

CANADA / JUDGMENT

He v. Guo

2020 BCSC 1632

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1632 He v. Guo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

He v. Guo,

2020 BCSC 1632

Date: 20201103

Docket: E56359

Registry: New Westminster

Between:

Cheng Feng He also known as Benjamin He

Claimant

And

Xueying Guo also known as Vivian Guo

Respondent

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

The Claimant, appearing in person:

C.F. He

Counsel for the Respondent:

R.C. McLeod

Place and Dates of Trial:

New Westminster, B.C.

February 18-21, 24-28, and

August 5-7, 24-26, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 3, 2020

1. introduction

- [1] This is a family law dispute involving claims for spousal support and property division.
- [2] The claimant and the respondent are 55 and 44 years old respectively.
- [3] Each party has been previously married. From his first marriage the claimant has a 23-year-old son who did not live with the parties. The claimant separated from his former spouse on September 28, 2014. He was divorced from his former spouse on February 22, 2017.
- [4] From her first marriage the respondent has a 16-year-old son who is challenged with autism and who lived with the parties. In December 2012, the respondent and her former spouse were granted a divorce. On January 12, 2014, the respondent and her son arrived in Canada. The respondent's son was admitted on a student visa and the respondent on a visitor visa.
- [5] On August 26, 2014, the respondent purchased a home on Meadedale Drive, Burnaby, B.C. as a residence for her and her son while her son attended school (the "Meadedale residence").
- [6] In October 2014, the parties met online. On or about November 17, 2014, the parties first met in person. On November 27, 2014, they started to live together in a marriage-like relationship in the Meadedale residence.
- [7] In 2016, the claimant started the process to apply to our immigration authorities to sponsor the respondent for a work permit and subsequent permanent residency status in Canada. The claimant provided a supporting financial undertaking.
- [8] The claimant says that the parties separated on January 8, 2018. The respondent says that the parties separated on March 25, 2018. The difference in dates does not have particular practical significance for the case at bar.
- [9] From November 27, 2014 to the date of trial, the Meadedale residence increased in value from \$1,170,000 to \$1,530,000.

- [10] The claimant says that, during the parties' 37 month relationship, he made significant contributions upon which he founds his claims for \$1,500 monthly spousal support for two years and one-half of the \$2,600 gross monthly income derived from renting suites located in the Meadedale residence.
- [11] The claimant also seeks 60% (being \$216,000) of the increase in the value of the respondent's house $((\$1,530,000 - \$1,170,000) \times 0.60)$ and an interest in the other personal and real property owned by the respondent in either Canada or China. The claimant counts as a contribution his sponsorship of the respondent and her son for permanent residency status in Canada.
- [12] The respondent counterclaimed and sought spousal support (\$1,000 per month for 12 months), an unequal division of the appreciation in value of the Meadedale residence (i.e., 100% in her favour), an interest in the personal and real property owned in either Canada or China by the claimant. With respect to the property owned by the claimant in China, the respondent sought compensation for her claimed interest because of the difficulty of enforcing an order of this Court in China.
- [13] During his final submissions, the claimant said that "actually to be honest, My Lord, I only raised" spousal support because the respondent was seeking spousal support.
- [14] With respect to a one-half share of \$2,600 gross monthly rental income, the claimant seeks such until he has received the total of the amount he says he spent in connection with the construction of the rental suites. He says that the total amount is approximately \$10,000. In other words, the claimant seeks \$1,300 per month for approximately eight months.
- [15] For the reasons that follow, the claimant's claims are dismissed. The respondent is awarded the spousal support she seeks. The respondent is also entitled to all of the appreciation in the value of the Meadedale residence.

2. spousal support

a) Generally

- [16] The fundamental principles underlying spousal support are described by our Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507, paras. 45-61. These paragraphs read:

(i) Relevant statutory provisions and the case authorities

- [45] Section 15.2 of the Divorce Act is the main provision governing entitlement to spousal support. Subsection 15.2(6) provides that a spousal support order should meet the following objectives:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [46] In order to achieve a fair and equitable distribution of resources, all four of these objectives should be examined: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-853, 43 R.F.L. (3d) 345. Having regard to these policy objectives, courts must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):
- (a) The length of time the spouses cohabited;
 - (b) The functions performed by each spouse during cohabitation; and
 - (c) Any order, agreement or arrangement relating to support of either spouse.
- [47] Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1).
- [48] The claim for spousal support in this case was advanced on compensatory and non-compensatory support principles.
- [49] Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (*Bracklow*, at para. 27; *Moge*, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (*Bracklow*, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (*Moge*, at 864).
- (ii) Compensatory support
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras.24, 41). The

compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (Moge, at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" [Emphasis of Rowles J.A.]

[52] The Court in Moge discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Emphasis of Rowles J.A., internal citations omitted.]

