

CANADA / JUDGMENT

G.K.D. v. C.S.D

2021 BCSC 367

COURT

Supreme Court of British Columbia

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2021 BCSC 367 G.K.D. v. C.S.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.K.D. v. C.S.D.,

2021 BCSC 367

Date: 20210304

Docket: E54130

Registry: New Westminster

Between:

G.K.D

Claimant

And

C.S.D. and ABC Ltd.

Respondent

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

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Counsel for the Respondent:

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R. Doicee

Place and Date of Trial:

New Westminster, B.C.

January 27-31, February 3-7, 21, March 9, 11 and 13, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 4, 2021

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I. introduction

- [1] G.D. ("the claimant" or "the mother") and C.D. ("the respondent" or "the father") married in India on February 26, 2003. The marriage was arranged. The respondent immigrated to Canada prior to the marriage. Following the marriage, he sponsored the claimant and she joined him in Canada in November 2003.
- [2] The parties initially lived as a joint household with other family members: R. (the respondent's older brother) and K. (R.'s wife and the claimant's cousin) ("Joint Family"). The mother of the respondent and R. lived with them for a period, but eventually returned to India.
- [3] At some point, the Joint Family bought a house ("Surrey House") with each couple contributing 50% of the down payment. A few years later, in 2012, R. and K. bought a second house and moved into it. When R. and K. moved out, the Surrey House was put into the parties' names and a new mortgage was obtained in their names.
- [4] The parties have two sons. The elder was born in June 2005, and was 14 years old at the time of trial. The younger was born in September 2009, and was 10 years old at the time of trial.
- [5] The parties separated in August 2015. They have lived separate since then, with the exception of a brief period in December 2016.
- [6] The corporate respondent, ABC Ltd. ("ABC"), is in the business of installing residential siding and constructing and repairing sun decks and patios (collectively, the "siding trade"). The respondent is ABC's sole director.
- [7] The respondent learned the siding trade in Canada and, for the most part, following the marriage. He started with a company operated by a brother-in-law and eventually started operating ABC as his own business.
- [8] There is also a second company, DEF Ltd. ("DEF"). DEF sells siding and patio linoleum. It operates out of a warehouse in Surrey. The claimant alleges the respondent has a direct or indirect ownership interest in DEF.

II. history of the proceedings

- [9] The claimant initially filed in the Provincial Court. On September 12, 2017, an interim order was made in that proceeding ("2017 Order"). The 2017 Order obliged the respondent to pay \$725 per month for the support of the children (inclusive of extraordinary expenses), effective February 1, 2017. The 2017 Order also gave the respondent three hours of parenting time each Sunday, commencing September 10, 2017.
- [10] No payment has ever been made under the 2017 Order.
- [11] The claimant filed a notice of family claim in this Court on October 30, 2017.
- [12] On December 12, 2017, a response was filed by the respondent. No counterclaim was filed.
- [13] ABC never filed a response.
- [14] A judicial case conference ("JCC") held on April 23, 2018, produced a consent order ("2018 Order"). Among other things, the parties agreed to exchange lists of documents and for the respondent to provide a Form 8 Financial Statement with all listed attachments within 30 days. (As the respondent is ABC's sole director, the Form 8 requires copies of ABC's last three financial statements to be attached.) The respondent did not comply with his obligations.
- [15] On July 19, 2019, the claimant filed an application seeking, among other things, orders for disclosure and compliance with the 2018 Order. On July 23, 2019, the respondent filed an application regarding parenting time ("Parenting Application"). The relevant parts of these applications were settled by a consent order of Master Muir made August 1, 2019 ("2019 Order").
- [16] The 2019 Order added supervised parenting hours on Wednesday nights (i.e., in addition to Sundays), but the respondent's parenting time was made subject to conditions, including demonstrating ongoing participation in a treatment program and refraining from consuming alcohol within the 24 hours prior to parenting time.
- [17] The 2019 Order required the respondent to disclose specified documents and/or categories of documents by August 9, 2019, including bank and credit card statements from January 1, 2013, forward and a Form 8 Financial Statement with all attachments. The respondent did not comply with his disclosure obligations under the 2019 Order. No ABC financial statements were ever disclosed, as attachments to a Form F8 or otherwise. While some statements for some bank accounts were disclosed, even those provided did not span the stipulated period (i.e., no statements were provided for 2013 or 2014).
- [18] The claimant set an examination for discovery for August 30, 2019. The respondent failed to attend. On October 25, 2019, Master Vos ordered him to attend for discovery on November 25, 2019. The respondent presented himself at the reporter's office on November 25, 2019, indicated he felt unwell and lacked a lawyer, and then left without being examined.

[19] The respondent appears to have had legal counsel for most of this proceeding. He was also represented by counsel before the Provincial Court. He has changed counsel several times, resulting in gaps during which he was self-represented. His counsel at trial was retained on December 13, 2019.

[20] On January 17, 2020, the respondent filed an application seeking to have the January 27, 2020, trial dates adjourned ("Adjournment Application"). The Adjournment Application was dismissed by Justice Jenkins on January 22, 2020, on the basis that adjournment would be prejudicial to the claimant.

III. SUMMARY OF POSITIONS

[21] Both parties seek a divorce.

[22] The claimant seeks sole guardianship and an exclusive grant of parental responsibility. She does not oppose the respondent's continuing to have some parenting time, provided it is under conditions including supervision, refraining from consuming alcohol, and participation in a treatment program.

[23] The claimant seeks child support and s. 7 expenses under the Federal Child Support Guidelines, SOR/97-175. She says the respondent has not disclosed his true post-separation income, and seeks retroactive child support and s. 7 expenses based on an imputed income. She also seeks prospective child support and s. 7 expenses in lump sum payment.

[24] The claimant has identified the following as family property:

- a) the family home (the Surrey House);
- b) a condominium in Surrey (the "Surrey Condo");
- c) the respondent's alleged interest in land located in India (the "Farm");
- d) ABC;
- e) the respondent's alleged interest in DEF; and
- f) a white 2008 BMW purchased during the marriage (the "BMW").

[25] The claimant seeks a reapportionment of the Surrey House 100% in her favour. She also seeks an order for costs, and an order for special costs regarding the mid-trial applications brought by the respondent.

[26] The respondent seeks orders for joint guardianship and shared parental responsibilities. He seeks a parenting order with terms that permit his parenting hours to gradually increase to a 50/50 position.

[27] The respondent denies having earned any income post-separation, through ABC or otherwise, aside from a two week period in December 2016. He asserts that he is medically unfit to work, and has been since the separation.

- [28] He submits that the claimant delayed unduly in seeking child support and s. 7 expenses for the period prior to the 2017 Order. With regard to the period between the 2017 Order and trial, he submits his support and expenses should be capped at the amount due under the 2017 Order.
- [29] The respondent concedes the Surrey House, Surrey Condo, ABC and the BMW are family property, but submits ABC and the BMW are of negligible value. He seeks an equal division of the family property.
- [30] He denies holding any interest in the Farm or DEF.
- [31] While the pleadings rely on 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], the parties' closing arguments were directed almost exclusively to the FLA. On no point did either party argue that the outcome would differ depending on which statute was applied. I agree that it is appropriate for the issues here, other than the divorce order, be determined under the FLA.

IV. DIVORCE

- [32] On the materials filed and the undisputed facts that I accept, I find the parties meet the requirements for a divorce under the DA. The parties are divorced from one another, effective the 31st day after the date of this judgment.

V. credibility & reliability

- [33] The credibility (honesty) and reliability (accuracy) of witnesses is central to fact-finding here. In making assessments, I have applied the framework and considerations outlined in C.L.M. v. M.J.S., 2017 BCSC 799, at paras. 7 and 8.
- [34] I am mindful that I may accept none, part, or all of the evidence of any witness' evidence, and may assign different weight to different parts of that evidence. However, after due consideration of the record, I am confident the following broad-stroke assessments are proper.
- [35] The claimant was, in general, a careful and honest witness. Her answers were responsive, straightforward and measured. Where her knowledge was limited, she candidly indicated that and qualified her answers. She was willing to acknowledge the respondent's positive attributes and conduct as well as the negative. Her evidence indicates she only reluctantly concluded the marriage could not be rehabilitated.
- [36] The respondent's testimony was, in contrast, consistently problematic. He concedes having significant memory loss as a result of his drinking. This was amply demonstrated in his testimony.

- [37] The respondent acknowledged that he blacks out when he drinks. In argument, his counsel described him as unable to recall any significant events, other than remembering "small pieces." The description is apposite. In my view, the bulk of what the respondent styled in evidence as his "recollection" is, in fact, the product of self-interested reconstruction by supposition.
- [38] While he generally implied that the claimant's evidence should be rejected, the respondent provided very little in terms of conflicting evidence. On a remarkably large number of significant factual issues, the respondent said nothing at all.
- [39] Finally, where he did have knowledge of the facts, the respondent demonstrated little commitment to his oath. In my view, his evidence on a number of points was fabricated.
- [40] Specific findings are discussed below.

VI. PARENTING ISSUES

A. General Background

- [41] The respondent has, and has had for some time, a severe alcohol addiction. His condition has profoundly impacted the lives of the parties and their children, and it has a significant role in the factual narrative of this decision.
- [42] Following his father's death in 2012, the respondent started drinking daily and to the extent that he needed to be put to bed at the day's end. By 2014, he was engaging in week-long binges and failing to do any work for days at a time.
- [43] In February 2015, he was hospitalized on an emergency basis suffering severe intoxication following a binge and, in the spring, enrolled in treatment in India. On May 6, 2015, only a few days into the rehabilitation stage of the program, he had one of his brothers sign him out of the treatment centre. He came back to Canada and resumed drinking.
- [44] During an argument on August 23, 2015, the respondent jerked the claimant off the sofa in front of the children. Believing he was going to strike her, the claimant telephoned the respondent's adult nephew, "S.", for assistance. S. came to see that she got out of the house, but the respondent still managed to kick at her as she was leaving with the children. The claimant testified that afterwards, the older son told her the respondent hit him when she left the room to phone S.
- [45] Although the claimant spoke to the police and the Ministry of Child and Family Development about this incident, she told them no one had been hurt. She testified that she under-reported the events as she believed doing otherwise would make life more difficult for the respondent, which would be counterproductive.

