assisted in installing some portions of the irrigation system;
- e) assisting with planning and research to ensure compliance with by-laws; and
- f) researching the requirements for land to be granted farm status.

[98] The Urdal Property was appraised with an undeveloped value of \$1,500,000 and an "as is" value with current improvement of \$1,800,000. The appraisers determined that the following features added value through improvements to the property:

- a) Farm stand: ADD and LDD paid for the stand. A contractor paid for by ADD and LDD built it with some assistance from NDD. NDD was paid for this work by ADD and LDD.
- b) Power C-Can: ADD and LDD paid for the C-Can. A contractor paid for by ADD and LDD built it with some assistance from NDD. NDD was paid for this work by ADD and LDD.
- c) Pump house: ADD and LDD paid for the pump house. NDD constructed the pump house and was paid for this work by ADD and LDD. HDD did not contribute to building the pump house, but dug some trenches that may have been used by the piping system.
- d) Barn: ADD and LDD paid for the barn. A contractor paid for by ADD and LDD built it with some assistance from NDD. NDD was paid for this work by ADD and LDD. HDD provided some input into the location of the barn.
- e) Greenhouse: ADD and LDD paid for the Greenhouse. NDD and HDD assembled the greenhouse.
- f) Chicken coop: ADD and LDD paid for the chicken coop. NDD put some additional labour into the chicken coop. HDD put less labour into the coop initially, but helped to keep the coop winterized.
- g) Apiary: ADD and LDD paid for the apiary. LDD constructed it.
- h) Driveway: ADD and LDD paid for the driveway. A contract paid for by ADD and LDD built the driveway with NDD. NDD was paid for this work by ADD and LDD. HDD did some work primarily on the last 20 to 30 feet of the driveway and provided some input into its location.
- i) Orchard: ADD and LDD paid for the saplings. I say this because the saplings cost \$3,500, which falls within the cash advances provided to Cold Creek Acres.

- [99] With respect to items a-d, and g-h, I am not convinced that HDD provided any assistance that would not otherwise have been provided without additional cost to ADD and LDD. Her work on these areas was marginal at best, providing little added value. Neither ADD nor LDD asked her to do the work described above.
- [100] To the extent that HDD's contribution in these areas offered some marginal value, it was enjoyable work that either NDD, working within his paid capacity, or LDD, at no additional cost to ADD and LDD, would have performed.
- [101] Regarding NDD, I say no extra cost because, in my view, there were several hours during which NDD was paid to work on the infrastructure that were not actually needed. This time was spent on Cold Creek Acres or as paid downtime. The amount and type of work provided by HDD could easily have been supplied by NDD during this period.
- [102] This means that HDD performed work that provided value to the Urdal Property in constructing the greenhouse with NDD, providing some assistance in setting up the chicken coup and winterizing the coup, planting and fencing the saplings, and researching into how to maintain farm status. Collectively, in my view, this constitutes an enrichment to ADD and LDD.
- [103] HDD says that the establishment of a working farm on the Urdal Property constitutes an enrichment to ADD and LDD. I reject this proposition. The appraisal report set out the improvements to the property that added value. The farm established by Cold Creek Acres added no value to the property outside of the improvements enumerated in the appraisal as set out in my reasons.

Deprivation to HDD

- [104] HDD must establish a corresponding deprivation linked to the enrichment provided to ADD and LDD. Kerr notes as follows:
- [39] Turning to the second element -- a corresponding deprivation -- the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (Peel, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (Pettkus, at p. 852; Rathwell, at p. 455).
- [105] To the extent that HDD assisted with capital improvements on the farm outside the operation of Cold Creek Acres, I have determined that there was no enrichment to ADD and LDD.
- [106] Cold Creek Acres was a passion project for HDD. I reject the proposition that she was asked to start or run a farm on the Urdal Property by ADD or LDD. She and NDD decided to pursue their passion and started a small business without any experience.

[107] However, in my view, this element of the test is a pure economic consideration. In order to establish a deprivation, HDD must establish that she passed up other opportunities, and that she did. HDD testified that she was headhunted and offered a full-time remote marketing position based out of Squamish that she turned down to work on the farm. In my view, this establishes the pure economic basis for a deprivation.

Absence of Juristic Reason for the Enrichment

[108] Kerr dictates that the following analysis be used to determine if an absence of juristic reason exists:

[43] In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. . . . The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

[44] Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

- [45] Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis. In the context of claims for unjust enrichment, this has led to questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes. However, the court in *Peter* rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 61.)
- [109] The first step requires a review of the circumstances to determine if there is a juristic reason that might deny HDD recovery of the benefit that she provided to ADD and LDD through her participation in Cold Creek Acres.
- [110] HDD wanted to pursue Cold Creek Acres. It was a passion project for her. In my view, she put little thought into the economics of the operation of the farm. ADD and LDD allowed NDD and HDD to pursue their passion in the hope that they might obtain some business experience.
- [111] However, from ADD and LDD's perspective, there had to be some economic accountability in exchange for the financial support that they were providing. HDD recognized this obligation. I say this because she was aware that the loans and financing provided to her and NDD by ADD and LDD would have to be paid back. In my view, it was clear that there were no guarantees that financing of Cold Creek Acres by ADD and LDD would be provided indefinitely and without accountability.
- [112] In my view, the following expectations existed between ADD and LDD and NDD and HDD:
- a) NDD and HDD could operate Cold Creek Acres and utilize the Urdal Property and equipment provided by ADD and LDD free of charge.
 - b) NDD would be paid to assist with the development of the capital that ADD and LDD wanted on the Urdal Property. These investments would be implemented in a manner consistent with the needs of the operation of Cold Creek Acres.
 - c) NDD would be able to use his paid time that was not required for assisting with the capital investment on the Urdal Property to further Cold Creek Acres if he wished to do so.
 - d) LDD and ADD would reimburse NDD and HDD for expenses related to Cold Creek Acres and supply cash advances for expenses. However, some economic accountability regarding the expenditures and the results obtained from them was necessary.
 - e) Any tangible benefits accruing to the Urdal Property from the operation of Cold Creek Acres would vest in the Urdal Property.

- [113] HDD says that ADD and LDD obtaining the tangible benefits to the Urdal Property that she provided through Cold Creek Acres is unfair because she believed that the property would be gifted to NDD (and thus her) in the future.
- [114] I disagree. HDD was content to operate Cold Creek Acres without knowing any specifics of what would happen to the Urdal Property in the future. She had not even moved into the apartment that NDD and she had rented at the time he was provided a right of survivorship in the Urdal Property. Accepting HDD's evidence, which I do not, that LDD specifically told her she would be gifted some part of the Urdal Property at an unspecified time in the future, as discussed earlier, HDD would not have a legal claim to the property.
- [115] In the event that I am wrong in this analysis, equity would dictate that there has been no unjust enrichment by ADD and LDD. ADD and LDD provided significant financial assistance to allow HDD to pursue her passion project. They paid for all of the substantive costs associated with this. HDD derived the pleasure and benefit of pursuing her dream. She was not concerned about the economics of the operation or being paid for her time.
- [116] ADD and LDD invested over \$500,000 in capital improvements on the Urdal Property. This does not include the salary paid to NDD or funding to Cold Creek Acres. This \$500,000 investment yielded an increase in value of \$300,000 to the Urdal Property.
- [117] Simply put, Cold Creek Acres existed and was operated as an entity separate and distinct from the Urdal Property. ADD and LDD would have been significantly financially ahead without it.
- [118] Although abandoned by ADD and LDD, in my view, they had a strong claim to recover funds advanced to NDD and HDD for use on Cold Creek Acres.

The ED Property

Finding of Facts

The Purchase of the ED Property

- [119] ADD and LDD, through Sabre, owned two plots of undeveloped residential land on Eagle Drive.
- [120] ADD and LDD discussed NDD and MDD purchasing these lots from them and constructing homes on the properties with the idea that the properties would be flipped shortly thereafter. NDD and MDD would repay them the land and construction costs and would then have the ability to keep the net proceeds and gain some experience while doing so. The capital gains on the homes would be tax-free if they were registered in NDD and MDD names and they lived in them. The idea was to build a Whistler-style homes in Pemberton.
- [121] In the late spring of 2021 ADD and LDD discussed with NDD and MDD this idea. Specifically, that they would:

- a) sell them the lots;
- b) provide them with money through loans registered on the property to purchase and build houses on the lots, and
- c) they could sell the homes for profit after they were built.

[122] An email was sent by ADD to LDD, NDD, and MDD in June 2021 articulating this plan. HDD recalls that she was forwarded this email by NDD.

[123] Essentially, the agreement provided MDD, and NDD and HDD the difference between the cost of purchasing the property and building the house and the market value of the property with the house built on it. This was not a gift of property and a new house.

[124] MDD was interested in designing houses and worked on the designs. If both houses were built at the same time with the same design, there would be some savings on construction. NDD would be able to choose the style of the house, interior, fixtures, etc. that he was building outside of the initial structural design.

[125] ADD and LDD did not discuss these plans with HDD at this time. They only discussed them with NDD and MDD. MDD went about designing the houses that were to be built.

[126] HDD was aware of the plans to build the house on the ED Property in the late spring of 2021. At that time, she told her sister that NDD and her were gifted a house on "snob hill".

[127] HDD told her sister that first she was given a farm and then she was given a huge house. Her sister said that she told HDD that "I don't understand it but I am happy for you." Her sister pressed HDD about how this was possible. HDD told her they were gifts, and that her and NDD were not paying for them. This made sense to her sister because she knew that NDD and HDD could never afford to own such a house. Her sister testified that "this was wild." I take from her testimony that she found it hard to understand how the farm and house were simply gifts to NDD and HDD.

[128] On November 24, 2021, NDD purchased one of the lots, the ED Property, from Sabre for the assessed value of the lot, which was \$392,170.54. NDD testified that he had investigated other lots that had been sold in the area and that this was a "sweet deal". MDD purchased the lot next door to the ED Property for its assessed value at the same time.

[129] NDD and MDD were provided the money to purchase the lots by ADD and LDD. All parties knew that these were loans, as set out in the email, and that they would have to be paid back.

[130] HDD was aware that NDD had purchased the ED Property. She knew that they didn't have the money but did not recall being particularly concerned. She was very pregnant at the time with ODD.

[131] HDD had little contact with ADD and LDD after ODD was born on December 1, 2021. ADD and LDD were travelled and were then infected with COVID over and after the holiday period.

The Loan to Build the House

[132] ADD wanted to formalize the agreement that had been made with everyone. ADD and LDD were out of town and then sick during the start of 2022. NDD sent a text on February 12, 2022, inquiring about the document.

[133] According to the metadata, ADD and LDD finalized two agreements--both of which were called an MOU--for NDD and HDD, and MDD on February 12, 2022, after receiving the text. The two MOUs were the same. The MOUs were printed and provided to NDD and MDD sometime thereafter.

[134] Around the third week of March, NDD informed ADD or LDD that HDD had concerns about one term in the MOU. NDD testified that he did not have any concerns about the MOU.

[135] The construction on the houses had to start soon if the houses were to be completed on time.

[136] NDD knew that if they didn't sign the MOU, the deal was off; that is, the house would not be built, and the property would be returned to ADD and LDD in exchange for forgiveness of the loan to purchase the house.

[137] On March 28, 2022, NDD signed a contract with the construction contracting company. The contract contained an estimate of \$2,600,000 to complete the build of the house on the ED Property.

[138] MDD signed a similar contract with the same contractor.

[139] Later that day NDD and HDD had the following text conversation:

NDD: Just signed a construction contract for our house. Estimated building cost of \$2.6 million

HDD: Holy duck.

NDD: Yaaa. But hey it's probably going to be worth 4 when it's done.

HDD: Mhmmm I really hope the real estate market never implodes haha or we'll be in debt for our whole lives But yes you're right

NDD: fingers crossed.

HDD: Wait so 2.6 is finished inside too. Like finished house.

NDD: I feel like the 2.6 is finished inside too. Like finished house.

HDD: Okay phew.

HDD: Sooo with the land cost and the house cost we're in 4 mil right now bahahah Holy

NDD: Well like 2.9 haha

HDD: Wait no 3 Yeah

NDD: Which you think would make you feel better about the price realizing it's not 4 mil but nope haha I'm still excited and think it's the right call

HDD: Yeah.

[140] On March 29, 2022, ADD, LDD, NDD, and HDD signed the MOU which states as follows:

ADD and LDD will fund the purchase of the lot and building of the house with the understanding that costs will be tracked and tallied and then converted into a mortgage when the house is complete.

NDD and HDD will be involved in the color and material choices of the exterior and interior surfaces, but ADD and LDD will have final say.

At the time house construction is completed, we will have to determine what the payments for the mortgage will be. As owners of the property, you will be responsible for all other costs (including but by no means limited to: insurance, property taxes, hydro, internet, maintenance and repairs). For the first five years, the mortgage will be virtually interest-free (0.1%). The mortgage payment should not be less than 25% of your gross wages plus what you are able to collect in rent. After the first five-year term, NDD and HDD can choose to get their own mortgage from a financial institution or pay ADD and LDD an interest rate that is competitive with the banks.

If NDD and HDD decide to sell the house, they get to keep the difference between what the house sells for (net of selling costs) and the amount of the mortgage remaining at that time, and ADD and LDD will be paid out of for that remaining amount of the mortgage.

[Names changed to reflect the Abbreviations used in Reasons.]

