
CANADA / JUDGMENT

El-Jaroudi v. El-Mikati

2020 BCSC 868

COURT

Supreme Court of British Columbia

DECIDED

10 June 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 868 El-Jaroudi v. El-Mikati

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

El-Jaroudi v. El-Mikati,

2020 BCSC 868

Date: 20200610

Docket: E51767

Registry: New Westminster

Between:

Maha El-Jaroudi

Claimant

And

Zakaria El-Mikati

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

Counsel for the Claimant:

A. Jahanmiri

The Respondent, Appearing in person:

Z. El-Mikati

Place and Date of Trial:

New Westminster, B.C.

October 15, 17, 22, 2018

May 6 - 10, 13-17, 2019

October 7 - 11, 2019

January 29 - 31, 2020

March 2 - 5, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 10, 2020

Table of Contents

I. Overview... 4

II. Litigation History.. 4

III. Credibility and Reliability.. 5

IV. Marriage Dowry.. 6

A. Legal Framework. 7

B. Background Facts. 7

C. Positions of the Parties. 8

D. Analysis. 10

V. Division of Family Property and Family Debts.. 14

A. Lebanese Properties. 15

1. Jurisdiction.. 16

2. Mazraa Property. 17

3. Ain Ksour Property. 20

B. Former Family Home. 26

C. Household Belongings. 27

1. Background. 28

2. Division of Household Contents. 31

3.	Storage Costs.	33
4.	Emergency Kit Items.	35
	D. Vehicles.	37
	E. Bank Accounts, Savings Plans, and Pensions.	39
1.	Bank Accounts.	39
2.	RRSP Accounts.	39
3.	TFSA Accounts.	41
4.	RESP Accounts.	41
5.	Richmond Elevator Pension..	42
6.	Lebanese Pension..	42
7.	CPP Pension..	43
	F. Family Debts.	43
1.	Loan to Claimant's Father	44
2.	FIDO..	45
3.	Home Buyer Plan..	45
4.	Canada CCTB..	46
	VI. Issues regarding the children..	47
	A. Background.	48
1.	J.	48
2.	M.	50
	B. Entitlement to Support	51
	C. Amount of Support	54
1.	Claimant's Income.	55
a)	Legal Framework.	56
b)	Evidence.	57
c)	Income Imputation..	60
d)	Support Amounts.	62
2.	Respondent's Income.	63

D. Section 7 Expenses. 65

VII. Spousal Support.. 67

A. Background. 69

B. Entitlement 70

C. Amount 70

D. Duration.. 72

VIII. Divorce.. 73

IX. Costs.. 73

I. Overview

- [1] The claimant, Maha El-Jaroudi, and the respondent, Zakaria El-Mikati, are both 52 years old. They separated in 2016 after being married for over 18 years. They have two daughters who are now both in university. Since the parties' separation the children have been residing with their father.
- [2] At issue is the respondent's claim for child support; the claimant's claim for spousal support; determination of the parties' incomes for support purposes; and division of family property and family debts. Complicating matters are two properties located in Lebanon, which Mr. El-Mikati seeks to have excluded, and Ms. El-Jaroudi's request that Mr. El-Mikati pay her a marriage dowry pursuant to a Lebanese Islamic marriage contract.

II. Litigation History

- [3] The parties seek relief under both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] and the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Although legal concepts in family law are described differently under the FLA and the DA, the underlying purpose of the relevant provisions is identical. For clarity and consistency, I will determine issues making reference to the statutory provisions relied on by the parties.
- [4] Ms. El-Jaroudi commenced this proceeding on September 23, 2016. In her Amended Notice of Family Claim filed April 13, 2017, Ms. El-Jaroudi sought a divorce, unequal division of family property, division of family debts, enforcement of a Lebanese marriage contract, spousal support, joint guardianship, shared parenting responsibilities or alternatively primary residence, child support and section 7 expenses. At trial, the claimant abandoned all claims in relation to the children.
- [5] In his Amended Counterclaim filed November 9, 2016, Mr. El-Mikati seeks a divorce, as well as sole custody and primary care of the children, child support, section 7 expenses, and equal division of family property and family debts.

- [6] The trial of this matter commenced in October 2018 and concluded in March 2020. It was originally set for 10 days, but ultimately required almost 25 days of court time. Although the parties were both represented by legal counsel in the early stages of their litigation, they were both self-represented when the trial started. On the first day of trial, the claimant fell while exiting the witness box. The matter was adjourned. By the time the trial resumed in May 2019, the claimant had retained a lawyer who represented her for the duration of the trial.
- [7] The respondent remained self-represented throughout the trial. Although Mr. El-Mikati practiced as a lawyer in Lebanon, he is not qualified to practice law in Canada, and had limited knowledge of British Columbia legal practice and procedure. He obtained the assistance of a non-lawyer friend who was present for most of the court proceeding.

III. Credibility and Reliability

- [8] In addition to the parties and their two daughters (J. and M.), six lay witnesses testified in the trial. They were all family members of the parties, and testified primarily on financial matters. The court also heard from Sheikh Said Youseff Fawaz, who provided expert opinion evidence regarding the purpose and meaning of the dowry provision in the parties' marriage contract as it relates to Lebanese Islamic marriage traditions.
- [9] The parties often presented diametrically opposed versions of events such that credibility and reliability of their testimony was a prominent feature in this trial. I have weighed each witness' evidence carefully, having regard to various considerations, such as the consistency of their evidence with their prior evidence and that of other witnesses and documents. English is a second language for both of the parties and most of their witnesses. Though the parties are fluent in English and testified without an interpreter, there were times when their evidence was impacted by linguistic challenges. I have factored these limitations into my credibility assessment.
- [10] I generally did not find the claimant to be a credible or reliable witness. She was prone to exaggeration, inconsistent, vague when it suited her, and rarely made admissions against self-interest. Much of her evidence lacked an air of reality, and was contradicted by documentary and other evidence, such as that provided by her at her examination for discovery. Her animosity towards Mr. El-Mikati was evident throughout her testimony. Her testimony lacked objectivity and she went out of her way to portray Mr. El-Mikati in a negative light. Many of her actions in relation to Mr. El-Mikati can only be characterized as vindictive. Her allegations to the police (and repeated in court) that Mr. El-Mikati was violent and abusive, were unproven.
- [11] Overall, I found Mr. El-Mikati to be a credible and reliable witness. His testimony was supported by documentary and other evidence in this case. He was consistent and rarely shaken in cross-examination. He readily made admissions against self interest. He was capable of being objective, and presented a fair and balanced view of the claimant and her

witnesses, despite their obviously fractured relationship. His evidence had an air of plausibility and was given without exaggeration. Thus, where there is a contradiction between Mr. El-Mikati's evidence and that of Ms. El-Jaroudi's, I have generally preferred Mr. El-Mikati's evidence.

- [12] I have addressed any specific concerns about the credibility or reliability of a witness' evidence in the context in which it arises in these Reasons.

IV. Marriage Dowry

- [13] One of the biggest points of contention between the parties is Ms. El-Jaroudi's claim for a marriage dowry which she says was payable by Mr. El-Mikati upon dissolution of the marriage, pursuant to a Lebanese Islamic marriage contract dated January 31, 1998 (the "Marriage Contract").
- [14] Mr. El-Mikati acknowledges that the parties entered into the Marriage Contract. However, he argues that the contract is void and unenforceable on jurisdictional grounds. Alternatively, if I find that the contract is enforceable, he submits that the terms of the contract have not been met.

A. Legal Framework

- [15] Section 252(2)(a) of the FLA provides that the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] applies in relation to proceedings respecting enforcement of an agreement respecting property division, where the agreement was entered into prior to the FLA coming into force: *Mohammadi v. Mohammadi*, 2016 BCSC 1873 at para. 48.
- [16] A "marriage agreement" is defined in s. 61(2) of the FRA, as follows:
- 61 (2) A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
- a) management of family assets or other property during marriage, or
 - b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.
- [17] The existence of an enforceable marriage agreement must be supported by the evidence in each case: *Mohammadi* at para. 48.
- [18] Even if the dowry in this case qualifies as a valid marriage agreement under the FRA, it may be set aside if it is found by the court to be unfair: *Mohammadi* at para. 52.

B. Background Facts

- [19] The parties are both Sunni Muslims. They were born and raised in Lebanon. They met in 1994, and became engaged in early 1995. They married in Lebanon on January 31, 1998. At the time of their marriage, the claimant was a bank employee and the respondent was a practicing lawyer.
- [20] The marriage was conducted at the respondent's parents' home in El-Mazraa, Lebanon. In accordance with Sunni Sharia religious traditions, the parties entered into the Marriage Contract on their wedding day. Both parties were present when the Marriage Contract was executed. As is customary, the Marriage Contract was entered into through the parties' proxies, namely their fathers.
- [21] The Marriage Contract makes provision for a mehr (dowry) payable to the bride. The amount of the mehr was negotiated by the parties' fathers. The terms of the Marriage Contract are as follows:

Advance Dowry: Copy of the Holy Quran, received, and a Deferred Dowry of one hundred fifty English Gold Lira, First Class.

(the "mehr" or "dowry provision")

- [22] The parties agree that the Marriage Contract was effective upon execution, and there is no dispute that the parties understood and agreed to its terms. Indeed, the uncontroverted evidence is that the marriage could only take place if there was agreement.

C. Positions of the Parties

- [23] The Marriage Contract provides for the payment of two dowries: an advance dowry and a deferred dowry. Although the document is silent as to when the dowries are to be paid, the parties agree that the advance dowry was to be paid on their wedding day. Accordingly, on January 31, 1998, Ms. El-Jaroudi received the advance dowry, which was a copy of the Holy Quran.
- [24] The parties also agree that the deferred dowry was to be payable to the wife upon the death of the husband or in the event of a divorce. However, they disagree as to whether Mr. El-Mikati is required to pay the dowry as part of this court proceeding.
- [25] Ms. El-Jaroudi submits that by virtue of this divorce proceeding she is entitled to receiving the deferred dowry of 150 gold liras (approximately \$60,000), in addition to pursuing civil remedies under the DA and FLA. In support, she relies on various case authorities in which our courts have accepted claims to enforce provisions of marriage agreements respecting the payment of dowries.
- [26] Mr. El-Mikati makes several arguments to dispute Ms. El-Jaroudi's claim:
- a) The Marriage Agreement does not meet the criteria required under the FRA.

- b) The Marriage Agreement provides for division of family property under a religious (Islamic) property regime. Thus, the claimant is not entitled to pursue enforcement of the Marriage Agreement while still maintaining a claim for division of family property under the civil property regime in British Columbia.
- c) In the alternative, if she is entitled to pursue her claim under both the religious and civil property regimes, the enforceability of the Marriage Agreement should be determined by the Sunni Sharia Courts, rather than BC courts.
- d) In the further alternative, the Marriage Agreement is void because it was Ms. El-Jaroudi who ended the marriage and not the respondent.

[27] In support of his position, Mr. El-Mikati relies on the evidence of Sheik Said Youseff Fawaz.

[28] Sheik Fawaz serves as the Imam of the Mosque of the Islamic Nation in Montreal, Quebec, and is also the Representative of the House of Fatwa (House of Statements) of the Lebanese Republic in Canada. He has a degree in Sharia law and served for four years as an assistant to the Sharia judge in the Sunni Sharia Court in Beirut. Sheik Fawaz prepared an expert report dated February 6, 2019, which was admitted into evidence at trial. In addition, Sheik Fawaz was called for cross-examination. I found Sheik Fawaz to be a knowledgeable witness. He provided his evidence in an objective and unbiased manner. His testimony was very helpful to the court, and I have placed considerable weight on it.

[29] Sheik Fawaz explained that a Lebanese Islamic marriage contract provides for the obligations and rights of spouses in accordance with Islamic Sharia law. The agreement is concluded by the Sunni Sharia Court in Beirut, Lebanon (the "Sharia Court"). The Sharia Court is empowered by the Lebanese government to perform marriages and rule on matters of divorce between Muslims.

[30] Sheik Fawaz testified that a Lebanese Islamic marriage contract provides for two types of dowries. The paid dowry must be paid to the wife immediately unless the parties agree otherwise. The deferred dowry is intended to provide financial security for the wife in the event that the marriage does not last. The deferred dowry is payable to the wife on the death of her husband while they are married, or when the husband divorces the wife without her consent. It is the only enforceable claim the wife has to her husband's property under Islamic Sharia Law. Though it is not specifically referenced in the marriage contract, the wife may also be entitled to spousal support for a duration of three months.

[31] Sheik Fawaz explained that whether or not the deferred dowry must be paid is determined by a Sharia judge in the course of an Islamic divorce proceeding. The adjudication is made in accordance with Islamic Sharia Law and having regard to the circumstances of each particular case. Generally, a deferred dowry is not owed to the wife if she initiates the divorce. However, there may be circumstances in which the deferred dowry must still be paid, such as mistreatment of the wife by the husband. In a Sharia divorce, neither spouse has any entitlement to property or assets held by the other spouse beyond what is stipulated

in the marriage contract, or what they have gifted to each other. This also applies to debts, such that the wife is absolved of all responsibility for any family debts on the granting of the Sharia divorce.

- [32] Sheik Fawaz also explained that even if the parties are divorced under Canadian law, they are considered married under Sharia law unless they seek a religious divorce. However, Canadian laws are respected, and a religious divorce will be granted to a Canadian Muslim couple only after a divorce judgment has been rendered by a Canadian court.

D. Analysis

- [33] For reasons set out below, I find that the claimant is not entitled to the deferred dowry in the Marriage Contract.
- [34] The Marriage Contract fits the criteria for a marriage agreement as per the FRA. It was made between a man and a woman at the commencement of their marriage, and was to take effect at the time of execution, on the making of an order for dissolution of marriage. The deferred dowry is properly characterized as "other property" within s. 61(2)(b) of the FRA.
- [35] However, the Marriage Contract provides for payment of a deferred dowry to the wife as part of a specific legal remedy within the context of Lebanese Islamic marriage traditions, which are governed by Sharia Law. Under those traditions, the parties to the marriage contract agree to govern their affairs in accordance with Sharia Law, which dictates how and when the deferred dowry is to be paid. The deferred dowry acts to extinguish any claim the wife has to assets held by the husband beyond that which is provided for in the Marriage Contract. I conclude that it provides a religious remedy for division of family property and debts, as an alternative to, rather than ancillary to, civil remedies.
- [36] The claimant relies on *Amlani v. Hirani*, 2000 BCSC 1653 at paras. 16-23 for the proposition that she can pursue civil remedies while also seeking enforcement of the Marriage Contract. In *Amlani*, Justice Sinclair-Prowse rejected the husband's argument that the mehr was only payable in the absence of civil remedies being available to the wife. In doing so, she noted that the husband's position was inconsistent with the evidence in that case: *Amlani* at paras. 29-31.
- [37] The facts of *Amlani* are considerably different than in the case at bar for the following reasons:
- a) The marriage contract in *Amlani* was for an Ismaili marriage.
 - b) The *Amlani* contract was entered into in the US during a religious marriage ceremony which was held in the US and which occurred about one year after the parties married in a civil ceremony also held in the US.
 - c) The parties acknowledged in the contract that the marriage had occurred in accordance with US laws.