- [46] I accept the claimant's evidence regarding the incident. While she under-reported the incident to the authorities, she reacted very seriously herself. She called S. for help and then took the children and left to live with her parents in Aldergrove. Her departure that night would be the parties' date of separation.
- [47] In or about September 2015, the respondent went back to India again with some of his family members. He would stay there until December 2016.
- [48] In October 2015, the claimant learned, through a happenstance conversation with S., that the respondent was living in India. She and the children moved from Aldergrove back into the Surrey House.
- [49] The respondent tried a second treatment program while back in India. In October 2016, he telephoned the claimant and reported doing well. He asked to rejoin her and the children in the Surrey House, and she said he could. He apparently finished the program and flew back to Canada in December 2016. He informed the claimant that he had started drinking again on the plane, moved into the Surrey House, returned to his work and resumed his prior drinking pattern.
- [50] On December 23, 2016, the respondent attempted to strike the claimant during another argument. He missed her, and then shoved her forcefully instead. The older son attempted to intervene, and he was then forcefully shoved as well. The police attended at the Surrey House and detained the respondent. The claimant gathered the children and went back to live with her parents in Aldergrove.
- [51] I accept the claimant's evidence regarding this incident as well. Her father, who was present in the room during the altercation, also testified. His testimony confirmed the incident was serious in nature.
- [52] In early January 2017, the respondent phoned the claimant and demanded she bring him either the BMW or cash and alcohol. When she refused, he said he would set the BMW on fire. She explained that she needed the car to transport the children and to get to work, to which he replied: "whenever I see the car, I am going to set it on fire". He was charged with uttering threats as a result of the conversation (the "2017 threats"), and pled guilty to that offence in March 2017.
- [53] In his testimony before me, the respondent denied making the 2017 threats (notwithstanding that he cannot, as a matter of law, dispute his guilt in these proceedings: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63).
- [54] He was given a conditional discharge and a year of probation. His probation terms obliged him to complete a residential rehabilitation program at the Path to Freedom Treatment Centre ("PTFC"). In March 2017, the respondent moved into PTFC, and the claimant and the children once again moved back to the Surrey House from Aldergrove.

- [55] PTFC's program has two stages. At the second, clients reside at PTFC, but are permitted to leave to attend work during the day. The respondent made it to the second stage. On September 11, 2017, a counsellor, Davinder Randhawa, noted the respondent smelling of alcohol following his work day and administered a breathalyzer test. After failing the test, the respondent left PTFC. He was not discharged nor did he collect his belongings - he simply left. As he was at PTFC as a term of probation, a warrant was issued. Eventually, the respondent turned himself in. In the end, the charge on the breach of probation was stayed and the respondent was directed to attend Night and Day Recovery Centre ("NDRC") under a new term of probation.
- [56] The respondent occasionally exercised supervised parenting time during December 2017 and early 2018. There was no schedule. He would call the children to arrange a time, and the claimant would arrange for supervision.
- [57] As noted, the respondent filed the Parenting Application in July 2019, seeking "reasonable and generous" unsupervised parenting time. In his affidavits sworn in support, he attested to being "sober for over five months now". That was not true. The hospital records before me satisfy me he sought (while still under the influence of alcohol) treatment on July 1, 2019, for the effects of self-reported heavy drinking over "the last couple of weeks". In outlining his recovery path in his supporting affidavit, he also attested that he left PTFC in favour of NDRC because "all the classes at the [PTFC] were in English language". I have already described the actual circumstances of that change. These are serious and material misrepresentations.
- [58] In cross-examination, the respondent took no responsibility for these misrepresentations, suggesting his then lawyer must have failed to properly interpret the affidavits before he swore them. I find the respondent made the misrepresentations knowingly and deliberately. His claims of recovery and sobriety were the lynchpin of the Parenting Application, not fine points dependent on nuance or literal word for word interpretation.
- [59] I find the respondent also failed to comply with terms of the 2019 Order that were patently included to protect the children. The claimant's father generally provided supervision for purposes of the 2019 Order. He testified that the respondent's appearance and conduct during several visits led him to conclude the respondent was under the influence of alcohol, albeit never to such an extent that he felt it necessary to abort the visit. The claimant testified that the children reported back to her following some visits that the respondent smelled of alcohol. The hearsay statements of children can be considered: *D.D.R. v K.T.R.*, 2019 BCSC 1799 at para. 11. By 2019, I am satisfied the children would have been able to accurately detect alcohol on the respondent. I am satisfied the respondent exercised parenting time while actively under the influence of alcohol.

- [60] The respondent also failed to provide evidence of continued participation in a treatment program as required under the 2019 Order. He was, in fact, hospitalized for drinking on multiple occasions while the 2019 Order was in effect, and did not disclose the hospitalizations to the claimant. Asked about his non-disclosure of these incidents, the respondent testified that his hospitalizations were "none of [the claimant's] business".
- [61] In January 2019, the claimant and respondent spoke directly over the phone in an attempt to settle this proceeding. Their conversation devolved into an argument and the claimant ended the call. About two hours later, the respondent called her again. The claimant concluded he had been drinking, said she didn't want to argue and ended the second call as well.
- [62] Shortly afterward, a police car pulled up to the Surrey House (where the claimant and the children were living). Officers came to the door and inquired about her phone calls with the respondent, asking whether she had made any threats. The claimant described the calls for them. The police explained that she had been reported for threatening to burn the house down with the children in it. The children overheard the conversation with the police and the claimant testified they were anxious and upset as a result.
- [63] The claimant denies having made a threat of any sort. There is no credible evidence suggesting she did. The timing and the fact that the threat reported was similar to the respondent's own 2017 threat suggest the report was made by the respondent. While the police did not take the respondent's allegation against the claimant seriously, she had to deal with the police, and the children were caused anxiety and insecurity.
- [64] The claimant testified about two earlier incidents of physical abuse towards her by the respondent in 2009 and 2012. Neither involved serious injury. I accept her evidence regarding those incidents, however, given the dates, I find it unnecessary to describe the incidents other than noting that the respondent had been drinking at the time of those incidents as well.
- [65] Finally, I find that the respondent continues to have an active and serious alcohol addiction. The respondent was hospitalized for alcohol abuse, and alcohol-related heart issues, in both November and December 2019.

B. Guardian, Parental Responsibilities and Parenting Arrangements

- [66] Section 37 of the FLA addresses the role of best interests in determining guardianship and parenting arrangements. Section 37(1) requires the court to consider only the best interests of the child. Section 37(2) provides a non-exhaustive list of factors that are to be considered:

37 (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;

- (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

[67] The term "family violence" is broadly and inclusively defined under s. 1 of the FLA, which reads in part:

"family violence" includes

- (a) physical abuse of a family member, ...
- (c) attempts to physically abuse a family member,
- (d) psychological or emotional abuse of a family member, including
- (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

, and

- (e) in the case of a child, direct or indirect exposure to family violence[.]

[68] The FLA also addresses the court's consideration of family violence in the assessment of best interests:

38 For the purposes of section 37 (2) (g) and (h), a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[69] The incidents in August 2015 and December 2016, the 2017 threats and the false allegations made against the claimant in 2019 all come within the statutory definition. The children were exposed to abuse directed toward the claimant and abuse was, at times, directed at the older son. Notwithstanding the absence of any significant physical injury, all four episodes were relatively serious and certainly sufficient to cause emotional and psychological distress. While the episodes were spread out over time, so too were the respondent's windows of opportunity. The respondent's conduct during these episodes unquestionably impacted the children's senses of safety, security, and well-being within the meaning of s. 37(2)(g).

[70] Perhaps even more significantly, however, these episodes highlight what I find to be the respondent's general inability to consider issues or assess his own conduct through the lens of what is best for the children. Taken together, the respondent's past conduct and his court testimony demonstrate a lack of ability to exercise parental responsibilities, provide care for the children or meet their needs. In terms of the FLA s. 37(2), the most relevant provisions here are paragraphs (f) and (h).

[71] The respondent has consistently put his own wants before the needs and interests of the children. He fails to comprehend, or at least refuses to acknowledge, that misrepresenting his recovery status to the Court imperils the children, and he has been repeatedly deceitful on the point. I am convinced he lacks the wherewithal to discharge the parental responsibilities he seeks to be granted.

1. Parental Responsibilities

- [72] The parties are unable to communicate constructively. It would be inappropriate and counterproductive to impose an obligation to consult. The claimant will have all of the s. 41 parental responsibilities for the children, under s. 40(3)(a) of the FLA.
- [73] For clarity, the claimant, on her own, has the requisite parental authority to deal with the children's Registered Education Savings Accounts. The respondent's signature is not required.
- [74] While the claimant is not obliged to consult the respondent in exercising her parental responsibilities, she must inform the respondent regarding any matters of a significant nature affecting the children. As communications between the parties breeds conflict, it is appropriate for the respondent's right to be informed to be structured. Accordingly, the respondent's right to be informed will be subject to the following terms and conditions:
- a. the claimant will, as soon as reasonably practicable, advise the respondent of any significant decisions made concerning the children, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare;
 - b. the claimant will provide the respondent with copies of any reports about the children that are provided to her by the children's teachers or medical professionals;
 - c. the respondent will provide the claimant with an address ("Information Address") for purposes of this right to be informed. The Information Address provided may be either a cellphone number for text communication, an email address or a Canada Post mail address;
 - d. the respondent is responsible for ensuring the claimant has an up-to-date Information Address; and
 - e. the claimant's obligation to inform under this term is sufficiently discharged by sending information and materials to the most recent Information Address provided.
- [75] The respondent will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.

2. Guardianship

- [76] The claimant seeks sole guardianship. Termination of guardianship is an extreme step: J.W.K. v. E.K., 2014 BCSC 1635 at para. 24-31; Vasudev v. Vasudev, 2020 BCSC 1787 at para. 41.
- [77] The children have an existing relationship with the respondent. The claimant does not object to his continuing to have parenting time, provided the exercise of it is subject to conditions. Termination of the respondent's guardianship would not be in the best interests of the children at present. Concerns regarding the respondent's parenting ability have been dealt with by allocating all parenting responsibilities to the claimant.