[141] NDD and HDD both understood the meaning and implications of the words in the MOU. In my view, given the text that she sent the previous day, HDD understood that if the value of the home was less than the market price, there was a possibility that they would be "in debt for our whole lives." They understood that they would have to rent out the suite as part of their mortgage payments and that the cost of the build would have to be paid back.

[142] NDD was aware that the construction contract that he signed for \$2,600,000 to build the house was an estimate.

[143] There was a discussion about the fact that ADD and LDD would have final say on colour and material choice before the MOU was signed. This was the contentious term that NDD had advised ADD and LDD about earlier.

[144] ADD and LDD explained that it was a big investment and that they would have to ensure they had a veto if they or MDD wanted anything that would have a detrimental impact on the property's value, or that was otherwise unreasonable, such as golden toilet seats.

The Building of the House

[145] NDD and HDD were very involved in building the home on the ED Property. HDD was constantly at the ED Property, meeting with various contractors and the designer.

[146] On February 17, 2023, LDD sent an email to ADD, NDD, HDD, and MDD providing them with the updated spreadsheet on the construction costs incurred to date on the house on the ED Property.

[147] NDD and HDD read the attached spreadsheet which showed they had been loaned over \$1,500,000 to build the house on the ED Property. No objections or concerns were raised. HDD did not do a deep dive into the numbers as there didn't appear to be a problem.

[148] On April 23, 2023, ADD arranged for a distribution to MDD and NDD of \$100,000 each

[149] On June 19, 2023, LDD sent an email to MDD and to NDD and HDD providing them with an updated spreadsheet on construction costs. At this time, the construction costs were already at \$2,423,105.97 for the ED Property. This email, in conjunction with conversations that LDD had with MDD and with NDD and HDD was to let them know that the construction costs of the homes were exceeding the costs contained in the estimates provided by the builder.

[150] NDD and HDD received the email and did not raise any objections about the cost of the build. In fact, they continued to remain actively engaged in the process, and continued meeting with the contractors and designer, and engaged in making decisions with respect to the construction of the house.

[151] On June 23, 2023, ADD and HDD picked up the Rivian that ADD had bought. HDD began using the Rivian. Title for the Rivian remained with Sabre.

[152] On August 21, 2023, NDD paid ADD and LDD \$80,000 from the distribution that he received. The approximate \$20,000 remaining was the tax debt associated with the money and was paid in NDD's April 2024 taxes.

[153] On September 15, 2023, LDD sent a further email to MDD and to NDD and HDD providing them with an updated spreadsheet on construction costs. The spreadsheet indicated that the house was overbudget. MDD was very concerned and "freaking out". LDD advised that she and ADD would pull \$1,000,000 out of their own house to pay for the overrun but that MDD and NDD would have to take a \$500,000 mortgage on their respective properties to pay them back for the overrun.

[154] The email was meant to provide an update on the cost of the house and to provide assurances to the kids. The email stated:

Please don't freak out about how you are going to pay and where all the money is coming from. Yes it is a huge amount. We won't let you go hungry or without. It will mean crunching numbers for the next while but we are hear to help and hopefully things will come together in 5 years whatever that looks like. Putting money in your own house v. renting will pay off.

We want to work together to make this affordable. Please let us know if you have any questions or need clarification on how to make this work with both the house and the Rivian.

[155] NDD said that they were "bummed out" about the build being overbudget but that they were very excited about the prospect of moving into their new house.

[156] ADD met with NDD and HDD. At this meeting, he told NDD and HDD that even with the additional mortgage, they would follow the repayment terms in the MOU as close as possible. He used a pie chart to show them with budgeting that the payments prescribed in the MOU should be workable. He advised them that the payment for the Rivian would be worked out at a later date once the cost of building the house had been finalized. HDD does not recall the specifics of this meeting; she wanted re-assurance that things would be okay and received those assurances.

[157] NDD and HDD moved into the house on the ED Property at the end of September 2023. Although the house was not yet finished, it was close enough to completion that they had received an occupancy permit.

[158] On October 18, 2023, NDD obtained a \$500,000 mortgage on the ED Property and home. He paid \$430,640.98 to ADD and LDD as partial repayment of the funds provided to him for building the home on the ED Property. Additionally, approximately \$42,000 was deposited into a bank account as a reserve to cover the roughly \$3,000 monthly mortgage payments or other expenses.

[159] The house continued to require work through December 2023. By January 2024, there was a final accounting of the cost of the build. The total amount outstanding pursuant to the MOU was \$3,109,673.34 net of the \$80,000 paid back from the funds that NDD received from the trust and the \$430,640.34 paid back from the mortgage that NDD took out on the ED Property.

[160] HDD does not dispute that she was aware of the terms of the arrangements made to finance the purchase of the ED Property and finance the building of a house, as formalized and acknowledged by her when she signed the MOU.

[161] HDD raises three challenges to the MOU:

- a) the MOU is void because the agreement is unconscionable;
- b) the MOU is not enforceable due to vagueness; and/or

- c) the MOU comprised part of a gift to NDD and HDD from ADD and LDD.

Did the MOU Fall Within a Future Gift?

[162] She says, although the MOU formed a binding contract:

- a) the MOU was not between NDD and herself, and LDD and ADD, but between NDD and herself and Sabre"; and
- b) ADD and LDD promised to gift Sabre to NDD and herself within the 5-year term of the MOU.

[163] Therefore, the MOU was part of the gift of Sabre that ADD and LDD promised to give NDD and herself before the 5-year term of the MOU expired.

[164] In the alternative, she says that although the MOU was made between ADD and LDD and NDD and herself, once she and NDD had obtained Sabre, they would have used Sabre's assets or equity to pay ADD and LDD what was owed under the MOU.

[165] ADD, LDD, and NDD say that no such arrangement was made.

[166] In reconciling these conflicting views of the MOU, I will have to assess the reliability and credibility of the evidence.

Findings of Fact

Legal Principles Used to Assess Credibility and Reliability

[167] I am cognizant of the factors to be considered when assessing credibility and reliability set out by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, [2012] S.C.C.A. No. 392 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 his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his 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*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *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 (*Faryna* at para. 356).

- [168] In assessing the credibility and reliability of the witnesses, I am also cognizant of, and rely on, the principles set out by our Court of Appeal in the recent case of *R. v. S.S.M.*, 2024 BCCA 417 at paras. 65-73:
- [65] The credibility of a witness refers to their honesty or truthfulness. Reliability refers to their accuracy. While related, these are distinct concepts. For example, a truthful witness may be mistaken about what they believe they saw or heard.
- [66] The fundamental approach [is] to [assess] the credibility of a witness and the reliability of their evidence was articulated in *Faryna v. Chorny* . . .

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [67] The assessment of both credibility and reliability is context-specific and multi-factorial. Factors that inform the assessment include: the opportunity and capacity of the witness to observe or perceive the events; the ability to remember those events; whether, or the extent to which, a witness can resist being influenced by an interest in a particular outcome when recalling those events; inconsistency in the witness's evidence at trial or between prior accounts; whether the witness's evidence harmonizes with, or is contradicted by, other reliable evidence; whether the evidence seems unlikely, unreasonable, or improbable in light of the probabilities affecting the case; and the witness' demeanour, meaning the way they presented while testifying . . .
- [68] Regarding the last of these, demeanour, it is well-recognized that grounding credibility or reliability determinations solely, or primarily, on this factor carries significant risks. . . .
- . . .

- [70] How a witness answers questions and some of the factors . . . in *Stenner* are captured by the notion of balance . . . Balance exists when a witness shies away from exaggeration or minimization, acknowledges memory frailties, admits personally difficult facts, or credibly acknowledges weaknesses in their evidence. A balanced witness does not answer questions strategically, in the sense that they answer the questions asked and without attempt to unreasonably control the narrative. They do not appear to have an agenda . . .
- [71] Credibility and reliability assessments can be the most important, and often the most difficult, determinations in a criminal trial, particularly in sexual assault cases which frequently involve the contradictory testimony of two witnesses about events that occurred in private. The difficulty lies not only in the challenge of the assessment itself, but in articulating the reasons.

- [72] The assessment itself is challenging because it requires the trial judge to simultaneously ground the assessment in the totality of the evidence, while also evaluating the testimony of each witness and making determinations that are entirely personal and individual to that witness. The task is further complicated by the ability of the trial judge to accept some, all, or none of a witness's testimony, and to ascribe different weight to different aspects of their evidence: *R. v. Kruk*, 2024 SCC 7 at para. 81.
- [73] Described as "more of an art than a science" (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 1997 CanLII 324 at para. 128), the assessment is also challenging to articulate because the exercise "may not be purely intellectual and may involve factors that are difficult to verbalize": *R. v. R.E.M.*, 2008 SCC 51 at para. 49. It involves a "complex intermingling of impressions that emerge" from the experience of observing and listening to the witness in the courtroom: *R. v. Gagnon*, 2006 SCC 17 at para. 20.

HDD's Evidence

- [169] HDD testified that it was always her and NDD's plan, from February 2020, that NDD would be taking over Sabre from his parents. This was reaffirmed in the late spring and summer of 2021 when discussions began about them building a house on the ED Property.
- [170] In the late spring, HDD also told her sister that the house and ED Property had been given to her and NDD by ADD and LDD.
- [171] HDD said that in this time period, around late spring of 2021, it was clear that NDD would be taking over Sabre. HDD said that once they took over Sabre, the debt owed for obtaining and building the ED Property would be subsumed into Sabre, such that NDD and HDD would simply owe the debt themselves. It was also at this time that HDD told her sister about the gift of the ED Property.
- [172] HDD maintained that this plan was then formalized by a written agreement in September 2021 when NDD was asked to return to work at Sabre.
- [173] HDD was unable to locate the written agreement and was unable to provide any details about its contents, including the timing, what would be purchased, what the purchase cost would be, or any other terms outside of the following:
- a) the written agreement was very short, much shorter than the MOU;
 - b) she and NDD would purchase Sabre along the same terms that ADD purchased Sabre from his parents;
 - c) the purchase would occur in five years;
 - d) NDD would rotate through all of the various departments at Sabre when he returned to work there to obtain knowledge of all aspects of the company business; and

e) HDD would shadow LDD to learn how to further support NDD when they took over the company.

[174] HDD says that she then began shadowing LDD and began contributing to discussions on how to operate Sabre. She gave two examples of suggestions that she provided to ensure that morale remained high with employees:

- a) that pizza and beer be provided to employees; and
- b) that a pool table be purchased for the use of employees.

[175] HDD does not dispute the fact that she signed the MOU, but says that it was signed within the overall circumstances of Sabre being offered to her and NDD such that the loan would simply be a debt owed to themselves after five years rather than a loan payable to ADD and LDD.

[176] HDD acknowledged that ADD and LDD were very fair between NDD and MDD and would always treat them equally. She had no explanation as to why she and NDD would be given/ purchase Sabre and have their loan forgiven through that transaction, whereas MDD would not receive Sabre and would still owe the money loaned to him under his MOU.

ADD and LDD's Evidence

[177] ADD took over and purchased Sabre from his mother and father. It was his hope that NDD and/or MDD would eventually be in a similar position to purchase the company from him.

[178] ADD and LDD were providing updates about Sabre to MDD, NDD and to a lesser extent HDD in the hope that their sons would take an interest in developing areas of the business, learn how to read and interpret the company's financials and obtain experience in managing the day-to-day operations. In my view, these opportunities were rarely, if at all, pursued by NDD. NDD is a mechanic and has made it clear that he is not interested in management. He did not take any business or management courses despite his father's suggestions. He simply does not have any interest in such things.

[179] ADD and LDD had hoped that if their kids expressed an interest in taking over Sabre that they could slowly grow their roles within the company over time and obtain experience and learn in each department. A lot of the attempts they made were to encourage and gauge the interest of their sons in committing to this process.

[180] Around the time of COVID in 2020, Sabre lost three key personnel who reported directly to ADD. This prompted ADD and LDD to further consider their future and the future of Sabre. They began to investigate ways that they might be able to spend less time in the company and what might be necessary to do should they chose to sell the company to a third party or family member.

- [181] ADD and LDD produced a document which they hoped would generate some ideas about how they might reduce their time working at Sabre. In addition, ADD obtained a generic PowerPoint presentation about ways that a family business could be transitioned to family members or sold to third parties. In my view, this was a method of generating ideas and seeing if they could encourage their sons to become more involved in Sabre.
- [182] At one time, NDD expressed some interest in eventually taking over Sabre. This prompted ADD and LDD to question, hypothetically, what NDD saw as the future of Sabre or what he imagined the company could become if he took it over. NDD said that he would simply hire a manager to run the company and pursue his own interests. This was laughable to ADD and LDD because it indicated that NDD had no interest in actually running and building something with Sabre, which in ADD and LDD's view, would be the whole point of having NDD take over running the company.
- [183] After this discussion, it became clear to ADD and LDD that NDD was not in a position to take over Sabre. They have not had any further discussion about him taking over the business since this meeting.
- [184] ADD and LDD are practical businesspeople and would never leave Sabre in a position where it was being operated by someone not qualified to do so, or passionate about developing the business. Sabre is not an entity that ADD or LDD would simply give to one or both of their sons; MDD or NDD would have to establish that they were both competent and passionate about running the business before it would be sold to them.
- [185] ADD and LDD deny that there was ever an oral or written agreement that NDD would take over Sabre.
- [186] LDD denies that HDD shadowed her to learn how to support NDD when he took over Sabre.
- [187] After NDD separated from HDD in early 2024, he needed more flexibility in his schedule. ADD and LDD have proposed that NDD take over a sales position, which would be consistent with many of his talents and provide him with more flexibility for child-care responsibilities with ODD. This would also provide NDD with some further experience in different aspects of the company outside of purely working as a mechanic and be consistent with his skill set.
- [188] ADD and LDD made it clear that the funds loaned to MDD, NDD, and HDD were not from Sabre but were from their own personal money and accounts. The records provided are consistent with this. In my view, the loans were provided personally by ADD and LDD as opposed to through Sabre.