- d) The contract contained a declaration from the husband that his undertaking to pay the agreed sum of money by way of mehr to his wife "shall be in addition and without prejudice to and not in substitution of all my obligations provided for by the laws of the land".
- [38] Here, the parties are Sunni Muslims, they married in Lebanon and entered into the contract in Lebanon in accordance with Sunni Sharia laws. Conspicuously absent is a declaration in the Marriage Contract from Mr. El-Mikati that the agreement applies in addition to his obligations under Canadian law. It would be surprising if it did, since there is no evidence that at the time of their marriage the parties contemplated that they may be divorcing years later in Canada, in a civil divorce proceeding held under the Canadian legal framework.
- [39] In addition, there is evidence in this case both from the parties and Sheikh Fawaz that there are restrictions on when the mehr is payable. Such evidence was missing in *Amlani*.
- [40] The claimant also relies on *Kariminia v. Nasser*, 2018 BCSC 695, which is similarly distinguishable. The parties in *Kariminia* were both Iranian, and had signed an Iranian marriage contract. Counsel for Ms. El-Jaroudi concedes that there is a material difference between Iranian Islamic marriage contracts and Lebanese Islamic marriage contracts. In addition, before getting a Canadian divorce, the wife in *Kariminia* had obtained judgment in Iran requiring the husband to pay her the dowry. The husband did not attend the hearing in Canada, and Justice Forth does not refer to any evidence about the purpose of the dowry. In those circumstances, Justice Forth upheld the dowry portion of the marriage contract which provided for the payment of 114 gold coins (approximately \$49,000).
- [41] In *Delvarani v. Delvarani*, 2012 BCSC 162, Justice Powers refused to enforce a marriage agreement, holding that it did not constitute a valid marriage agreement under the FRA because the parties did not reach an agreement to payment upon dissolution of the marriage. The court noted at para. 209 that it was difficult to accept that the husband would have committed himself to paying the dowry in addition to any other obligations that he may have under BC laws. Justice Powers went on to note that even if the marriage agreement was valid under the FRA, it was clearly unfair.
- [42] A similar conclusion was reached by Justice Fisher (as she then was) in *Mohammadi*. In that case, the court refused to enforce the marriage agreement, holding at para. 54 that "I find it difficult to accept that he would have undertaken to be liable for such a large dowry that he had no ability to pay had he understood that the respondent intended to claim it from him."
- [43] Having regard to all of the evidence in this case, I conclude that the Marriage Contract is not enforceable alongside a claim for civil remedies under the FRA. In my view, Mr. El-Mikati would not have agreed to pay \$60,000 (a not insubstantial amount in light of the parties finances) if he had known that he would also have financial obligations under Canadian civil laws.

- [44] Even if the Marriage Contract were enforceable in addition to civil remedies, I conclude that it would be unfair to enforce it, given the amount being claimed relative to the parties' assets and the impact that enforcement of the agreement would have on the parties' respective financial positions and legal rights. I say this notwithstanding s. 108(3) of the FLA, which I address more fully elsewhere in these Reasons.
- [45] In the event that I find the Marriage Contract enforceable, but conclude that Ms. El-Jaroudi cannot seek enforcement of the Marriage Contract while also pursuing civil remedies, Ms. El-Jaroudi has asked me to defer to the civil remedies available to her under the FLA and DA. When viewed in the light of an alternative property regime, she considers that the Marriage Contract is unfair as it provides inadequate relief and goes contrary to the equal property regime in place in this province. I agree with this characterization of the Marriage Contract, and that in any event, this court is not well placed to make a determination of entitlement to the mehr, since the criteria for entitlement are unique to Sharia law, where the focus is on who initiated the divorce proceeding, who is to blame for the marriage breakdown, and whether there was any mistreatment during the marriage that would entitle the claimant to receiving the dowry. Such considerations are predicated on a fault-based view of entitlement, which was rejected by our legislators long ago.
- [46] I conclude that the Marriage Agreement does not create a contractual right in addition to a civil remedy within the BC family law regime, but rather, instead of a civil remedy. It provides for resolution of any property claims the claimant might have on marriage dissolution, through payment of a deferred dowry. The Marriage Contract is part of a separate property regime that addresses all the property rights available to the claimant under Islamic Sharia Law. Ms. El-Jaroudi has acceded to this court's jurisdiction by pursuing a claim for division of family property and debts under the DA and FLA. She has therefore waived her rights to assert a claim for payment of a dowry which is part of a different property law regime.
- [47] The claimant's claim for the deferred dowry is dismissed.

V. Division of Family Property and Family Debts

- [48] Pursuant to s. 81 of the FLA, each spouse is presumptively entitled to an undivided half interest in all family property as a tenant in common, and equally responsible for family debt. These rights and responsibilities accord to the parties regardless of their respective use or contribution. The date on which property rights vest is the date of separation: *Cole v. Cole*, 2016 BCSC 716 at para. 22.
- [49] Section 83(4) defines "property", which "includes a beneficial interest in property unless a contrary intention appears".

- [50] Under the FLA, property is categorized as either "family property" or "excluded property". All real or personal property owned by either spouse at the date of separation is broadly defined as family property (s. 84(1)). Section 84(2)(g)(ii) stipulates that the amount by which the value of excluded property has increased since the date the excluded property was acquired, constitutes family property.
- [51] "Excluded property" is property which presumptively remains with the owning spouse, and is not subject to division except by operation of s. 96. Section 85(1) of the FLA lists the categories of property that are excluded. Section 85(2) places the onus on the spouse claiming the exclusion to prove that the property qualifies as excluded property.
- [52] Family debts are defined under s. 86(a) of the FLA as all financial obligations incurred by a spouse during the period beginning when the relationship between the spouses began, and ending on their separation. Thus, any debt acquired during the relationship, regardless of whether it was for a family purpose, is a family debt: Cole at para. 25.
- [53] Pursuant to s. 86(b) of the FLA, family debt also includes all financial obligations incurred by a spouse after the date of separation, provided that they are incurred for the purpose of maintaining family property.
- [54] Section 87 of the FLA stipulates that in the absence of an agreement or court order, (a) the value of family property must be based on its fair market value and (b) the value of family property and family debt must be determined as of the date an agreement dividing the family property and debt is made, or the date of trial.
- [55] Section 95(1) of the FLA allows the court to order an unequal division of family property or family debt if it would be significantly unfair to equally divide such property or debt. Section 95(2) enumerates factors the court may consider in weighing an unequal division.
- [56] Section 96 prohibits the division of excluded property, unless it would be significantly unfair not to divide it having regard to the duration of the relationship and a spouses' direct contribution towards the preservation, maintenance, improvement, operation or management of excluded property.

A. Lebanese Properties

- [57] There are two properties in Lebanon over which Ms. El-Jaroudi claims an interest (the "Lebanese properties"). The first is a property located in the Al-Mazraa sector in the city of Beirut (the "Mazraa property"). The second property is located in the village of Ain Ksour (the "Ain Ksour property"). Mr. El-Mikati and his family are on title to both properties. Mr. El-Mikati's mother lives in the Mazraa property; the Ain Ksour property lies vacant and is in disrepair.

[58] Mr. El-Mikati submits that Ms. El-Jaroudi has no claim over either of the properties as he is holding his interest in them in trust for his mother. Alternatively, he submits that this court should decline to make an order pursuant to s. 106(4) of the FLA, on the grounds that it is more appropriate for the Sharia Court to rule on the ownership and interest in the Lebanese properties. I will address the jurisdiction question first.

1. Jurisdiction

[59] Section 106(4) of the FLA permits this court to decline to make an order for division of extra-provincial properties where this court considers it more appropriate for jurisdiction to be exercised outside of BC. In doing so, this court must have regard to the interests of the spouses and the ends of justice.

[60] In determining whether to decline jurisdiction, this court must consider all factors enumerated in s. 106(5):

- a) Relative convenience and expense for the spouses and their witnesses;
- b) If s. 108 choice of law rules apply, the law to be applied to issues in the proceeding;
- c) The desirability of avoiding multiple proceedings or conflicting decision in different courts or tribunals;
- d) The extent to which an order respecting property or debt made in another jurisdiction would be enforceable in BC and vice versa;
- e) The fair and efficient working of the Canadian legal system as a whole; and
- f) Any other circumstances this court considers relevant.

[61] Having regard to the circumstances of this case, and the interests of the spouses and the ends of justice, I conclude that it is more appropriate for jurisdiction to be exercised in BC rather than in the Lebanese Sharia Court. In arriving at this decision, I have carefully considered all of the factors set out in s. 106(5). I note first that in accordance with s. 106(2) (b), both spouses have submitted to the jurisdiction of this court. Ms. El-Jaroudi did so by commencing this action, and Mr. El-Mikati did so by failing to file a jurisdictional response as required under Rule 18-2(2) of the Supreme Court Family Rules, B.C. Reg. 169/2009.

[62] It also would be inconvenient and expensive to the parties and their witnesses if I was to decline to make an order in relation to the Lebanese properties. The witnesses have already incurred considerable expense and inconvenience. In particular, I note that Ms. El-Chimaitilly has travelled from Jordan on two occasions to be available for trial. Further, the Islamic Sharia Laws which would likely apply if I declined to exercise my jurisdiction are diametrically opposed to the regime of community property that exists in BC, a concern which was emphasized by the claimant's counsel. The Islamic Sharia legal regime does not recognize the equal ownership of property and debt regime which is in effect in BC; it is predicated on a fault-based view of entitlement to the deferred dowry; and it significantly

restricts any entitlement to spousal support.

2. Mazraa Property

- [63] The respondent's parents, Ibtissam Yehya El-Chimaitilly and Yehya El-Mikati, married in 1965. They had four children between them: the respondent and his brothers Mohammed Kheir, Mustafa, and Omar. To avoid confusion, I will refer to each of them by their first names, intending no disrespect. Yehya passed away in 2001. Omar passed away in 2009.
- [64] Ms. El-Chimaitilly is a retired school teacher, and also served as a deputy manager for a school in Beirut. She was employed at the school continuously from 1985 to 2013, with the exception of two years when she was on leave. In addition, she earned money sewing clothes and crocheting, and helping her husband in his business.
- [65] The Mazraa Property is an apartment located in a multi-story residential building. It was purchased in 1969 by Ibtissam and Yehya for \$22,000 Lebanese Liras ("LL", also known as Lebanese Pounds). The apartment was intended to be the primary residence for their growing family. Ms. El-Chimaitilly's brother loaned the couple 18,000 LL to buy the apartment; the balance of the funds came from the sale of their previous home. Ms. El-Chimaitilly re-paid the debt to her brother around 1973, using money she had inherited from her father's estate.
- [66] As is customary, the title to the Mazraa property was held in Yehya's name, even though most of the purchase price was paid by Ms. El-Chimaitilly. Following Yehya's death, cultural traditions dictated that title to the Mazraa Property be transferred to all family members that had a claim over the estate, rather than solely to the deceased's widow. In this case, Yehya's shares were distributed between Ms. El-Chimaitilly and their four children. Out of the total issued shares, the respondent held approximately 22% interest. After Omar's death, his shares were distributed amongst the four remaining joint owners. The respondent's share in the Mazraa Property increased to approximately 28% as a result.
- [67] Though her children have grown and moved out, and her husband has passed, the Mazraa Property is still Ms. El-Chimaitilly's home. She has lived in it continuously since 1969. The respondent and the claimant have never lived in this property as a married couple.
- [68] The respondent maintains that he is holding his interest in the Mazraa Property in trust for his mother. This evidence was corroborated by Ms. Chimaitilly. She testified that although custom dictated that her children be added on title following her husband's death, it was never her intention, nor that of her husband's, to relinquish her full interest. Rather, it was understood that her children were holding their shares in the Mazraa Property in trust for their mother. Although it was possible to transfer the title fully into her name, Ms. El-Chimaitilly did not feel that it was necessary to do so. She trusted her children, and believed that they would continue to keep holding their shares in trust for her.

- [69] I found Ms. El-Chimaitilly to be a compelling witness. She was credible and reliable. She had good recall of events, her evidence was logical and consistent, and delivered in a balanced and forthright manner.
- [70] Ms. El-Chimaitilly's evidence was further corroborated by her son Mohammed Kheir. He testified that prior to his death, Yehya told his children to take care of their mother. The brothers were in agreement that they would transfer their shares to their mother. However, Ms. El-Chimaitilly stopped them, telling them that it was not necessary as she trusted them to hold their shares in trust for her.
- [71] Ms. Chimaitilly's evidence is also consistent with her actions. All expenses for the maintenance and upkeep of the Mazraa Property have been borne by Ms. El-Chimaitilly alone following her husband's death. She renovated the apartment and made repairs to it using her own funds. She has also continued to take care of all related expenses, such as furniture, strata fees, and property taxes.
- [72] The preponderance of evidence supports the respondent's position that his interest in the Mazraa Property constitutes excluded property. Because equity presumes bargains, not gifts, there is a general presumption in the law that when one person gratuitously transfers property to another adult person, the recipient holds the property in trust for the donor: *Hu v. Li*, 2016 BCSC 2131 at para. 36. In this case, the presumption is borne out by the evidence.
- [73] I also am unable to find that it would be significantly unfair not to divide the excluded property pursuant to s. 96(b) of the FLA. The Court noted in *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 10 that s. 96(b) permits a trial judge to consider only two factors in determining whether it would be significantly unfair not to divide excluded property: the duration of the parties' relationship and any direct contribution by a spouse to the preservation and maintenance of the property. The Court went on to say that:

Obviously, the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the 'unfairness' test in the FRA

- [74] There is no evidence that the claimant or even the respondent made any contribution to the purchase, maintenance or upkeep of the Mazraa Property.
- [75] I conclude that the Mazraa property constitutes excluded property under s. 85 of the FLA and is not subject to division.

