

CANADA / JUDGMENT

Finkelstein v. Finkelstein

2025 BCSC 1373

COURT

Supreme Court of British Columbia

DECIDED

17 July 2025

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2025 BCSC 1373 Finkelstein v. Finkelstein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Finkelstein v. Finkelstein,

2025 BCSC 1373

Date: 20250717

Docket: E211969

Registry: Vancouver

Between:

Robert Aaron Finkelstein

Claimant

And

Kathryn Edith Finkelstein

Respondent

Before: The Honourable Chief Justice Skolrood

Reasons for Judgment

Counsel for the Claimant:

J. Cudmore

Counsel for the Respondent:

J. Broadhurst

Place and Date of Hearing:

Vancouver, B.C.

June 4, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 17, 2025

Introduction

- [1] The claimant has brought a summary trial application seeking final orders in respect of the division of family property, including the sale of the family home located on Clarendon Street in Vancouver (the "Home") and determination of the respondent's claim for spousal support. For her part, the respondent has brought an application seeking sole conduct of sale of the Home. A third application was filed by the claimant, albeit out of time, seeking an order that either party be permitted to bid, make an offer or meet any bids on the Home.
- [2] To the credit of the parties, they engaged in a mediation and arbitration process in 2022 and 2023 using the services of John-Paul Boyd, K.C., through which they resolved many financial issues. As will be seen, the remaining financial issues are relatively straight forward.
- [3] For the reasons that follow, I find that the issues relating to the division of family property and the sale of the Home can be determined on these applications. However, the issue of the respondent's claim to spousal support as well as issues relating to potential child support, which were raised by the respondent, are not suitable for summary determination.
- [4] I note that the parties currently have a trial set for five days commencing November 25, 2025.
- [5] I also note that the parties both sought a divorce, however no clearance certificate was filed thus that aspect of the relief sought was adjourned.
- [6] One final preliminary note. The parties disagree about their respective shares of expenses incurred in connection with the Home and the "nesting" arrangement (see below). They have, as yet, not taken up Mr. Boyd's recommendation in his arbitration award that they retain the services of a mutually agreed-upon accountant to conduct this analysis on the basis of some guidelines set out by Mr. Boyd. While that approach makes eminent sense, this issue was not before me on the summary trial application.

Background

- [7] I do not propose to review the background facts in any detail. Briefly, the parties began to live together in a marriage-like relationship on April 1, 2006, were married on October 7, 2008, and separated on February 26, 2021. They have four children ranging in age from six to fifteen years old.
- [8] The parties currently share parenting time using a nesting arrangement in the Home. On February 14, 2025, Associate Judge Vos ordered that the Home be sold, with the parties having joint conduct of sale. The Home has not been listed for sale, although the parties now agree that needs to happen. They disagree on the process.

Summary Trial Principles

- [9] As noted, the claimant's application is brought as a summary trial under R. 11-3 of the Supreme Court Family Rules [SCFR]. The principles governing summary trials are well known and have been discussed in numerous decisions of this Court and the Court of Appeal, with much of the commentary applying and building on Chief Justice McEachern's seminal decision in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.) [*Inspiration Management*].
- [10] A central issue on any summary trial application is whether the matter is suitable for summary determination. The claimant accurately submits that the suitability analysis turns largely on two factors:
- a) The Court must be able to find the facts necessary to decide the issues of fact or law; and
 - b) The Court must be of the view that it would not be unjust to proceed summarily.
- [11] As the Court of Appeal held in *Hudema v. Moore*, 2021 BCCA 482 at para. 51, proportionality is relevant to both factors.
- [12] As to whether it would be unjust to proceed summarily, a number of factors inform the analysis, including:
- a) The amount involved;
 - b) The complexity of the matter;
 - c) Its urgency;
 - d) Any prejudice likely to arise by reasons of delay;
 - e) The cost of taking the case forward to a conventional trial in relation to the amount involved;
 - f) The course of the proceedings,
 - g) The cost of litigation and the time of the summary trial management conference;
 - h) Whether credibility is a critical factor in the determination of the dispute;

- i) Whether the summary trial may create unnecessary complexity in the resolution of the dispute;
- j) Whether the application would result in litigating in slices; and
- k) Any other matters which may be relevant in the particular case.

See *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31.