3. Parenting Time

- [78] The only evidence of the children's wishes is indirect. Fortunately, it is one of few areas of little dispute. The children love their father and, however absent he has been from their lives intermittently, there is an existing relationship to foster. Both children willingly participate in his exercise of parenting time. The evidence at trial is that the children express their wishes and preferences when the respondent seeks to arrange an exercise of parenting time. Given their age, this is appropriate and it should continue to be the case.
- [79] The respondent's parenting time will continue to be supervised indefinitely. Both parties noted that such a term is unusual. The general rule is that children have the right to know and to develop a relationship with each parent. However, the rule necessarily gives way where the children's best interests are better served otherwise: *Young v. Young* [1993], 4 SCR 3 at 120; *B.G.M.S. v. J.E.B.*, 2018 BCSC 1628 at para. 152.
- [80] Supervised access is an appropriate longer-term solution in certain circumstances: *K.M.E. v. D.M.Z.*, [1996] B.C.J. No. 464 (S.C.) at para. 21. In *F.K. v. M.K.*, 2010 BCSC 563, Justice Griffin (as she then was) outlined a number of factors of relevance:
- [147] In *V.S.J. v. L.J.G.*, [2004] O.T.C. 460 (S.C.J.), the court found that an order for supervised access, like termination of access, requires evidence of exceptional circumstances as it is just one small step away from a complete termination of the parent-child relationship: at para. 1. At paragraph 135, the court set out factors most commonly considered by the courts in terminating access:
1. Long term harassment and harmful behaviours towards the custodial parent causing that parent and the child stress and or fear.
 2. History of violence; unpredictable, uncontrollable behaviour; alcohol, drug abuse which has been witnessed by the child and/or presents a risk to the child's safety and well being.
 3. Extreme parental alienation which has resulted in changes of custody and, at times, no access orders to the former custodial parent.
 4. Ongoing severe denigration of the other parent.
 5. Lack of relationship or attachment between noncustodial parent and child.
 6. Neglect or abuse to a child on the access visits.
 7. Older children's wishes and preferences to terminate access.
- [148] At paragraph 137, the court in *V.S.J. v. L.J.G.* found that those factors listed above would also be relevant to a consideration of supervised access. The court also stated:

...It is possible through a supervision order to do the following: protect children from risk of harm; continue or promote the parent/child relationship; direct the access parent to engage in programming, counselling or treatment to deal with issues relevant to parenting; create a bridge between no relationship and a normal parenting relationship; and, avoid or reduce the conflict between parents and thus, the impact upon children.

[81] The second factor in paragraph 147 is key here. The nature and intransigence of the respondent's addiction brings this case into the category of exceptional. Notwithstanding significant efforts, the respondent has yet to achieve and maintain any significant period of sobriety. He was unable to refrain from drinking for the limited time period required to exercise parenting time in accordance with the 2019 Order. This case is far-removed from those in which orders establishing steps and thresholds have been made: *Gallant v. Gallant*, 2007 BCSC 151 at para. 88-90; *L.K.S. v. S.S.S.*, 2016 BCPC 35 at paras. 39-43. The respondent's future recovery milestones, such as they may be, will fall to be addressed as possible material changes in circumstance: see *F.K.* at para. 150.

[82] The evidence indicates the respondent has never exercised anything approaching the full amount of parenting time permitted under 2019 Order. There is evidence that the Wednesday hours are difficult to arrange and pose conflicts with the children's other regular activities. The evidence also indicates the respondent has never exercised the full three hours in the Sunday block. I am persuaded it is appropriate to discontinue the Wednesday hours, but the Sunday block will continue to be up to three hours.

[83] I am also persuaded that it would be of general benefit to all involved to introduce more certainty regarding the actual exercise of upcoming parenting time. Accordingly, there will be an order on the following terms and conditions:

- a. The respondent will have parenting time on Sunday from 2:30-5:30 p.m. ("Sunday Block");
- b. The Sunday Block may be exchanged for another block by mutual agreement of the parties;
- c. The respondent must provide the claimant with a minimum of 48 hours notice, by text message, of his intent to exercise the upcoming Sunday Block (i.e., text notice prior to 2:30 p.m. on the Friday before);
- d. Absent timely delivery of the required notice, the respondent is deemed to have waived the upcoming Sunday Block;
- e. The respondent's parenting time will take place in a public place mutually agreed upon by the parties;
- f. The respondent's exercise of parenting time is to be supervised;
- g. The supervisor may be the claimant, a member of her family, or another person approved by the claimant;
- h. The claimant will not unreasonably refuse to approve a proposed supervisor;

- i. The supervisor will not interfere with the respondent's exercise of his parenting time absent circumstances posing apparent danger to the children;
- j. The respondent will abstain from consuming alcohol in the 24 hour period leading up to a parenting time block, and during parenting time;
- k. Aside from use of the Information Address, the parties will communicate with one another solely by text message;
- l. The parties will provide one another with up-to-date cellular telephone numbers for purposes of text communications; and
- m. The parties will refrain from making direct or indirect disparaging statements to the children or in front of the children, about one another, members of one another's families, or these family law proceedings (including any future applications).

VII. respondent's WORK HISTORY

- [84] The respondent's personal tax documents show his income as follows: \$14,948 in 2014; \$106 in 2015; \$3,262 in 2016; \$1,342 in 2017; and \$9,285 in 2018.
- [85] He asserts he has, but for a two-week period in December 2016, been medically unable to work since separation and that he will be unable for the foreseeable future.

A. Ability to Work

- [86] There is no medical evidence that the respondent cannot or should not work, in the siding trade or otherwise. This is so notwithstanding that several of the hospital records in evidence indicate the respondent's medical care providers understood he was actively engaging in construction work. For example, a September 26, 2018, hospital record notes: "He reports that he works in construction and has a business in siding for home."
- [87] Further, while the respondent failed to establish that he is in recovery in the sense or to the degree he asserted with respect to parenting issues, the evidence does indicate that respondent's drinking was better controlled at the time of trial than had been the case over much of the past five years.

B. Past & Future Income

1. ABC

- [88] The claimant alleges the respondent received undisclosed income through ABC over 2015, 2016, and 2017, as well as part of 2018. She submits that the evidence shows ABC continued to be profitable following separation and, in fact, had significantly increased deposits each following year, including deposits made while the respondent was in India.

- [89] As noted, the respondent failed to disclose ABC's financial statements or other financial documents. His testimony regarding ABC was scattered, spotty and often self-contradictory. For example, he testified, variously, that: ABC closed down in 2016; he knew nothing about ABC having any income while he was in India; R. operated ABC while he was in India; and that he (the respondent) tried to hire employees to work for ABC, but people declined because of his alcohol issues.
- [90] The respondent and R. both testified that R. has always taken care of ABC's finances. R. testified that ABC still exists, but is in debt and no longer a viable business. R. also testified that ABC's truck and trailer had been "given" to S., to enable S. to work in the siding trade.
- [91] The available ABC bank statements show deposits through 2015 and up to March 2018. The pattern is one of moderately-sized deposits spread out over time. The 2015 deposits total \$72,998; the 2016 deposits total \$113,619; the 2017 deposits total \$185,244.
- [92] Deposits into the ABC bank account ceased in March 2018. In February 2019, the ABC account was closed. It was also disclosed (for the first time ever) in testimony that the respondent continued to have an ABC credit card for his use as late as August 2017.
- [93] The respondent was cross-examined at length on ABC's bank statements and viability as a business. He agreed that the 2015-2018 deposits represent ABC income. He also conceded ABC's 2015 income was significant by historical standards and that the further increases in 2016 and again in 2017 were themselves substantial. Asked how that ABC income had been generated, the respondent said the deposits were payments on outstanding accounts.
- [94] The respondent said that employee wages, material costs and other operating expenses would have been paid from the deposited monies. He provided no details with respect to any of the ABC expenses referenced. He offered no credible explanation for how or why ABC could or would have accumulated and carried outstanding accounts sufficient to account for three years of unusually high income. While both the respondent and R. baldly asserted that ABC is heavily in debt, neither provided an explanation of how or why that came to be in the face of that income.

2. CIBC Joint Account

- [95] To transfer monies from ABC to the respondent, R. would transfer money from ABC's bank account into a joint bank account held by R. and the respondent ("CIBC Joint Account"). The CIBC Joint Account goes back to the Joint Family period. It is clear on the evidence that R. has had effective control of the CIBC Joint Account, and over the respondent's personal and family finances, since the days of the Joint Family.
- [96] R. testified that some of his own income was also paid into the CIBC Joint Account. The bank statements show that R. and the respondent both had bills set up to be paid directly from the CIBC Joint Account. One such bill was the parties' mortgage on the Surrey House.

- [97] Following separation, the Surrey House mortgage continued to be paid from the CIBC Joint Account through March 2017. No payment was made in April 2017, and the claimant was notified the mortgage was in arrears. At that point, she arranged to have it paid from a personal account opened in her own name, and she has made the mortgage payment ever since.
- [98] R. testified that no money was paid into the CIBC Joint Account on the respondent's behalf after the parties' separation. (Presumably, he intended to exclude at least the Surrey Condo rental income, which generally continued to be paid in by the management company and out again on the Surrey Condo mortgage). R. testified that he allowed the Surrey House mortgage to be paid from his own deposits into the CIBC Joint Account so the respondent's children would have a place to live, but in March 2017, decided to use his money otherwise.
- [99] I reject R.'s evidence on the point. There is no indication that R. took any interest in the welfare of the children or the claimant following the separation. The claimant and children only moved back into the Surrey House after she became aware, by happenstance, that the respondent was in India. I conclude the Surrey House mortgage continued to be paid from the CIBC Joint Account because money continued to be transferred into that account from the ABC account on behalf of the respondent.