3. Ain Ksour Property

- [76] The Ain Ksour property consists of a steep parcel of land with a two story building containing four apartments. Two of the apartments are fully constructed while the other two are unfinished and exist as shells only. As noted elsewhere, the property is currently in disrepair and unoccupied.

- [77] Ms. El-Chimaitilly and her husband purchased the Ain Ksour Property (also referred to as "Lot 21") as bare land around 1995, for approximately \$31,000 USD. It was their intention to construct an apartment building containing four living units. They wished to give one apartment to each of their four children to live in rent free. Most of the money for the purchase price came from Ms. El-Chimaitilly and her husband. Mohammed Kheir paid the remaining \$3,000 USD towards the purchase price.
- [78] As with the Mazraa Property, Yehya held sole title to the Ain Ksour Property until his death in 2001. Following his passing, his interest was divided between his widow and four children as joint tenants, in the same proportionate share as the Mazraa Property. Later, with Omar's passing in 2009, Omar's interest was distributed between his siblings and his mother, such that currently, the respondent holds a 28% share in the Ain Ksour Property.
- [79] Construction on the property commenced in late 1995. It was financed mostly through the sale proceeds of a property that Ms. El-Chimaitilly had inherited from her parents. She sold her inherited property for \$125,000 USD, and then used those funds for the construction of the apartment building. By the fall of 1997 only two apartments had been completed as they had run out of money. Ms. El-Chimaitilly testified that she and her husband assigned each apartment to one child and asked them to complete the construction. As both the respondent and Mohammed Kheir were engaged, they completed construction of their units first. This included paying for all the internal finishing and painting of each unit.
- [80] Although the claimant testified that she spent about \$20,000 to \$25,000 USD to complete the interior of the Ain Ksour apartment, I did not find her evidence on this issue credible. She provided no documentary or other evidence to corroborate her assertions and it was contradicted by the respondent and his witnesses, whose evidence I preferred.
- [81] The respondent and claimant moved into the Ain Ksour Property following their marriage in January 1998. They were not required to pay any rent, and they lived there until immigrating to Canada in 2007. However, following the birth of their second child, they generally used the Ain Ksour Property as their summer home, alternating between it and a residence in Beirut where they lived during the winter months. In my view, the preponderance of evidence supports a finding that the respondent is not holding his interest in the Ain Ksour Property in trust for his mother.
- [82] The respondent acquired a legal interest in the Ain Ksour Property following the death of Yehya. The shares in the Ain Ksour Property received by the respondent are properly characterized as a gift or an inheritance, and thereby excluded property pursuant to ss. 85(1) (b) or (b.1) of the FLA. By operation of s. 84(2)(g)(ii), the claimant is entitled to the amount by which the value of the respondent's interest in the Ain Ksour property has increased since the date it was acquired by the respondent, in this case, 2001.

- [83] I turn now to determine the value of the respondent's shares in the Ain Ksour property. The claimant asks me to completely reject the valuations from the court appointed expert's report, and asks for a compensation payment of \$32,213.
- [84] In February 2017, Master Wilson, as he then was, ordered a joint appraisal of the Lebanese Properties pursuant to Rule 13-3. The parties agreed to jointly retain Malek Zouheir Chaar to conduct the appraisal. A joint letter of instruction was sent to Mr. Chaar by their lawyers around June 2017. Mr. Chaar was asked to provide an appraisal of both the Lebanese properties, with their current fair market value as well as their value in February 2001. Mr. Chaar agreed to the joint retainer in July 2017, and provided his appraisal report dated November 29, 2017 (the "first report").
- [85] The claimant was not happy with Mr. Chaar's opinion. She concluded that he was biased and colluding with the respondent's mother, thereby making his valuation unreliable. Despite her concerns, the claimant did not apply for leave under Rule 13-4(6) to have another expert appointed. It was not until May 2019, when the trial was already underway, that her counsel sought leave to introduce the evidence of an additional expert. The application was dismissed because there was insufficient evidence supporting the allegations of bias and collusion.
- [86] The trial did not complete in May 2019 as anticipated, and it was set for continuation in October 2019. I made an order for an updated appraisal of the Lebanese Properties from Mr. Chaar to be delivered prior to the continuation of the trial. Mr. Chaar prepared a supplemental report dated September 9, 2019 (the "second report") providing updated property values. The supplemental report was admitted into evidence, against the objection of the claimant, who again alleged bias, collusion, and unreliability. I found no basis to exclude the supplemental report, and no evidence of bias or collusion. I determined that any issues of reliability would go to weight.
- [87] Despite her very serious allegations against the court appointed expert, at no time did the claimant seek to cross-examine Mr. Chaar on either of his reports. Instead, at the conclusion of the trial, the claimant renewed her objection to Mr. Chaar's evidence, and asked me to place no weight on either report for reasons of bias and unreliability.
- [88] Of the myriad of allegations made against Mr. Chaar, the only one potentially going to bias is the respondent's allegation that Mr. Chaar had unauthorized contact with Mr. El-Mikati and his mother. This assertion is based on circumstantial evidence, rather than any direct knowledge on the part of the claimant, or any admission made by any of the witnesses. Mr. Chaar was never cross-examined to test the validity of this allegation, and Mr. El-Mikati and Ms. El-Chimaitilly deny it.
- [89] The impetus for this allegation of improper contact are some passages in Mr. Chaar's first report, which seem to indicate that Ms. El-Chimaitilly told him: the Mazraa apartment was renovated in 2003, she paid for the renovations out of her own money, and the total land size of the Ain Ksour property was 1593 square meters. Ms. El-Chimaitilly denies making these

statements to Mr. Chaar, and testified that her contact with Mr. Chaar was limited to providing him with keys to the properties and the property addresses. Without the benefit of hearing Mr. Chaar's testimony on this issue, there is insufficient evidence to conclude that the offending statements were in fact made by Ms. El-Chimaitilly.

- [90] Even if I were to find that Ms. El-Chimaitilly did tell Mr. Chaar when the Mazraa apartment was renovated, who paid for the renovations, and the size of Lot 21, this is not enough to establish bias on the part of Mr. Chaar. To conclude that he was biased requires me to make some findings about the impact these statements had on Mr. Chaar's ultimate opinion. There is no evidence that any purported statements made by Ms. El-Chimaitilly influenced Mr. Chaar to give a report that was biased in favour of the respondent, and I am simply not able to make that finding on the basis of conjecture alone.
- [91] If having unauthorized contact with Mr. Chaar is enough to establish bias, then it is equally open to me to conclude on the evidence that Mr. Chaar was biased in favour of the claimant. This is because both the claimant and her counsel had contact with Mr. Chaar without the respondent's knowledge or consent. During the trial, it was revealed that Ms. El-Jaroudi contacted Mr. Chaar in December 2016, prior to the parties sending him a joint retainer letter. In the course of that contact, Ms. El-Jaroudi provided sufficient information to enable Mr. Chaar to understand what kind of a report was being sought, and advise her how much it would cost and how long it would take. In addition, subsequent to my order that the parties jointly instruct Mr. Chaar to prepare a supplemental report, counsel for Ms. El-Jaroudi sent the instruction letter to Mr. Chaar without notifying Mr. El-Mikati or obtaining his consent.
- [92] Thus, even if I assume that there was unauthorized contact between Mr. Chaar and the respondent or his mother, in which some potentially prejudicial information about the property was relayed, this is more than counter balanced by Ms. El-Jaroudi and her counsel's unauthorized contact with Mr. Chaar.
- [93] I conclude that the evidence supporting bias and collusion has not been established.
- [94] I turn now to the argument that Mr. Chaar's valuations are unreliable. It is alleged that:
- a) There is information missing from the first report, such as the fact that the Ain Ksour property has parking spaces which were not mentioned.
 - b) Mr. Chaar does not indicate if he conducted his own research about the property or if he simply relied on statements made by the respondent's mother.
 - c) There is a discrepancy between his two reports in the reported size of Lot 21. In the first appraisal report, Mr. Chaar calculates the value of this property based on a lot size of 1593 square meters; however, in the supplemental report he says that Lot 21 is 1100 square meters. Mr. Chaar does not explain why his first report consisted of a completely different measurement, and he does not provide a revised 2001 value based on the new measurement.

[95] These concerns about the reliability of Mr. Chaar's report may be legitimate. They constitute prime examples of the types of issues that counsel would put to an expert witness in cross-examination. That of course was not done.

[96] Table 1 sets out Mr. Chaar's valuations of the Ain Ksour property as set out in his two reports, as well as an adjustment based on the reduced size of Lot 21.

Table 1: Ain Ksour Property - Chaar Report Valuations with Adjustments

Date

Measurement

The total value

(USD)

Adjusted Value Based on Land Size 1,100 sqm

February 2001

Land - 1,593 sqm at \$50 per sqm

\$80,000

\$55,000

Building - 849 sqm at \$400 per sqm

\$339,600

No change

Total: \$419,600

Total: \$394,600

November 29, 2017

Land - 1,593 sqm at \$100 per sqm

\$159,300

\$110,000

Building - 849 sqm at \$200 per sqm

\$170,000

No change

Total: \$329,300

Total: \$280,000

September 9, 2019

Land - 1,100 sqm at \$90 per sqm

\$99,000

No change

Building - 849 sqm at \$200 per sqm

\$170,000

No change

Total: \$269,000

Total: \$269,000

- [97] The main problem with these valuations was noted earlier, and that is the inexplicable reduction of the size of the land from 1593 sqm to 1100 sqm. Mr. Chaar does not explain where he got the original 1593 sqm number from. However, the revised size of 1100 sqm is supported by a document which is attached to the second report. The document was issued in August 2019 by the Republic of Lebanon Ministry of Finance. Thus while the source of the 1593 sqm measurement remains a mystery, I have no reason to believe that the 1100 sqm measurement is inaccurate.
- [98] Mr. Chaar explains the decrease in value of the Ain Ksour property from 2001 to 2017/2019 due to a number of factors: the significant state of disrepair of the building; the instability of the political and economic situation in Lebanon; lack of foreign investment due to tension between Lebanon and most other Gulf Cooperation Council countries; the location of the property on a dead-end and unpaved street; and the shape of Lot 21 which makes it less useable. The photographs of the apartment complex, verify the state of disrepair of the building. This is also corroborated by the various witnesses and evidenced by the fact that the property has not been rented out.
- [99] Even when I factor in Mr. Chaar's failure to note the existence of a parking spot, and adjust the calculations to account for the discrepancy in the size of Lot 21, it is clear that since it was acquired in 2001, the Ain Ksour property has decreased rather than increased in value. Since the claimant is entitled only to her one-half share of the amount by which the respondent's interest in the Ain Ksour property has increased since the date it was acquired, no money is payable to the claimant with respect to the Ain Ksour property.
- [100] I conclude that the claimant is entitled to retain his full interest in the Ain Ksour property without any compensation payment to the respondent.

B. Former Family Home

- [101] The former family home ("family home") was purchased in 2010 for \$568,000. It sold on July 15, 2017 for \$992,000. The net proceeds of sale amounted to \$467,000, and were placed in the claimant's former lawyer's trust account. After advances to both parties and various court orders, the balance remaining as at March 2020 was approximately \$143,660. Those funds are being held in the claimant's lawyer's trust account.
- [102] The claimant asks for an equal division of the net sale proceeds, whereas the respondent argues that the sale proceeds of the family home should be divided unequally pursuant to s. 95(2)(f).
- [103] Mr. El-Mikati asserts that he caused a significant increase in the value of the family home beyond market trends, and concomitantly, that the claimant caused a significant decrease. In support, he points to a number of custom upgrades that he did to the home post separation, as well as his pre-separation efforts to maintain and improve the property. In addition, the respondent says that his actions to prepare the property for sale - such as deep cleaning and staging of the home, and convincing the real estate agent to list the home for a higher price - resulted in the property being sold for a higher price. In contrast, he says that the respondent was obstructionist, non-cooperative, and refused to list the home with a real estate agent that placed a higher value on the home.
- [104] While there is credible evidence that the respondent did maintain and improve the property prior and subsequent to the parties' separation, the high evidentiary bar required for establishing a "significant increase" beyond market trends has not been met. The respondent's actions prior to the separation were not unusual for what would be expected of a spouse who is working towards a common family goal of preserving the parties' primary asset. Following the separation, the respondent lived in the home for over a year, during which time he had full enjoyment of the property. Any upgrades or cleanup he performed on the residence was based on his own occupancy of the home during this time. Any efforts beyond that fall within the range of what is reasonably expected of a prudent seller who wants to ensure that their property sells for maximum value. While these actions may have caused an increase in the value of the family home, it cannot be said that they caused a "significant" increase.
- [105] Similarly, while the claimant was no doubt obstructionist during some of the interactions between the parties, her actions do not meet the high bar required to establish that she caused a significant decrease in the value of the family home.
- [106] The respondent's claim for an unequal share in the family home is dismissed. Each party is entitled to a 50% share of the net remaining sale proceeds of the family home, which is approximately \$71,830 each.

C. Household Belongings

- [107] I turn now to matters involving the contents of the family home, including furniture, dishes, tools, and various other items ("household belongings" or "household items"). The parties dispute the value of the household belongings at the date of separation and disagree on where these items are currently held. They also differ on whether the claimant should receive a compensation payment in lieu of her share, who should pay the costs to remove the household items, and who should pay for the costs of storing the household items.
- [108] The claimant values the household belongings at \$15,000. She says that the respondent has kept all of the household belongings post separation, and asks for a compensation payment representing of \$7,500.
- [109] The respondent says that most of household belongings were set aside for the claimant, and are stored in three storage lockers. He wants an order permitting him to keep the household items currently in his possession, and giving the claimant possession of the entire contents of the three storage lockers, with no compensation payment made to either of them. He also wants the claimant to return his tools that he says she removed from the family home, and for her to pay for the cost of the storage lockers.
1. Background
- [110] The parties arrived in Canada in December 2007. Prior to their departure from Lebanon, they arranged to have their furniture and other household belongings shipped to Canada in a container. The container was insured for \$40,000 US, which was the depreciated value of the Lebanese furniture. The claimant testified that the furniture was custom made and purchased by her during their lengthy engagement. The respondent says that they both paid for the furniture, though he agreed that the claimant paid for a greater share.
- [111] On arrival in Canada, they initially lived with the claimant's brother, and then moved into a rental basement suite in April 2008. The family home was purchased in April 2010. Difficulties in the parties' marriage began to surface not long after. The claimant began to spend a large amount of time in Lebanon, living there for approximately one year between the spring of 2013 to spring 2014; and another six months or so from December 2015 to May 2016.
- [112] On August 12, 2016, there was an altercation between the parties while the children were home. The claimant called the police. M. started having a panic attack which frightened J., who called the Kids Help Line. M. was taken by ambulance to the hospital. The respondent and J. went to the hospital to be with M., while the claimant remained behind. M. was discharged on August 13 and the children and their father spent the next two nights in a hotel.