[53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in Moge:

[11] In British Columbia this comment in Moge has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough

equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).

[Rowles J.A.'s emphasis.]

(iii) Non-compensatory support

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para.23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:

[21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.

[57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of

living of the spouses following the marriage breakdown. In Yemchuk, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive":

- [41] I am also satisfied that the trial judge erred in viewing Mr. Yemchuk's "need" for support from too narrow a perspective. He treated "need" as solely a question of whether Mr. Yemchuk could meet his stated expenses with the income available to him. After attributing \$800-\$1,000 per month to Mr. Yemchuk, the trial judge found that Mr. Yemchuk could meet his expense sand, therefore, was not entitled to support.
- [58] In *Tedham v. Tedham*, 2005 BCCA 502, 20 R.F.L. (6th) 217, Prowse J.A. referred to Yemchuk as illustrative of the fact that the courts, at least in longer marriages, are measuring need against the marital standard of living (para. 55), and followed Allaire in finding that the objective of self-sufficiency must be viewed in the context of the marital standard of living (para. 60).
- [59] Non-compensatory support was also considered in *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 25 R.F.L. (6th) 235. In that case, the parties divided assets of close to \$7 million, and the wife was awarded time-limited spousal support on non-compensatory grounds. The trial judge had found that the wife was not entitled to spousal support on either compensatory or non-compensatory grounds: she was not financially disadvantaged by the marriage; she was both highly trained and capable of stepping back into the work force; and she was able to earn investment income from her share of the capital assets. On appeal, Saunders J.A., for the court, held that the trial judge's analysis of the wife's needs and means was "impermissibly narrow"; in part because it had not taken into account the marital standard of living or the husband's post-separation standard of living:
- [68] However, the trial judge did not relate that capacity to earn income from her capital assets and from employment to the standard of living the parties enjoyed during marriage or to the standard of living of Mr. Hodgkinson after trial, or advert to the time lag that would be involved in earning income from a business if Mrs. Hodgkinson immediately resumed work as a chef or caterer. While none of these factors is, by itself, a determinant of Mrs. Hodgkinson's entitlement to spousal support, their absence illustrates what I consider an impermissibly narrow approach to the issue of spousal support.
- [69] Both the question of hardship to Mrs. Hodgkinson ([15.2(6)(c)]) and her self-sufficiency ([15.2(6)(d)]) bear some relationship to the standard of living enjoyed by the parties during the marriage (tempered by the income available) and by the other spouse after the marriage. While Mrs. Hodgkinson is not entitled to support at a level that would maintain the highly affluent lifestyle the parties shared, particularly as it appears to have been beyond the level of Mr. Hodgkinson's earnings, in these circumstances she is entitled to a degree of comfort well beyond "basic needs".

- [74] It was an error, in my view, for the trial judge to fail to recognize these several aspects. The arrangement between the parties during marriage as described by the trial judge, in my view, required consideration of spousal support from the perspective of the standard of living that is still reasonably available to them, although in two residences. While recognizing that Mrs. Hodgkinson is not necessarily entitled, step for step, to Mr. Hodgkinson's standard of living, something closer is required.
- [60] The trial judge distinguished Hodgkinson on the basis that the wife had been awarded non-compensatory support for the time required to restore her career, whereas in this case the appellant had been continuously employed for many years. However, the factual differences between Hodgkinson and this case do not diminish the principle that an analysis of the support-seeking spouse's "needs" under non-compensatory support, i.e., the objectives of ss. 15.2(6)(c) and 15.2(6)(d) of the Divorce Act, requires some consideration of the standard of living enjoyed by the parties during the marriage and by the other spouse after the marriage.
- [61] Finally, I note that in *Fisher v. Fisher*, 2008 ONCA 11,88 O.R. (3d) 241, the Ontario Court of Appeal recently reiterated the principle that self-sufficiency is a relative concept encompassing more than the ability to meet basic expenses:
- [53] Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation.
- [17] The Chutter summary was made in the context of the Divorce Act., R.S.C. 1985, c. 3 (2nd Supp.). The objectives are analogous to spousal support in relation to marriage-like relationships under the Family Law Act, S.B.C. 2011, c. 25 [FLA]: *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 136.
- [18] The relevant FLA provisions read:
- Objectives of spousal support
- 161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

b) The Claimant's Claim for Spousal Support

[19] The parties' marriage-like relationship was short. The claimant says that it lasted 37 months.

[20] With respect to compensatory support, the claimant's economic position did not change. The investment advisory business he had established as an Investia Financial Services Inc. representative continued. The parties' marriage-like relationship did not affect his ability to earn income during the relationship or after the relationship ended.