Evidentiary Requirements and Issues

- [13] The fact that there are conflicts in the evidence does not necessarily mean that a matter is not suitable for summary determination. Often conflicts can be resolved by reference to other evidence, for example documentary evidence, or by permitting some degree of cross-examination: *Inspiration Management* at 215-216; see also *Spring Hill Farms Limited Partnership v. Nose*, 2014 BCCA 66 at para. 19; *Saran v. Cartonio, Inc.*, 2020 BCSC 556 at para. 33, leave to appeal ref'd, 2020 BCCA 252.
- [14] That said, in order for a judge to be able to find the facts necessary to decide the issues that arise, the evidence filed on a summary trial application must focus on the actual matters in issue, be admissible and, to the extent that the evidence is contained in affidavits, it must comply with the requirements governing affidavits as set out in the Rules: *MacLean v. Mio*, 2019 BCSC 375 at paras. 36-37; *Lu v. Shen*, 2020 BCSC 490 at paras. 118-123, 131-134.
- [15] Of particular note is SCFR R. 10-4(12) which requires that, subject to limited exceptions, "an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial". In other words, what is permitted are factual statements about which the witness has personal knowledge. What is not permitted are opinions, argument, legal conclusions or conjecture, none of which would be admissible at trial: *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 2554 at para. 7.
- [16] In considering what evidence is appropriate on a summary trial, it is useful to pay heed to Chief Justice McEachern's words in *Inspiration Management*:
- [59] But it is necessary to recognize that it is essential on all applications under R. 18A for counsel to bring an appropriate measure of professional skill to the preparation of both the substance and the form of their material. It is unfair to scoop-shovel volumes of disjointed affidavits and exhibits upon the chambers judge and expect him or her to make an informed judgment it is incumbent upon counsel to ensure, as the old pleaders used to say, that there is a proper joinder of issues on all questions on fact and law, and the practice of serial affidavits as in this case should be avoided.

- [60] It should not be good enough in such serious matters, for counsel to throw up volumes of ill-considered affidavits and exhibits which do not squarely raise or answer the real issues in the case. The preparation of affidavits for an application or defence under R. [11-3] is a serious matter which requires the careful professional attention of counsel.
- [17] While I would not suggest that the parties here have "scoop-shovelled" affidavits onto the record, there are issues with both volume and content. The record contains five affidavits sworn by the claimant and four by the respondent, as well as two affidavits sworn by a legal assistant to the claimant's counsel that largely comprise exchanges of correspondence between counsel.
- [18] The parties' affidavits suffer from many of the problems referred to above. In addition to being replete with inadmissible argument and opinion, they reflect the unfortunate practice, present in many summary trial applications but particularly prevalent in family law, whereby the parties seem compelled to respond to every statement made by the other party regardless of whether the statement is relevant to a matter in issue on the summary trial. This leads to serial affidavits, something decried by Chief Justice McEachern in *Inspiration Management*.
- [19] To illustrate the problem, I will highlight briefly portions of the parties' affidavits filed as part of the Application Record, particularly as they relate to the parties' employment:
- a) The claimant, in his 5th affidavit, sworn April 8, 2025, (at para. 48(a)) states that "Since January 2023, Kasia has been unemployed, and it does not appear that she has made any real or substantial efforts to find a job for over 2 years admitting that she has not applied for a single job since she became unemployed";
 - b) The respondent swore her 6th affidavit on April 25, 2025, apparently at least in part in response to the claimant's 5th affidavit. In her affidavit, the respondent provides details about her attempts to obtain employment, including listing numerous applications submitted;
 - c) The claimant swore his 6th affidavit on April 25, 2025, for the express purpose of responding to the respondent's 6th affidavit. This affidavit includes the following statements (at paras. 6 (a)-(c)):

In responding to paragraph 29 of the Affidavit and Kasia's list of jobs she applied for:

· I note there is not a single application between January 2023 and July 2024 and then there are 27 applications, 19 of which were made in July 2024, many on the same day which is indicative to me of a "click to apply" style application and does not support Kasia's statements that "at her level" one does not "simply apply to jobs";

- Kasia seems to have applied for 10 jobs on July 12, 2024. I do not see how she could have researched each of these companies and drafted cover letters tailored to each of these positions on that day. Especially when she spent days preparing the cover letter resume for the Danielle LaPorte role;
- This sudden influx of applications occurred directly after examination for discovery where she admitted she made no job seeking efforts in the year and a half leading up to discovery.

The claimant then goes on in his affidavit to provide extensive narrative about his and the respondent's work histories.