NDD's Evidence

- [189] NDD graduated from High school in Pemberton in June 2014. He worked in the summers and holidays at Sabre as a shop helper working with the mechanics and cleaning snow in the winters. In 2016, he moved to Alberta and obtained his heavy-duty mechanic training.
- [190] He finished the training in the summer of 2018 and moved to Saskatchewan where he worked as a heavy-duty mechanic.
- [191] NDD returned to Pemberton in 2019. He did not return to work for Sabre, but rather returned to work for another company whose mechanical projects interested him. He did decide to work for Sabre in early 2020 but this was because he wanted more flexible and predictable hours. He denies that there was any agreement that he would take over Sabre. He has no interest in management. He enjoys working as a mechanic.
- [192] Cold Creek Acres was independent of Sabre; it was a company that he and HDD started together. It was his intention to work full-time for Cold Creek Acres and not for Sabre. He returned to Sabre to work as a mechanic because Cold Creek Acres could not financially support his family.
- [193] He denies that there was any oral or written agreement for him to take over Sabre. He always understood that the MOU would require HDD and him to pay back the money loaned to them by ADD and LDD.
- [194] When NDD returned to Sabre in the fall of 2021, he was working strictly as a mechanic in the shop. Around Christmas of 2022 there may have been an opportunity for NDD to move out of the shop to work as some sort of manager at either at the shop or some other part of Sabre. However, this position never materialized and NDD remained in the shop working as a mechanic. NDD did not circulate throughout Sabre, working in different positions or departments.

Conclusions

- [195] In assessing the credibility of the witnesses, I have set out and generally placed greater reliance on the objective contemporaneous evidence. It is within this overall framework that I have assessed the credibility and reliability of the oral testimony.
- [196] I do not accept HDD's evidence that she and NDD intended to take over Sabre from ADD and LDD while NDD was involved in Cold Creek Acres prior to September 2021. I say this because:
- a) NDD and HDD were fully committed to making Cold Creek Acres, their own independent company, a success over the long term. This was their company, and they hoped to make their future with it. Their plans were extremely ambitious and long term.

- b) HDD was very upset when their plan for Cold Creek Acres did not come to fruition in September 2021 and NDD consequently had to return to work as a mechanic at Sabre to financially support their family.

[197] MDD and NDD and HDD were planning on building houses on respective properties prior to September 2021. At that time, the plan for building the house was as follows:

- a) MDD and NDD would purchase lots from ADD and LDD;
- b) ADD and LDD would provide them money through loans registered on the property to purchase and build houses on the lots;
- c) MDD and NDD would make the homes built on the properties their primary residence to be eligible for the tax advantages; and
- d) MDD and NDD could then flip the properties for the profit after the homes were built.

[198] I do not accept that ADD and LDD entered into an agreement to gift or sell Sabre to NDD and HDD in five years in September 2021 or thereafter. I say this because:

- a) NDD and HDD lacked basic business competence, let alone the skills necessary to run and manage Sabre. ADD and LDD would never agree to allow them to take over Sabre without such competence;
- b) When NDD returned to Sabre, he did not cycle through all the departments to learn the business. He returned to be a mechanic and had no interest in managing or learning other aspects of the business; and
- c) HDD, even on her own evidence, which I do not accept, did not shadow LDD to learn how to support NDD if he took over Sabre. At best, she attended a few meetings and socialized with LDD at Sabre.

[199] I do not accept that the plan for building the house was changed by NDD returning to work for Sabre in the fall of 2021. I say this because:

- a) The terms discussed in the spring of summer 2021 remained unchanged and were then formalized in the MOU after NDD returned to work for Sabre in 2022;
- b) HDD was aware of the risks involved in entering into the loan agreement contained in the MOU prior to signing the agreement in 2022 when she sent her text to NDD on March 28, 2022; the day before she signed the MOU. This text clearly indicates that HDD was aware of the risks inherent in the loan that they had agreed to; and in my view also indicates that she was aware that the plan would be to flip the house for profit; and

- c) When HDD signed the MOU on March 29, 2022, she was aware of and understood the terms and conditions contained in the MOU. She did not have legal advice, but the terms of the MOU were clear and she was aware of the fact that she and NDD would be responsible for the loan if it exceeded the market value of the ED Property after the house was built (as set out in her text to NDD on March 28, 2022). If she was not aware of this, she would have been when she reviewed the document, and in my view would not have signed it.

[200] In coming to these conclusions, I specifically reject HDD's evidence that she and NDD entered into an agreement with ADD and LDD to take over Sabre and that the money owed to purchase the ED Property and build the house would be subsumed into Sabre and then owned by NDD and HDD after they took over Sabre. This was simply not the case. The loan from ADD and LDD to NDD and HDD contained in the MOU is owed to ADD and LDD.

[201] If I am wrong on my findings of fact, HDD still cannot succeed for the following reasons:

- a) On her evidence, which I have rejected, at best the agreement was a promise to provide a future gift or sale of Sabre to her and NDD. The terms of the sale or gift, and what it would encompass, were undecided. This is not an enforceable promise and is therefore fatal to HDD's position that the loan set out in the MOU is not enforceable against NDD and HDD because it would be subsumed into the gift of Sabre to them at some time in future.
- b) The loan provided by ADD and LDD was from their personal funds and not by Sabre.
- c) The agreement was not that NDD and HDD would be gifted the house and the property; the agreement was that NDD and HDD would receive the difference between the cost of purchasing the land and building the house and the value of the property once the house was built on it. HDD's argument is incompatible with the agreement's fundamental nature.

[202] When examining whether monetary advances from parents to children are loans or gifts, one considers the factors set out in *Locke v. Locke*, 2000 BCSC 1300 at para. 20:

- a) whether there were any contemporaneous documents evidencing a loan;
- b) whether the manner for repayment is specified;
- c) whether there is security held for the loan;
- d) whether there are advances to one child and not others, or advances of unequal amounts to various children;
- e) whether there has been any demand for payment before the separation of the parties;
- f) whether there has been any partial repayment; and
- g) whether there was any expectation, or likelihood, of repayment.

[203] When considering these factors, one must consider the intentions of ADD and LDD as opposed to NDD and HDD: *B.F.W. v. F.P.*, 2025 BCSC 975 at para. 127.

[204] The findings of fact that I have set out definitively answer the Locke factors in favour of finding the money provided by ADD and LDD to purchase and build the house to be a loan as opposed to a gift. I say this because:

- a) there were contemporaneous documents evidencing the loan through the June 2021 email and March 2022 MOU;
- b) the manner of repayment was specified;
- c) the agreement prescribed security for the loan;
- d) NDD was treated equally to MDD for purposes of the loan, and in my view, the fact that the agreements provided flexibility with the amount of repayment is not an essential distinguishing factor;
- e) there was both a demand for repayment and partial repayment, which resulted in NDD taking out a mortgage to repay part of the loan in the fall of 2022; and
- f) there was an expectation of repayment by ADD and LDD when the loan was made. When it became apparent that the loan would exceed the market value of the property in my view, the expectation for repayment was for at least the market value of the property.

Unconscionability

Legal Principles

I now address HDD's argument that the MOU is void for unconscionability, the doctrine of unconscionability has two elements:

- a) an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant; and
- b) an improvident transaction.

See: *Dietterle v. Vanguard Mortgage Investment Corporation*, 2023 BCCA 425 at para. 14; and *Kim v. Choi*, 2020 BCCA 98 at para. 78 [Kim].

Inequality of Bargaining Power

[205] ADD and LDD are sophisticated businesspeople who wished to help MDD and NDD and HDD to obtain experience and get financially ahead in the world. NDD and HDD were not sophisticated and relied upon the expertise of ADD and LDD with respect to the fairness of the MOU. In my view, this constitutes an inequality of bargaining power.

Improvident Transaction

[206] The purpose of the loan was to enable NDD and HDD to purchase property, build a house on the property, and then sell the property. They would be allowed to keep the increase in value of the transaction and would only be charged a minimal amount of interest for the initial five years of the loan, something comparable to rent, to provide them sufficient time to sell the property.

[207] The terms of the loan were very favourable to NDD and HDD. I say this because:

- a) the borrowing terms were extremely generous;
- b) there was a considerable expectation of profit at the time that the agreement was made in June of 2021, and then formalized into the MOU in March of 2022;
- c) to the extent there was a risk of loss, the parties were aware of this possibility and this part of the loan was unsecured with little prospect of full repayment; and
- d) there was a cap on the interest charged such that it would be affordable to NDD and HDD over the initial five-year period, regardless of the size of the loan.

[208] In my view, given these findings, the loan cannot be characterized as improvident as defined in *Kim*. In fact, if NDD and HDD were the parties with greater bargaining power, the agreement would likely be characterized as improvident and unconscionable against ADD and LDD.

Unenforceability

Legal Principles

[209] The applicable legal principles used to determine whether an enforceable contract has been formed are as follows:

- a) there must be an intention to form a contract;
- b) the essential terms must be agreed upon;
- c) the terms must be sufficiently certain;
- d) the determination of these requirements must be made from the perspective of an objectively reasonable bystander as opposed to the intentions of the parties; and
- e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties before and after the agreement.

See *Oswald v. Start Up SRL*, 2020 BCSC 1730 at paras. 120-124.

[210] However, our Court of Appeal in *Berthin v. Berthin*, 2016 BCCA 104 emphasized that courts will be reluctant to find a contract void for uncertainty:

[47] Of course, the terms in question must be enforceable - i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, supra:

An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.

If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted. [Emphasis added.]

Lambert J.A. observed in *Griffin v. Martens* (1988), 1988 CanLII 2852 (BC CA), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves."

[211] With respect to documents that are not drafted with legal assistance, or are otherwise poorly drafted, as is the case here with the MOU, the court should make every effort to find a meaning in the words used consistent with the intentions of the parties and should avoid applying form over substance. This was noted by our Court of Appeal in *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75:

[47] There is no question that the documents the parties signed were inelegantly and inartistically drafted. They contain typographical errors and substantive mistakes. There seems to be little doubt that the form of the contracts and the offers from which they arose did not strictly comply with the specifications in the USA. However, the inquiry is not whether the contracts were competently drafted, but rather whether they disclose the parties' intentions as to the substance of their agreement. In *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1968 CanLII 581 (BC CA), 1 D.L.R. (3d) 513 (B.C.C.A.), the majority outlined the role of the court at 517-18:

In the first place, consideration must be given to the duty of a Court and the rules it should apply, where a claim is made that a portion of a commercial agreement between two contracting parties is void for uncertainty or, to put it another way, is meaningless. The primary rule of construction

has been expressed by the maxim, *ut res magis valeat quam pereat* or as paraphrased in English, "a deed shall never be void where the words may be applied to any extent to make it good". The maxim has been basic to such authoritative decisions as *Scammell v. Ouston*, [1941] 1 All. E.R. 14; *Wells v. Blain*, 1926 CanLII 134 (SK CA), [1927] 1 D.L.R. 687, [1927] 1 W.W.R. 223; *Ottawa Electric Co. v. St. Jacques* (1902), 1901 CanLII 17 (SCC), 31 S.C.R. 636, as well as many others, which establish that every effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to. Also, as stated as early as 1868 in *Gwyn v. Neath Canal Navigation Co.* (1868), L.R. 3 Ex. 209, that if the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.

Clause 10 of the contract is admittedly a highly inartistic piece of draftsmanship and clearly poses difficulties in construction. However, keeping in mind the rules of interpretation which I have outlined, and approaching the terms of the contract and cl. 10 in what I consider a "reasonable and business manner" (see *Wells v. Blain* at p. 691), it is my opinion that cl. 10 is not so uncertain as to be meaningless. On the contrary, I consider it has a clear meaning but is badly expressed. ...

[48] In *Langley*, before citing *Marquest Industries*, McEachern C.J.B.C. stated the following at para. 37:

[37] Having determined that the legal force of the arrangements represented by the communications I have described is not contingent upon the preparation of a formal document, it is necessary to consider what the terms of the bargain are and whether they are legally sufficient to constitute a binding agreement. This analysis is carried out according to the standard rules of contract construction: give the words their plain and ordinary meaning where that meaning does not conflict with the context of the communications as a whole. Where there is ambiguity, extrinsic evidence may be considered.

[55] The trial judge did not make every effort to give effect to the parties' intentions by looking at substance and not mere form. Rather than attempting to extract meaning from the parties' expression of their contractual intention as the authorities require, the trial judge applied an overly formalistic and literal approach to interpreting the document. When this approach produced ambiguity and inconsistencies with undisputed facts, the trial judge did not attempt to resolve them by looking to extrinsic evidence, as *Langley* prescribes. In omitting to apply these principles of contractual interpretation set out in *Marquest Industries* and *Langley*, the trial judge erred in law. [Emphasis in original.]