- [113] The Ministry of Children and Family Development ("MCFD") became involved, and a meeting was held between all the family members on August 15, 2016. This time it was the claimant who stayed in a hotel. On August 18, 2016, the MCFD held another family meeting where a safety plan was agreed to. The claimant moved back into the house though the parties slept in separate rooms.
- [114] On September 16, 2016, the claimant attended at the police station with her brother, Maher, and laid a complaint that the respondent had been violent towards her. Mr. El-Mikati was arrested and kept in jail overnight. The police took statements from the children, who said that they felt safer with their father and wanted to live with him. Ms. El-Jaroudi was asked to leave the home, and escorted out by the police who permitted her take some personal belongings.
- [115] The claimant says that she left with no money, no credit cards, and no furniture, and only a few bags of clothing and personal belongings.
- [116] On September 17, 2016 Mr. El-Mikati was released from jail without charges.
- [117] Ms. El-Jaroudi moved in with her brother, and commenced this litigation a week later. The parties communicated back and forth by text message in an unsuccessful attempt to resolve issues related to the household belongings. The claimant returned to the family home on a few occasions, to gather some personal effects. She was accompanied by a police officer or family counsellor.
- [118] The parties decided to list the home for sale but could still not agree on how to divide the household belongings. As they were at an impasse, Mr. El-Mikati decided to take some furniture with him to his new home so that the children had a furnished place to live in. In a letter dated June 21, 2017, he notified Ms. El-Jaroudi through his counsel what items he proposed to take from a list that she had prepared. Ms. El-Jaroudi was told that she could do a walk through of the house in early July, after Mr. El-Mikati had moved out, to determine what remaining items she wanted. Ms. El-Jaroudi says she did a walk through on July 4, 2017, but refused to take any items as Mr. El-Mikati had taken all the items of value.
- [119] Notwithstanding her view that the remaining household items were "garbage", the claimant hired some movers and attended at the home on July 6, 2017, with the intention of taking some household belongings. Her presence caused some concern to a tenant of the property, who called the police. Ms. El-Jaroudi was removed in handcuffs.
- [120] The dispute about dividing the household belongings continued. Mr. El-Mikati moved the remaining household contents into three storage lockers, costing him about \$300 per month. Ms. El-Jaroudi was notified when this step was taken.
- [121] Ms. El-Jaroudi moved to Coquitlam into her own accommodation in October 2017. Because she had not taken any of the household items, she purchased new furniture.

- [122] The parties entered into an Interim Agreement on October 26, 2017, which provided for a manner for division of household items, as well as other matters. The Interim Agreement required Mr. El-Mikati to prepare a comprehensive list of the household contents, including those items he had placed in storage. The division of household contents was to be done on December 1, 2017, by a "you pick - I pick" process. The parties agreed that the costs of the storage units would be shared equally commencing November 11, 2017. The first trial date of December 5, 2017 was adjourned as a result of the Interim Agreement.
- [123] The parties did not follow the "you pick - I pick" process stipulated in the Interim Agreement, and when this trial commenced before me in October 2018, the items were still in storage. Each party blamed the other for the failure to comply with the process they had agreed to for dividing the household items.
- [124] On my suggestion, the claimant finally attended on April 30, 2019, to ascertain the contents of the storage lockers. She submits that until that time, she did not know what was contained in the storage units. It is her evidence that the storage units were filled with boxes. Other than the master bedroom bed set, which she says was broken, there was no other visible furniture.
- [125] The claimant declined to take any items from the storage lockers, and the respondent has continued to pay for the storage costs.

2. Division of Household Contents

- [126] Based on the lists prepared by both parties, the value of the furniture when it was shipped from Lebanon, and the likely depreciation of items after the passage of time, I accept that \$15,000 is a fair and reasonable value for the entire household contents at the date of separation. However, I do not agree that Ms. El-Jaroudi should receive \$7,500 as a compensation payment. This is because I do not accept her evidence as to the quality and quantity of the items that Mr. El-Mikati took with him, and those that he left behind.
- [127] First, the photographs of what is contained in the storage lockers contradict Ms. El-Jaroudi's evidence, and are consistent with the items that Mr. El-Mikati says he placed into storage. The pictures depict furniture and other items that appear to be in reasonably good condition and are likely of value. Second, Ms. El-Jaroudi's evidence that her walk through in July 2017 revealed that Mr. El-Mikati had only left her with "garbage" is inconsistent with her decision a few days later to hire movers so she could take items left in the family home. Third, I find it implausible that Mr. El-Mikati would have gone to the effort and expense of moving items to fill three storage lockers if the remaining items were worthless. Fourth, Ms. El-Jaroudi's failure to even attempt to ascertain what was contained in the storage lockers, until urged to do so by the court, and her admission that she never went through the numerous boxes in the storage lockers to ascertain their contents, suggests that she was motivated by reasons other than achieving a fair and final resolution of this issue.

[128] After considering all the evidence, I dismiss Ms. El-Jaroudi's claim for a compensation payment for the household items, and dismiss Mr. El-Mikati's claim to have tools returned to him. In arriving at this decision, I have considered the following:

- a) The fact that Mr. El-Mikati made the first pick, so to speak, and may have taken some items that were of more value to the parties;
- b) Ms. El-Jaroudi's lack of credibility and the significant likelihood that she has additional items of considerable monetary value in her possession than what she has admitted to (see below discussion under the heading "Emergency Kit Items");
- c) The fact that by virtue of these Reasons, I am awarding Ms. El-Jaroudi the entire contents of all three storage lockers;
- d) Mr. El-Mikati's admission that there likely was some material in storage that may be of little value and may possibly need to be discarded;
- e) The cost to Ms. El-Jaroudi of discarding said material; and
- f) The cost to Mr. El-Mikati of replacing his tools.

[129] After considering all of the evidence, I make the following orders, which I consider to be a fair resolution of the division of household belongings:

- a) Mr. El-Mikati may keep all of the household items currently in his possession;
- b) Ms. El-Jaroudi may keep all of the household items currently in her possession;
- c) Ms. El-Jaroudi may take possession of the entire contents of the Newton Self Storage units A061, A064, and A003 for her absolute use;
- d) Mr. El-Mikati is to give Ms. El-Jaroudi the keys to the storage lockers within seven days of the release of these Reasons and facilitate the transfer of the Newton Self Storage contracts for storage units A061, A064, and A003 into Ms. El-Jaroudi's name in the event that she wishes to continue to retain the items in storage beyond June 30, 2020;
- e) Ms. El-Jaroudi is to remove all the household contents from Newton Self Storage, storage units A061, A064, and A003, by June 30, 2020, at her own cost;
- f) If Ms. El-Jaroudi does not remove all the household contents from Newton Self Storage, storage units A061, A064, and A003, by June 30, 2020, she must take all steps necessary to assume the contracts for the three storage lockers from Mr. El-Mikati;
- g) Commencing July 1, 2020, Ms. El-Jaroudi is to assume full liability for the cost of the three storage lockers in which the household items are currently kept;
- h) Neither party is required to compensate the other for any household items in their possession; and

i) By consent, each party shall retain their own jewelry and other personal items.

3. Storage Costs

[130] Mr. El-Mikati claims for storage fees for three storage lockers, from July 2017 to the date of judgment ("storage costs"). Although the initial costs of the storage lockers were under \$300 per month, by the time of trial, the monthly cost had increased to \$325.50 per month. As at March 2020, this amounted to \$14,405 (all figures are rounded to the nearest dollar). In addition, Mr. El-Mikati seeks costs of \$2,918 for moving the household items into storage ("moving costs"). This includes the cost of the boxes, labour, and padlocks for the storage lockers.

[131] Ms. El-Jaroudi says that she should only be responsible for one month's rent, i.e., \$259.20, pursuant to an agreement between the parties.

[132] Mr. El-Mikati has never refused to give half of the household belongings to Ms. El-Jaroudi. Rather, they were kept in the family home, and then moved into three storage units when the home was listed for sale. A review of the text messages between the parties, and letters from their counsel, indicates that following separation, Ms. El-Jaroudi took an unnecessarily adversarial and antagonistic stance towards the issue of the storage of the household contents. Rather than working with Mr. El-Mikati to facilitate quick removal of these items, she stubbornly refused to even view the items, preferring instead to let them remain in the storage lockers for almost three years. She was repeatedly warned through counsel that the costs of storage were continuing to rise, and that Mr. El-Mikati would be seeking full reimbursement from her at trial. Knowing full well that the storage contracts were in Mr. El-Mikati's name, I view her refusal to work with Mr. El-Mikati to try to resolve this issue as nothing more than a vindictive effort to try to drive up Mr. El-Mikati's costs.

[133] While Mr. El-Mikati was far more reasonable on this matter, I conclude that Mr. El-Mikati could also have taken steps to try to bring this matter to a close. For example, although he filed a Notice of Application in April 2018 to compel Ms. El-Jaroudi to abide by some of the terms of the Interim Agreement, he took no steps to try to bring the issue of storage costs for the household items to a head. He could have brought on a chambers application to have the matter of the storage locker resolved so as not to continue to incur costs.

[134] I consider the fee charged by Newton Self Storage for the monthly cost of the storage lockers reasonable, as were the moving costs. I conclude that it was necessary for Mr. El-Mikati to put the household items into storage, since the family home had been sold and the parties could not agree on how to divide the furnishings. As such, Ms. El-Jaroudi must share the costs of storage.

[135] Having regard to all the evidence, I conclude that Ms. El-Jaroudi should be responsible for 60% of the storage costs, including the costs of moving the household items into storage.

[136] When adding the months of April, May, and June, the total storage locker costs are \$15,382. I have added to this the moving costs of \$2,918, bringing the total to \$18,300. Ms. El-Jaroudi's share of this figure is \$10,980, which she is required to pay to Mr. El-Mikati as reimbursement for the storage fees incurred by him to June 30, 2020.

4. Emergency Kit Items

[137] For a number of years prior to their separation, the parties had a bag in which they kept all of their important documents and other valuables (the "emergency kit"). Ms. El-Jaroudi described it as a bag that contained "everything" that the family needed to take with them in case of an emergency. All members of the family, including the children, had access to the emergency kit. In it were contained items such as: their social insurance ("SIN") cards; Lebanese citizenship cards; expired Lebanese passports; and banking documents. In addition, the kit contained M.'s allowance money, jewelry belonging to the girls and Mr. El-Mikati, and some gold coins (the "valuables"). Mr. El-Mikati estimates that the valuables are collectively worth about \$12,000.

[138] Unbeknownst to Mr. El-Mikati, Ms. El-Jaroudi took the emergency kit with her when she left the family home in September 2016. Since that time, Mr. El-Mikati and the children have had a great deal of difficulty in getting Ms. El-Jaroudi to return their personal items and documents.

[139] Ms. El-Jaroudi was less than forthright about the contents of the emergency kit or the items in her possession. While she admitted taking the emergency kit, she gave varying accounts about what items she had taken, what had been returned, and what still remained in her possession. The SIN cards were returned only after a court order pronounced October 18, 2016. The children's Lebanese passports and citizenship ID cards were not returned until mid-way through this trial, when they were notified that they could pick them up from the claimant's lawyer's office on August 19, 2019. Ms. El-Jaroudi continued to stubbornly hold onto other items belonging to Mr. El-Mikati, necessitating an order on the last day of trial that Ms. El-Jaroudi return Mr. El-Mikati's expired Lebanese passport and his Lebanese Citizenship card within 48 hours.

[140] Ms. El-Jaroudi's evidence about the valuables was vague. While she acknowledged that these items had been in the emergency kit, she denied removing them from the family home.

[141] J. and M. testified about the difficulties which arose because of their mother's refusal to provide them with their legal documents. For example, they could not renew their passports without their Lebanese citizenship cards and expired passports. This was particularly problematic for M., who risked having to pay international student tuition fees which are about five times higher than fees for domestic students. I found J. and M. to be credible witnesses, and accept their testimony on this issue.

- [142] The children also corroborated Mr. El-Mikati's evidence that gold coins, the children's jewelry, and M.'s cash allowance were all in the emergency kit when Ms. El-Jaroudi took it with her. The allowance money totalled approximately \$1500 and was kept in an envelope. M. testified that her mother returned a few hundred dollars, leaving about \$1,000 unaccounted for.
- [143] I was not provided with any photographs of the children's gold jewelry or Mr. El-Mikati's watches. Nor was I given any further details or documents that would assist me in determining their value. Thus, while I conclude that Ms. El-Jaroudi took valuable jewelry, cash, and gold coins which were contained in the emergency kit, Mr. El-Mikati has not proven that they are worth \$12,000.
- [144] Doing the best that I can with the evidence that I have, I place a value of \$6,000 on the cash, jewelry, and gold coins contained in the emergency kit. I order Ms. El-Jaroudi to make a compensation payment to Mr. El-Mikati in the amount of \$3,000.
- [145] Another significant point of dispute was whether the emergency kit contained an original power of attorney ("POA") in relation to the Ain Ksour property. The POA enabled Ms. El-Jaroudi to sell Mr. El-Mikati's interest in the Ain Ksour property. Ms. El-Jaroudi denied knowing where the POA was, and gave some vague explanation about taking it with her to Lebanon in 2013, and leaving it there. However, this is disputed by Mr. El-Mikati. He says that the POA was in the emergency kit until sometime prior to August 12, 2016. He discovered it missing on August 12, 2016, which is what lead to the altercation between the parties that day. Mr. El-Mikati's version of events is in part corroborated by J. and M., who both testified that the August 2016 altercation was preceded by an argument between their parents as to the whereabouts of the POA.
- [146] I did not find Ms. El-Jaroudi's evidence with respect to the POA credible. Based on the preponderance of probability, I conclude that Ms. El-Jaroudi did not leave the POA in Lebanon in 2013, but rather took it from the emergency kit sometime prior to August 2016, and has deliberately refused to disclose the whereabouts of the POA.
- [147] Mr. El-Mikati asks that Ms. El-Jaroudi be ordered to return the POA and reimburse him for the costs of cancelling it. Since the whereabouts of the POA are not clear, I decline to make an order requiring Ms. El-Jaroudi to return it. However, Ms. El-Jaroudi is required to reimburse \$250 to Mr. El-Mikati to compensate him for the cost of cancelling the POA, and she is prohibited from making use of the POA.