3. Other Evidence of Work Performed

- [100] In addition to ABC's continued income, the claimant relies on the following evidence in support of her assertion that the respondent earned undisclosed income between separation and the trial.
- [101] K.D. was called as a witness by the claimant. K.D. and his wife are friends of the claimant. The respondent and K.D. encountered one another at some meetings in early 2017. K.D. sought some advice about his patio and the respondent offered to help him repair it. In the end, although others helped, the respondent did most of the work himself and K.D. offered to pay him for the day. The respondent declined. K.D. testified that the respondent took him to DEF to select and purchase the linoleum for the project. The claimant says the K.D. patio project shows that the respondent was capable of working in the siding trade in 2017 and also, by inference, in a financial position to decline a full day's pay.
- [102] The claimant also relies on the evidence of Mr. Randhawa, the PTFC counsellor. Mr. Randhawa testified that the respondent represented that he was going to work in 2017, and that he saw the respondent being picked up at PTFC by a work van.
- [103] She also relies on her own testimony that whenever she was living at the Surrey House post-separation, S. continued to collect and drop off the ABC truck and trailer at the start and end of workdays.

- [104] In May 2019, the claimant retained Gregory Carrington of Eye Witness Investigation Ltd. ("EWI") to investigate whether the respondent was working. She provided a description of the BMW and the ABC truck and trailer, and advised him that the respondent had previously worked in association with a company called "GHI".
- [105] EWI conducted surveillance on nine random days between May 21 and July 11, 2019, and produced a written report dated July 12, 2019 ("EWI Report"). Mr. Carrington testified that on five of those nine days, the respondent drove to residential construction sites nearing exterior completion. On one occasion, the respondent picked up two other men and gave them a ride to the site. At several sites, Mr. Carrington saw workers in the act of putting siding up on houses. He testified that he saw the respondent, wearing a tool belt, alongside the workers, and doing such acts as laying out power cables, cutting lengths of siding and standing on a ladder while holding a nail gun. The respondent was seen actively assisting workers who were in the act of attaching siding to houses. He was seen working alongside, and travelling to and from sites with, a shorter, younger man to whom he bore a strong family resemblance. A van marked GHI was seen at three sites; the ABC truck and trailer were seen at three sites. Photographs taken from surveillance video were included in the EWI Report.
- [106] Mr. Carrington was a precise and impressive witness. I am satisfied his testimony and the EWI Report are accurate and reliable.

4. Conclusion

- [107] I conclude that the respondent performed and/or supervised siding work through ABC between separation and March 2018. He did so personally, with the exception of the following periods: (1) while in India; (2) while in the first stage of the PFTC program, and (3) during binge (and related physical recovery) periods. Further, given that ABC's income continued throughout this period, I am satisfied that, to the extent active work was required and the respondent was unavailable, S. performed work on behalf of ABC.
- [108] The response to the notice of family claim was filed on December 12, 2017. Deposits into ABC's bank account ended in March 2018. That timing is consistent with the respondent ceasing to actively contract work qua ABC at or about the time the response was filed. I am satisfied that ABC's bank account was abandoned as a result of ABC being named as a party in this proceeding, and not because of any arising issues relating to ABC's viability as a business.
- [109] I find that after abandoning ABC as a structure in early 2018, the respondent continued to work in the siding trade - alongside S. and using the ABC truck and trailer - through to trial. From early 2018 through to trial, the respondent's earnings may have been through GHI, DEF, another company or even off the books, but I am satisfied he continued in the trade and continued to earn a comparable income.

[110] These conclusions are reinforced by the adverse inference I find appropriate to draw from the respondent's failure to disclose ABC's financial statements: *Kim v. Kim*, 2011 BCSC 1347 at para. 47. The respondent argued the documents were not in his possession, but rather in R.'s possession. However, as ABC's sole director the respondent had control over those documents. I draw the inference that their disclosure would not have supported the assertion that ABC had ceased to be a viable business.

C. Determination of Respondent's Income

[111] The respondent has failed to provide accurate and complete financial disclosure and I am left to do the best I can to impute an income based on the evidence before me.

[112] In *Sullivan v. Struck*, 2015 BCCA 521, the Court of Appeal set out the following framework for determining a party's income:

[67] Section 15 of the Guidelines provides that the income of a spouse is determined in accordance with ss. 16-20. A court should begin with finding the spouse's line 150 income from his or her tax return. The next step is to determine whether any of the specific considerations in the subsequent sections apply. In *Vincent v. Vincent*, 2012 BCCA 186, Madam Justice Huddart summarized the process for determining income. Starting at para. 35 she wrote:

[35] All determinations of child support begin with finding the spouse's Line 150 income, a relatively straight-forward step one. The second step is to make whatever adjustments to that amount are required by Schedule III. Once these two steps are completed, the court must look to sections 17 to 20, to determine whether any of the exceptions set down in those provisions applies, and, if so, what effect they should be given on the facts of the case.

...

[37] Section 18 provides discretion to deal with the situation where a spouse is in a position to manipulate income in his or her capacity as shareholder, director or officer of a corporation, such that a person's income under s. 16 does not fairly reflect all the money available to that spouse for the payment of child support. It permits the inclusion of pre-tax corporate income and benefits paid to non-arm's length persons.

[38] Section 19 addresses situations where the spouse's disclosed income does not fairly reflect what should be paid in child support by permitting imputation of income. It permits the imputation of income in a variety of situations, including income which is tax exempt, under-utilized capital investments, and when there is a failure to provide income information.

[113] In *Sullivan*, the trial judge determined that Mr. Struck's financial disclosure was inaccurate and incomplete and imputed an income of \$100,000 to him based on his lifestyle and spending patterns. The Court of Appeal held:

- [71] The trial judge had no alternative but to do the best that he could to impute an appropriate amount of income under s. 19. Section 19(f) of the Guidelines gives a court the discretion to impute "such amount of income to a spouse as it considers appropriate" when a party has failed to make the required financial disclosure.
- [114] Justice Warren adopted a similar approach in *Yang v. Zhang*, 2017 BCSC 524 at paras. 145-150. There, as here, neither the respondent's tax documents nor his company's financial statements were reliable, obliging the court to impute an income based on the evidence available.
- [115] The claimant submits it would be appropriate to determine an imputed personal income to the respondent for the years 2015, 2016, and 2017 by totalling ABC's deposits in those years and determining an average ABC annual income over the period, and then deducting 40% from income to account for ABC's operating costs.
- [116] The respondent argues the proposed 40% deduction lacks an evidentiary foundation. The absence of evidence of ABC's actual operating costs is due to the respondent's non-disclosure. In the circumstances, the court must look to the evidence it does have in order to determine a reasonable deduction.
- [117] R. testified that ABC's physical assets are few in number and of minimal value. That suggests little in the way of capital expenses or depreciation. Nothing in evidence indicates ABC supplied materials aside from those necessarily incidental to the performance of installation work (e.g., siding nails). There is no evidence of marketing or similar business costs. R. provided ABC's financial services.
- [118] The respondent's evidence indicated ABC did not generally employ other workers. As ABC's work is project-based, the respondent may have aligned his binge and recovery periods with slow or down work periods such that there was no need for employees to cover work in that regard. However, his extended time in India and the months spent in stage one of the PTFC program were atypical interruptions in his availability for work. As above, I am satisfied that S. performed work on behalf of ABC as required during those periods.
- [119] The compensation arrangement in place for S.'s role in ABC during the years 2015, 2016, and 2017 is unknown. However, several witnesses testified that the respondent was highly skilled at his trade, whereas S. is a relatively junior tradesman. S.'s work on behalf of ABC was also performed using ABC assets. On that basis, it is probable that S. was compensated for his efforts on behalf of ABC at a level appropriate for a mid-level employee.
- [120] In round terms, ABC's 2017 deposit income was \$185,000 (up from \$113,500 in 2016, and from \$73,000 in 2015). The respondent was available to perform ABC work during 2015 before he went to India. In 2016, he was available to perform ABC work only in December. He was available to ABC throughout 2017, but for his time in stage one of the PTFC program. I conclude that the higher level of ABC income in 2017 is a reflection of the fact that, for most of that year, the respondent and S. both performed work for ABC.

- [121] Thus, the amount that would have been paid to S. by ABC varied significantly over the three years. The respondent worked hardly at all in 2016, but the majority of 2015 and of 2017; S. worked some in 2015, but the majority of 2016 and 2017. Thus, S. performed about 50% of ABC's total work over the years 2015, 2016, and 2017. Accordingly, S. was responsible for 50% of the work that generated ABC's average annual income over that period. However, S. was not a partner in ABC and therefore not entitled to 50% of the profit. Rather, he was compensated as a mid-level employee, making it unlikely that more than 30% of ABC's income would go towards his remuneration.
- [122] Based on the above, I conclude that the plaintiff's proposed 40% operating costs (inclusive of S.'s remuneration) deduction is reasonable in the circumstances.
- [123] ABC's deposits during 2015, 2016, and 2017 average out to \$123,954 per year; a 40% operating costs deduction, results in a net average of about \$74,000 per year. Accordingly, I impute an income of \$74,000 per year to the respondent for each of 2015, 2016 and 2017.
- [124] I note that this approach to imputation assumes the respondent did not earn, and ought not to have been expected to earn, other income while he was in India. That said, I note that there was no evidence put in to establish the duration of the program the respondent says he attended in India or as to whether the program (like PTFC) permitted participants to work while attending.
- [125] Finally, as I have already found that the respondent and S. effectively carried on business in the trade from 2018 forward, but without ABC as a business structure, I also impute the respondent an income of \$74,000 a year from 2018 through to trial.

VIII. claimant's income

- [126] Prior to separation, the respondent was the primary breadwinner for the household and earned a higher income than the claimant. The claimant worked part-time at various low-paying jobs and shouldered the vast majority of the child-rearing and household responsibilities. However, from February 2013 through March 2014, the claimant successfully completed a college hospital support worker program.
- [127] She began to get full-time hours, in October 2015, working as a registration clerk. Subsequently, she successfully obtained a regular full-time position at Surrey Memorial Hospital.
- [128] The claimant's gross income has been as follows:
- a) 2014 -- \$9,164;
 - b) 2015 - \$12,662;
 - c) 2016 - \$33,788
 - d) 2017 - \$28,543;

- e) 2018 - \$39,449;
- f) 2019 -- approximately \$46,000.

[129] I accept that this was the claimant's actual income for those years and decline to impute any additional income to her as sought by the respondent.