Vague or Uncertain Terms

[212] HDD argues that critical terms of the MOU were vague, uncertain or absent. She notes the MOU does not contain:

- a) a start date for any repayment obligations;
- b) the specified repayment schedule;
- c) a term specifying the amount to be repaid or what would be repaid if the monies advanced exceeded the value of the house and property;
- d) a term specifying the time frame for repayment;
- e) a provision addressing what would occur in the event of default, delay or changes in circumstances--all of which would be expected in a legally enforceable agreement involving significant financial obligations; and that
- f) a term openly conveying the parties' true intentions during the formation of the contract.

[213] My findings establish a clear meeting of the minds between the parties over the terms of the MOU. It is within these findings, along with the overall context and conduct of the parties, that I will assess the issues raised by HDD. I make the following additional comments with respect to these issues:

- a) The MOU specifies that once the house construction is completed, ADD and LDD ill determine what the payments will be. In my view, the clear inference is that the payments will start around the time that the house is completed.
- b) Although a particular payment schedule is not specified, the MOU is clear that the payments will be not less than 25% of NDD and HDD's gross wages plus what they can collect in rent. ADD and LDD were clear that, given the cost of the build that they would be flexible and realistic in the required payments.
- c) The MOU clearly states that the loan will be for the cost of purchase and the cost of building the house. The fact that the cost of the build was unknown at the time the MOU was signed does not void the contract or make it unenforceable.
- d) The MOU specifies a time frame for repayment, which is that payments will start once the building of the house is complete and the costs tallied. After five years if the house is not sold, the mortgage payments will be at a competitive interest rate. This is standard mortgage terminology.
- e) There are provisions for default, delay, or changes in circumstances in the MOU. They clearly are not exhaustive. ADD and LDD have a mortgage on the property, which would allow them to sell the property and obtain repayment of some or all of the loan if there were default or delay in payment.

- f) In my view, the parties' true intentions were conveyed in this contract. HDD claims that having a right to sell the mortgage and a clause giving ADD and LDD the final say on home finishes and materials were not intended by the contract, and/or that the parties agreed that they would not be enforced. The fact that the mortgage provided a right to sell the property is the purpose of obtaining a mortgage, which is to offer some security for a loan. Additionally, the clause giving the final say on purchases was discussed with NDD and HDD. In my view, their expressed concern that it prevented MDD from purchasing golden toilet seats was a helpful and tactful way to discuss the clause.

The purpose of both clauses is clear and aligns with the circumstances based on my findings of fact. In my view, even if I accepted that HDD believed the clauses would not be enforced, it would not invalidate the contract in its entirety, as this belief was not objectively reasonable given the circumstances and the wording of the contract.

- [214] In my view, for the reasons that I have just set out, these submissions are based on an overly technical emphasis on form as opposed to substance, which courts have cautioned against, and do not result in making the contract unenforceable.

Post Contractual Conduct

- [215] In my view, there is nothing in the post-contract conduct that would impact the enforceability of the MOU against NDD and HDD.
- [216] When it became apparent that the build was well over budget and would exceed the value of the property; ADD and LDD reassured NDD and HDD that they would work something out in five years. This does not repudiate the loan, nor does it indicate that the entire loan would be forgiven.
- [217] NDD and HDD began repayment of the loan through a \$3,100 mortgage, an amount that was not inconsistent with the payback terms set out in the MOU. The mortgage obtained was paid to ADD and LDD. In my view, this is evidence of enforcement. I reject HDD's assertion that no steps have been taken to enforce the agreement.
- [218] MDD was required to pay for the cost of the loan. He also had to obtain a mortgage from the bank, pay the amount obtained to ADD and LDD and pay the amount of the mortgage. ADD and LDD have been clear to everyone that they will be flexible on the terms of repayment depending on earnings and the amount owed. MDD is making great efforts to pay down the principal of the bank mortgage which accounts for the reduction in the payments made directly to ADD and LDD. In my view, MDD is required to pay back the loan. I reject the assertion that MDD is not bound by the reciprocal agreement that he made with ADD and LDD.

Civil Conspiracy Allegations

The Law

[219] The law on predominant purpose conspiracy was recently summarized by our court of appeal in *Latifi v. The TDL Group Corp.*, 2025 BCCA 45 as follows:

- a) The plaintiff has the burden to prove an actual agreement amongst conspirators, and not merely knowledge or approval of the impugned conduct: *Barroqueiro v. Qualcomm Incorporated*, 2023 BCSC 1662 at para. 167.
- b) Harm must be the predominant purpose of the concerted action or agreement, not merely an ancillary purpose or a resulting effect: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 74.
- c) It is insufficient if the alleged harm is the result of, or collateral to, acts pursued merely or predominantly out of self-interest: *LeRoy v. TimberWest Forest Corp.*, 2020 BCSC 978 at paras. 428, 475-476, *aff'd* 2021 BCCA 326; *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872 at para. 39, leave to appeal to SCC *ref'd*, 34111 (14 July 2011); *Canadian Bedding Company Ltd. v. Western Sleep Products Ltd.*, 2009 BCSC 1499 at para. 146.
- d) Even in cases of clear injury to the party affected, the claim of predominant purpose conspiracy cannot succeed if the predominant object is to benefit the parties to the agreement: *Cement Lafarge; Southam Co. Ltd. v. Gouthro*, [1948] 3 D.L.R. 178, 1948 CanLII 248 (B.C.S.C); *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142, [1942] A.C. 435 (H.L.).

The Allegations

[220] HDD argued that ADD and LDD conspired together and with NDD with the predominant purpose of harming her through the following activity:

- a) commencing an action to recover payment of the MOU in parallel with the Family Petition;
- b) registering a mortgage against the ED property for funds owed pursuant to the MOU;
- c) excluding HDD from the Urdal Property, where she was "banned without cause" and calling the police when she entered onto the property;
- d) terminating HDD employment with Sabre in May 2024 and removing her access to her email account at Sabre, which impacted her ability to do her job correctly;
- e) removing her use of the Rivian truck;
- f) reducing NDD's income following separation to reduce the support payable to HDD;
- g) removing HDD's access to the joint bank account that she had with NDD; and
- h) ceasing payment of child support and the proportionate share of special expenses.

Each Alleged Element of the Claim

Overlap with Family Law Remedies

- [221] ADD and LDD were already involved in the Family Petition through the pleadings filed by HDD advancing claims for property owned by ADD and LDD and unjust enrichment.
- [222] The action commenced by ADD and LDD to recover repayment is neither unusual nor unexpected in the circumstances.
- [223] In my view, the primary purpose of commencing the action was to preserve their assets, not to cause harm to HDD.
- [224] It is not clear to me what harm has occurred to HDD through the commencement of the action. She was not entitled to the property she claimed that she was, nor were ADD and LDD unjustly enriched by her activities.

The Registration of the Mortgage on the ED Property

- [225] HDD alleges that the mortgage was registered without her consent in an effort to gain financial leverage against her in the Family Petition commenced by NDD.
- [226] In my view, this is a baseless allegation. It is not apparent to me how the mortgage would create leverage in the Family Petition against HDD. HDD consented to the mortgage in the MOU. The mortgage was registered as part of the MOU to provide security to the loan provided by ADD and LDD. Its purpose was to protect their loan. I do not see how the registration of the mortgage could be used in a manner to cause harm to HDD. The ED Property and debt associated with it are subject to the Family Petition.

Excluding HDD from the Urdal Property

- [227] I do not see any economic harm associated with HDD being excluded from the Urdal Property. HDD's relationship with LDD significantly deteriorated immediately after HDD's separation from NDD. HDD would make rude gestures at LDD and refused to allow her to look after ODD because of her personal feelings toward LDD, despite LDD's close relationship with ODD. There was clearly a lack of trust between the parties.
- [228] In these circumstances, it is understandable why ADD and LDD would prohibit HDD from accessing their property. In my view, this is lawful activity that they are entitled to pursue as part of their use and enjoyment of their property. This is not the type of conduct that falls within the scope of a civil conspiracy claim.
- [229] HDD says that calling the police when she entered the Urdal Property and having her arrested falls within the rubric of acts subject to predominant purpose conspiracy.

- [230] HDD was told not to enter the property. She made it clear that despite this, she would enter the property. LDD did not call the police to have HDD arrested; rather, LDD was out of the country and texted her friend, who is a police officer, who said that he would drive by the property.
- [231] The police officer handcuffed HDD. However, in my view, there was no intent to cause harm to HDD by LDD. LDD was concerned about HDD entering her property despite being explicitly told not to. LDD did not call the police with the intent to harm HDD but rather called a friend to ensure that things were okay on her property. This does not fall within the rubric of predominant purpose conspiracy.

Terminating HDD's Employment with Sabre

- [232] HDD was hired by ADD and LDD to do marketing work for Sabre as a consultant shortly after ODD's birth. Sabre had never had a marketing consultant before. In my view, this employment was done through ADD and LDD's desire to help support NDD and HDD since HDD's consulting business had not recovered since losing most of her clients during COVID.
- [233] After NDD and HDD separated, the relationship between LDD and HDD significantly deteriorated. HDD refused to allow LDD to care for ODD as she did prior to separation because of HDD's animus towards LDD.
- [234] Nonetheless, HDD remained working at Sabre for several months after separation, despite noting in her affidavit evidence that she expected that she would not be able to continue working there.
- [235] In May 2024, ADD was not confident that HDD's billings were reflecting the work that she was performing for Sabre. At this point, it was clear that there was a lack of trust between HDD and ADD and LDD such that further employment was not feasible. This lack of trust arose primarily from circumstances outside of work, but also from the manner in which HDD submitted her accounts.
- [236] ADD and LDD were legally entitled to terminate HDD. They offered to pay her \$24,000 upon termination, which would reflect her income for the rest of the year. LDD confirmed that this payment would have no impact on this litigation. HDD refused the offer.
- [237] In my view, the predominant purpose of the termination was to remove HDD from Sabre, as there was a lack of trust between ADD and LDD and HDD. It was done with a view to minimize the financial impact on HDD.

Retrieval of the Rivian

- [238] ADD and LDD are the lawful owners of the Rivian which is valued at \$120,000. The evidence is clear that the Rivian had not been gifted to NDD or HDD.

- [239] In my view, the disbursement was provided to NDD as part of the financing arrangements for building the house. An identical disbursement was made to MDD and used for financing the build of his house. Ownership of the Rivian was never transferred to NDD or HDD.
- [240] In my view, the predominant purpose was retrieving the Rivian from HDD, given the breakdown in the marriage and subsequent animosity displayed by HDD to LDD.
- [241] HDD was offered a very favourable lease on the Rivian, but she could not afford to pay for it. ADD and LDD lent NDD money so that he could purchase a vehicle for HDD's use after the vehicle was returned. NDD gave this vehicle to HDD, and the Rivian was returned.
- [242] HDD was upset that the vehicle used to replace the Rivian, by comparison, was "a piece of shit". However, HDD could not afford a vehicle in her circumstances. The vehicle provided was safe but required maintenance.
- [243] In my view, this does not fall within the rubric of civil conspiracy. HDD understandably preferred to drive the Rivian. It was not hers and she had to return it to the lawful owners.

Reducing NDD's Income After Separation

- [244] After separation, NDD needed more flexible work hours to spend time with ODD. He requested this from ADD and LDD, who accommodated his request by transferring him to a sales position. This position provided ADD with flexibility and was an appropriate job for his skill set, and resulted in a modest reduction in the hours that NDD worked. He received the same hourly wage and benefits as his previous job and there is room for an increase in compensation based on performance.
- [245] It is clear that the primary purpose of providing the change in NDD's employment was to support his access to ODD while maintaining his standard of living. This does not fall within the rubric of civil conspiracy.

NDD's Conduct in Issues Associated with the Family Petition

- [246] HDD says that NDD is party to the civil conspiracy and that his acts with respect to:

- a) her access to family finances; and
- b) her entitlement and receipt of child support and proportional expenses

constitute an element of the alleged civil conspiracy.

- [247] In my view, NDD acted independently from ADD and LDD with respect to his decisions on these issues. Furthermore, these issues are subject to final and interlocutory resolution in the Family Petition. Many of these issues were raised on interlocutory applications in the Family Petition proceedings. These allegations form part of the Family Petition and are governed by the relevant statute. In my view, they are not appropriately addressed as part of the civil conspiracy claim.

Determination of the Civil Action

[248] As a result of my findings, I make the following orders:

- a) ADD and LDD are entitled to funds owing pursuant to the MOU from NDD and HDD;
- b) ADD and LDD own the Urdal Property;
- c) NDD has a revocable right of survivorship in the Urdal Property;
- d) the allegations of unjust enrichment against ADD, LDD and NDD are dismissed;
- e) the allegations of civil conspiracy are dismissed; and
- f) ADD and LDD are entitled to costs against HDD.

[249] ADD and LDD ask the court to make conditional orders with respect to:

- a) Costs: they wish to defer collection of costs for one year if HDD does not relocate ODD to another jurisdiction.
- b) Payment of \$20,000 to HDD (an amount similar to that offered to HDD upon her termination from Sabre): they intend to provide HDD with \$20,000 to assist her in Pemberton, on the condition that the money be used by HDD for rent payments in Pemberton.

[250] In my view, the nature of the discretionary orders sought by ADD and LDD are not appropriate. However, I do find that their request for these orders accurately sets out their intention with respect to how they will proceed on these issues.