- d) On May 30, 2025, the respondent swore her 6th affidavit in which she provides a virtually paragraph by paragraph response to the claimant's 6th affidavit. Much of this affidavit is directed at commenting on the claimant's statements about his past employment-evidence that the respondent characterizes as "a misrepresentation of his true experience and past roles" (at para. 18).

[20] As can be seen, each party has offered editorial comments, opinions and argument on the actions and motivations of the other. Such "evidence" would not be admissible at a conventional trial and it is not admissible on a summary trial. Again, the above references are simply brief examples of problems with the evidence that permeate the entire record.

[21] I will close this section by acknowledging that a more flexible approach to evidence is often taken by the Courts in family law matters, particularly where the best interests of the children are at stake: *Kennedy v. Kennedy*, 2006 BCSC 190 at para. 59. Further, it is important and valuable for the court to hear the parties' evidence in their own words, whether by way of viva voce testimony or affidavits. That said, counsel play an essential role in ensuring the evidence led is admissible, focussed and relevant to the matters in issue. Again, absent a proper evidentiary record, it will be virtually impossible for a judge to find the facts necessary to decide the case summarily.

The Respondent's Spousal Support Claim

[22] As I indicated at the outset, I am of the view that the respondent's claim for spousal support is not suitable for determination on this summary trial application.

[23] I have already touched on the many problems with the evidentiary record which make it impossible to find the facts necessary to decide the question of the respondent's entitlement to spousal support. Three issues central to this determination are (i) the parties' respective roles in parenting the children during the marriage, (ii) the relationship of the claimant's new employment to the employment positions he held during the marriage and the skills and experience he developed from those positions and (iii) the respondent's efforts to secure new employment.

[24] Some additional background is useful to put these issues in context.

- [25] In terms of the parties' employment, during the marriage, both parties had successful careers -- the claimant in the field of marketing and event planning and the respondent in the field of marketing and communications.
- [26] Both parties' careers appear to have been adversely impacted by the COVID-19 pandemic. The claimant deposes that he was unemployed for a period of time and ultimately decided to shift focus to a "completely unrelated" field in order to maintain financial stability. He obtained a role as Business Development Director at a local parking company at a salary of \$120,000. He further deposes that his efforts in this role led to an offer from a leading parking company, Impark, involving expanded responsibilities and an annual salary of \$225,000, substantially more than he had ever earned previously. The claimant alleges that this increase in income is what prompted the respondent to advance her claim for spousal support. As I have also alluded to, the parties have very different views, again largely stated in the form of inadmissible opinions, on whether the claimant's new position is related to his former work or was obtained by reason of the skills and experience he developed during the marriage.
- [27] The respondent also deposes to her work history, noting a number of absences due to maternity leaves. She says that she was laid off in April 2020 from her then employment due to a pandemic reorganization. She then had periods of employment with different companies until January 2023 when she was laid off due to a restructuring. As referred to above, she sets out in some detail her efforts to obtain new employment since that time -- efforts which the claimant questions. The respondent is currently unemployed resulting in a significant income disparity between the parties.
- [28] The claimant submits that the respondent has not established entitlement to spousal support. He notes that at the mediation, they agreed to incomes for the purposes of child support, with the claimant's income set at about \$120,000 and the respondent's at about \$130,000, suggesting that the respondent is capable of earning a significant income. He alleges that she is intentionally under-employed. In his written submission, the claimant states: "There is no good reason for the Respondent to have remained unemployed for approaching 2.5 years while in the prime of her life and parenting responsibility only 50% of the time".
- [29] The respondent claims entitlement to spousal support on the basis that she has been economically disadvantaged as a result of the marriage. She notes that she took four maternity leaves and throughout the marriage was the primary care giver for the children. She alleges that she sacrificed her career so that the claimant's could flourish. She further alleges that the claimant's post-separation increase in income should be accounted for in the spousal support analysis because it is directly related to the skills and experience developed during the marriage.