[130] The family home contains a rental suite. It has been rented out more or less consistently since the parties became the registered owners of the Surrey House. Prior to separation, the rent was tendered in cash and generally treated as disposable household income for groceries, sundries and supplies or activities for the children. Post-separation, the cash payment appears to have been accepted and retained by whichever party was occupying the Surrey House at the relevant time. The claimant testified that the rental income paid to her post-separation continued to be applied as before separation. I am satisfied this income should not be treated as part of the claimant's income. (The rental income payments further addressed below.)

[131] The respondent alleged that the claimant received income in the form of room and board. In January 2015, A.K., a somewhat distant relative of the respondent's, came from India to take some college classes in the Lower Mainland and stayed in the Surrey House until December 2018 (except during periods when the claimant was living in Aldergrove).

[132] The claimant and A.K. both testified that A.K. did not pay room and board to the claimant. I accept their testimony. On the evidence, A.K. was essentially an au pair. Following separation, her presence and household contributions enabled the claimant to work full-time hours. Notably, after A.K. left, the claimant's father was called upon to step into a similar role, and has performed it ever since. It is not surprising that A.K. did not pay room and board in the circumstances.

[133] The respondent also alleged the claimant had undeclared income as a Mary Kay consultant. In direct, the claimant testified that she and K. had signed up as consultants long ago, likely back while living as the Joint Family. They quickly concluded the investment of time required to earn commissions was not workable, but the claimant kept her consultant status to use the discount for personal and family use. She testified that she continues to occasionally attend events hosted by other consultants in order to keep informed and as a social activity. She did not waver on cross-examination.

[134] K.D. testified that he had seen the claimant at Mary Kay events hosted by his wife in recent years, but that he knew nothing about why she was there. K.D.'s wife is an active Mary Kay consultant and a close friend of the claimant's. Nothing in K.D.'s evidence about Mark Kay was inconsistent with the claimant's testimony. I accept the claimant's evidence that she earns no income as a Mary Kay consultant, and has not since long before separation.

[135] Finally, the respondent testified that R., acting on the respondent's behalf, gave the claimant \$1000 in cash each month for a period of time following separation. The claimant and R. both denied R. did anything of the sort. R. testified that he had no interaction with the claimant or the children after the separation. I find no cash payments whatsoever were made.

IX. child support

A. Retroactive

[136] The 2017 Order required the respondent to pay \$725 a month (inclusive of extraordinary expenses) effective February 1, 2017. The respondent has never paid any child support. The claimant seeks retroactive child support payments from separation through to trial.

[137] Under my earlier findings, that finding would be based on a gross annual income of \$74,000 each year from 2015 through 2020.

[138] In *D.B.S. v. S.R.G.*, 2006 SCC 37, at paras. 99-116, the Supreme Court of Canada identified four factors for consideration in relation to retroactive child support orders:

- (a) The conduct of the payor party;
- (b) The recipient's delay in seeking the retroactive award;
- (c) The circumstances of the children; and
- (d) Potential hardship to the payor.

[139] The respondent submits the claimant unduly delayed in seeking child support for the period between August 2015 and February 2017. I find that the claimant did not delay unduly considering the circumstances of the separation arising from family violence, the parties' brief reconciliation in December 2016, and her initial acceptance of his asserted inability to pay.

[140] With regard to the period between February 1, 2017, and the trial, the respondent says the amount owing should be capped by the terms of the 2017 Order. The 2017 Order states, on its face, that it is only an interim order. An interim order operates without prejudice. Further, the respondent, having never made any attempt to comply with the 2017 Order, cannot claim to have placed any particular reliance on its terms.

[141] He has failed to identify any particular prejudice or hardship beyond his assertion of inability to pay. His assertion of inability to pay was, in turn, predicated on his asserted inability to work - which I have rejected.

[142] The respondent did not merely fail to fully disclose his actual income, he falsely denied having any income. He essentially refused to pay support for his children unless and until the claimant proved a claim in court. When she went to court, he failed to disclose documents in order to make proving that claim as difficult as possible. While retroactive

child support is generally ordered from the date of notice of intent to rely on the obligation, effective notice is not relevant when the payor's conduct was blameworthy: *Michel v. Graydon*, 2020 SCC 24 at para. 36. The respondent's blameworthy conduct, in this case, supports an order for retroactive support back to the date of separation.

[143] The child support payable from August 2015 to November 2017 (28 months) for two children based on the respondent's imputed annual income of \$74,000 is \$1,121 per month for a total of \$31,388. The child support payable from December 2017 to March 2020 (28 months) for two children based on the respondent's imputed annual income of \$74,000 is \$1,148 per month for a total of \$32,144.

[144] I have deducted the month of December 2016 (\$1,121) during which the parties were briefly reconciled and lived together.

[145] The total arrears are \$62,411.

B. Prospective lump sum

[146] The respondent shall also pay ongoing child support based on an annual income of \$74,000, which results in monthly child support of \$1,148 per month effective April 1, 2020.

[147] The claimant seeks an order for lump sum payment. She refers to the summary of relevant factors outlined in *Dong v. Liu*, 2008 BCSC 1795:

[53] Using the same factors applied to the spousal support calculation, past child support under the Child Support Guidelines would total \$78,120 and prospective child support for three years would amount to \$46,872, presuming Paul pursues post-secondary education and remains a child of the marriage. Based on these very conservative estimates, Dong owes Liu a total of at least \$898,922 in past and prospective spousal and child support.

[54] With respect to lump sum support, *Vinciguerra v. Bertram*, [1998] B.C.J. No. 2004 (S.C.), conveniently lists some of the matters which can be taken into account in making a lump sum child or spousal support award. *Levine J.*, as she then was, followed the reasoning of *Kirkpatrick J.*, as she then was, in *Myatt v. Myatt* (1993), 45 R.F.L. (3d) 45 (B.C.S.C.), by listing the follow factors at paragraph 51:

1. The same considerations that apply to orders for lump sum spousal maintenance apply to consideration of a lump sum child maintenance order (p. 51).
2. Lump sum maintenance awards are exceptional, and should be made only when there is some special need or specific circumstances render it appropriate.
3. The existence of animosity between the parties may favour a lump sum maintenance order to reduce future sources of conflict.
4. The only asset of the parent was his interest in the matrimonial home.

5. The parent was not in a position to pay any amount towards the support of the children.
 6. It was neither practical nor feasible for the parent to pay periodic maintenance, considering her earning.
 7. The parent disobeyed a previous maintenance order and had not demonstrated "prudent financial management.
 8. The parent's plans were to use available monies to pay off debts instead of child support.
 9. The parent had limited means to earn income in the foreseeable future and one financial asset.
- [55] In my opinion, while granting this kind of relief is exceptional, this is an exceptional case. The following factors militate in favour of a lump sum award: (1) there is a level of animosity between the parties, and Liu fears Dong; (2) the plaintiff's incarceration and China's seizure of his foreign assets means that the only known exigible assets are those in Canada; (3) Dong's incarceration entails he is not in a position to pay periodic support; (4) Dong has not paid past support; and, (5) Liu has a limited means to earn income and only one significant asset. Based on the foregoing calculations, Liu is entitled to a lump sum award of past and prospective spousal and child support totalling, at minimum, \$898,992.

[Cites omitted]

- [148] I consider lump sum payment warranted in the circumstances. The respondent has paid nothing to date in the face of the 2017 Order. He denied being able to work and pay child support when that was not the case. He has failed to disclose assets. I am satisfied he has intentionally made this litigation difficult and expensive for the claimant. I have little doubt that he will resist making periodic payments and repeatedly oblige the claimant to invoke enforcement mechanisms. He also has little in the way of assets to enforce future payments against.
- [149] The respondent is in a position to make the lump sum payment by offsetting it against the value of the matrimonial home, which is sought by the claimant: see *Santelli v. Trinetti*, 2019 BCCA 319 at para. 168-70.
- [150] Accordingly, I order lump sum child support for the two children until they reach age 19. The amount of basic child support for the children to be used in calculating lump sum support is \$1,148 per month. The lump sum support order deals with the amount of support payable until the children turn 19.
- [151] Child support is payable at \$1,148 per month for both children until the older son turns 19 in June 2024. From April 2020 to June 2024 (51 months) this amounts to \$58,548. From July 2024 to September 2028 (51 months), child support will be payable for only the younger son until he turns 19 at \$706 per month for a total of \$36,006. The total lump sum of child support for both children as calculated above is \$94,554

X. section 7 expenses

A. Separation to Trial

- [152] The claimant receives extended medical and dental coverage by Blue Cross through her employer and the children are enrolled on her plan. S. requires orthodontics for which the claimant has been paying \$168 per month (net of coverage).
- [153] The children attend private school now, as they did prior to the separation. The claimant has been given a discounted tuition rate in light of her financial circumstances in recent years, but the private school is not obliged to continue to provide a discounted rate in the future.
- [154] The claimant has paid for the children to attend dance classes and to participate in track. The dance classes were paid for in cash, but the claimant has provided evidence tracking the special expenses incurred, including through her credit card statement, by receipt and by testimony.
- [155] Her evidence establishes she has incurred reasonable special expenses from 2016 through to trial amounting to \$15,000. She testified that she did not retain receipts for prescription, school costs, library fees and similar expenses during 2015. I find these further 2015 expenses are not sufficiently proven and thus are not allowed.
- [156] For 2015, based on the claimant's income of \$12,662 and the respondent's income of \$74,000 the respondent's proportionate share of the special expenses is 85% of \$1,000, which is \$850. For 2016 to trial, the claimant's income fluctuated but I am satisfied that the respondent's proportionate share of the special expenses during this period is 67% of \$15,000, which is \$10,050.

B. Prospective Expenses

- [157] The claimant has sought an award for base s. 7 expenses through to the children reaching the age of majority. For the same reasons I found it fair and appropriate for prospective child support to be paid by lump sum, I find it appropriate to make a determination here.
- [158] The private school attended by the children is religion-based. Both parties' agreed from the outset that the children would go there, as apparently have their cousins. It is not unreasonably priced and, on the evidence, appears to adjust tuition fees to account for parental income. There are related uniform and bus costs as well, but these also appear reasonable. On the evidence, the total school costs paid by the claimant in relation to both children's attendance in 2019 was about \$2,400. The older son will go for another three years; the younger for another seven, for a total of \$12,000. At a 67% proportional contribution by the respondent, that works out to \$8,040.