Financial Issues

Issues Already Decided

[251] The most significant issues in dispute with respect to family property have been resolved: the status of the Urdal Property, the validity of the MOU, and HDD's claim for unjust enrichment.

[252] The result of these determinations is that NDD and HDD own the ED Property which has a fair market value of \$2,058,000, but owe an amount of \$3,110,314.31 under the MOU to ADD and LDD and an amount of \$484,494.98 under the mortgage which amounts to a net debt of \$1,539,809.29

[253] There is no family interest in the Urdal Property and there is no claim for unjust enrichment against ADD and LDD.

[254] In addition, I determined that the Rivian was not a family asset and that the disbursement provided to NDD was for a specific purpose, the payment of the debt on the ED Property, and was used for that purpose.

Excluded Property

Excluded Inheritance

- [255] HDD claims a living inheritance of \$50,000 which she received on September 26, 2022, from her grandmother. This inheritance was deposited into her and NDD's joint account which was used for day-to-day expenses and larger expenses incurred by the parties. HDD had a separate individual account, but the money was not deposited into that account.
- [256] Some of the larger purchases which HDD says this money was used for include their vacation to the Azores and approximately \$15,000 worth of furniture for the ED Property. I note that both of these expenses would be family property as opposed to excluded property.
- [257] In my view, this inheritance was comingled with family property. It is not possible to identify or trace the use of the money after it was placed in the joint account, given the nature of the deposits and expenses that flowed to and from that account. As such, the money has lost its exclusive character.

Pre-Relationship Debt

- [258] As of July 1, 2020, HDD had debt of \$22,316.19 in two BMO MasterCard accounts, which she kept separate from any joint accounts during the marriage-like relationship.
- [259] HDD continued to carry this debt in her personal accounts until November 20, 2023, at which time she wrote herself a cheque for \$22,272 from the joint mortgage account to pay of her debt.
- [260] HDD testified that she spoke with NDD about doing this and he agreed to the transaction. NDD agrees that he spoke with HDD, but states that he did not agree to the use of the account for that purpose. He stated that the joint mortgage account was to be used to cover expenses for the ED Property.
- [261] In November 2023 NDD and HDD relationship was extremely strained. They were not communicating in person at all. In these circumstances, in my view, it is unlikely that NDD would agree to use joint funds to pay off HDD's debt that pre-dated their relationship. Therefore, I accept NDD's testimony over HDD's testimony on this issue. In my view, her personal debt was improperly paid off with joint funds.
- [262] NDD has two bikes that he owned prior to the relationship. HDD owns a car purchased by NDD on March 20, 2024, for \$9,429. Given the limited amount of time that has passed, the difficulties that have been identified with the car, and the repairs that have been performed on the vehicle, I would assess the value of the car at \$7,500. This car in my view, is a family asset. It was purchased by NDD to replace the Rivian because HDD needed a vehicle for herself and to care for ODD.

Post Separation to Trial

Family Assets

- [263] On December 1, 2023, NDD stopped contributing to the joint bank account he shared with HDD and removed HDD's access to their shared credit card.
- [264] On December 7, 2023, NDD removed the full balance of the mortgage account he shared with HDD of \$42,823.26. This was a joint asset.
- [265] On March 20, 2024, NDD purchased a car for HDD for \$9,429. This was necessary as HDD had to return the Rivian to ADD and LDD.
- [266] Since separation, NDD has paid expenses with respect to the ED Property of \$84,707.95. NDD used the joint mortgage account in addition to his money earned after separation, which means that he paid a total of \$41,884.69 of his own funds for payments associated with the joint property. He has not been able to pay the 2025 property taxes of \$10,295.34, which is a joint debt.

Child Support

- [267] NDD was required to pay child support of \$899 per month and 90% of daycare expenses. This amount is based on NDD earning \$94,511 and HDD earning \$10,800. NDD's income was based on what he earned prior to separation. HDD's income was reduced from her pre-separation income because she lost her job with Sabre after separation.
- [268] Both NDD and HDD take the position that the other party has been under-employed since separation. In addition, HDD claims that NDD is receiving income-like benefits through his employment with Sabre. In my view, the incomes set out above are appropriate and represent a reasonable estimate of the parties' appropriate incomes based on the circumstances of the parties during the period of separation up to trial.
- [269] This means that NDD owes \$899 in child support per month since separation. The parties have been living apart from December 6, 2024, to the date of trial, which is approximately 19 months. Therefore, NDD owes \$17,081 in child support to HDD during this period.

Spousal Support

- [270] Justice Elwood previously set spousal support at zero on an interim basis based on the financial circumstances of the parties. In my view, this was appropriate. HDD is living in a large home essentially rent-free. She was ordered to receive child support and appropriate childcare support.
- [271] Although HDD has only limited sources of income and does not enjoy the same standard of living that she enjoyed during the marriage, she has been able to engage in many activities such as skydiving, taking ODD out for drinks and snacks at bakeries on a daily basis, hosting her friends at restaurants for food and drinks and continues to purchase significant amounts of cannabis which she uses as a relaxant. Given the financial circumstances of the

parties, I will assess HDD's entitlement to spousal support on a going-forward basis. It is clear that, given parties' respective incomes, neither NDD nor HDD will enjoy the standard of living they enjoyed during their marriage.

Section 7 Expenses

- [272] ODD has been attending the Nest Early Learning Centre (the "Nest") for childcare since October 2024, which costs \$609 per month. ODD has attended the Nest for 10 months (payment made on July 1, 2025, for July) for a total expense of \$6,090.
- [273] Prior to obtaining a spot for ODD in the Nest, HDD obtained childcare from a woman named Rachel and from a woman named Catlin. Both the cost and duration of these childcare services were unclear. HDD estimated that she paid approximately \$1,600 to \$1,800 per month for these services and obtained daycare for up to three days a week.
- [274] NDD did not agree that these expenses were appropriate. He felt that the services were too expensive, not necessary given the HDD's flexibility with work, and that alternative childcare services were offered to HDD free of charge by LDD.
- [275] HDD refused to allow LDD to look after ODD given HDD's animus towards LDD and the fact that she was involved in ongoing litigation with ADD and LDD.
- [276] In my view, the amount of childcare received by HDD, although helpful, was excessive. HDD was working minimal hours and given the family's finances, the amount she is claiming is excessive. Although I can understand her reluctance to utilize LDD for childcare while litigation was ongoing, in my view, this was not in ODD's best interest and is not an appropriate position to take going forward given the resolution of the ongoing litigation through this trial.
- [277] Considering all of these circumstances, I am of the view that \$800 a month for childcare services from January 1, 2024, to September 30, 2024, is appropriate. This amounts to nine months for a total of \$5,600.

Payments made by NDD to HDD

- [278] NDD has made payments to HDD. I have calculated these expenses based on the payments set out in Exhibit 22; but I have deducted \$142.99 as the suite hydro expense and \$9,429 with which he purchased the car for HDD. In my view, this should be treated as a family expense and asset. In addition, I have separated payments made directly to the Nest by NDD and will treat these payments as special expenses.
- [279] This means that NDD made payments to HDD of \$20,851.22 directly and \$2,436 towards childcare expenses.

Reconciliation of Retroactive Payments

- [280] NDD owes HDD the following:

- a) child support of \$17,081; and
- b) childcare expenses of $(\$11,690 * 0.9 =) \$10,521$;

for a total of \$27,602.

[281] NDD has paid the following amounts:

- a) \$20,851.22 in direct payments to NDD; and
- b) \$2,436 for childcare expenses to Nest

for a total of \$23,287.22.

[282] This results in a deficit owed to HDD by NDD of \$4,314.78 for child support and childcare expenses.

[283] NDD has paid \$41,884.69 of his own funds for payments associated with the ED Property. In addition, he paid \$9,429 for the vehicle he purchased for HDD's use, which I am treating as a joint expense. This totals \$51,313.69. HDD owes NDD half of this amount since they constitute family expenses. This amounts to \$25,656.85.

[284] In addition, the family debt has increased by \$10,295.34, which is the amount of taxes for 2025 on the ED Property.

Family Assets and Debt

Assets

[285] The joint bank accounts have been closed and have been accounted for in my reconciliation analysis.

[286] NDD and HDD have their own bank accounts, which have assets and debts accumulated after separation. These accounts fall outside of the family assets and debts.

[287] NDD and HDD have each received loans from their parents to support themselves after separation. These debts fall outside of the family assets and debts.

[288] NDD and HDD own the following assets:

- a) the ED Property, which is valued at \$2,058,000.
- b) the vehicle purchased by NDD for HDD, which I have determined is family property and valued at \$7,500; and
- c) the furniture in the ED Property paid through NDD and HDD's joint account, which was purchased for approximately \$15,000--though I would value these assets at \$10,000 given the short amount of time that they have been in use.

[289] NDD and HDD also jointly own the company Cold Creek Acres. In my view, the company has no value. HDD was passionate about the company she should be awarded sole ownership of it.

Debts

[290] NDD and HDD owe the following debts:

- a) the MOU debt to ADD and LDD of \$3,110,314.31;
- b) the mortgage of \$484,494.98; and
- c) property taxes of \$10,295.34.

[291] HDD owns an additional \$25,656.85 of family debt to NDD, given the payments made solely by NDD to family debt.

[292] In addition, HDD owes an additional \$11,136.00 of family debt to NDD for using family assets to pay off her outstanding debt that pre-dated the relationship.

Reconciliation of Family Debt and Assets

[293] The difference between the value of the house and the liquid debts is negative \$1,547,104.63. I have excluded the non-liquid assets, consisting of the vehicle and furniture, from this amount.

[294] In my view, HDD needs a vehicle and should keep ownership of the car. NDD has advised that HDD should have the furniture purchased in the family home.

[295] This means that NDD would owe \$773,552.32 ($\$1,547,104.63 / 2$) in family debt and HDD would owe \$810,345.17 ($((1,547,104.63 / 2) + \$25,656.85 + \$11,136)$) in family debt.

[296] HDD is owed \$4,314.78 for past child support and childcare expenses by NDD, and has the additional benefit of the car and furniture valued at \$17,500.

Reapportionment of Debt

[297] The parties agree that s. 95 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] allows the Court to divide family property and/or family debt unequally if an equal division would be "significantly unfair".

[298] Justice Horsman in *Healey v. Healey*, 2024 BCCA 68 summarized the procedure as follows:

[69] In considering a claim for unequal division of family property, the court should proceed by first making a notional equal division of property, and then determine whether such an equal division would be significantly unfair, given the factors in s. 95(2) and, where applicable, s. 95(3) of the FLA.

- [299] NDD, ADD, and LDD agree that it would be unfair for HDD to be placed in debt as a result of the purchase of the ED Property and associated MOU and mortgage. However, they are also of the view that HDD should not benefit from her ownership in the ED Property, given the significant debt associated with the property.
- [300] HDD says that the MOU loan should be capped at the remaining equity in the ED Property, and the ED Property should be sold to pay off the mortgage and the reduced amount owed under the MOU. Based on my findings, this proposal would result in HDD owing NDD \$36,792.85 (HDD's remaining share of the family debt). NDD would still owe her the retroactive child support and childcare expenses; but even considering this, HDD would still end up in debt.
- [301] Essentially, the parties agree that HDD should not have any assets or liabilities related to the ED Property. The disputed issue is how to best achieve that result. In my view, the proposal made by HDD is inconsistent with the findings of fact that I have made with respect to the MOU. Even if it were not, it would leave HDD in debt.
- [302] The parties say that the factors to consider for reapportionment of debt fall under ss. 95(2) (e) and (i) of the FLA.
- [303] Neither NDD nor HDD are in a position to pay off the debt owed to ADD and LDD. Therefore, in my view, s. 95(2)(e) is not a significant factor for re-apportionment of the debt.
- [304] However, I agree that the notional division of debt against HDD of \$810,345.17 would represent a significant unfairness in the circumstances that I have found surrounding the purchase, financing and building of the house on the ED Property. It was not ADD and LDD's intention to burden NDD and HDD with significant debt; however, it is not their intention to simply forgive the debt.
- [305] This constitutes a basis for re-apportionment under s. 95(2)(i).
- [306] In my view, the most equitable way to achieve a fair result would be to apportion all family debt to NDD along with sole ownership of the ED Property. This would:
- a) leave HDD free of any debt and able to receive appropriate support from NDD; and
 - b) although NDD would be in significant debt, his parents would be in a position to help him manage the debt, as they have been doing with NDD after separation and with MDD, in accord with their intention not to burden their children with substantial debt.
- [307] This arrangement could provide NDD with the ability to:
- a) retain ownership of the house for several years in the hope that the value of the ED Property appreciates, and also potentially benefiting from or avoiding tax issues related to a sale of the property to ADD and LDD, or a third party; and

- b) enable NDD to supplement his income by living in the suite and renting the main part of the home on the ED Property. This supplemental income could be used to manage or pay off the debt associated with the house.

Conclusions on Financial Issues

[308] The result of these findings is that:

- a) NDD is solely responsible for:
 - i. the amount owed to ADD and LDD under the MOU;
 - ii. the mortgage on the ED Property;
 - iii. all expenses associated with the ED Property.
- b) NDD will receive sole title and ownership to the ED Property. HDD will have until February 28, 2026, to vacate the property.
- c) NDD will be entitled to recover for the cost of repairs to any damage beyond normal wear and tear to the property caused by HDD or someone on the property with her permission.
- d) The certificate of pending litigation placed on the ED Property be removed.
- e) HDD is owed \$4,314.78 by NDD for retroactive child support and childcare expenses.
- f) HDD receives the car and furniture purchased by NDD and HDD for the ED Property with their family funds valued at \$17,500.