D. Vehicles

- [148] At the time of separation the parties had two vehicles: a 2007 Honda Civic (the "Honda") and a 2001 Acura MDX (the "MDX"). The respondent retained the Honda and the claimant kept the MDX.

- [149] The Honda was involved in a collision not long after the separation, and written off. ICBC paid Mr. El-Mikati \$3,991 for the loss. The parties agree that Mr. El-Mikati should make a compensation payment to Ms. El-Jaroudi for half of this amount.
- [150] The parties agree that Mr. El-Mikati is entitled to a compensation payment for the MDX, but dispute the value of the vehicle. The MDX was purchased for \$18,152.40 in July 2008. In her Form F8 Property and Financial Statement ("PFS") of October 19, 2016, Ms. El-Jaroudi valued the car at \$4,500, which is what Mr. El-Mikati says is the fair market value for property division purposes. However, the car was involved in an accident in 2017, and subsequently, Ms. El-Jaroudi traded it in for a 2012 Nissan Rogue. The trade in value was \$1,100 which is the value Ms. El-Jaroudi says should be assigned to it.
- [151] It is reasonable to assume that the MDX had depreciated in value by the time it was traded in, due to the passage of time from the date of separation and the fact that it had been involved in a collision causing significant damage. Mr. El-Mikati was not responsible for the depreciation and it is not fair or reasonable that Mr. El-Mikati be compensated on the reduced value.
- [152] As no other evidence was provided about the actual value of the MDX at the time of separation, I conclude that a fair market value for the MDX is the \$4,500 value assigned to it by the claimant at the time of separation. Mr. El-Mikati is entitled to half this amount.
- [153] The parties agree that Ms. El-Jaroudi should keep the 2012 Nissan Rogue and associated liability, which were acquired after the separation.
- [154] I therefore order as follows:
- a) Mr. El-Mikati is to make a compensation payment to Ms. El-Jaroudi in the amount of \$1,996 for the 2007 Honda Civic;
 - b) Ms. El-Jaroudi is to make a compensation payment of \$2,250 to Mr. El-Mikati for the 2001 Acura MDX;
 - c) After applying a set-off, Ms. El-Jaroudi is to pay \$254 to Mr. El-Mikati; and
 - d) Ms. El-Jaroudi shall keep the 2012 Nissan Rogue for her exclusive use and benefit, and is responsible for the entire liability associated with it.

E. Bank Accounts, Savings Plans, and Pensions

- [155] For the most part, the parties were able to agree on the division of the various bank accounts and savings plans held by each of them.

1. Bank Accounts

- [156] The parties had various joint bank accounts at the time of separation which had nominal amounts of money in them. They are not seeking any orders with respect to those accounts.

[157] By agreement, I make the following orders with respect to accounts held in each of their names:

- a) Ms. El-Jaroudi shall retain the funds held in RBC accounts ending in 8285 and 2073, for her sole use and benefit;
- b) Mr. El-Mikati shall retain the funds held in RBC account ending in 4857, for his sole use and benefit; and
- c) Neither party is required to make a compensation payment to the other party for the bank accounts retained by each of them.

2. RRSP Accounts

[158] The claimant opened an RBC Registered Retirement Savings Plan ("RRSP") account, ending in 1449, with a balance of \$87. This is related to the Home Buyer Plan debt and the parties agree and I so order, that the claimant shall retain the \$87 sitting in this RRSP account, without compensation to Mr. El-Mikati.

[159] The claimant's HSBC RRSP account ending in 2655, in her sole name, had a balance of \$5,258.40 as of April 2016. Between April 2016 and September 2016, this account grew in market value by about \$202.19. Following separation, the claimant withdrew \$4,900 from this account, leaving only \$560.59. The parties agree that the claimant can retain this RRSP account, upon making a compensation payment to Mr. El-Mikati of half the value of this account as it stood at the date of separation. Ms. El-Jaroudi wishes for me to use the April 2016 value of \$5,258.40; Mr. El-Mikati says the fair market value should include a growth of \$200 (rounded down), bringing his total to \$5,458.40.

[160] I see no reason why Mr. El-Mikati should not benefit from the growth of the account up to the date of separation. To do otherwise would be unfair and unreasonable. I therefore order that the claimant may keep her HSBC RRSP account ending in 2655, and the respondent is entitled to a compensation payment of \$2,729.20.

[161] The Claimant's RBC RRSP account ending in 4402, in her sole name, had a balance of \$8,002.50 on September 1, 2016 and a balance of \$8,011.05 on October 19, 2016. Ms. El-Jaroudi would like to retain this account upon making a compensation payment to Mr. El-Mikati. The dispute arises as to whether it should be valued at the date of separation or date of trial. Contrary to a court order made February 15, 2017 requiring the parties to provide updated statements for their RRSP accounts, Ms. El-Jaroudi did not provide updated information as to the trial value of this RRSP account. In the absence of such evidence, Mr. El-Mikati asks that I attribute a growth of \$300 to the date of trial.

[162] I make an adverse inference for Ms. El-Jaroudi's failure to provide updated statements from which the trial value of her RBC RRSP account ending in 4402 can be assessed. The documentation indicates that the market value of this account increased by about \$9 in the six-week period between September 1, 2016 and October 19, 2016. Extrapolating this figure

to the date of trial, would indicate a growth of about \$250. Doing the best that I can with the evidence I have, I assess the value of Ms. El-Jaroudi's RBC RRSP account ending in 4402 at \$8,250, of which Mr. El-Mikati is entitled to half.

[163] As such, Ms. El-Jaroudi may retain her RRSP account ending in 4402, upon providing a compensation payment to Mr. El-Mikati totalling \$4,125.

[164] The parties agree and I so order that the respondent's RBC RRSP account ending in 3627 is valued at \$1,511.89, and is to be retained by the respondent upon making of a compensation payment to the claimant in the amount of \$755.95.

3. TFSA Accounts

[165] The parties consent to the following orders with respect to Tax Free Savings Accounts ("TFSAs") held in each of their names:

- a) Claimant's RBC TFSA ending in 7801 valued at \$33.79 - the claimant is to retain this account and provide a compensation payment to the respondent of \$16.90.
- b) Respondents' TFSA ending in 3615 valued at \$1,136.52 - the respondent is to retain this and make a compensation payment to the claimant of \$568.26.

4. RESP Accounts

[166] The Claimant was the account holder of an RBC Registered Education Savings Plan ("RESP") account number ending in 8374, for the benefit of J. and M. As of the end of 2018 the balance in the RESP account was approximately \$12,846.85.

[167] Mid-way through the trial, the parties consented to an order that the claimant's RESP account ending in 8374 be transferred to the respondent's name, for the sole use and benefit of the children's education. In compliance with that order, the claimant effected this transfer.

[168] The respondent holds an RBC RESP account ending in 5030 valued at \$1,600.86. At the close of trial, the parties consented to an order that the respondent is to hold this account, for the sole use and benefit of the children's education.

5. Richmond Elevator Pension

[169] The parties agree that Ms. El-Jaroudi is entitled to one-half the value of Mr. El-Mikati's Richmond Elevator REM Pension, and wish it to be valued at the date of separation. The pension statement provides a value of \$14,131.53 as of December 31, 2016, which is the value that the claimant says I should place on it. However, the respondent argues that the pension would have been worth less at the date of separation, and asks that I deduct \$336, and conclude that the pension value is \$13,795.53. The respondent has not provided any explanation as to how he arrived at this figure.

[170] I conclude that the pension statement for the period ending December 31, 2016 provides the best evidence as to the value of Mr. El-Mikati's pension at the date of separation. Mr. El-Mikati is entitled to keep his Richmond Elevator REM Pension, which I assess at \$14,131.53. Mr. El-Mikati is to pay Ms. El-Jaroudi \$7,065.77, representing her one-half share.

6. Lebanese Pension

[171] The respondent was called to the Lebanon bar in 1992. After doing his apprenticeship for three years, he wrote his bar exams and became a fully qualified lawyer around 1995 or 1996. He worked as a lawyer before immigrating to Canada in 2007. Though he stopped practicing law at that time, he continues to pay approximately \$500 USD annually in bar fees.

[172] The claimant argues that Mr. El-Mikati is paying bar fees to maintain entitlement to a pension, which she says he will receive on retirement. She values his Lebanese pension at \$15,554, and she asks for one-half the value of that.

[173] Mr. El-Mikati says that he has no pension coming to him in Lebanon, though he admits that a lawyer in Lebanon who is active in his or her practice is entitled to a pension on retirement. The minimum age for retirement in Lebanon is 60. Mr. El-Mikati estimated that the lawyer's pension was around 600,000 LL per month when he left for Canada, and speculates that it may now be as high as 800,000 LL. However, he argues that he does not know if he will get a pension because he is not working as a lawyer and not getting any income in Lebanon.

[174] I agree with the claimant that the fact Mr. El-Mikati continues to pay his costly monthly bar fees leads to a logical inference that he would only do so if he believed that there was a real prospect of getting a retirement pension. However, the length of time that he could potentially receive such a pension, as well as the monthly pension amount, are unknown variables that I must consider. In addition, I note a number of contingencies, such as: his ongoing ability to afford to pay the bar fees; risk of early death; and ineligibility for the lawyer's retirement pension because of Mr. El-Mikati's residency and the fact that he has not been actively practicing law since his departure from Lebanon.

[175] Having regard to all the evidence in this case, and the various negative and positive contingencies, I value Mr. El-Mikati's lawyer's pension at \$12,000. Ms. El-Jaroudi is entitled to half this amount. Mr. El-Mikati is entitled to retain any pension he receives from Lebanon, for his exclusive use and benefit, upon the making of a compensation payment of \$6,000 to Ms. El-Jaroudi.

7. CPP Pension

[176] The claimant is entitled to one-half of the respondent's Canada Pension Plan ("CPP") pension. The period of entitlement will be from the date the parties moved to Canada to the date of their separation.

F. Family Debts

[177] The parties consent to the following orders regarding family debts:

- a) The respondent's Canadian Tire credit card debt of \$1,000 is to be shared equally, such that the claimant is to make a compensation payment of \$500 to the respondent;
- b) The respondent's Sears Credit Card debt of \$1401.69 is to be shared equally, such that the claimant is to make a compensation payment to the respondent of \$700.84.

[178] The parties agree that the following were incurred post-separation and do not constitute family debts:

- a) A debt of \$27,530 incurred by the claimant and a debt of \$25,850 incurred by the respondent;
- b) The \$300 ICBC deductible payable by the claimant for her car accident; and
- c) The claimant's Walmart Credit Card debt of \$9,000.

1. Loan to Claimant's Father

[179] The claimant says that the parties borrowed 30 million LL (approximately \$20,000 USD) from her father Sami El-Jaroudi before immigrating to Canada, and returned approximately 8,800,000 LL (\$5,000 USD) before their departure. The remaining \$15,000 USD was deposited into her brother's account in Canada on December 6, 2007. When the parties moved into their own basement suite, they used this money to finance the purchase of the MDX.

[180] The claimant has provided documentary evidence in the form of a loan agreement dated December 7, 2007, between herself and Sami El-Jaroudi, for 22,000,000 LL. The respondent acknowledged that he drafted the loan agreement but denies that any debt is owing, saying that when he asked his father-in-law about it, he was told that the money was a gift.

[181] The claimant has proven on a balance of probabilities the existence of a family debt of 22,000,000 LL to her father. The respondent does not dispute that this figure converts to approximately \$16,125 Canadian dollars. As such, the respondent is responsible for half this debt, namely \$8,062.50.

2. FIDO

[182] The parties dispute who should be responsible for a \$1,000 debt with Fido for J.'s cell phone. The claimant says that on September 7, 2018, the respondent forwarded her a letter from a collection agency indicating that a FIDO account in her name had an outstanding balance of \$901.95. The claimant submits that the final amount that she paid to FIDO to close the account was \$1,000. She wants that money reimbursed as the phone had been given to J. and she has not had use of it since 2013.

- [183] The respondent says that though the FIDO account was in the claimant's name he had been paying for J.'s FIDO bill. Following separation, the claimant was to transfer the FIDO account into his name so that he could administer it. When she failed to do so, he purchased a new phone for J. and gave the SIM card for the FIDO phone to his counsel. He notified the claimant in December 2017, indicating that he would no longer be responsible for the FIDO account.
- [184] In my view both parties are responsible for the incurring of the FIDO debt, and each should be responsible for half of the FIDO bill. While the claimant failed to transfer the FIDO account into the respondent's name, the respondent could also have taken steps to try to force the issue given that the phone bills were coming to his residence and not the claimant's. The respondent is therefore required to pay \$500 to the claimant for his half share of the FIDO debt.

3. Home Buyer Plan

- [185] The parties have a Home Buyer's Plan debt with a balance outstanding of \$961. In addition to requiring Mr. El-Mikati to contribute \$87 towards the Home Buyer's Plan to open an RRSP account, the February 15, 2017 order stipulated that the rest of the debt was to be deducted from the net sale of proceeds of the former family residence. I see no reason to vary this order, and find that the Home Buyer's Plan debt is a family debt for which Mr. El-Mikati is responsible to pay one-half, i.e., \$437.