- [159] The evidence shows the claimant paid about \$1,200 for both children to participate in extracurricular sports in 2019 and about \$1,450 for them to participate in cultural dance classes, for a total of \$2,650 (or \$1,325 each). That works out to a total cost of \$13,250 to continue both children through to the age of majority. At a 67% proportional contribution by the respondent, that works out to about \$8,875.
- [160] The remaining payments for the older son's orthodontics amount to about \$5,280. A 67% proportional contribution by the respondent works out to about \$3,540.
- [161] In total, the base prospective s. 7 expense payment required up front in lump sum will be \$20,455.

XI. family property and Debt

- [162] The framework for determining the division of family property and debt is set out in Part 5 of the FLA.
- [163] As stated earlier, the claimant is seeking an interest in the following family property:
- a) the Surrey House,
 - b) the Surrey Condo,
 - c) the respondent's interest in the Farm,
 - d) ABC,
 - e) the respondent's interest in DEF, and
 - f) the BMW
- [164] The claimant seeks a reapportionment of the Surrey House 100% in her favour, and equal division of the remaining family property.
- [165] The respondent concedes that the Surrey House, the Surrey Condo, ABC and the BMW are family property, but he claims that ABC and the BMW are of negligible value. He denies having any interest in the Farm or in DEF.
- [166] The respondent is seeking equal division of the family property.

A. Family Property

1. Surrey House and Surrey Condo

- [167] At trial, the Surrey House had an appraised value of \$1,076,000 and an outstanding mortgage of \$292,000, resulting in a net equity of \$784,000. At trial, the Surrey Condo had an appraised value of \$335,000 and an outstanding mortgage of \$194,500, resulting in a net equity of \$140,500.

[168] The parties agree that the Surrey Condo should be divided equally, but the claimant argues the Surrey House should be reapportioned 100% in her favour. I deal with reapportionment later in these reasons.

2. The Farm in India

[169] The respondent denied owning any land in India, and testified that the land title document adduced by the claimant has nothing to do with him or his family. He testified that his father's Farm was put in his mother's name after his father died in 2012.

[170] The land title document is a generational record. It lists the respondent's grandfather's name as owner, then his father's, and then the respondent's along with his brothers', all in relation to the same two parcels of land. The parcels are in a village of the same name as that given as the respondent's address on the parties' marriage certificate.

[171] R. testified that prior to the trial he thought the Farm was still in their father's name, but agreed, on review of the land title document, that it had been in "our names" since 2012.

[172] I agree with R.'s reading of the land title document. Accordingly, while the respondent does hold an interest in the Farm, I am satisfied that he obtained it by inheritance in 2012. While under the FLA, s. 85(1)(b) and (2), the burden to establish that a contested property is "excluded property" is on the respondent, the land title document itself is satisfactory proof of it.

[173] The respondent's interest in the Farm in India is not family property under the FLA. There is no evidence that his interest has increased in value since 2012. There is no need to address the conflict of law issues raised by the respondent.

3. ABC's Physical Assets

[174] ABC has physical assets: the truck and trailer. The evidence indicates the trailer holds basic tools and equipment of the sort listed in Mr. Carrington's evidence: e.g., ladders, nail guns and related power tools. While R. testified that these assets had somehow been "given" to S., the respondent remains accountable for them as family property.

[175] The EWI Report included pictures of the ABC truck and trailer, which are evidently serviceable and appear in reasonable condition. Given the mundane nature of the assets in question, I find the evidence before me is sufficient to enable me to attribute a minimum estimated value of \$30,000 to them without entering the realm of speculation.

4. DEF

[176] DEF operates out of a warehouse in Surrey. While it is unclear when DEF opened, ABC existed well prior to DEF and DEF was open and operating prior to the parties' separation in 2015.

- [177] The claimant testified that the respondent and R. both referred to DEF as a "family" business when it opened. She said that she, along with other relatives, occasionally helped out at the warehouse. She points to the absence of any evidence explaining where the seed money for DEF came from, and to the respondent's coincidental failure to disclose any bank statements prior to 2015, notwithstanding the terms of the 2019 Order.
- [178] R. denied that the claimant ever worked at the DEF warehouse. He also asserted it would be a breach of his agreement with his silent partner, if she had. The latter point, resting implicitly as it does on the assertion that R. would never permit a breach of an agreement, is far from compelling support.
- [179] The evidence is sparse. R. testified that he owns DEF with a silent partner, who he failed to identify, and provided no evidence regarding the source of the money used to set up the business. Given the claimant's claims regarding DEF, the gaps in R.'s testimony are telling.
- [180] I am persuaded, for a number of reasons, that the respondent most likely holds a direct or indirect interest in DEF.
- [181] First, ABC works in the siding trade. DEF, which was opened after ABC was well-established, is a specialized supplier of materials used in the siding trade. There is an obvious synergy - ABC's clients are DEF's market. The benefit of operating the two businesses in conjunction is demonstrated, albeit on a small scale, by the K.D. patio project.
- [182] Second, I accept the claimant's evidence that DEF was, within the family, referred to as a family business and that she and others helped out at the warehouse accordingly. As noted, I find the claimant generally credible, and her evidence in this respect makes sense in context. She did not claim she was employed by DEF - she described lending a hand when things were hectic, the kind of casual contribution commonly made by relatives in a family business. I reject R.'s testimony that the claimant never helped at the warehouse. That said, there is no evidence as to how often R. is present at the location in any event.
- [183] Third, R. has been primarily responsible for managing the respondent's personal and family finances since the days of the Joint Family. Even after R. and K. got their own house, R. continued to manage the CIBC Joint Account and to participate in financial decision-making involving the parties. It was, for example, essentially R.'s decision to buy the Surrey Condo (and he was even middleman in the purchase). Given the dependency relationship between the respondent and R., I find it unlikely that R. would invest in DEF - a business capitalizing on ABC - without involving the respondent in DEF as well.
- [184] Finally, as noted by the claimant, the respondent failed to produce bank statements for the period prior to 2015. The CIBC Joint Account in particular, which held monies regularly used for the respondent's family purposes, is the most logical source of any joint investment made in DEF.

[185] I find it is probable that DEF was financed with CIBC Joint Account money and it is probable that the respondent's interest is a half interest (i.e., the respondent is "the" silent partner).

5. The BMW

[186] The BMW is a 2008 model year. There is no evidence of the model. The respondent testified that it needed significant repair when he took possession of it in 2017, although he provided no documentary evidence regarding repairs. There is nothing before me that would enable me to conclude it has anything more than nominal value.

[187] The respondent will retain the vehicle.

B. Valuing Undisclosed Assets

[188] The claimant relies on the approach to asset valuation outlined in *Cunha*. A helpful overview of the law regarding hidden assets and the division of family property was provided by Justice Dardi in *M.C.V. v. F.V.*, 2018 BCSC 96:

[124] Ms. C. relies on the approach taken by Mr. Justice Fraser in *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.), a case decided under the FRA. The *Cunha* approach urged a robust exercise of the adverse inference power when one party in matrimonial litigation conceals assets: at paras. 11-13.

[125] In *Laxton v. Coglon*, 2008 BCSC 42, Mr. Justice Kelleher clarified that the Court in *Cunha* did not reapportion family assets pursuant to s. 65 of the FRA. Rather, the Court, having not been satisfied that adequate disclosure had been made, inferred that the value of the undisclosed assets was at least equal to the value of the disclosed assets: at paras. 27-29. It is key that the principle in *Cunha* only applies where there is a sound evidentiary basis to support the notion that one of the parties to the litigation has hidden assets. See also *Nearing v. Sauer*, 2015 BCSC 58, at para. 126.

[126] In *Wu v. Sun*, 2011 BCCA 239, the Court of the Appeal, while affirming that strong measures are justified in discouraging nondisclosure, cautioned that there must be sufficient evidence upon which the court may draw any adverse inferences regarding the existence of undisclosed family assets: at paras. 40-42.

[127] In *Nearing*, the Court concluded, at para. 132, that the adverse inference referred to in *Cunha* and the subsequent authorities continues to be applicable to the new regime for property division under the FLA. I agree.

[189] Here, the respondent has done a number of different things, and the distinction between them is relevant to any inference under the *Cunha* line of authority.

- [190] The respondent denied having personal income earned by the practice of his trade. His failure to disclose documents made determining the issue challenging. Nonetheless, I found he did earn personal income between separation and trial and determined the amount by deduction and imputation. Accordingly, there is no need to value ABC qua an operating business.
- [191] The respondent failed to disclose ABC's physical assets as family property, and he failed to disclose documents that would have helped assign a value to them. Notwithstanding the respondent's omissions, I made findings about those assets and assign an estimated value on the evidence before me.
- [192] He failed to disclose that he held an interest in land in India. However, to his good fortune, the same evidence that established his interest also established that it was excluded property and there was no evidence of increased value. No valuation of his interest was required, by inference or otherwise.
- [193] The respondent failed to disclose an interest in DEF. The existence of an interest was found on the evidence, and that interest was also found to be family property. There is no evidence regarding the actual value of DEF.
- [194] As noted in *Wu v. Sun*, 2011 BCCA 239, the adverse inference permitted under *Cunha* is supplemental in nature, including in its application to the valuation of an undisclosed asset:
- [41] I am not the first to observe that non-disclosure is the Achilles heel of family assets litigation. Strong measures are justified in discouraging it. However, one cannot make something out of nothing. The right note of caution was sounded by Madam Justice Baker in *Palanca v. Palanca*, 2005 BCSC 1014:
- [127] Counsel for Mrs. Palanca submitted that the court could draw an adverse inference against Mr. Palanca's estate in relation to the existence of family assets in the Philippines because Mr. Palanca failed to comply with court orders relating to accounting and disclosure. I accept that Mr. Palanca did not meet his obligations in this regard, but an adverse inference is not an adequate substitute for evidence about specific assets, the ownership of those assets, whether the assets were used for a family purpose, or otherwise met the definition of family assets, or the value of the family assets, sufficient to allow for the making of a compensation order that is more than a guess.
- [42] With respect, I think the judge erred in putting any value on the overseas investments when there was not any evidence about them. In my view, the \$1.6 million ascribed to this item must be taken out of the reckoning of family assets.