Relocation

Order Sought

[309] HDD seeks an order that ODD relocate with her to Salt Spring Island, with the parenting arrangement set out in Schedule A of Exhibit Q, which proposes that:

- a) ODD will reside primarily with HDD on Salt Spring Island;
- b) NDD will have parenting time on alternating weekends from Friday afternoon to Monday morning;
- c) NDD will have the option of having ODD for two non-consecutive two-week periods during the summer holidays;
- d) ODD will have the option of having ODD for one two-week period during the summer holidays;
- e) HDD and NDD will each have ODD for half of the spring break and winter break;
- f) ODD will be in HDD's care for the Mother's Day weekend;
- g) ODD will be in NDD's care for the Father's Day weekend;

- h) the parties will exchange care of ODD at a ferry terminal or seaplane terminal as set out in Schedule A;
- i) HDD and NDD will facilitate FaceTime calls with ODD every second day with the other parent; and
- j) NDD may request additional parenting time if and when he chooses to visit the Salt Spring Island area.

Applicable Law Governing Relocation

[310] The parties agree that the applicable law with respect to relocation and the ancillary determinations concerning parenting time should be determined pursuant to s. 16 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA].

Burden of Proof

[311] In HDD's interim application for relocation in *Den Duyf v. Den Duyf*, 2024 BCSC 2151 [Den Duyf], Justice Elwood noted that s. 16.93 of the DA creates three different scenarios to consider:

[70] Section 16.93 of the DA, [] creates three different scenarios. Section 16.93(1) applies when the child spends "substantially equal time" with each party, in which case the parent proposing the relocation has the burden of proving the relocation is in the best interests of the child. Section 16.93(2) applies when the child spends the "vast majority" of their time in the care of the parent proposing to relocate, in which case the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child. Section 16.93(3) applies to all other cases. It provides that:

- (3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

[71] In this case, the JCC Order provides that Hanna has the Child in her care approximately 67% of the time. This is more than "substantially equal", but less than the "vast majority of the time". Accordingly, s 16.93(3) of the DA provides that there is no evidentiary burden on one party or the other--both parents must demonstrate to the court why the proposed relocation is or is not in the best interests of the child.

[312] The JCC Order was amended in October 2024 such that NDD and HDD have ODD in their care for "substantially equal" time.

[313] HDD says that since the October order is an interim order, the fact that ODD is spending "substantially equal" time with NDD should not apply for relocation purposes. She relies on *S.K.G. v. B.S.G.*, 2024 BCSC 455 [S.K.G.] for this proposition:

- [78] I agree with the parties that in the particular circumstances of this case, s. 16.93(3) applies. I find that neither subsection 16.93 (1) or (2) are applicable. To date there has been no substantially equal parenting arrangement, by agreement or otherwise, such that subsection (1) does not apply. Subsection 2 is also not applicable; there has been no order or agreement that S. is to spend the vast a majority of her time with the mother.
- [79] Furthermore, under s. 16.94, the court may decide not to apply s. 16.93(1) and (2) if the order referred to is an interim order. The procedural history of this case is such that the orders issued prior to trial were interim in nature and in some cases made on a without prejudice basis. The temporal nature of those orders galvanizes my decision to apply s. 16.93. In light of the particular circumstances of this case, the burden lies with each party, pursuant of s. 16.93(3), to prove whether the relocation is in their daughter's best interests.
- [314] In varying the parenting schedule set at the JCC, Justice Elwood noted that ODD's enrollment in daycare at the Nest constituted a material change in circumstances because it would allow HDD to pursue additional employment. He noted that the Nest provided reliable and affordable care, and that NDD could also assist with further childcare during HDD's time with ODD. He concluded:
- [116] The Child's enrolment in daycare is a material change because it allows the parties to consider alternative parenting arrangements that fully serve the Child's best interests as she approaches her third birthday, and Hanna plans a return to work.
- [315] This is a very different situation from that considered by Justice Morellato in S.K.G. In my view, the current situation of "substantially equal" care is in ODD's best interest. Therefore, I will not exercise my discretion to ignore s. 16.93(1). HDD bears the burden of proving that relocation is in the best interest of ODD.

Double Bind

- [316] I am mindful of the decision of our Court of Appeal in C.C. v. S.P.R., 2023 BCCA 422 at paras. 14-19, where the Court reasons that the trial judge in a relocation application under the DA is to conduct a relocation assessment in accordance with s. 16.92. In this case, the parties have been very clear that the relocation analysis is not to consider the issue of the double bind, that is, I am not to consider whether HDD will or will not relocate if the relocation application is dismissed.
- [317] The language of s. 16.92 (2) expressly states that the court is not permitted to consider whether the relocating parent will or will not relocate if the child's relocation is prohibited:
- (2) In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

Principles to Consider

- [318] Our Court of Appeal has directed that, in determining what parenting arrangements are in the child's best interests, the court must conduct a "blended analysis" and balance all relevant factors "in the round" including the proposed move to a new community: *K.W. v. L.H.*, 2018 BCCA 204 at paras. 108-110.
- [319] In my view, Justice Elwood summarized the principles applicable to the issue before me:
- [76] Section 16(3) of the DA enumerates 11 factors to consider in assessing a child's best interest, including in a proposed relocation. Section 16.92(1) enumerates an additional seven factors specific to relocation applications. All of these factors inform an overarching question of the child's physical, emotional and psychological safety, security, and well-being.
- [77] Not all of the factors in s. 16(3) of the DA are relevant to the analysis in this case. Specifically: the Child is too young for her views and preferences to be given weight (s. 16(3)(e)); cultural, linguistic, religious and spiritual upbringing and heritage are not relevant (s. 16(3)(f)); and there are no issues of family violence of any kind or other court proceedings relevant to the Child's safety, security and well-being (s. 16(3)(j) and (k)). I need not consider these factors. I will consider the remaining factors by subject matter relating to the relocation, rather than as an enumerated list.
- [320] Although there was an issue regarding NDD taking ODD to church while in his care, which would fall under s. 16(3)(f), this was primarily a communication matter. HDD did not object to ODD attending church, given her age and the activities she participates in there; her concern was only that she was not informed about ODD's attendance.

Reason for Relocation

- [321] HDD says that relocation is necessary because:
- a) she cannot afford to live in Pemberton;
 - b) there are greater opportunities to grow her business in Salt Spring Island;
 - c) there is animus between her and NDD's family such that it is uncomfortable for her to remain living in Pemberton;
 - d) she feels isolated from her family and friends; and
 - e) Salt Spring Island offers more opportunities for ODD in comparison to Pemberton.

Cost of Pemberton in Comparison to Salt Spring Island

- [322] Pemberton is in the Greater Vancouver CMA region, which has low vacancy rates. HDD found a small three-bedroom rental suite for ODD and her to live in for \$2,200 per month. Two-bedroom rental accommodations generally range between \$2,700 and \$3,000 per month; however, cheaper options can sometimes be found, especially through friend networks, often before they are listed on the market. This is how HDD found her last rental suite.
- [323] There was anecdotal evidence that rental accommodations and food are cheaper on Salt Spring Island. Additionally, there is more availability of affordable childcare--although ODD currently receives three days a week of childcare at the Nest for \$609 per month.
- [324] The main advantage from a cost perspective to moving to Salt Spring Island is that HDD expects to live with her parents rent free and with free childcare, for a period of time, to enable her to grow her consulting business to a level which would enable her to move to her own place with ODD. When she would be in a position to do this, and where she would move to, is unclear at this time (although her plan is to remain in the Salt Spring Island area).
- [325] In my view, this is a short-term solution. HDD has not lived with her parents for an extended period of time as an adult, nor has she lived on Salt Spring Island beyond visits. Given her disposition and past relations with her father, in my view, cohabiting with her parents would not remain harmonious or sustainable beyond the short term. To be clear, HDD and her father have a loving relationship. However, this does not mean that living in the same house would be harmonious beyond the short term.
- [326] One challenge is that, in my view, HDD feels that if she were to leave the house on the ED Property, she would be homeless if she remained in Pemberton, given her current finances and unreliability of child support payments by NDD. Having HDD remain at the ED Property is beyond the means of either herself or NDD. In my opinion, the main reason NDD was unable to fully comply with his child support and childcare obligations was that he could not afford to support the cost of HDD staying in the house. The parties have been unable to resolve this situation themselves.
- [327] This was pointed out by Justice Elwood nearly a year ago in Den Duyf:
- [157] The difficult reality is that both parties are currently "house poor". One solution might be for Hanna and the Child to move into the suite. This would allow the parties to rent out the main house and share the net income by way of spousal support. However, Nolan is not in a position to demand that Hanna leave her home. Unless and until the parties reach an agreement, or sell the property, the property expenses will continue to exhaust Nolan's disposable income.

- [328] The parties remain unable to reach an agreement on this issue, and it is being resolved for them in this proceeding.
- [329] I note that the cost advantages of moving to Salt Spring Island and living rent free with her parents is mitigated to some extent by the fact that ADD and LDD intend to provide HDD \$20,000 to be used for rent if she remains in Pemberton.
- [330] Another mitigating factor is my belief that this decision will address NDD's difficulties in making timely and complete payments for support and childcare expenses.
- [331] To be clear, both HDD's receipt of the \$20,000 and NDD's ability to make these ongoing payments as a result of my judgment are material factors in my consideration of this issue.
- [332] Given the parties' potential incomes and the expenses of housing in both Pemberton and Salt Spring Island, it may be that both of them will have to consider residing in some type of shared housing arrangement (not with each other).

Ability to Grow Her Consulting Business

Prior Marketing Work History

- [333] Prior to starting up a consulting business, HDD worked in marketing for Hootsuite and SAXX underwear. She earned over \$65,000 per year working for these companies in 2017 and 2018. She discovered that it was possible to work in her field remotely and moved to Whistler and then Pemberton working remotely for companies located in Vancouver. She became disenchanted working for these companies and wanted to work for local companies, so she began working as a consultant remotely.
- [334] In 2019, HDD's consulting business had two large clients. One of the clients paid HDD around \$4,000 each month. HDD was uncertain as to the number of other clients that she had, with estimates ranging from four to eight. She made around \$52,000 from her consulting business and from working at Pemberton Brewing twice a week. In my view, her consulting business was small and focused on one or two main clients. She was in debt by over \$20,000, owned no assets besides a lease on her truck, and appears to have received cash gifts from her parents of approximately \$18,000.
- [335] In 2020, due to COVID, she lost all of her consulting clients. She was headhunted and received an offer to work remotely full-time for a corporate company in the fall of 2020 but declined the offer as she wanted to work on the farm.

Post-Separation Marketing Work

- [336] In 2024, after ODD had been accepted into daycare at the Nest, HDD met with an old contact at Hootsuite who heard she was unemployed. He told her that he would be happy to "find something for her". By this, HDD understood that he meant that he would find a full-time position for HDD to work for remotely. HDD turned down this offer to find her a position.
- [337] I was troubled by HDD's evidence with respect to why she declined this offer to provide her a marketing job that she could do remotely from Pemberton. HDD did not make reasonable inquiries about whether it would be possible to obtain a position with flexible hours to accommodate childcare needs and scheduling. In my view, given that this prospective employer was eager to hire her and stated he would find a job for her, it is likely he would be accommodating with scheduling hours around HDD's childcare needs.
- [338] Under cross-examination, HDD stated that her long-term goal was to look after ODD as opposed to finding full-time employment. She was frustrated that HDD had a flexible position that would allow him to spend more time with ODD after they were separated than while they were married. In her view, she should be looking after ODD full-time and HDD should be working as much as possible to support her while she looks after ODD. HDD prefers not to have a third-party caregiver for ODD when she can care for her.
- [339] HDD stated that the only reason she agreed to have ODD put in the Nest for childcare was because HDD did not pay child support. She stated that this forced her to work, which required her to put ODD in pre-school instead of looking after ODD herself on those days.
- [340] In my view, HDD did not ask HDD whether he or his family could assist with childcare in order for her to obtain the position because it was her preference to look after ODD herself instead of working full-time.
- [341] HDD testified that her goal is to establish a marketing consulting business with small local companies, which would provide her the flexibility to care for ODD with minimal childcare assistance. Since their separation, HDD has declined an offer of full-time employment and has found two small companies in Britannia Village for consulting work, and some sporadic work at Pemberton Brewing. These jobs allow her to continue caring for ODD during the two weekdays she is not at the Nest.
- [342] HDD testified that she might prefer delaying ODD starting kindergarten until 2027 instead of 2026 because of her later birthday. There is no indication that ODD is struggling or not thriving compared to her peers. In my view, this further suggests that HDD would prefer not to work full-time, as having ODD in school full-time, within a shared parenting arrangement, would allow her to work full-time remotely with flexible hours to accommodate childcare.