4. Canada CCTB

- [186] The claimant says she has been assessed \$4,500 by the Canada Revenue Agency ("CRA") for overpayment of the Canada Child Tax Benefit ("CCTB"). She argues that this money was collected by the respondent and he should be responsible to pay the debt to the CRA.
- [187] The documentary evidence shows that the assessed amount is actually \$4,486.74. The CCTB Notice is dated May 19, 2017, and covers the payment period from July 2016 to June 2017. It stipulates that an adjustment was made of \$1,415.29 for the period July to September 2016; and then another adjustment of \$1,186.70 for 2014. Added to this is an overpayment amount due in an April 2017 statement of \$924.75. The total assessed amount of overpaid CCTB benefits is \$3,526.74. There is also a Universal Child Care Benefit notice for \$960 owing from an October 21, 2017 statement.
- [188] The claimant alleges that the CRA assessed an overpayment after the respondent contacted the government and falsely claimed that the claimant was using the children's CCTB benefits. She says that in 2015, she was visiting her parents in Lebanon, and did not have access to her Canadian bank accounts. In addition, she states that in 2015, the CCTB was mailing cheques to the home as opposed to making direct deposits into the bank account. The respondent was depositing these cheques into the parties' joint RBC account ending in 4515.

- [189] The respondent denies the allegations, and says that the claimant received the funds and put them to her own use. As evidence he points to a letter from her counsel dated January 4, 2017, where her counsel admits that the claimant received and put to her own use CCTB payments for September and October 2016.
- [190] The claimant admits that she received these CCTB payments post separation but says this was due to an error on the part of the CRA. She says that when she moved out of the family home, she informed the government but they still mailed her the CCTB cheques for October and November 2016. She says she cashed the cheques knowing she was not entitled to, as she was facing "major" financial hardship. The claimant asserts that she refunded the money to the CRA.
- [191] I do not find the claimant credible on this issue. First, I note that no documentation was provided to prove that she repaid the money to the CRA. In fact, her counsel's letter suggests the opposite, since she was seeking to have the payments applied against spousal support arrears. Second, I find it implausible that the CRA would have mailed her the CCTB payments at her new address, upon receiving notice from her that the parties had separated and the children were with their father. Third, while there are bank statements showing that money was deposited into the parties' joint bank account during periods of time that the claimant was out of the country, it is unclear whether these are the amounts that the CRA has deemed as overpayments.
- [192] However, the documentation supports a finding that part of the CCTB debt arose for a period of time when the parties were still married. I find that the adjustment of \$1,186.70 for 2014 and the adjustment of \$1,415.29 for July to September 2016 constitute a family debt, as the parties were still together and it would not be significantly unfair to apportion the debt equally.
- [193] I conclude that \$2,602 of the CRA debt is to be divided evenly between the parties, such that Mr. El-Mikati is responsible for \$1,301 of the CCTB debt. Ms. El-Jaroudi is responsible for the remaining amount of \$3,185.74.

VI. Issues regarding the children

- [194] Mr. El-Mikati seeks guardianship and primary residence over both the children, who are now adults. J. was 17 years old at the time the parties separated, and is now 21. M. was 15 at the date of separation, and is now 19 years of age.
- [195] I decline to make any orders for guardianship, custody, or parenting with respect to J. and M. In light of their ages, such orders are no longer warranted.

[196] Mr. El-Mikati also seeks child support and payment of section 7 expenses for both children, retroactive and prospective. The claimant resists such an award, arguing (a) that she should not be required to pay retroactive child support or section 7 expenses because her income was too low; (b) the children are over the age of majority and no longer entitled to child support; and (c) the children have withdrawn from their parents' charge and therefore are not entitled to support.

A. Background

[197] To their credit, the parties have raised two very accomplished young women. They are bright, personable, and highly motivated. They both attend university, are recipients of numerous awards and scholarships, and are actively engaged in community service. However, J. and M. have both been emotionally devastated by the dysfunctional relationship dynamic between their parents. They have had to witness their parents' arguments, spend long periods of time without their mother while she was travelling abroad, stand by while their father was arrested and held overnight in jail, sleep in a motel with their father when their parents could not get along, and endure the involvement of the MCFD. These events have taken a toll on their mental health and educational pursuits.

[198] J. and M. currently live in a two bedroom, one bathroom accommodation, which they share with their father and their therapy dog. Their relationship with their mother is extremely fractured, and they have had very little contact with her over the years. Though they are both open to a relationship with their mother, they recognize that they will need to develop it with the assistance of a counsellor.

[199] I found J. and M. to be credible and reliable witnesses. Their testimony was not shaken in cross-examination. They were both articulate, balanced in their evidence and forthright.

1. J.

[200] In the year that the parties separated, J. was entering her first year in university. Her future held much promise. She was the recipient of a scholarship which covered all of her tuition for four years (\$10,000 per year), and \$7,500 per year for her living expenses. A condition of the scholarship included working with the scholarship provider during the summers for the duration of her undergraduate program.

[201] In addition to her scholarship money, J. has earned the following income since the parties' separation:

- a) From May 2016 to August 2016 and May 2017 to August 2017, she worked in customer service, earning on average \$13.50 an hour. Her 2017 income was approximately \$7,926.
- b) From May 2018 to August 2018, and May 2019 to August 2019, she worked in talent acquisition, earning approximately \$12,607 in each year.

- [202] As of the fall of 2019, J. had \$13,000 in savings. However, she is at risk of losing her scholarship for the remainder of the 2019/2020 year, and in any event, the scholarship will run out in the spring of 2020, requiring her to fund her ongoing education completely on her own. This includes her final year for her Bachelors degree, as well as any professional degree.
- [203] The parties' fractured relationship wreaked havoc on J. emotionally. Not long after starting her degree, J. started having panic attacks in class. One of her professors took notice, and referred her to a psychiatrist. She was diagnosed with chronic mood disorder, depressive disorder, and insomnia. J. managed to complete her first year of studies, but decided to take some online courses in the summer so that she would have a lighter course load during her second year. At the same time, she was working full-time in customer service. J. testified that her mental health concerns had a significant impact on her job. Fortunately, management was supportive and accommodating of her needs. J. completed her summer 2017 classes but with lower grades than she had achieved in her first year.
- [204] J. found her second (2017/18) and third (2018/19) academic years even more challenging. Her symptoms were triggered by the frequent court battles that consumed her parents. Though her professors tried to accommodate her, having quiet places to write her exams was not enough. During the first semester of her third year, she had a panic attack during one of her mid-terms and was unable to finish the course. She got a deferred standing in the class, and applied for and received disabled student status.
- [205] Unfortunately, J. had a motor vehicle accident in February 2019. She hit her head during the collision, and has been suffering from dizziness and other vestibular symptoms. She failed to complete three of her courses that semester, and by the summer of 2019, had deferred four courses.
- [206] In the fall of 2019, J. enrolled in her fourth year of university. However, because of the impact of the car accident and her psychological condition, she was advised to drop some of her courses. She was not able to write the LSAT as planned, and will not complete her degree in the spring of 2020, requiring at least one further academic year to complete her Bachelor of Arts degree. She still hopes to gain admission to law school.
- [207] J. currently has an emotional therapy dog, is under the care of a psychiatrist, and is undergoing treatment for her car accident injuries. She lives at home with her father. Though she does not pay any room and board, with her scholarship money and employment earnings, she contributes towards the family's expenses, her sister's expenses, and her own. In addition, she helps pay for the dog's expenses, which include surgery.
2. M.
- [208] At the time of separation, M. was a few months shy of her 16th birthday, and entering into grade 11. She was a straight "A" student, engaged in volunteer work, and also had plans to attend law school.

- [209] M. testified that the months leading up to her parents' separation were the most difficult. She had depression and anxiety, and suffered from frequent panic attacks. Since about 2016 she has been on anti-depressants and medication for migraines. Despite this, M. worked hard and remained focussed. She graduated high school with honours, and was the recipient of several scholarships and the humanitarian award at her school for her work with Syrian refugees. In addition, she worked weekends at H&M from approximately August 2017 to August 2018. She left the job to focus on school.
- [210] M. started university in the fall of 2018, and is currently completing her second year in the Bachelor of Arts program. Despite her health, M. has managed to maintain high grades and was on the Dean's list in her first year.
- [211] M. attends university five days per week and has a four to five hour commute each day. In addition to her mental health concerns, M. has scoliosis, which causes her a lot of back pain and may require surgery. Due to her long school days and commutes, she is not able to work during the school year. As working retail increases her back pain, she tried to find sedentary work for the summer of 2019. However, she could not find a job that fit around her summer school schedule.
- [212] M. was not able to get any student loans as her mother would not provide her with her legal documents. However, she was able to fund her education through a combination of employment earnings, scholarships, and financial assistance from her father and sister. M. has a scholarship for \$10,000 which covers \$2,500 tuition for each semester, for the first two years of her degree. The scholarship does not cover all of her education or tuition costs, which are \$6,000 per semester. Her textbooks cost about \$400 per semester.
- [213] M. earned about \$2,700 from her job at H&M while she was working weekends from August 2017 to August 2018. She has about \$1,300 in her savings account. M. lives with Mr. El-Mikati with free room and board. Mr. El-Mikati also covers the tuition shortfall that is not covered by her scholarship, and J. helps pay for the cost of her books and other school-related expenses.

B. Entitlement to Support

- [214] The first issue I must decide is one of entitlement. The question is whether the children are, or were, children of the marriage, during the periods of time for which support is being sought.
- [215] Child support is the right of the child. It survives the breakdown of the marriage and is intended to provide the child with the same standard of living which the child enjoyed when the spouses were together: *H.(U.V.) v H.(M.W.)*, 2008 BCCA 177 at para. 41.
- [216] Section 2(1) of the DA defines a "child of the marriage" as:
- a child of two spouses or former spouses who, at the material time,

- a) is under the age of majority and who has not withdrawn from their charge, or
- b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.

[217] The age of majority is that of the province in which the child resides, which in British Columbia is 19: DA s. 2(1).

[218] A child can remain a child of the marriage even if they are over the age of majority, so long as it is established that they are not able to withdraw from their parents' charge, or obtain the necessities of life. The parent who alleges an adult child remains a child of the marriage bears the burden of proof on a balance of probabilities: *Classen v. Anima*, 2011 BCSC 868 at para. 6.

[219] Similarly, a child who is under the age of majority will no longer be a child of the marriage if that child has withdrawn from their parents' charge.

[220] Enrollment in post-secondary education can be a valid reason for continued support. The issue is whether the child's educational pursuits are reasonable, and if so, whether it is appropriate for the parents to finance the child's education: *Nordeen v. Nordeen*, 2013 BCCA 178 at para. 16.

[221] Master Joyce (as he then was) set out eight factors in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.), which are helpful in determining whether a child's educational pursuits justify retaining the status of child of the marriage:

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;
- (5) the age of the child;
- (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

- [222] The Farden factors do not establish a minimum requirement for discharging the burden of proof. Rather, as noted by the Court of Appeal in *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 (B.C.C.A.) at paras. 14-15, the Farden factors are a non-exhaustive list which trial judges have found useful in examining the question of status. The applicant is not required to lead evidence on each of these factors to discharge the burden of proof on this issue.
- [223] First, I note that the educational pursuits of J. and M. are necessary and reasonable. Getting a post-secondary education is necessary for J. and M. to establish themselves in careers which will allow them to become financially independent. J. and M.'s goals to become lawyers, or some other professional designation in the event they do not get into law school, are consistent with the high value that their parents' have placed on education. The girls are intelligent, hard-working, and have shown the ability to succeed in their educational endeavours. Second, I conclude that it is appropriate that these pursuits be financed by their parents. During cohabitation, the parties' made plans to fund their daughters' education, as exhibited by the fact that they set aside money in RESPs. In the environment in which J. and M. were raised, getting a second degree or a professional designation was encouraged, and indeed expected.
- [224] Having regard to the statutory authorities, and guiding principles, as well as the circumstances of this case, I conclude that M. remains a child of the marriage and is unable to withdraw from her parents' charge. She is entitled to child support from the claimant from the period of separation to the date of judgment. She is also entitled to prospective child support, so long as she continues to remain a child of the marriage in accordance with the DA.
- [225] Through a combination of bursaries, student loans, and summer jobs, M. may be able to earn enough money to meet many of her future educational expenses. However, there will likely be a shortfall, and her sources of income will not be enough to meet her ongoing living expenses while she is undertaking full-time studies. Further, given her long commute to school, it is not reasonable to expect M. to work during the school year, nor is it reasonable to expect her sister to continue to fund her living expenses, particularly since J.'s scholarship money is also running out.
- [226] With respect to J., I conclude that she was no longer a child of the marriage after September 2016, as she was able to temporarily withdraw from her parent's charge because of a combination of her employment income and scholarship money. These sources of revenue were sufficient to cover all of her expenses. As such, no support is payable for her by the claimant from the parties' separation to the date of judgment.

[227] However, J.'s scholarship money runs out in April 2020 at the latest. Even with her savings and summer job, she will not be able to fully meet her educational and living expenses. The RESPs will cover less than one year of tuition and textbooks for J. and M. As such, I conclude that effective June 1, 2020, J. has regained the status of child of the marriage, and is entitled to child support and contribution from Ms. El-Jaroudi towards her section 7 expenses.

C. Amount of Support

[228] The specific amount of child support that is owed may vary based on the income of the payor spouse, but the duty to provide support does not. This is reinforced by s. 147(1) of the FLA, which stipulates that each parent and guardian of a child has the duty to provide support.

[229] Both the FLA (s. 150) and the DA (s. 15.1(3)) adopt the use of the Federal Child Support Guidelines, S.O.R./97-175 [CSG] to determine the appropriate amount of child support, which is based on the parties' incomes (the "Table Amounts"). Deviation from the CSG is allowed in limited circumstances: FLA, s. 150 and DA, s. 15.1(8).

[230] Child support calculations are generally based on the previous year's income of each spouse: J. (K.M.) v. N. (J.H.D.), 2014 BCSC 1895 at para. 114.

[231] Sections 16 to 19 of the CSG distinguish between taxable income (often referred to as Line 150 income), and income for support purposes. Pursuant to s. 17(1) of the CSG, the court may consider income patterns or fluctuations to arrive at an amount that is fair and reasonable.

[232] Pursuant to s. 3(2)(b) of the CSG, where the court determines that support is payable to a child over the age of majority, the court may set an amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

1. Claimant's Income

[233] While in Lebanon, the claimant had a successful career in the banking industry. However, she assumed a homemaker role on her arrival in Canada. The claimant did not work in Canada for the eight-and-a-half years prior to their separation. At the date of separation she was 49 years old. Her primary source of reported income since that time has been spousal support payments.