[Emphasis added]

[195] Furthermore, Cunha applies where there are known and valued assets and further undisclosed assets of the same variety: e.g., that discovered and undiscovered hidden bonds are of equal value: see *Laxton v. Coglon*, 2008 BCSC 42 at paras. 25 and 33. There is no analogue for valuation on the present facts.

[196] Here, there is no evidence whatsoever of DEF's value. Accordingly, I will return to DEF in addressing the claimant's request for unequal division of family property.

C. Family Debt and Other Adjustments

1. Respondent's 2015 Transfer to R.

[197] In March 2015, R. transferred approximately \$70,000 out of the CIBC Joint Account. Neither the respondent nor R. disputed the claimant's characterization of this transfer as a \$35,000 payment by the respondent to R. R. and the respondent both testified the transfer paid off a family debt owing to R. since 2012.

[198] As already noted, the Surrey House down payment was 50/50 between the two couples in the Joint Family. The entire down payment was made from the CIBC Joint Account. The Surrey House was originally in the names of R. and the respondent. When R. and K. got their own house in 2012, R. was removed from title on the Surrey House and the claimant was added. The parties took a mortgage on the Surrey House at that same time. The claimant testified that she understood the financial dealings related to R.'s removal from title to the Surrey House were squared as between the couples at that time.

[199] There is no documentary evidence indicating R. was owed \$35,000 in relation to the 2012 Surrey House transfer, nor that the March 2015 transfer extinguished a debt. No explanation was provided for why the purported 2012 debt to R. was repaid all at once or in March 2015. There is no evidence of what R. did with the transferred money. The claim that the March 2015 transfer to R. addressed a debt owing from 2012 lacks any air of reality. On the other hand, it would be logical for any debt arising from the 2012 change of title to have been addressed in 2012, when the parties were getting a new mortgage in any event and R. could have put the money toward the down payment on his new house.

[200] The respondent's transfer of the \$35,000 to R. in March 2015 stands unexplained on the record before me. There is no credible evidence that the money was used to pay a debt, let alone a family debt. Given R.'s role in managing the respondent's personal finances and the respondent's failure to make full disclosure, I am satisfied the \$35,000 transfer to R. should be deemed a transfer of family money, from the CIBC Joint Account by the respondent to the respondent, that remains under the respondent's control.

[201] I conclude the respondent must pay the claimant \$17,500 (her 50% share of the family money in issue).

2. Claimant's \$35,000 Transfer from TFSA

[202] The claimant agrees that she transferred \$35,000 from a tax-free savings account ("TFSA") to her personal account following separation. It is not disputed that the TFSA monies were family property. The claimant testified that she transferred the funds to her father and brother to make sure she would have access to it if required as she was concerned the respondent would assert control over the TFSA when he got back from India. She said her brother and father returned it to her piecemeal at her request and she used it to pay household debts and expenses. Her evidence in this regard is consistent with her financial records, and I accept it.

[203] The claimant's expenditure of the TFSA money is further addressed below.

3. Respondent's Withdrawal from Joint Line of Credit

[204] In March 2017, the respondent withdrew \$4,945 from a chequing account held jointly with the claimant and having a \$5,000 line of credit attached to it. Since that withdrawal, the claimant has made the payments required to cover the interest owing on the line of credit. Following the March withdrawal, deposits of roughly \$2,995 were paid into the account by the claimant to keep the line of credit in good standing up to date of trial. Those deposits and the respondent's March 2017 withdrawal total to \$7,940.

[205] The draw on the line of credit debt was made post-separation. There is no evidence the money withdrawn was used to pay a family debt or preserve or maintain family property under s. 86, FLA: see *K.P.B.v. K.E.*, 2019 BCCA 152, at para. 44; *Blair v. Johnson*, 2015 BCSC 761 at para. 91; *Bell v. Stagg*, 2016 BCSC 1491 at para. 61.

[206] The resulting debt is the respondent's personal debt, as are the payments made by the plaintiff to keep the debt in good standing. The respondent is required to pay the claimant \$7,940.

XII. reapportionment

A. FLA Section 95

[207] The FLA presumes an equal division of property as of the date of hearing, subject to exceptions: ss. 81 and 87. Section 95 confers the discretion to depart from an equal division but only if equal division would be significantly unfair: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 40-44.

[208] As observed in *Remmem v. Remmem*, 2014 BCSC 1552, significant unfairness is a substantial standard:

[44] The FLA provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), courts had a discretion to divide family property in unequal shares if the court found that the division of property (pursuant to agreement or the provisions of the FRA) would be unfair having regard to the factors set

out in that section. The first and obvious difference between the discretion given under the FRA and the discretion given in Part 5 of the FLA is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely "unfair". There must be a finding that the division of property pursuant to the statutory scheme is "significantly" unfair. The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact - something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).

[209] In order to assess unfairness, it is necessary to consider the result that would be obtained by equal division: Remmem at paras. 30 and 47.

[210] The value of the BMW is nominal and the land in India is excluded property. Thus, the value of the family property valued as of date of trial is the equity in the Surrey House (\$784,000), the equity in the Surrey Condo (\$140,500) and the amount for ABC's physical assets (\$30,000), which totals \$954,500.

[211] Equal division would give each party \$477,250.

[212] The factors to be considered in assessing whether equal division is significantly unfair are outlined in s. 95(2):

- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or

- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 have not been met.

[213] The claimant seeks reapportionment in her favour pointing, in particular, to s. 95(2)(c),(f) and (i).

1. Contribution to Career/ Career Potential

[214] While both parties had post-secondary education in India, both now perform work based on skills, experience and/or education they obtained post-marriage.

[215] The respondent began in the siding trade at or about the time of marriage. He learned the skills of the trade, set up ABC and built up ABC's assets over the course of the marriage. During the corresponding period, the claimant looked after the children and worked at part-time jobs. As noted, as between the parties, the claimant was responsible for the vast majority of the child-rearing and household responsibilities during the marriage.

[216] When the children were older, and shortly prior to separation, the claimant took a college program to train as a hospital worker. Her career path crystallized after separation, when she began to get hours in the health authority systems (eventually leading to a regular position at Surrey Memorial Hospital). However, the trade and contractor skills developed by the defendant during the marriage enable him to earn a considerably higher income than she does, and that disparity is likely to continue indefinitely. As the claimant has not sought spousal support, this consideration is otherwise unaccounted for: Remmem at para. 46.

2. Post-separation Contribution to Surrey House

[217] The claimant argues she has disproportionately contributed to maintaining the Surrey House post-separation. The evidence shows the claimant paid the following: mortgage payments (\$54,458), utility payments (\$10,065), property taxes (\$19,550) and property insurance (\$4,673), for a total of \$88,747.

- [218] I already concluded that the payments on the Surrey House mortgage made from the CIBC Joint Account from September 2015 through March 2017 were paid with income the respondent received from ABC. Those mortgage payments totalled \$27,379. Thus, the claimant has contributed \$61,000 more to maintain the Surrey House than the respondent has since separation.
- [219] However, the claimant received the rent from the suite during the time she occupied the house, which was by far the majority of the post-separation period. She testified that the rent was about \$600-700 a month in 2015, and was gradually moved up, standing at \$1,250 a month in December 2019. By my calculation, the rental income she received roughly off-sets the amounts she paid toward utilities, taxes and insurance.
- [220] Once the set-off above is made, the difference between the parties is reduced to the fact that the claimant paid, post-separation, roughly \$27,000 more toward the mortgage than the respondent did. However, the money expended by the claimant on family purposes during this period included the \$35,000 in family money that she withdrew from the TFSA. She also had occupation of the Surrey House to the exclusion of the respondent for the majority of the post-separation period. Considered in that context, I am not satisfied the claimant's contributions to maintain the Surrey House post-separation give rise to any unfairness.

3. DEF as an Undisclosed Asset

- [221] Lack of financial disclosure can be a relevant factor in considering whether equal distribution is significantly unfair: *Nanara v. Nanara*, 2017 BCSC 1447 at para. 63; *Bamford v. Mulyati*, 2017 BCSC 945 at para. 43; *N.H. v. M.H.*, 2018 BCSC 921 at para. 104; *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 123; *Singh v. Singh*, 2020 BCCA 21 at paras. 135-144. As noted in *Singh*, under s. 95, the court can consider the existence of undisclosed assets as a factor going to fairness without needing to ascribe any specific value to the assets in question: para. 144.
- [222] The nature of the asset is a relevant consideration. DEF is a business - it has a warehouse, holds inventory and has been in operation for more than five years. It provides the respondent with a second income stream that capitalizes on his own siding trade work or and that done by associates (e.g., S. and GHI).
- [223] I am satisfied that it would be unfair not to account for DEF in dividing the Surrey House. I note also that whatever income DEF generates for the respondent is otherwise unaccounted for in terms of child support and s. 7 expenses.

B. Conclusion

- [224] I am satisfied that the considerations identified above cumulatively render the equal division of family property unfair. Of the identified considerations, DEF is the most weighty. I find it is appropriate for 60% of the Surrey House to be allocated to the claimant.

[225] The Surrey Condo was purchased as an investment and the rental income it has generated has generally covered its mortgage. Equal division of the equity in the Surrey Condo is appropriate, as is the value attributed to the ABC assets.

C. Orders for Division of Family Property

[226] The claimant seeks to retain the Surrey House. I find that this is appropriate in the circumstances, and order that the Surrey House be vested in the claimant's name. The claimant is required to compensate the respondent for his 40% interest in the Surrey House which is \$784,000 x 40% for a total of \$313,600, but subject to the following adjustments (which total \$110,700):

- a) The Surrey Condo will be vested in the respondent's name. The respondent will compensate the claimant for her 50% share of the Surrey Condo: \$70,250;
- b) The respondent will compensate the claimant for her 50% share of ABC's physical assets (which the respondent either holds to her exclusion or, as testified by R., previously transferred to S.): \$15,000;
- c) The respondent will compensate the claimant for her 50% share of the \$35,000 transferred to R. in March 2015: \$17,500; and
- d) The respondent shall compensate the claimant for his March 2017 withdrawal on their joint line of credit and the monies she paid to keep that debt in good standing: \$7,950.