- [343] In my view, HDD does not wish to find full-time work that would require her to utilize childcare, or rely on NDD, his family, or others to accommodate a full-time work schedule. Instead, she would prefer to work on a part-time flexible basis supplemented by support that would allow her to maximize her time with ODD. I note that NDD's partner is moving to Pemberton in September 2025, has a very close relationship with ODD and is happy to assist with childcare as well. HDD has indicated that she does not want NDD's partner to care for ODD.
- [344] In making this determination, I am aware that this contradicts HDD's direct testimony, but in considering the principles reviewed earlier in my reasons regarding credibility summarized in *R. v. S.S.M.*, 2024 BCCA 417, I find the evidence that I have summarized above on this issue persuasive.
- [345] The problem with HDD's position is that it overlooks the economic realities of her situation. NDD and HDD will both need to work full-time to support ODD in two separate households, whether they live in Pemberton or on Salt Spring Island. Given the economic realities of the two proposed communities and their earnings, it is in ODD's best interest that both of her parents are financially independent and employed full-time. Implicit in this is that ODD, given that she appears to be thriving within her current peer cohort, needs to start kindergarten in the fall of 2026.

Comparison Between Salt Spring Island and Pemberton

- [346] HDD did not provide documents verifying the steps she has been taking to find new clients. Much of her effort appears to focus on locating small local businesses she might work for in the Salt Spring Island area. In my opinion, HDD's life has been on hold since she filed her application to relocate to Salt Spring Island in October 2024, and she has not been making serious efforts to find employment or develop her consulting business.
- [347] This makes it challenging to compare her prospects in the two communities. However, in my view, given the remote nature of her work, her success in securing full-time job offers in Pemberton, and her ability to find clients accessible from Pemberton with, in my opinion, minimal effort, Salt Spring Island does not offer significantly better job opportunities.
- [348] HDD needs to work full-time to support herself and ODD, even with support from NDD. The most feasible option appears to be working for a company remotely on a full-time basis with hours that would accommodate her childcare needs. Although these jobs require some travel to the home location of the company, in my view, despite the dearth of evidence provided by HDD on these types of jobs, the majority of these jobs are based in the Vancouver area and would be equally accessible from either Pemberton or Salt Spring Island.

Animus Between HDD and NDD's Family

- [349] It is clear that the separation and subsequent litigation have created animus between HDD and NDD and their families. The situation is aggravated by the fact that HDD lives on the same property as NDD and next door to his family.
- [350] In my view, the resolution of the litigation and physical separation of HDD's residence from NDD and his family will go a long way to resolving this animus.

Isolation from Family and Friends

- [351] HDD has lived in the Pemberton area for many years and has a strong network of friends in the area. She volunteers with organizations like search and rescue. Her partner also has close ties to the community and has family residing in Pemberton. Although he did not testify, I understand that her partner has formed a positive relationship with ODD. It is unclear what will happen to this relationship if HDD relocates to Salt Spring Island. I understand that her partner has no ties to that location outside of HDD.
- [352] HDD has never lived on Salt Spring Island for an extended period of time, nor has she lived with her parents as an adult. Although I am sure that she would benefit from living closer to her parents and sister (who is moving to the Salt Spring area), she remains well supported by friends and has regular contact with her family and sister in Pemberton. HDD is understandably not excited by the prospect of having to move into and live with her parents on Salt Spring Island.

Salt Spring Island Offers More Opportunities for ODD

- [353] Both Salt Spring Island and Pemberton are relatively small and isolated communities. Salt Spring Island offers a greater variety of activities for children. Pemberton, although smaller, provides access to world-renowned outdoor pursuits, such as skiing, hiking, and biking. In my view, both are idyllic communities that present wonderful opportunities for ODD.

Conclusions on Reason for Relocation

- [354] The primary reasons for the proposed relocation are HDD's financial circumstances and her emotional well-being given the animosity between herself and NDD and his family.
- [355] In my view, the resolution of this litigation as well as HDD moving away from the close proximity her living situation has with NDD and his family will resolve much of this animosity.

- [356] The primary benefit of relocating to Salt Spring Island is that HDD will be able to live rent-free in her parents' house with ODD over the short term--at least until ODD is able to go to kindergarten in September of 2026--and to avail herself of free child care services from her parents.
- [357] To this end, I note that HDD is currently living rent-free on the ED Property in Pemberton. However, NDD's parents have indicated that they will provide HDD with \$20,000 to be used exclusively on rent if she remains in Pemberton. Both NDD and LDD have offered to provide free child support to assist HDD in returning to work, but she has refused these offers.
- [358] The crux of the problem with the current situation is twofold:
- a) the litigation has created a stalemate in which HDD will not leave the house, but the house is too expensive for the resources of NDD and HDD to manage; and
 - b) HDD refuses to pursue work until the issues pertaining to this litigation are resolved, and because of her desire to look after ODD instead of relying on others to care for ODD while she works. However, until she does, she will not be able to afford to live on her own in Pemberton or Salt Spring Island.
- [359] I am cognizant that HDD says that she cannot increase her amount of work in Pemberton because of inadequate childcare, even if ODD were to attend kindergarten full-time. I do not accept this evidence. I have found that HDD is unwilling to work full-time because she prefers to look after ODD without utilizing other caregivers. In my view, she is resistant to even inquiring about flexible full-time hours to accommodate her childcare needs, or utilizing additional childcare that is available to her in Pemberton.
- [360] In my view, relocating to Salt Spring Island offers a short-term solution to these problems but does not address the core issue, which is that HDD needs to return to full-time work. I realize that she would prefer to look after ODD instead of working, however, I have determined that this is not an economic reality and is not in ODD's best interest.
- [361] In my view, Salt Spring Island does not provide HDD with better employment opportunities suited to her skills and needs than are available in Pemberton.

History of ODD's Care and the Relationships in Her Life

- [362] HDD was initially ODD's primary caregiver. Since separation, NDD's role in ODD's life has increased and they have been providing substantially equal care to ODD since October 2024. ODD has formed healthy bonds with both HDD and NDD.
- [363] ODD has formed a good relationship with NDD's family, especially LDD. She has also formed a good relationship with HDD's family, primarily through FaceTime calls, but also with visits by them to Pemberton and by HDD to Salt Spring Island. ODD has also formed a positive relationship with NDD's partner.

- [364] ODD has a circle of young friends who she spends time with in Pemberton, including children at her daycare, the community centre and NDD's church. However, given her age, she has not formed strong, deep friendships. It is clear that she is thriving in Pemberton and enjoys the outdoor activities.
- [365] If she moves to Salt Spring Island, ODD would lose many of her friends in Pemberton and her connection to NDD's family, but she would have more opportunity to develop her relationship with HDD's parents and be able to spend more time with HDD's sister and family.
- [366] I am confident that ODD would be able to transition from her circle of friends and family in Pemberton to a circle of equally loving friends and family in Salt Spring Island. However, the most significant change would be the reduction in her meaningful and regular parenting with NDD and the impact that would have on her relationship with him.

Proposed Parenting Arrangement

- [367] HDD has made two significant changes to the proposed transportation arrangements to exchange of ODD to NDD. She has included:
- a) more options for exchanges, expanding the list from the Tsawwassen ferry terminal to the Horseshoe Bay, Nanaimo, Crofton, Vancouver or Salt Spring Harbour by seaplane; but
 - b) now requires NDD to travel on the ferry or seaplane with ODD when he picks her up or drops her off for an exchange.
- [368] There was anecdotal evidence as to the economy and reliability of flying by seaplane between Salt Spring Island and Vancouver, and even Whistler. I do not find this evidence persuasive. I take judicial notice of the fact that although cheaper tickets are available, they are not always available, and that the routes are subject to change and cancellation, particularly in the non-summer months. I do not accept that this is a reliable method for facilitating a regular exchange of ODD between NDD and HDD.
- [369] I make similar findings to Justice Elwood that the drive to the ferry terminals, with the possible exception of Horseshoe Bay, are neither short nor easy. Traffic on the Sea-to-Sky Highway and the Lions Gate Bridge is notoriously heavy, especially on either end of the weekend.
- [370] Of additional concern is the fact that the exchange locations to a large part are left to the discretion of the party who travels on the ferry (or seaplane) with ODD. HDD has demonstrated an unwillingness to communicate and cooperate with NDD on childcare. She has taken a completely unreasonable interpretation of her right of first refusal to look after ODD, insisting that even if NDD needs to be away for five to ten minutes, that he cannot leave ODD with a responsible person.

- [371] Although the parties are working on their communication skills, and the difficulties between them may lessen once the litigation is finished and they are no longer living in such close proximity, given the current issues I am concerned that this will further affect NDD's ability to spend time with ODD if she is relocated to Salt Spring Island.
- [372] In considering HDD's earlier proposal, which required the exchange of ODD to occur at the Tsawwassen ferry terminal, Justice Elwood concluded:
- [98] To drop the Child off at the Tsawwassen ferry terminal at 10:00 am on Monday, Nolan would need to leave Pemberton with the Child at 5:00 am in the morning. He would not return home until 3:00 pm in the afternoon.
- [99] The result, in practical terms, is that, during the regular parenting schedule, the Child would spend just one day in Pemberton every other week, and two days every other week travelling to and from Tsawwassen. Time in a moving vehicle is not meaningful parenting time with a three-year-old child. Nor would it be fun for the Child to spend such long hours in a car seat. And this does not include the time on the ferry with her mother.
- [100] Given the practical difficulties with weekend parenting time in these circumstances, especially during the winter, there is a risk that Nolan would stop seeing the Child on a regular basis, and settle for one week during spring break and the 14-day block during the summer.
- [373] The conclusions provided by Justice Elwood equally apply to many of the additional transportation scenarios proposed in HDD's current plan, with the exception that an exchange at Horseshoe Bay may be slightly shorter. However, the exchanges on Vancouver Island or Salt Spring Island would substantially increase NDD's travel time.
- [374] Given the practical difficulties with weekend parenting time in these circumstances, especially during the winter, there remains the risk that NDD would stop seeing ODD on a regular basis and settle for one week during spring and winter breaks and two 14-day blocks during the summer.

Conclusions on Relocation

- [375] HDD has not satisfied the burden of proof that relocation is in ODD's best interest. Even if neither party had the evidentiary burden of proof, I find that it is not in ODD's interest to allow a relocation to Salt Spring Island. The disadvantages far outweigh the advantages.

Parenting Arrangements

Ability to Proceed Despite Dismissal of Relocation

- [376] The parties have agreed that if I dismissed the relocation application that I would proceed with a determination of a post-relocation application parenting schedule, associated issues and support obligations.

- [377] In assessing the relocation application, at the request of the parties, I proceeded to use the required double bind analysis, which prohibited me from considering whether HDD would relocate or remain in Pemberton if her application to relocate ODD was dismissed.
- [378] The parties now ask me to proceed with the determination of the appropriate parenting arrangement on the basis that HDD will remain in Pemberton. The reason for this is based on economy, efficiency and timing. The parties have spent more than they can afford on a lengthy trial. Ongoing litigation is having a negative impact on their lives and the best interests of ODD. I have already heard the evidence relevant to determining appropriate parenting arrangements. Little would be achieved, outside of increased time, expense and duplication of evidence, if I were to require a second trial or application to determine this issue. It might also raise issues of parties attempting to introduce evidence that could or should have been entered in the trial I have just heard.
- [379] I am cognizant of the risk inherent in making rulings that do not reflect the reality of a situation. However, I am confident that I was able to determine the relocation issue within the parameters of the double-bind analysis by disabusing my mind of the fact that HDD would remain in Pemberton if the application was dismissed. If I did not feel able to do so, I would have recused myself, declared a mistrial on that issue, and had the parties proceed with the relocation application anew before a different presider.
- [380] Having completed the relocation application, for the reasons set out above, in my view, it is appropriate to proceed with the rest of the application as proposed by the parties.

Legal Principles

[381] Section 16(6) of the DA states:

- (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

[382] In my view, Justice Elwood in *Den Duyf* summarized the appropriate legal principles governing the allocation of parenting time:

- [118] In *Barendregt*, the Supreme Court of Canada cautioned against continued use of the so-called "maximum contact principle". The Court found that Parliament has recast the principle as "parenting time consistent with best interests of child." There is no presumption that parenting time is shared equally. Instead, each case must involve a child-centric inquiry into how much parenting time with each spouse is in the best interests of the specific child: *Barendregt* at paras. 133-135.

Historical Parenting Arrangements

- [383] HDD has been ODD's primary caregiver. She exclusively managed ODD's childcare, extracurriculars, playdates and medical appointments. She cared for her through the challenges of a colicky baby. She is a good parent with a strong bond with ODD.

- [384] NDD is a good parent with a healthy bond with ODD. Since separation and then since Justice Elwood's order of November 2024, he has been increasingly involved in ODD's care, including extracurriculars, playdates, managing childcare and medical appointments.
- [385] Although NDD sought 50:50 parenting in the October 2024 application, Justice Elwood elected to increase NDD's parenting time to 60:40:
- [121] In my view, it would not be in the Child's best interests to implement a 50/50 shared parenting schedule at this time. Moving directly to a shared parenting schedule would be too much of a change for the Child.
- [122] However, I do find that an increase in Nolan's parenting time would be in the best interests of the Child. More time with Nolan while the Child is awake would help foster and maintain her relationship with her father as she develops, which happens quickly at this age.
- [123] An increase in Nolan's parenting time on days that the Child is not in daycare would also provide Hanna with additional time to work on her digital marketing business, which would, in turn, promote the Child's best interests.
- [386] It has now been nearly a year since Justice Elwood increased NDD's parenting time to 60:40. NDD has been increasingly involved in ODD's care, and she is thriving.
- [387] In addition, HDD needs to reduce the amount of childcare that she directly provides to ODD in order to increase the amount of time for her to work.