[234] The claimant had the following historical Line 150 earnings:

2016 - \$10,357

2017 - \$19,661

2018 - \$22,215

[235] The claimant says the income reported for 2016 and 2017 was entirely from spousal support paid by the respondent, though this is questionable as the spousal support payments in 2016 amount to less than \$5,000. In any event, the claimant was not cross-examined on this point. The 2018 income was from spousal support and employment earnings of \$6,068. These earnings were for a job that lasted about three months at Tommy Hilfiger - from the end of December 2017 until the beginning of April 2018. She has not reported any earnings since that time. Though she has ample experience in the banking industry, she does not wish to go back into banking. She has dreams of doing fashion design, and testified at her examination for discovery that she was waiting for the right job.

a) Legal Framework

[236] Mr. El-Mikati does not dispute that the claimant's reported income is low. However, he argues that she has been working under the table and not reporting her income, and further that the claimant has been intentionally unemployed or underemployed. As such, income should be imputed to her.

[237] Section 19(1) of the CSG provides a non-exhaustive list of circumstances where the court may impute income to a spouse, such as when the spouse is intentionally under-employed or unemployed. The court has a broad discretion to impute income to either or both spouses for the purposes of determining child and spousal support, and is not limited by the restrictions set out in ss. 16-18 of the CSG: *Yeung v. Silva*, 2016 BCSC 1682 at paras. 43-45.

[238] The following principles for income imputation emerge from the authorities:

- a) The court must have a rational and evidentiary basis for imputing income: *Windle v. Windle*, 2010 BCSC 18 at para. 88.
- b) The onus lies on the party seeking to have income imputed to the other spouse: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 35.
- c) Bad faith is not required for a finding that a party is intentionally underemployed. What is required is a finding that the party is not earning to their capacity: *Beissner v. Matheusik*, 2014 BCSC 1785 at para. 37, *aff'd* 2015 BCCA 308.
- d) When imputing income, the court must consider what is reasonable given the age, education, skills, health of the parents, and availability of work: *Yeung* at para. 47.
- e) A parent who chooses to work less than full-time must justify the choice by the needs of the children: *Yeung* at para. 47.
- f) Limited experience and skills do not justify a failure to pursue employment: *Fong v. Fong*, 2011 BCSC 42 at para. 82.
- g) A court may impute income where a person pursues unremunerated employment or unrealistic career aspirations: *Fong* at para. 82.

[239] The overriding principle underlying income imputation is to make the fairest determination of income, having regard to the evidence.

b) Evidence

[240] Ms. El-Jaroudi submits that she has been unable to find remunerative employment due to her age, lack of transferable skills, lack of Canadian work experience, and health.

[241] The claimant testified that she left the former family home with no money, no job and just a few bags of personal items. She was an emotional wreck and started seeing a counsellor. Her primary focus became her litigation, which she commenced almost immediately after separation. Shortly afterwards, her father came from Lebanon to live with her. She said she spent her time taking care of him as he had some health conditions.

[242] Rather than working right away, she decided to take some workshops so that she could "understand" the work force. She wanted to build her resume before she applied for a job. From January 2017 to March 2017, she registered in five workshops. The workshops covered topics such as real estate, wealth management, and small business start-ups.

[243] On February 5, 2017, Ms. El-Jaroudi was involved in a car accident. She testified that she sustained injuries to her back, neck, the left side of her body, face, shoulders, hip and left leg. She started attending physiotherapy and related treatment. Despite still not having recovered, the claimant attended two more workshops in September 2017.

[244] With the assistance of her sister, Lina, who was a manager at Tommy Hilfiger, the claimant got a job as a seasonal sales associate. She worked in this capacity from December 26, 2017 to the end of January 2018, earning \$12 an hour and working about 20-30 hours per week. Despite her evidence that she was facing difficulties at work due to her injuries, the claimant was promoted to sales manager at Tommy Hilfiger. She was transferred to a store in White Rock on February 1, 2018 where she worked full-time until April 3, 2018. During this time, she was paid \$20 an hour.

[245] The claimant says that she stopped working at Tommy Hilfiger for health reasons but also because the store was too far from her home and her car was in need of repair. On April 1, 2018 she says she was feeling unwell and called the ambulance. She quit her job shortly thereafter.

[246] Ms. El-Jaroudi testified that she has not been able to return to work due to her ongoing health concerns, such as double vision, water in her eyes, difficulty walking, running or lifting, a tendency to walk or sway to the left, headaches, soreness, numbness and body aches. She says that she has seen various specialists, a neurologist, and optometrists, and has undergone testing such as X-rays and MRI's. She is currently taking medication for hypertension, pain, anxiety, depression and is also taking some supplements.

- [247] Despite her physical limitations the claimant testified that she has been actively looking for work. She described applying to jobs at banks, Aldo, Tommy Hilfiger, and various other retail stores. In December 2019, she was hired as a sales associate at Tommy Hilfiger in Loughheed Mall, earning \$14 an hour. The store closed shortly thereafter, and her last day of work was January 26, 2020. In the six-week period, Ms. El-Jaroudi testified that she earned approximately \$950 and is expecting another paycheck in the approximate amount of \$400. She said that she is still in communication with the Human Resources Department at PVH, which owns Tommy Hilfiger and other brands, and is hoping to get another job offer from them for one of their other retail stores.
- [248] The claimant submits if she finds employment, she expects to make approximately \$14,404 annually, for a minimum wage job working 20 hours a week.
- [249] Mr. El-Mikati says that the claimant is not reporting her full income, and has in fact been working as a personal shopper since 2018. In support, M. testified that while she was working at H&M her mother came into the store on three occasions with people that she believes were her clients. The first time she saw the claimant with a middle aged man and a teenage boy. Her mother was picking out clothes and giving them to the teenage boy, who would then go and try them on. M. had not seen her mother for over a year by this time, and started having a panic attack. She left the floor and did not see her mother leave.
- [250] The second time the claimant came in with a middle aged woman and a teenaged girl. Again, the claimant would pick out clothes for the girl, and the girl would go and try them on.
- [251] On the third occasion, Ms. El-Jaroudi came into the H&M store with yet another different group of people. She briefly made eye contact with M., who started having a panic attack. M. left the floor.
- [252] M. did not hear any conversation during these three incidents, and did not see any money changing hands. However, M. credibly testified that the interactions between her mother and the other people all seemed to be like a business relationship, and not personal.
- [253] The claimant denied that she was working and said that she was just assisting a customer in the store who asked for some help. I do not find her credible on this issue, for the following reasons:
- a) Her explanation that she was just helping a random person in the store is not plausible. While it is possible that she might have been helping someone on one occasion, I find it highly implausible that she would have done so on three occasions in the same store;
 - b) She did not disclose to the respondent or to FMEP that she had started working at Tommy Hilfiger;

- c) She stopped working at Tommy Hilfiger within only a few days of the respondent's counsel's letter of March 29, 2018, where she is told that the respondent has learned she is working and will be seeking to vary interim spousal support;
- d) Her proven ability to work, as demonstrated by her success in the sales clerk position and rapid promotion to the management position, contradicts her evidence of her injuries limiting her ability to work;
- e) Her testimony that her current inability to work is due to lack of success in finding employment rather than any physical limitations;
- f) The numerous contradictions between her trial evidence and her examination for discovery evidence about her physical limitations, and her search for work; and
- g) The lack of medical evidence corroborating the extent of her physical injuries and the impact they have on her ability to work.

[254] Thus, based on a preponderance of probability, I conclude that the claimant has been working since 2018, and has failed to report her income.

c) Income Imputation

[255] I conclude that income should be imputed to Ms. El-Jaroudi for a number of reasons. First, I have concluded that since 2018, the claimant has been working without reporting her income. I make an adverse inference based on her failure to disclose her actual earnings. Since I have insufficient evidence as to how much income the claimant has been earning from her freelance work, I find that it is appropriate to conclude that her unreported income is at least \$14,000 per year, based on part-time minimum wage employment.

[256] Second, even if the claimant does not have unreported earnings of \$14,000 per year, I find that the claimant's capacity to earn an income is far greater than she submits. Despite her age and health, I find that the claimant is resourceful, bright, and capable. She speaks multiple languages, and has a number of transferrable skills, as evidenced by her rapid promotion at Tommy Hilfiger. While she argues that her health is poor and prevents her from working, the lack of medical evidence, the suspicious timing of her quitting her job at Tommy Hilfiger, and my significant concerns about her credibility lead me to conclude that Ms. El-Jaroudi is not restricted from working on account of any health conditions.

[257] Third, assuming that she has not already done so, the claimant is obliged to find remunerative employment so that she can earn to capacity. While foregoing employment so that she can pursue her dream in fashion design may serve the claimant's personal goals, I conclude that it does not meet the children's financial needs and the claimant's shared obligation to provide for those needs along with the respondent.

- [258] After having regard to all of the evidence in this case, and having regard to Ms. El-Jaroudi's age, qualifications, skills, health and availability of work, I find that she was capable of earning at least \$14,000 per year starting in 2018.
- [259] Given the unreliability of the claimant's evidence and the adverse inference I have made about her employment earnings, I find that it is appropriate to impute income to Ms. El-Jaroudi in the amount of \$14,000 for the 2018, 2019 and 2020 years in order to determine her support obligations. I decline to impute full-time income to her at this time, because I accept that given her long absence from the work force and her age, it may take several years before the claimant is able to find full-time employment, if at all.
- [260] The amount of Ms. El-Jaroudi's ongoing support obligations from the date of judgment to June 30, 2021, shall also be determined based on her imputed income of \$14,000. The amount of the claimant's support obligations after July 1, 2021 will be adjusted in the manner set out in paragraph 308 of these Reasons, having regard to her actual earnings and circumstances at the time, which may no longer warrant income imputation.

d) Support Amounts

- [261] Based on the fact that the claimant did not have any income for 2016 and 2017, she has no child support obligation towards M. for those years. Based on an imputed income of \$14,000, for 2018, 2019, and 2020, the claimant's monthly child support obligation for one child is \$57. This is calculated to May 31, 2020, and amounts to a total retroactive child support award of \$1,653.
- [262] In *D.B.S. v. S.R.G.*, 2006 SCC 37, the Court considered circumstances where an award for retroactive child support will be warranted. These include consideration of the needs of the recipient parent, conduct of the payor parent, hardship occasioned by a retroactive award, and circumstances of the children. After considering all these factors, I find that the making of a retroactive child support award is appropriate.
- [263] While Ms. El-Jaroudi may experience some hardship from the making of this award, M. would also experience some hardship if the award is not made. She relies on Mr. El-Mikati and J. for support, and both her and J.'s scholarships expire in April 2020. As the Court noted at para. 116 of *D.B.S.*, it is not always possible to avoid hardship, and hardship in this case is minimal given the amount of the retroactive award. Ms. El-Jaroudi is ordered to pay Mr. El-Mikati \$1,653 in retroactive child support.
- [264] Prospectively, I have concluded that effective June 1, 2020, J. has regained the status of child of the marriage. As such, based on an imputed income of \$14,000, Ms. El-Jaroudi is required to pay child support for both children in the amount of \$148 per month, for the period June 2020 to June 2021, so long as the children continue to qualify as children of the marriage in accordance with the DA. The amount of the claimant's child support obligations after July 1, 2021, will be adjusted in the manner set out in paragraph 308 of these Reasons, having regard to her actual earnings and circumstances at the time, which

may no longer warrant income imputation.

2. Respondent's Income

[265] The respondent testified that in 2008 when he was hired by Richmond Elevator ("REM") his starting wage was \$18. He has been consistently getting raises and his hourly rate is currently \$42.90 per hour. Mr. El-Mikati testified that he works occasional overtime, averaging two to four hours per month, at time-and-a-half.

[266] Because of a number of work injuries, for the years 2015 to 2018, Mr. El-Mikati's earnings were comprised of employment income and workers' compensation benefits (WCB). His historical earnings are as follows:

2015 - \$78,114 (\$65,793 T4 and \$12,323 WCB)

2016 - \$82,111 (\$78,029 T4 and \$4,083 WCB)

2017 - \$83,558 (\$66,735 T4 and \$16,824 WCB)

2018 - \$70,980 (\$44,729 T4 and \$26,252 WCB)

[267] The respondent has had four work injuries while employed at REM. On July 27, 2015, Mr. El-Mikati fell through an open elevator hatch. He suffered a number of injuries, and was off work until April 11, 2016. Mr. El-Mikati was granted a permanent functional impairment ("PFI") pension as a result of this injury. The pension originally was set at about 7% equalling PFI payments of about \$280 per month. Mr. El-Mikati was successful on appeal, and the PFI award was increased to 18% equaling \$731 per month. These payments were retroactively adjusted in 2019 and he continues to receive this PFI award in addition to his income.

[268] Mr. El-Mikati's second injury occurred on November 30, 2016. This time he was off work until April 2, 2017, and in receipt of wage loss benefits.

[269] His third work injury was on January 30, 2018, and resulted in him being off until July 2018. He again received wage loss benefits, though there is a discrepancy in the documentation with respect to the amount of wage loss he received in 2018. A letter from WorkSafeBC indicates that Mr. El-Mikati received a total of \$21,866 in wage loss compensation for this claim. However, the T5007 for 2018 indicates that he received \$26,252. The documentation does not reveal whether this discrepancy is because his monthly PFI award was added into the T5007, or if there were additional payments made that are not properly included as income for support purposes. I have therefore taken this discrepancy into consideration when determining the amount of support payable.

[270] Mr. El-Mikati suffered his fourth work injury on March 11, 2019. He did not lose any time off from work due to this injury.

- [271] Though WCB wage loss payments are non-taxable, they are considered income for the purposes of calculating support. However, this does not hold true for a PFI pension award. The claimant agrees that Mr. El-Mikati's PFI pension does not constitute income for the purposes of calculating support, though it can be factored in when considering the conditions, means and needs of the spouses.
- [272] Mr. El-Mikati admitted that he received rental income from January 2017 until July 2017, when the Former Family Residence was sold. This income was not declared to the CRA and needs to be accounted for when calculating income for support purposes. Both basement suites in the home were rented, totalling about \$1,150 to \$1,200 per month. As the house sold on July 15, 2017, this amounts to a rental income of about \$7,475 to \$7,800. I have therefore estimated the income at \$7,600. This increases Mr. El-Mikati's income for 2017 to \$91,158, slightly less than the \$91,608 which the claimant asks that I impute for that year.
- [273] In a letter from his employer dated February 25, 2019, Mr. El-Mikati's year to date income for the first two months of 2019 was \$13,253. This works out to \$6,626 per month. Extrapolated over one year, it totals \$79,518. This is about \$10,000 lower than the income the claimant asks me to impute to Mr. El-Mikati for 2019. In my view, it would be unfair and unreasonable to impute \$89,000 in income to Mr. El-Mikati for 2019. Mr. El-Mikati has never earned this much income in any of the years between 2015 and 2018. Further, this figure does not factor in his lost earnings necessitated by his attendance in this trial. Therefore, I set Mr. El-Mikati's income for support purposes at \$79,518 for 2019, and also for the period from January 1 to May 31, 2020.