[21] I understood the claimant to argue that his sponsorship of the respondent and her son related to visas and permanent residency in Canada also serves to justify his claim for spousal support. At trial, the respondent acknowledged that the claimant was helpful with her and her son's immigration applications and in their obtaining permanent residency status. On December 12, 2017, the respondent and her son were granted permanent residency status.

[22] The claimant says that he was used by the respondent to obtain permanent residency status for her and her son in Canada and this was the respondent's design and the reason she entered into the marriage-like relationship with him. He points to the fact that the parties separated within a month or a few months after December 12, 2017. I reject the claimant's assertion.

[23] The respondent testified that she had wished to have a child with the claimant as part of a family. Her wish is confirmed by medical consulting reports dated August 14, 2015, October 23, 2015, and August 30, 2016, showing that the parties consulted specialists at a medical fertility centre for tests and advice. I accept the respondent's testimony that she wished to have a child with the claimant as part of their family.

- [24] On April 17, 2018, under his employer's letterhead, the claimant using the title, Immigration Marriage Fraud Report, reported the parties' marriage-like relationship to our Country's immigration authorities as part of a fraud undertaken by the respondent.
- [25] In the claimant's report, he also accused the respondent of beating him, threatening a particular witness, and that she was "dating with some men for money".
- [26] One of its conditions of the respondent's work permit issued on March 3, 2017 reads: "Not valid for employment in businesses related to the sex-trade such as strip clubs, massage parlours or escort services."
- [27] The claimant's assertions of fraud, violence, witness threatening, and working in the sex-trade were not shown at trial to be other than baseless assertions.
- [28] An immigrant applying for permanent residency status is vulnerable to threats, intimidation, and unfounded accusations. I find that the claimant's report to the immigration authorities and related serious allegations were maliciously made by him.
- [29] The claimant's sponsorship of the respondent and her son for immigration purposes arose in the course of the relationship. I find that the respondent's and her son's immigration status in Canada were favourably affected. However, rewarding the claimant by way of spousal support would, as a matter of policy, encourage avarice rather than relationships of love and support both to the detriment of families and our Country's immigration system.
- [30] I do not find that the claimant conferred any significant economic advantage upon the respondent. The claimant lived without paying rent to the respondent or extraordinary expenses for the respondent's benefit. I have considered that the claimant did help with managing tenants at the Meadeale residence and in obtaining a partial tuition refund related to the respondent's son's schooling. I also do not find that the claimant requires redress for any economic disadvantage arising from the 37-month marriage-like relationship justifying spousal support on a compensatory basis.
- [31] With respect to spousal support for the claimant based on non-compensatory principles, I do not find the "need" for such.
- [32] The relationship was short. In the overall circumstances, the claimant is in a position to enjoy a good standard of living. He is well-educated and an intelligent man. He has an established business and owns real estate in China.
- [33] On March 30, 2018, the claimant sent by email a four-page draft separation agreement he had prepared. In the draft separation agreement, he seeks \$150,000 from the respondent and addresses other matters such as "childcare responsibilities" for the respondent's son and property division. He refers to the respondent and himself as having "cohabitated in a conjugal relationship". He seeks to take no responsibility for the respondent or her son. During the relationship, the respondent provided the care for her son.

[34] In his March 30, 2018 email, the claimant provides a hyperlink to the Immigration and Refugee Protection Act, S.C 2001, c. 27.

[35] With the context of the subsequent April 17, 2018 Immigration Marriage Fraud Report, I agree with respondent's counsel's written submission that the claimant's hyperlink reference was:

an obvious attempt to intimidate the Respondent into signing an agreement which would give him \$150,000 and absolve him of any responsibility to support the Respondent and her son as he was required under the terms of his sponsorship undertaking. The Family Law Act, section 1 defines "family violence" as including "(d) psychological or emotional abuse of a family member including (i) intimidation, harassment, coercion or threats respecting other persons, pets or property."

[36] The claimant's categorization of the parties' relationship as conjugal without family obligations to either the respondent or her son and his reporting of the relationship to our immigration authorities in a manner designed to harass and harm the respondent are two further reasons to dismiss the claimant's claim for spousal support on a "needs" basis. The respondent testified as to the adverse psychological and emotional impact that the claimant's conduct had upon her. I find that the abuse hindered the respondent's attainment of economic self-sufficiency.

3. property division

a) Generally

[37] The general rules regarding property division are:

- i) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution (FLA, s. 81(a));
- ii) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common and is equally responsible for family debt (FLA, s. 81(b)); and
- iii) an unequal division of family property may be ordered where an equal division would be significantly unfair (FLA, s. 95(1)).

[38] For the case at bar, the relevant portions of the definitions of family property, excluded property, and family debt read:

Family property

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
- (i) property that is owned by at least one spouse, or

(ii) a beneficial interest of at least one spouse in property;

(2) Without limiting subsection (1), family property includes the following:

...