Parenting Arrangement Order

- [388] In my view, it is appropriate at this time to increase NDD's parenting to a 50:50 shared ratio. This is consistent with the gradual approach taken to incrementally increase NDD's caregiving time with ODD and decrease HDD's caregiving time with ODD, which is also consistent with the best interests of ODD.
- [389] Given the flexibility in NDD's work schedule, and the ability for his family to provide free childcare to ODD, NDD and HDD should collaborate to establish a parenting schedule that accommodates HDD's ability to work full-time. If the parties cannot agree on a schedule, they may appear before me, and I will make an order that specifies the specifics of the arrangement.

Restrictions on Caregiving While in Other Parent's Care

- [390] NDD and HDD currently have a right of first refusal over childcare, which enables the other parent the right to provide childcare if the parent with ODD cannot personally provide the care and a restriction that people who provide ODD with care are limited to people on an approved list. HDD has taken an unnecessarily restrictive approach to this provision, requiring NDD to provide her with a right of first refusal even if he is running a brief errand while ODD is in his care and refusing to allow LDD to provide care to ODD. The motivation of such an interpretation is not the best interest of ODD, but rather to make

things difficult for NDD and due to her animosity towards LDD.

- [391] In my view, HDD has not entirely accepted that she is in a shared parenting arrangement with NDD and that it is in ODD's interest that other people will be providing ODD with care in order for each of the parties to work full-time. Having ODD form close relationships with NDD's family and his partner is part of shared parenting and is in ODD's best interest.
- [392] Both NDD and HDD are good parents who generally exercise good judgment with respect to ODD. They are responsible enough to be able to select appropriate caregivers for ODD when she is under each of their care. Given the degree of conflict between the parties on this issue, in my view, a right of first refusal for providing care to ODD when she is under the care of the other parent, and requiring the other parent to approve care providers who will provide care, is not in ODD's best interest and is no longer appropriate.
- [393] I would encourage the parties to give the other parent the opportunity to provide care if they are unable to look after ODD for an evening or extended period of time. However, given the abuse of this provision that has occurred, I strike out the orders providing a right of first refusal and limitation on approved caregivers.

Contact with ODD While in Other Parent's Care

- [394] The parent caring for ODD will facilitate and support ODD's communication with the other parent every second day that ODD is in their care for a maximum of 10 minutes per call. The calls will occur at 6:45 pm unless a parent requests a change of time at a minimum of two hours before the scheduled time or the proposed new time, whichever is longer. The non-changing parents will use reasonable efforts to accommodate a change in time, but are not required to change previously scheduled activities. If an agreement cannot be reached, the call will occur at 6:45 pm.
- [395] The parent providing care to ODD will use their best judgment with respect to additional contact with the other parent.

Travel

- [396] Either parent is at liberty to travel with ODD during their respective parenting time subject to the following:
- a) unless otherwise agreed, the travel will not disrupt or occur during ODD'S attendance in primary and secondary school;
 - b) for travel within British Columbia, the travelling party will notify the other party as soon as reasonably possible of the plans or travel, including the dates of travel, the destination, the address and contact information where ODD will be staying and any flight itineraries;

- c) for travel outside of British Columbia, the travelling parent must provide notice to the other party of the travel, which will include dates of travel, addresses and contact information for ODD, flight itineraries and confirmation that adequate travel medical insurance has been acquired for ODD;
- d) notice of travelling outside of British Columbia must be provided as follows: for trips under 72 hours, at least 24 hours notice; for trips between 72 hours and seven days, at least seven days notice; and for trips exceeding seven days, at least 21 days notice; and
- e) for all travel, the non-travelling party's consent will not be unreasonably withheld. If the travelling party provides the non-travelling party with an authorization letter, the non-travelling party will promptly attend to getting the letter signed and notarized at the travelling party's expense. If there is no request for the letter notarized, then the non-travelling party will sign the letter with an adult witness.

[397] HDD will have possession over ODD's travel documents, including her passport. HDD will promptly make the passport available to NDD for all agreed travel outside of Canada. NDD will return the passport to HDD within seven days of returning from the travel.

Communication

[398] NDD and HDD struggle with communicating with each other. This is not conducive to shared parenting.

[399] Except in cases of emergency, or to address time-sensitive issues, NDD and HDD shall communicate, share information, scheduling and appointments regarding ODD via the Our Family Wizard application.

[400] The parents have an obligation to advise the other parent of any matters of a significant nature affecting ODD.

[401] The parents will:

- a) put the best interests of ODD before their own interest;
- b) encourage ODD to have a good relationship with the other parent;
- c) speak to ODD about the other parent and a positive and respectful manner;
- d) maintain polite, respectful communications with each other, refrain from any negative, hostile criticism, communication or argument with each other in front of ODD; and
- e) use neutral language when communicating with each other and remove as many descriptors as possible in their communication.

[402] The parents will not:

- a) make personal, disrespectful, or denigrating comments in their communications with each other about the other parent or life choices;

- b) question ODD about the other parent or time spent with the other parent beyond basic conversation;
- c) discuss with ODD any inappropriate adult or legal matters; or
- d) blame, criticize, or disparage the other parent to ODD or within earshot of ODD.

[403] The parents will use their best efforts to ensure that their respective families and friends do not speak negatively or disrespectfully about the other parent, either to ODD or within earshot of ODD.

[404] Each parent will do their best to respect the other parent's privacy. This includes refraining from making any recordings of the other parent or referencing the other parent, directly or indirectly, on online posts.

Support

NDD's Income

[405] NDD works full time. His employment is commensurate with his training and experience. In addition, he enjoys benefits such as a vehicle, gas and cellphone which should, to some extent, be treated as income for support purposes.

[406] I agree with NDD's submissions that, given his historic income and allowing for the fact that he is changing positions from working in the shop to sales, \$97,779 is close to his full-time wage and grossed-up benefit of using a vehicle and fuel card for his travel.

[407] In my view, NDD's non-wage benefits should amount to more than the income put forward by his counsel, and I assess his 2025 income at \$100,000.

[408] In this calculation, I have assessed the value of his non-wage benefits as the difference between his expected 2025 income and \$100,000. In my view, this is an appropriate amount to use going forward for non-wage benefits. For 2026 income, NDD's income should be his actual 2025 income plus this non-wage benefit amount as his base income for support purposes.

[409] In addition, NDD now owns the ED Property. I expect that he will rent out the main unit in the home typically this would be accounted for as income. However, there would be considerable additional expenses reflected in the financing of the home beyond what he would be expected to pay in rent for his own accommodations.

[410] To a considerable degree, these expenses will be dictated by what ADD and LDD charge for interest on the money owed to them and how quickly NDD can pay down the mortgage owed to the bank. Given the amount of debt apportioned to NDD, in my view it is not appropriate to use rental income associated with the ED Property as income for support or section 7 expense purposes.

HDD's Income

- [411] HDD currently earns \$600 per month from her contract with Copper and Fern and \$1,500 per month from her contract with Britannia Village. In addition, she is doing about \$300 a month worth of work for Pemberton Brewing. This totals \$2,400 per month, which equates to approximately \$28,800 for the year. HDD's income is uncertain, and she could always lose her current clients. However, it is my expectation that she will increase her income with further efforts before the little remaining time at the end of this year expires. I would assess her income for 2025 at \$30,000.
- [412] HDD has been living rent free in the main house on the ED Property. I attributed this as a family debt owed by HDD to NDD, and I then transferred all of her debt to NDD as part of the re-apportionment process. Although I am not treating this as income, it is a factor that I will consider in my analysis for HDD's claim for spousal support.
- [413] I have expressed my concerns that HDD has not been fully engaged in seeking work. However, in my view, it is not appropriate at this time to attribute additional income to her. It is apparent that HDD has been under considerable pressure and stress. In no small part, this has been aggravated by the fact that surveillance cameras were used to record her coming and going from her home. She is navigating a very difficult time in her life and ODD's life. It is a testament to her resiliency that she continues to be able to function at such a high level.
- [414] ADD and LDD have indicated that they will provide HDD with \$20,000 to assist her with rent in Pemberton. It is provided for that purpose. I note that this was initially money intended to be given to HDD as part of her termination from Sabre. This money should not be considered income, as doing so would simply mean HDD has to repay some of it to NDD instead of using it for rent.

Child Support

- [415] From the date of judgment until June 30, 2026, child support will be calculated using the following incomes:
- a) NDD - \$100,000; and
 - b) HDD - \$30,000.
- [416] The parties will exchange their income tax returns for 2025 prior to June 30, 2026. From July 1, 2026, to June 30, 2027, child support will be calculated based on the following incomes:
- a) NDD - his declared income for 2025, plus non-wage benefits as set out earlier in these reasons; and
 - b) HDD - her declared income for 2025.

Special Expenses and Child Care

- [417] The parents have been unable to agree on suitable costs for childcare provided by third parties. For HDD to work full-time, childcare services will be necessary. If NDD believes that the childcare proposed by HDD to enable her to work is too expensive, it is his responsibility to find a reasonable alternative.
- [418] Both parties will have to be flexible with respect to whom provides the care and when the care can be provided. This will include inquiries with employers about flexibility for childcare issues and attempting to maximize work opportunities when HDD is not caring for ODD.
- [419] Special and extraordinary expenses, which include childcare, will be promptly paid, and calculated as follows: 75% by NDD and 25% by HDD.
- [420] This will be recalculated on July 1, 2026, for the next year using the following formula:
$$\text{NDD} = (\text{NDD child support income}) / (\text{NDD child support income} + \text{HDD child support income})$$
 rounded down to the lowest 5%. HDD's amount will be recalculated using the following formula $(100\% - \text{NDD}\%)$.

Spousal Support

Length of the Marriage-Like Relationship

- [421] NDD and HDD met in October 2019 and formed a close relationship shortly thereafter.
- [422] In February 2020 during COVID, NDD isolated with HDD at her premises, which she resided in with other roommates. After the isolating period they had a brief breakup and then got back together.
- [423] By April, NDD was living with HDD in her premises but also continued to reside at his parent's house where he had his clothes cleaned, ate, stored items, paid rent, and interacted with ADD, LDD and MDD.
- [424] In May, HDD's roommate became pregnant and HDD decided that she would like to move to a different residence. She located a small apartment in an industrial park and showed it to NDD. NDD agreed to move into the new residence with HDD. They signed a lease on June 20, 2020, and moved in a couple of days before July 1, 2020. They opened up a joint bank account to pay for their household expenses.
- [425] Although NDD was spending most of his non-working time with HDD prior to signing a lease with her, in my view, the signing of the lease and moving into an apartment together was a significant step in their relationship. It was at this time that NDD moved out of his parents' house and that HDD and NDD obtained a joint bank account to pay for their home.
- [426] In my view, when NDD and HDD moved into the apartment together, they formed the intention that their relationship would become marriage-like.

[427] NDD and HDD commenced living in a marriage-like relationship shortly before July 1, 2020. The marriage ended on December 6, 2023, and was therefore approximately two and a half years in duration.

Entitlement to Spousal Support

[428] HDD relies upon the principles for spousal support set out in *Parton v. Parton*, 2018 BCCA 273 at paras. 38-39 and 42-46 for the proposition that she is entitled to spousal support on compensatory and non-compensatory grounds.

[429] HDD has a very weak claim for compensatory spousal support. Her marketing business was essentially eliminated by COVID. After COVID, she chose to devote herself to her new passion of being a farmer. This venture was not successful. In my view, this was a personal choice and not a result of the marriage-like relationship she had with NDD.

[430] The main compensatory issue raised was trying to re-establish a career in marketing while being primarily responsible for caring for ODD. This extended from ODD's birth until November 2024, when NDD's parenting time was increased.

[431] Although she was no longer primarily responsible for caring for ODD, she had difficulty finding childcare due to the limited options available in Pemberton. Part of these difficulties were based on her decision not to utilize LDD as a childcare provider or to rely more on NDD for childcare assistance.

[432] HDD has a stronger claim for non-compensatory spousal support. NDD has a higher-paying job, while HDD has to rebuild her marketing career.

[433] A major factor affecting the claim for non-compensatory spousal support is the substantial debt that has been re-apportioned to NDD. This re-apportionment includes debt that HDD incurred because she insisted on living in the home on the ED Property. I note that she was offered to live in the suite on the property rent-free so that the home could generate rental income to offset the family debt, an offer she declined. The cost associated with this aspect of the reapportionment alone is considerable.

[434] When considering the economic consequences of the breakdown of the marriage, an important factor is that NDD is responsible not only for the debt under the MOU (which he owes to his parents) but also for a substantial mortgage owed to a bank.

[435] In my view, based on these factors, HDD is entitled to spousal support at the midpoint of the SSAG guidelines from the time that she vacates the ED Property until ODD enters full day kindergarten in September 2026.

[436] Support will be calculated using the same incomes that are used for child support.

Divorce

[437] My reasons have set out the facts required for a divorce under the DA. I order that NDD and HDD are divorced.

Costs

[438] If the parties are unable to agree on costs, they may make an application to appear before me to obtain a date to conduct a cost hearing. If such a hearing is necessary, they should apply within 45 days of the date of these reasons for a time to set the hearing. I would request that they provide the registry with a number of mutual agreeable dates and time estimates when they apply for a hearing date. I do not expect that such a date could be set within the 45 days.

"Thomas J."

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