D. Section 7 Expenses

- [274] The CSG calculations indicate that Ms. El-Jaroudi's proportionate share of retroactive section 7 expenses ranges from 26% to 34% for the various pre-trial years. Mr. El-Mikati claims section 7 expenses for both the children, ranging from \$12,000 to \$22,000, and asks Ms. El-Jaroudi to contribute half. These section 7 expenses are comprised of items such as costs for textbooks, tuition, medical costs, cell phone expenses, and compass cards.
- [275] I note that many of the section 7 expenses claimed by Mr. El-Mikati were not proven. In addition, given the intermingling of finances between Mr. El-Mikati, J. and M., it has been difficult to tease out how each expense was covered. Thus, for this part of the analysis, I have looked strictly at independent sources of revenue for each of the girls to determine their means.
- [276] I conclude that between her scholarship, employment earnings, savings, and RESPs, J. had enough money to pay for all of her section 7 expenses from the date of separation to the date of judgment, including paying for the costs of her therapy dog. As such, no claimable section 7 expenses have been incurred by Mr. El-Mikati for J.

- [277] However, once I remove J.'s contributions for M.'s expenses (which J. would otherwise have spent on herself to meet her own costs of living) I conclude that M. did not have enough money from her scholarships, employment earnings, savings, and RESPs to cover all of her section 7 expenses. She required financial assistance from Mr. El-Mikati to help meet the shortfall.
- [278] Noting that section 7(1) of the CSG permits the court to estimate section 7 expenses, and doing the best that I can with the evidence I have, I conclude that Mr. El-Mikati has incurred \$5,000 in retroactive section 7 expenses for M. Having regard to the conditions, means, and needs of the parties and the children, and taking into consideration the D.B.S. factors, I conclude that Ms. El-Jaroudi should be required to contribute \$1,500 towards retroactive section 7 expenses for M.
- [279] I note that both J.'s and M.'s scholarship money will run out in April 2020, and their savings, RESPs and expected income from summer jobs will likely not cover all of their special expenses. They will likely both require financial aid in the form of student loans and further assistance from their parents.
- [280] Accordingly, I order that Ms. El-Jaroudi is required to contribute towards the prospective section 7 expenses for M. and J., so long as they continue to qualify as children of the marriage.
- [281] M. and J. have an ongoing obligation to contribute towards their own living and educational expenses. Thus, they are obliged to continue to seek out summer jobs, and apply for student loans and bursaries to help fund their education and living costs while they remain in school. Claimable section 7 expenses will be calculated after deducting for student loans, bursaries, scholarships, RESPs, and employment income earned by each child.
- [282] Subject to any adjustments that may occur to Mr. El-Mikati's income on July 1, 2020, the claimant's proportionate share of section 7 expenses for 2020 is set at 31%, based on her imputed income of \$14,000. The parties' proportionate share of section 7 expenses is to be adjusted annually, with the first adjustment occurring in July 2020, in the manner set out at paragraph 308 of these Reasons.
- [283] Ms. El-Jaroudi's contributions for her proportionate share of section 7 expenses are to be paid on a quarterly basis, retroactively, on the first day of the month following the end of the previous quarter. The first such payment is to commence on October 1, 2020, for any section 7 expenses incurred by J. and M. for the period June 1, 2020, to September 30, 2020. All subsequent payments are to be based on the following schedule: on January 1 for expenses incurred from October 1 to December 31; on April 1 for expenses incurred from January 1 to March 31; on July 1 for expenses incurred from April 1 to June 30, and October 1 for expenses incurred from July 1 to September 30.

[284] Allowable section 7 expenses include the following: medication and healthcare costs that are not covered by MSP or any applicable extended health benefits plan; counselling or psychotherapy costs; costs of the therapy dog; tuition fees; textbooks; school supplies; transportation costs for school purposes; and such other items as agreed to by the parties or as ordered by the court. The claimant is to be notified in advance of any claimable section 7 expenses being incurred, and provided with a receipt or other document proving the cost once it is incurred.

VII. Spousal Support

[285] At issue is the amount and duration of spousal support payable. The claimant seeks retroactive adjustments for what she says is underpayment of spousal support, as well as prospective spousal support for an indefinite period in the amount of \$1,710 per month. The respondent argues that he has overpaid spousal support, and that he should be reimbursed these overpayments. Further he asks that the claimant's entitlement to prospective spousal support be terminated.

[286] In accordance with s. 15.2(6) of the DA an award for spousal support is intended to: recognize the economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; apportion between the spouses any financial consequences arising from the care of their children over and above any obligation for support of that child; relieve any economic hardship of the spouses arising from the breakdown of the marriage; and as far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time. This provision is virtually identical to that found in s. 161 of the FLA.

[287] The starting point for an analysis for spousal support is income disparity between the parties. In this case, there was an income disparity between the spouses at the time of separation. Mr. El-Mikati was earning an income and Ms. El-Jaroudi was not. However, income disparity is not enough. The court must inquire as to the cause of the income disparity between the spouses in order to establish entitlement.

[288] Consistent with these objectives, our courts have recognized three grounds for entitlement to spousal support: compensatory, non-compensatory and contractual: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 15; and *Chutter v. Chutter*, 2008 BCCA 507 at para. 47, leave to appeal ref'd [2009] S.C.C.A. No. 41.

[289] Orders for spousal support under the DA are made pursuant to s. 15.2, which provides:

15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[290] The factors set out in s.15.2(4) require the trial judge to balance the circumstances of each spouse, bearing in mind the objectives of spousal support stipulated in s. 15.2(6), to achieve an equitable alleviation of the adverse consequences of the breakdown of the marriage: Bracklow at para. 36.

[291] In making a spousal support order, the Court must find entitlement to receive spousal support, with the attendant liability to pay on the part of the payor spouse. Once entitlement has been established, issues of duration and amount arise.

A. Background

[292] At the time of their marriage, the claimant was working as an employee at Banque de la Méditerranée, where she had been employed since 1990. She had been supporting herself in the three years leading up to the marriage. The respondent was working as a lawyer, and also self-supporting.

[293] Following the marriage, both parties continued working full-time. They hired a nanny after their first child was born, and experienced no interruptions in either of their careers. The parties agree that their incomes increased over the course of their marriage, although they each assert that they earned more money than the other. Regardless, the parties decided to move to Canada to build a better life for their daughters, who were then aged seven and nine.

[294] Within a few months of their arrival, Mr. El-Mikati found a job with REM as a helper. He received on-the-job training and worked his way up to the job of elevator mechanic. Initially, he did not need a licence to perform this job. However, the law changed and he was required to get his formal qualification. Mr. El-Mikati took a course of home study which lasted about 18 months. During a large portion of this time, Ms. El-Jaroudi was in Lebanon while he was taking care of their daughters, working full-time, and studying for his mechanic exam. Mr. El-Mikati passed his exams and became a licenced mechanic around March 2015.

[295] Ms. El-Jaroudi did not find a job following her arrival in Canada. There is a significant amount of dispute as to whether this was because of a mutual decision of the parties or Ms. El-Jaroudi's lack of motivation. Mr. El-Mikati testified that the main reason for their immigration was to attain financial success. As such, he was anxious for Ms. El-Jaroudi to get a job. The move to Canada was costly, they had two young children, and many expenses they had to meet. Ms. El-Jaroudi says that Mr. El-Mikati did not want her to work, as the needs of the children required her to stay at home. I did not find Ms. El-Jaroudi's evidence credible. Given the parties reasons for immigrating, and the fact that Mr. El-Mikati did not prevent her from developing her career in Lebanon even after the birth of the children, I

find it implausible that Mr. El-Mikati would have discouraged Ms. El-Jaroudi from working once they arrived in Canada.

[296] Further, while it is evident that Ms. El-Jaroudi did assume a lot of the domestic duties during these years, I accept Mr. El-Mikati's evidence that he continued fulfilling his parental responsibilities. In the approximately nine years they were in Canada prior to separation, Ms. El-Jaroudi took two lengthy trips abroad lasting a total of one-and-a-half years. During this time, Mr. El-Mikati was required to continue working full-time, assume all household responsibilities, and take care of two teenaged children.

B. Entitlement

[297] The claimant seeks spousal support on both compensatory and non-compensatory (needs based) grounds. Mr. El-Mikati does not dispute entitlement on compensatory grounds, though he does argue that needs based entitlement has not been established. I conclude that Ms. El-Jaroudi is entitled to support on compensatory grounds.

[298] While her lifestyle may not be what it was during the marriage, this is not enough to establish needs based entitlement. Mr. El-Mikati is in no better position than the claimant. They both live in rental accommodation with one vehicle each - far from the comfortable existence that the parties lived in when they were together. However, Mr. El-Mikati has the added difficulty of having to share his two-bedroom accommodation and vehicle with their two children and a support dog for J. He has been supporting the children and covering some of the cost of the dog, without any financial contribution from the claimant.

C. Amount

[299] As previously discussed, I find it is appropriate to impute income to Ms. El-Jaroudi beginning in 2018. Application of the Spousal Support Advisory Guidelines [SSAG] results in the following calculations:

Table 2: Spousal Support and *Child Support Calculations

Year

Claimant Income

Respondent Income

SSAG

Amount

Paid

LOW

MID

HIGH

2015

Nil

\$78,114

-

-

-

-

2016

Nil

\$82,111

1542

1799

2056

1582

2017

Nil

\$91,158

1686

1967

2248

1582

Jan 2018 to Jun 2018

\$14,000

*CS \$57

\$70,980

1046

1220

1394

1582

Jul 2018 to Dec 2018

\$14,000

*CS \$57

\$70,980

1046

1220

1394

1400

2019

\$14,000

*CS \$57

\$79,518

1198

1398

1597

1400

Jan 2020 to May 2020

\$14,000 *CS \$57

\$79,518

1198

1398

1597

1400

[300] In 2016, Mr. El-Mikati paid spousal support of \$217 per month less than spousal support in the mid range. A retroactive adjustment is warranted from October to December 2016, resulting in a shortfall of \$651 for this period.

- [301] For the 2017 year, a retroactive adjustment is warranted as Mr. El-Mikati paid less than the calculations for mid-range, resulting in a shortfall of \$4,620 for 2017.
- [302] In the 2018 year, Mr. El-Mikati overpaid spousal support. For the first half of the year, he paid spousal support in the amount of \$1,582 per month, while mid-range support would indicate a payment of \$1,220/month, resulting in an overpayment of \$2,172 for that period. Then, for the latter half of 2018, Mr. El-Mikati overpaid \$1,080 based on payments of \$1,400 in monthly spousal support.
- [303] I find no basis for adjusting the retroactive spousal support paid by Mr. El-Mikati through 2019 and up to the end of May 2020. The payments made of \$1,400 per month are consistent with spousal support of \$1,398 per month in the mid range.
- [304] After allowing for set off of the figures for underpaid and overpaid spousal support, the total spousal support underpayment by Mr. El-Mikati up to May 2020 is \$2,019. After accounting for the \$1,653 in retroactive child support owed by Ms. El-Jaroudi, there is a shortfall of \$366 calculated to May 31, 2020. Thus, Mr. El-Mikati is required to compensate Ms. El-Jaroudi \$366 for underpayment of spousal support.

D. Duration

- [305] Based on a relationship of 18.5 years the SSAG indicate spousal support for an indefinite duration, which I find is appropriate in the circumstances, subject to a review. The first such review is to occur after July 2022. The purpose of spousal support is to promote the economic self-sufficiency of each spouse within a reasonable period of time. Having regard to the fact that the parties have now been separated for 3.5 years, I conclude that it would be appropriate to review the claimant's entitlement to and, if necessary, quantum of spousal support after July 2022, on the basis of the parties' incomes and employment status at that time.
- [306] The onus remains on the claimant to find remunerative employment so that she can earn to capacity. Even if she is only able to secure minimum wage employment, if she works full-time, she should be able to earn \$28,000 to \$30,000 per year. Despite her age and limited Canadian work experience, given her qualifications, skills, health and availability of work, I see no impediment to the claimant becoming economically self-sufficient in the near future.
- [307] For the month of June 2020, Mr. El-Mikati is required to pay spousal support in the amount of \$1,398 per month. After set off for child support, this amounts to a net spousal support payment of \$1,250 per month. His spousal support obligations after July 1, 2020 are to be calculated in accordance with the methodology described below.
- [308] Commencing in 2020, the parties are to exchange income tax returns and any related income tax assessments by June 30 of each year. Child and spousal support payments, and the parties' proportionate share of section 7 expenses, shall be adjusted each year effective

July 1, based on the parties' income tax returns from the previous year. However, for the period July 1, 2020 to June 30, 2021, Ms. El-Jaroudi's income will remain fixed at the imputed amount of \$14,000, whereas Mr. El-Mikati's income will be adjusted based on his 2019 income tax information.

VIII. Divorce

[309] Both parties seek a divorce, and I am satisfied on the evidence and record before me that a divorce order should be granted pursuant to s. 8(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The requisite criteria for granting a divorce have been satisfied. There is no chance of reconciliation and there has been no collusion. This divorce order will take effect 31 days from the date of these Reasons.

IX. Costs

[310] Costs ordinarily follow the event. Where success is divided, as in this case, costs are generally awarded to the party who has achieved substantial success. My preliminary view is that each party should bear their own costs. However, in the event that a party wishes to address the matter of costs, they may do so by filing and serving written submissions within 30 days of the date of this Order. Any responding submissions must be filed and served within 14 days of receipt. Written submissions are not to exceed five pages in length, and are to be submitted for my consideration through Supreme Court Scheduling.

"Shergill J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/08/2020BCSC0868.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/el-jaroudi-v-el-mikati-2020>

Prepared on 27 October 2026 · Esheria