- [30] The flaws in the evidence that I have referred to make it impossible to find the necessary facts relevant to the parties' past and current employment. Further, the parties disagree about their respective roles in caring for the children and the household, a factor relevant to the issue of the respondent's entitlement to spousal support. This disagreement manifests in extensive opposing narratives set out in the various affidavits, again largely in the form of inadmissible opinion and argument.
- [31] Additionally, both parties allege that the other has failed to fully disclose relevant documents. The claimant says that the respondent has not provided documents disclosing her actual income and assets, notwithstanding a consent disclosure order made by Associate Judge Bilawich on April 8, 2024. The respondent submits that the claimant has not produced documents relevant to his new employment, which was only disclosed shortly before the summary trial application.
- [32] While there is no application for further document production before me, the lack of documents relevant to the central issues in dispute is a further reason why the spousal support issue is not suitable for determination by summary trial.
- [33] Finally, the respondent included in her response to the claimant's summary trial application, a request for retroactive child support from June 1, 2024, and prospective support commencing May 1, 2025.
- [34] The date of June 1, 2024, comes out of the parties' mediation agreement in which they agreed that neither would pay child support until June 1, 2024. That agreement also contemplated that effective June 1, 2024, child support would be adjusted based on the parties' current incomes following an exchange of income information.
- [35] No adjustment has yet taken place. Further, the parties both acknowledge that any adjustment to child support will turn in part on whether there is a change in parenting arrangements following the sale of the Home as the nesting arrangement, at least in its current form, will no longer be possible. Accordingly, it is clear that, absent an agreement, further proceedings will be required to determine both parenting and child support issues. The parties' incomes will be relevant to that determination; thus it only makes sense that all income issues, including those impacting the spousal support issue, be heard together at a later date.
- [36] For all of these reasons, the claimant's application to dismiss the respondent's claim to spousal support on a summary basis is dismissed.

Property Division and Sale of the Home

- [37] In my view, the sale of the family home and the division of the remaining family assets can properly be decided on these applications.

- [38] In coming to this conclusion, I acknowledge the historical reluctance to permit parties to "litigate in slices", i.e., to seek determination of some issues by way of summary trial while having other issues proceed to a conventional trial. The underlying concern was described in *SmartCentres Inc. v. EBA Engineering Consultants Ltd.*, 2014 BCSC 2271, citing *Coast Foundation v. Currie*, 2003 BCSC 1781, as follows:
- [23] While the court will attempt to resolve the issues placed before it and give judgment where it is appropriate to do so, special considerations apply when a single issue is proposed for resolution by way of summary trial. In *Coast Foundation v. Currie*, 2003 BCSC 1781, Groberman J. summarized these difficulties with reference to the relevant authorities. He noted that courts should be cautious about deciding cases in a piecemeal fashion. The extent to which issues may be intertwined is not always obvious or immediately evident when a single issue is placed before the court in isolation. He highlighted two concerns which are relevant to the efficient resolution of disputes; the allocation of a court's own resources and the efficiency of a partial determination from the standpoint of the litigation.
- [39] While these concerns are well-founded, there is not in my view a universal and intractable rule precluding the determination of some but not all issues in a case summarily. Such a rule would in fact be inconsistent with the wording of SCFR R. 11-3(15)(a) which directs that on a summary trial application, the court may "grant judgment in favour of any party, either on an issue or generally". Moreover, Chief Justice McEachern specifically contemplated such an approach in *Inspiration Management*:
- [51] But I wish to add that a chambers judge should also consider, if a critical issue in the case can be decided, whether that may assist the parties to reach an accommodation on other questions. It may be the case that there will still have to be a trial of other issues notwithstanding a judgment on one or more issues, but chambers judges should not feel constrained to avoid deciding some issues even if others cannot be decided at the same time by this procedure.
- [40] As Chief Justice McEachern held, a critical factor in determining if it is appropriate to proceed on some but not all issues is whether doing so will assist the parties in reaching an accommodation on other issues. I would add as equally important considerations whether a summary trial on some issues will advance the litigation, rather than impose a further layer of cost and complexity, and whether it will assist the Court in its adjudicative function.
- [41] Of course, in order to proceed by summary trial, the same criteria apply in that the Court must be able to find the necessary facts and be satisfied that it would not be unjust to proceed. Those criteria have been met as I will explain below.