[227] These adjustments result in the claimant owing the respondent \$202,900.

[228] However, this amount will be set off by the retroactive child support (\$62,411) and special expenses (\$10,050) owed by the respondent to the claimant as well as by the awards for lump sum for prospective child support (\$94,554) and lump sum prospective s. 7 expenses (\$24,440).

[229] This results in the claimant owing the respondent \$11,445.

XIII. MID-TRIAL APPLICATIONS

[230] The respondent made a number of mid-trial applications. (The claimant's claim for special costs relates to these mid-trial applications.)

A. Leave to File a Counterclaim (Spousal Support)

[231] On January 31, 2020, the fifth day of the trial, the respondent sought leave to bring a counterclaim for spousal support. I was advised by counsel that the possibility of a counterclaim had not been raised at the Adjournment Application. The claimant had emphasized the absence of any counterclaim in her opening statement at trial.

[232] The respondent provided no explanation for not raising the counterclaim, at the very least, prior to the claimant giving her testimony. Her counsel may well have approached her case and evidence differently had there been a claim for spousal support against the claimant. The application for leave was dismissed.

B. Leave to Add Undisclosed Witness (S.)

[233] Although his trial brief included other witnesses, the respondent advised that only the respondent and R. would be called. R. was the final scheduled witness. During R.'s testimony, the respondent sought leave to add S. as a witness. S. had never been on the respondent's witness list.

[234] The discretion to allow the addition of an undisclosed witness was addressed in *Fu v. Zhu*, 2017 BCSC 749, where Griffin J. (as she then was) said:

[50] In summary, I conclude that the factors to consider in exercising discretion under the Rules to allow a party to call a witness not previously disclosed on a witness list in accordance with the time requirements of the Rules are:

- (a) Will there be prejudice to the opposing party due to the lack of notice?
- (b) Is there a reasonable explanation for the failure to give notice? For example, is the lack of notice due to something new learned during trial or was the witness known to the party before trial and a strategic decision was initially made by that party to not call the witness?
- (c) Will precluding the witness being called prevent determination of an issue in the case on the merits?
- (d) Should the party be permitted to call the witness in the interests of justice?

[235] S. was a central character in the claimant's case. It was evident from the outset that he would be: e.g., he was a participant in the 2015 Incident and was featured in the disclosed EWI Report. Nothing unanticipated was learned about S.'s role or conduct during the course of the trial. The testimony given by the claimant regarding S. went essentially unchallenged in cross-examination.

[236] S.'s evidence was not required in order to address the merits, and granting leave at the late point it was sought would have resulted in procedural unfairness to the claimant and lengthened and delayed the trial. Leave was denied.

C. For Claimant to Produce Documents & Inventory

[237] At no time prior to trial, including at the Adjournment Application, did the respondent seek additional disclosure from the claimant.

- [238] On multiple occasions during cross-examination, the respondent asked the claimant whether documents relevant to her testimony existed. On at least some occasions, she testified that there might be. He subsequently sought an order for production of many such documents and an inventory of her safety deposit box.
- [239] The respondent had ample opportunity to seek the documents in question pre-trial. Some of the documents he sought were, in fact, documents listed by the claimant, but which had never requested by the respondent.
- [240] The claimant answered the questions put to her on cross-examination. The respondent is not entitled to documents because her answers were unhelpful to his position. The respondent was unable to point to any evidentiary basis for asserting that the answers she had given were untruthful or that the documents sought would in any way impeach those answers.
- [241] In direct, the claimant testified that she kept her own and the children's jewelry in a safety deposit box, but that the respondent did not keep his own in the box and that he was in personal possession of all of his jewelry. The respondent did not contradict her evidence. While the safety deposit box ought, as the claimant readily conceded, to have been listed on her Form F8 Financial Statement at the outset, there was no evidentiary basis for seeking an order for an inventory to be taken.
- [242] The application was dismissed.

D. Leave to Admit Undisclosed Documents (Financial Statements)

- [243] As noted, R. was the final witness. In his direct examination, he took a file folder and papers into the witness box. When a line of questioning came up, he asked if he could refer to his materials to answer. He was directed, by the court, to try to testify from memory. Several questions in, it became apparent that he was reading from documents he was holding below the edge of the box. On inquiry by the court, he confirmed that he was doing just that.
- [244] I directed R. to hand over the materials for inspection. Interestingly, the materials included documents labelled as ABC's unaudited financial statements for the years 2014-2018 ("Purported Financial Statements"). Copies of the Purported Financial Statements were disclosed to claimant's counsel by the court.
- [245] As above, notwithstanding demands and court orders, no ABC financial statements, including the Purported Financial Documents, had ever been disclosed by the respondent.
- [246] On February 21, 2020, the respondent applied for leave to adduce the Purported Financial Statements in evidence.

- [247] The discretion to admit undisclosed documents was also addressed in *Fu* (see para 49). The principles that apply parallel those already outlined above regarding undisclosed witnesses (see *Fu*, paras 48-50).
- [248] The respondent argued the Purported Financial Statements were directly relevant to an issue in dispute and thus needed to be considered to address the merits and serve the ends of justice. The respondent has it precisely backwards. In the circumstances, the fact that ABC's financial status was a significant and material fact in dispute is the basis for his obligation to disclose, not for making an exception to it.
- [249] The prejudice and delay that would arise from permitting the documents to be entered at this late point in the trial is manifest. The claimant's case was closed. The origin, authenticity and accuracy of the Purported Financial Statements were disputed. Finally, no explanation at all - let alone a reasonable one - was given for failing to disclose the documents at any point prior to the Court's inquiry.
- [250] Leave was denied.

XIV. costs and special costs

- [251] The claimant seeks costs and special costs.
- [252] Rule 16-1(7) of the Family Rules codifies the tradition that costs follow the event. The costs of a family law case go to the successful party absent a court order to the contrary. The claimant has been substantially successful throughout and is entitled to costs of the trial in accordance with Appendix B.
- [253] With regard to the time spent on the respondent's various mid-trial applications, the claimant seeks special costs on the basis that the bringing of the applications amounted to "misconduct deserving of reproof or rebuke": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17, 119 D.L.R. (4th) 740 (C.A.).
- [254] The claimant argues the applications addressed matters that could and should have been addressed pre-trial, and that the applications were, in the circumstances in which they were brought, without merit and bound to fail, and thus unnecessarily prolonged the trial and imposed additional cost on her.
- [255] In *Friedlander v. Claman*, 2015 BCSC 482, at paras. 19-26, Justice Gropper addressed at length the application of special costs principles in the family law context. I endorse and am guided by them here.
- [256] It is fair to characterize the mid-trial applications as ill-considered from the outset in that no reasonable explanation for delay was advanced for any of them. The litigant who foregoes pre-trial procedures and then attempts to replicate them during trial should expect to provide a remarkably good explanation for the choice. However, as observed by Gropper J. in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, advancing a meritless position is, in and of itself, unlikely to warrant special costs unless it is combined

with something further, such as an improper motive (at paras. 42-52).

- [257] I do not think the mid-trial applications were brought with improper motive. However, I am satisfied that two of them, the applications for production of documents and for leave to adduce the Purported Financial Statements, are sufficiently tainted by abuse of process to merit special costs.
- [258] The respondent repeatedly failed to comply with pre-trial disclosure orders made against him. He then brought a mid-trial application for disclosure, essentially doing so while standing in contempt of parallel outstanding orders against him. He repeatedly failed to comply with court orders that pertained to ABC's financial statements. He then brought an application founded on his assertion that ABC's financial statements were of such critical importance to the litigation that they should be admitted at any cost or inconvenience to the trial process. This conduct smacks, in a colloquial sense, of approbation and reprobation of the court's powers.
- [259] I am satisfied that these applications are sufficiently hallmarked as beyond the pale to merit an order for special costs. The claimant ought not to have been required to incur cost in responding to these applications.
- [260] I award the claimant special costs in relation to the preparation time and materials in relation to the two applications and one full day of trial.

XV. SUMMARY

- [261] The parties are divorced from one another, effective the 31st day after the date of this judgment.
- [262] The claimant will have all of the s. 41 parental responsibilities for the children, under s. 40(3)(a) of the FLA. For clarity, the claimant, on her own, has the requisite parental authority to deal with the children's Registered Education Savings Accounts and any requirement for the respondent's signature is dispensed with.
- [263] While the claimant is not obligated to consult the respondent in exercising her parental responsibilities, she must inform the respondent regarding any matters of a significant nature affecting the children. The respondent's right to be informed will be subject to the following terms and conditions:
- a) the claimant will, as soon as reasonably practicable, advise the respondent of any significant decisions made concerning the children, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare;
 - b) the claimant will provide the respondent with copies of any reports about the children that are provided to her by the children's teachers or medical professionals;

- c) the respondent will provide the claimant with an address ("Information Address") for purposes of this right to be informed. The Information Address provided may be either a cellphone number for text communication, an email address or a Canada Post mail address;
 - d) the respondent is responsible for ensuring the claimant has an up-to-date Information Address; and
 - e) the claimant's obligation to inform under this term is sufficiently discharged by sending information and materials to the most recent Information Address provided.
- [264] The respondent will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.
- [265] The claimant and the respondent maintain joint guardianship of the children.
- [266] The respondent will have supervised parenting time on Sundays from 2:30-5:30 pm, subject to the terms and conditions set out in paragraph 83 of these reasons.
- [267] The respondent owes the claimant \$62,411 in arrears in child support and \$10,050 in s. 7 expenses. The respondent owes the claimant \$94,554 in prospective child support and \$24,400 in prospective s. 7 expenses. The amounts due in lump sum have been deducted from the 60% reapportionment of the Surrey Home to the claimant.
- [268] The Surrey House will be vested in the claimant's name only.
- [269] The Surrey Condo will be vested in the respondent's name only.
- [270] Following the division of family property and debt, and deductions for child support, the claimant is ordered to pay the claimant \$11,445.
- [271] The claimant is entitled to costs of the trial in accordance with Appendix B.
- [272] I also award the claimant special costs in relation to the two applications specified above on the basis of one full day of trial.

"Tucker J."

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