The Home

- [42] I will deal first with the sale of the Home. Again, some brief additional background is useful. The parties own the Home jointly and, as noted, have been parenting the children on a shared basis in a nesting arrangement using the Home.
- [43] On February 14, 2025, the respondent brought an application seeking to sell the Home. Associate Judge Vos granted the application, with the parties to have joint conduct of sale. Associate Judge Vos delayed the coming into force of the order for sale for one month, to March 14, 2025, for the express purpose of giving the claimant the opportunity to buy the respondent's interest in the Home. It is the claimant's position that he has always wanted to buy out the respondent in order to minimize the disruption to the children's lives.
- [44] As of February 14, 2025, the respondent believed the value of the Home to be \$2,400,000, based on an appraisal dated May 24, 2024. The claimant was unable to obtain financing that would permit him to buy the Home at that price; thus he did not make an offer to purchase by the deadline of March 14, 2025, set out in Associate Judge Vos's order.
- [45] Thereafter, each party retained a realtor and there was considerable back and forth correspondence about the sale of the Home. For example, the claimant's realtor identified several issues with the Home that in his view meant the value was less than \$2,400,000. The claimant then suggested the parties undertake some repairs and upgrades to address those issues. The respondent did not agree.
- [46] Subsequently, the realtors for both parties agreed that a reasonable listing price for the Home was \$2,150,000. Both parties, however, accuse one another of subverting the sales process. The claimant alleges that the respondent signed the listing agreement without providing the required disclosure statement. He further alleges that she refused to permit him to purchase the Home. The respondent alleges that the claimant has refused to sign the listing agreement. She further alleges that the claimant has an interest in not obtaining maximum value for the Home given his desire to purchase her interest.
- [47] Against that background, the respondent now seeks an order for sole conduct of sale. The claimant opposes that order and seeks a term that he be permitted to make an offer for the purchase of the Home.
- [48] In *Etemadi v. Maali*, 2021 BCCA 298, Justice Butler (dissenting but not on this issue) discussed the principles governing an application for sole conduct of sale:
- [102] In *Dhillon v. Khumar*, 2014 BCSC 2366, Master Keighley set out considerations relevant to orders for conduct of sale in family litigation:

- [34] As to whether the claimant should be given sole conduct of sale, while there is no singular test for granting sole conduct of sale, the Court should consider all factors including the willingness of a party to facilitate sale, the inability of the parties to agree on routine aspects of sale and the inability of the parties to cooperate: *McLachlan v. McLachlan*, 2013 BCSC 1733.
- [103] These considerations have been applied in many cases. In *Dosanjh v. Lalli*, 2021 BCCA 204, this Court set aside the approval of a non-arm's length sale to the respondent's parents and granted an order for joint conduct of sale. Justice Dickson made the order for joint conduct, with liberty to apply for directions and such further orders as may be necessary, because the evidence failed to establish that the parties could not cooperate with one another in connection with the court-ordered sale, particularly with the assistance of professional advisors: at para. 40.
- [104] Trial courts frequently make orders for sale of property jointly held by spouses in acrimonious family disputes. Usually courts grant orders for joint conduct of sale because both parties have a profound interest in the terms of any sale. This is so even where there is evidence that the parties have difficulty in cooperating. For example, in *McClaughry v. McClaughry*, 2009 BCSC 501, at paras. 41-43, the court granted joint conduct of sale despite the husband's position that the sale could not proceed in an orderly fashion if a joint conduct order was made because the wife would not cooperate and would "take steps to block any timely sale". In *Kubas v. Kubas*, 2017 BCSC 81, at para. 81, the court ordered joint conduct of sale over the wife's objection. The judge noted that the husband's lack of cooperation related to separate issues of document disclosure, not the sale of property, and that he should be given the opportunity to cooperate in joint conduct of sale. Similarly, in *Steward v. Sanddar Estate*, 2020 BCSC 1898, at paras. 15-18, although not a family case, the court-ordered joint conduct of sale despite the petitioner's allegations that the parties could not cooperate.
- [106] It is usual to give spouses in family litigation the opportunity to work together, through an order for joint conduct of sale, and only if they are unable to do so, to grant sole conduct to one party on specific terms: see, e.g., *McClaughry* at para. 43; *Kubas* at para. 81; *Dosanjh* at para. 40.
- [Emphasis added.]
- [49] As noted, the order for sale granted by Associate Judge Vos provided for joint conduct of sale. I am not satisfied that events subsequent to that order or current circumstances warrant varying the order and providing for sole conduct on the part of the respondent.
- [50] It is clear that the parties have difficulty cooperating, and there were initial disagreements about price and the need for renovation work. However, both agree that the Home must be sold and now generally agree on an appropriate list price. In my view, joint conduct of sale remains appropriate, subject to what I say below.

- [51] The only real sticking point seems to be whether the claimant is permitted to submit an offer to purchase the Home and/or match any other offers received.
- [52] The respondent has not provided any compelling reasons why the claimant should not be permitted to buy the Home or at least submit an offer, other than the fact that he was given the opportunity by Associate Judge Vos to buy out the respondent's interest and failed to do so.
- [53] In my view, both parties should have the opportunity to buy the Home. However, that opportunity should not extend to granting either party a right of first refusal, which is what the claimant seeks when he asks for an order permitting him to match any bids received. There are compelling reasons for not granting such a right.
- [54] As the respondent fairly submits, granting either party a right of first refusal is likely to have a dampening effect on the marketability of the property. This was recognized by the Ontario Court of Appeal in *Martin v. Martin*, 8 O.R. (3d) 41, 1992 CanLII 7402 (C.A.). The principal issue in dispute on that appeal was the jurisdiction of a motions judge to order the sale of a jointly owned matrimonial home. As part of the order for sale, the motions judge had granted the husband a right of first refusal. The Court of Appeal found that the motions judge lacked jurisdiction to make the order. The Court then considered the right of first refusal.

[55] Justice Osborne for the Court stated:

a right of first refusal, such as was granted to the respondent, is a substantive right. It is a right which has some clear, albeit difficult to quantify, economic value. It is a right which falls outside the boundaries of what is ancillary to, or what is reasonably necessary to implement the order for sale of the matrimonial home.

A right of first refusal will most often work to discourage other interested buyers. If a spouse is granted a right of first refusal, the effect of it is to remove that spouse from the competitive market for the matrimonial home. The existence of a right of first refusal distorts the market, because it provides a benefit to one party, which eliminates the need for that party to compete with any other interested purchaser. Finally, if the spouse with a right of first refusal is in possession, the existence of the right of first refusal will provide a disincentive to maintaining the property, so as to increase its value and saleability. I acknowledge that, in some degree, the same disincentive may operate if a spouse in possession, without a right of first refusal, wants to buy the matrimonial home. In my view, the motions judge erred in concluding that the right of first refusal would not prejudice Mrs. Martin.

Both Dr. Martin and Mrs. Martin have a right to buy the matrimonial home. If Dr. Martin wants to exercise that right he should be in a position of having to compete with any other interested purchaser. It is only in that way that Mrs. Martin's interest in the property will be fairly and justly quantified.

- [56] Martin was cited in *Laurignano v. Laurignano*, 2009 ONCA 241, where the Court set aside an order granting one of the parties a right of first refusal to purchase the matrimonial home. The Court, by way of an endorsement, said:
- [3] absent the agreement of both parties, the motion judge's orders granting rights of first refusal should not have been made. See *Martin v. Martin* (1992), 1992 CanLII 7402 (ON CA), 8 O.R. (3d) 41 (C.A.).
- [5] the motion judge's order concerning the sale of the matrimonial home is set aside and in its place is substituted an order that the matrimonial home be sold on terms and conditions to be agreed to by the parties or, absent agreement, fixed by the court. Both parties shall have the right to submit offer(s) to purchase the matrimonial home.
- [57] The concerns identified in *Martin*, and implicitly endorsed in *Laurignano*, exist in this case as well. The claimant, given his expressed desire to purchase the Home, is in a position of inherent conflict between, as a prospective purchaser, wanting to buy at a reasonable price and, as a seller, the objective of maximizing value as part of the division of family assets. In my view, that conflict is best addressed by varying Associate Judge Vos's order to include the terms ordered by the Court in *Laurignano* directing that the parties have joint conduct of sale on terms to be agreed to by the parties or, absent agreement, fixed by the Court, and stipulating that both parties have the right to submit offers to purchase the Home.
- [58] I would add that if the claimant is sincere in his wish to purchase the respondent's interest in the Home, there does not appear to be anything preventing him from offering to do so at the price most recently agreed to by the parties.
- [59] Two final notes on the sale of the Home. First, in his notice of application, the claimant sought a holdback of \$100,000 from the sale proceeds on account of the adjustment to family expenses referred to above at para. 6 of these Reasons. The parties did not address the holdback issue in their submissions and I am not satisfied that such an order is necessary in the circumstances.
- [60] Second, the respondent sought a fine payable in the amount of \$5,000 by the claimant for failure to comply with Associate Judge Vos' order to sell the Home. This was not pushed by the respondent at the hearing and in any event, there is no basis for such a fine. As I have alluded to above, the failure to sell the Home was the result of a lack of cooperation by both parties rather than an intentional breach by the claimant.

Property Division

- [61] Turning to the division of the remaining family property, the matters in dispute are relatively limited as is the relevant evidence. Not only can these matters be resolved now, it is in my view useful to do so, so that any further proceedings can focus on the child and spousal support issues.

[62] The parties have helpfully provided schedules setting out their respective positions on the remaining property issues. There appears to be no dispute about the following:

- a) Any funds remaining in the parties' joint bank accounts will be divided equally;
- b) Any funds remaining in the parties' own accounts will remain the property of the owner of the account free from any claims by the other spouse;
- c) The parties' CPP benefits will be divided equally between the parties; and
- d) The parties will maintain the existing RESP account for the children, with the respondent to be added to the account. Any unused portion of the RESP will be divided equally between the children.

[63] Both parties refer in their schedules to various personal items, for example some jewellery and silver coins, but there were minimal submissions on how to divide this property. I do not take there to be significant disagreement about the following items:

- a) The claimant will retain:
 - His grandfather's watch;
 - His grandfather's ring;
 - His grandfather's necklace;
 - His high school graduation ring; and,
 - His wedding band.
- b) The respondent will retain:
 - Silver coins;
 - Her engagement ring;
 - Her wedding band;
 - Diamond heart pendant;
 - Diamond circles pendant; and,
 - Tiffany charm bracelet.

[64] If there are additional items on which the parties cannot agree, such items will be sold and the proceeds divided equally.

[65] The few remaining matters in dispute are:

- a) The value of the claimant's excluded property claim within his RRSP;
- b) Whether the respondent must compensate the claimant for funds removed from her TFSA account after separation; and,

- c) How to deal with the two vehicles.

The RRSPs

- [66] The parties agree that their respective RRSP accounts should be divided equally. They disagree, however, on the amount of the claimant's excluded property claim. Both agree that the claimant has an exclusion of \$21,414.02. The claimant claims an additional \$79,488.98 that he alleges he brought into the relationship from non-registered accounts in his name. The respondent disputes this claim and says the claimant has not made it out on the evidence.
- [67] The onus of proving an exclusion is on the party claiming it: *Shih v. Shih*, 2017 BCCA 37. There, Justice Kirkpatrick said:
- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [68] The claimant's evidence about the \$79,488.98 is sparse. He deposes that he had balances of \$7,897.84 and \$71,591.14 in specified RBC Investment Accounts as at June 30, 2006, "which subsequently went into" his RRSP accounts and he has produced statements indicating those balances. He has not produced any documents demonstrating the alleged transfer of those sums into his RRSP.
- [69] In my view, the claimant has not met the burden of establishing that the additional \$79,488.98 claimed is excluded property. While it is not unusual that a party no longer has documents, including banking statements, dating back many years, the claimant does not explain why he was able to produce account statements dated June 30, 2006, for his RRSP and for the two RBC Investment Accounts referred to above, but no other statements. Further, he provides no evidence about the alleged transfers into his RRSP account, for example the general dates, circumstances or mechanics of the alleged transfers. In short, there is no clear and cogent evidence supporting a finding that the additional \$79,488.98 is excluded property, nor does the existing evidence permit the Court to draw a reasonable inference to that effect.
- [70] The claimant's excluded property claim in respect of the parties' RRSPs is therefore limited to the amount of \$21,414.02 as agreed between the parties.

The TFSA Accounts

- [71] Both parties have TFSA accounts registered in their respective names. In the claimant's first F8 Financial Statement, he listed the value of his TFSA at \$25,758 as at October 29, 2021. His most recent F8 put the value at \$27,675.80. The respondent's first F8 stated the value of her TFSA at \$31,000.00. In her most recent F8, the value was stated at \$1,876.98 as at February 3, 2025.
- [72] The claimant submits that the respondent disposed of family property and as such he is entitled to be compensated pursuant to s. 97(2)(c) of the FLA. The respondent argues that the claimant is effectively seeking a reapportionment or unequal division of family property under s. 95(2)(g)(i) on the basis that the respondent substantially reduced the value of family property. She submits that she used these funds for living expenses due to the financial pressure she was facing leading up to the trial.
- [73] Section 87 of the FLA requires the value of family property to be determined as of the hearing or trial date, and a departure from this presumptive date is effectively a reappointment or an unequal division of family property, which can only be done under s. 95: *Fox v. Fox*, 2022 BCSC 139 at para. 101. The onus is on the claimant to prove why equal division of family property would be significantly unfair to him: *Nicol v. Lau*, 2024 BCSC 1866 at paras. 169, 174.
- [74] The basis for doing so, having regard to case law under the former legislation and the differences between s. 95(2)(f) and (g), was discussed by Justice Fleming (as she then was) in *J.D.G. v. J.J.V.*, 2016 BCSC 2389, as follows:
- [238] In *Jacoubson v. Jacoubson* (1991), 60 B.C.L.R. (2d) 40 (C.A.), the court had interpreted *Newson* as providing for compensation orders where assets have been deliberately given away, disposed of, or wasted to defeat the interest of the other spouse or reducing the amount available for distribution. Lawrence emphasized however it was not the motive for depletion or wasting of assets that triggered the court's jurisdiction to reapportion family assets. Instead, it was the fact they had been depleted or wasted, thereby defeating the intent of the FRA to effect an equal division of all (family) assets. Accordingly, the appropriate inquiry when applying s. 65 was not whether the spouse's unreasonable conduct was responsible for the loss, but whether as a result, he or she reduced the amount available for distribution in circumstances that rendered an equal division unfair.
- [239] This analysis appears consistent with s. 95(2)(f), not (g), which allows the court to consider whether a spouse, after separation, has caused a significant increase or decrease in the value of family property or debt beyond market trends, focusing on the effect of the conduct only. In contrast, s. 95(2)(g) includes a fault element or motive for spousal conduct. It applies where "a spouse, other than a spouse acting in good faith", disposes of or substantially reduces the value of family property.

- [75] In J.D.G., Justice Fleming concluded that the claimant's disengagement from his business and resulting decline in the value of the business did not justify a reapportionment in the respondent's favour, but the claimant's gambling -- which had dissipated nearly \$300,000 of family property -- did justify a corresponding reapportionment in favour of the respondent.
- [76] I have considered a number of cases in which an unequal division of family property was ordered, having regard to one spouse's dissipation of family assets. In *M.L.N. v. D.N.*, 2006 BCSC 249, the Court found that approximately \$50,000 in RRSPs had been used by one of the spouses to purchase drugs, buy a new vehicle, and travel abroad: para. 39. In *Kim v. Hong*, 2013 BCSC 587, the Court found that the husband had dissipated over \$1 million of family assets and court advances post-separation, primarily using the money for gambling, holidays, personal expenditures, and unexplained money transfers: paras. 314-327.
- [77] In my view, the circumstances here are distinguishable from those above. While the evidence of the respondent as to her use of the funds is limited, I am satisfied that she was acting in good faith. I do not consider the respondent's use of approximately \$30,000 towards her living expenses to be unreasonable. Moreover, the claimant has not established that valuing the TFSA accounts at the date of trial would be substantially unfair to him.
- [78] As a result, the TFSA accounts are to be divided equally between the parties based on the value at the date of trial.

The Vehicles

- [79] The parties own two vehicles, both of which are acknowledged to be family property: a 2010 Ford Escape SUV, estimated by the parties to have a value of between \$3,000-5,000, and a 2016 Chrysler Town and Country Minivan, which the parties agree has a value of \$20,000.
- [80] While the claimant suggested there is a dispute about the vehicles, specifically that the respondent wishes to retain the Chrysler minivan, the respondent's proposed property division provides for sale of both vehicles, with the proceeds to be divided equally.
- [81] This makes sense in the circumstances, although it remains open to either party to purchase the other's interest in one or both of the vehicles.

Conclusion

- [82] The claimant's application to dismiss the respondent's claim to spousal support on a summary basis is dismissed.
- [83] Having concluded that a summary trial is appropriate for resolution of the property division issues and the sale of the Home, I make the following orders:
- a) Associate Judge Vos' order is varied to specify that the parties have joint conduct of sale on terms to be agreed to by the parties or, absent agreement, fixed by the Court, and stipulating that both parties have the right to submit offers to purchase the Home;

- b) Any funds remaining in the parties' joint bank accounts will be divided equally;
- c) Any funds remaining in the parties' own accounts will remain the property of the owner of the account free from any claims by the other spouse;
- d) The parties' CPP benefits will be divided equally between the parties;
- e) The parties will maintain the existing RESP account for the children, with the respondent to be added to the account. Any unused portion of the RESP will be divided equally between the children.
- f) Both parties will retain various personal items as referred to in para. 63 of these Reasons;
- g) The parties' TFSA accounts will be divided equally between the parties; and
- h) The 2010 Ford Escape SUV and 2016 Chrysler Town and Country Minivan will both be sold, with the proceeds to be divided equally.

[84] Costs of both applications will be in the cause.

"Chief Justice Skolrood"

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