(g) the amount by which the value of excluded property has increased since the later of the date

(i) the relationship between the spouses began, or

(ii) the excluded property was acquired.

Excluded property

85 (1) The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began;

Family debt

86 Family debt includes all financial obligations incurred by a spouse

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate,

[39] With respect to an unequal division of family property, s. 95 of the FLA reads:

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

(a) equally divide family property or family debt, or both, or

(b) divide family property as required under Part 6 [Pension Division].

(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 [objectives of spousal support] have not been met.

[40] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, Justice Harris, in writing for our Court of Appeal, reviews the meaning of the phrase "significantly unfair" in s. 95 of the FLA. Justice Harris states:

[35] The value of family property is divided equally unless it is significantly unfair to do so.

[36] It is useful to recognize that the purpose of the legislative reform to the FRA seems to have been to simplify the division of family property, to render it more certain and predictable, and to divide property on a basis that better fits people's expectations of fairness. The Legislature attempted to accomplish this purpose in two ways. First, the definition of excluded property in the FLA provides greater clarity regarding what property is subject to division than existed under the FRA, where the identification of family assets was often difficult. Second, the Legislature reduced the discretion of courts to depart from equal division. This was accomplished in part by imposing a higher test for such a departure. Under the new scheme, family property is to be divided equally unless it is "significantly unfair" rather than just "unfair" to do so. A court's discretion was also limited by identifying more precisely the considerations relevant to the analysis than had previously been the case.

[37] These policy objectives are clear enough from a comparison of the FLA to the legislation it replaced, the FRA. To the extent that it is helpful, the policy objectives are also clear from extrinsic sources including the Ministry of Attorney General's White Paper on Family Relations Act Reform: Proposals for a new Family Law Act, (2010), online: <<http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/>

fla/family-law-white-paper.pdf> and legislative debates. These sources reflect the intention to limit and control judicial discretion in reapportioning property and to foster certainty and predictability in property division. At the same time neither the legislation nor the extrinsic sources disclose an intention to eliminate judicial discretion to reapportion family property entirely. For relevant legislative history see: British Columbia, Legislative Assembly, Hansard, 39th Parl., 4th Sess., Vol. 28, No. 2 (17 November 2011) at 8845 (Hon. S. Bond) and British Columbia, Legislative Assembly, Hansard, 39th Parl., 4th Sess., Vol. 28, No. 8 (23 November 2011) at 9036 (Hon. S. Bond).

- [38] It is safe, therefore, to conclude that the Legislature intended to limit the circumstances in which a departure from equal division of family property could be justified because of unequal contributions to its acquisition, preservation, maintenance or improvement. The FLA starts with the presumption found in s. 81 that family property is to be equally divided. As I read s. 81, each spouse is presumptively entitled to an undivided half interest in all family property, regardless of their respective use or contribution. I do not think the use of the words "regardless of their respective use or contribution" in s. 81(a), rather than in s. 81(b), is inconsistent with that view. Any potential uncertainty on this point would have been removed if s. 81(b) had read "on separation, each spouse has a right to an undivided half interest in all family property, regardless of their respective use or contribution". But as I read it, the phrase in s. 81(a) refers to the basis of entitlement to family property. Entitlement exists independent of contribution or use, and the extent of that entitlement on separation is defined in s. 81(b).
- [39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.
- [40] Nonetheless, the scheme contemplates judicial discretion to depart from an equal division. That discretion is recognized in s. 81 and further articulated in s. 95. Section 95 defines both the test and the factors for a court to consider in exercising its discretion.
- [41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.

- [42] No doubt the nuanced meaning attaching to the test of "significant unfairness" will develop in the case law. No other province uses the same test, so there is no clear persuasive authority to look to. It would be unwise to attempt to define the test with too much precision in anticipation of circumstances arising in individual cases; however, one can say that reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense.
- [43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the FRA. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1)(f) of the FRA. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c)) and to post-separation increases in value beyond market trends caused by one spouse (95(2)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the FLA division of property regime.
- [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.
- [41] In *Singh v. Singh*, 2020 BCCA 21, in writing for our Court of Appeal, Justice Garson, after reviewing Justice Harris's extensive analysis of s. 95 of the FLA, summarized matters and then turned the Court's focus to analyze the meaning of s. 95(2)(i) of the FLA in its context.
- [42] Justice Garson's summary and analysis reads:
- [133] In *V.J.F. v. S.K.W.*, 2016 BCCA 186, Justice Newbury described s. 95 as requiring a high threshold of "significant unfairness" to depart from equal division: at para. 81. Other cases have reached similar conclusions about the high threshold necessary to reapportion assets under s. 95. In *Khan v. Gilbert*, 2019 BCCA 80, for example, Justice Fenlon noted that cases in which unequal contribution was found to reach the significantly unfair threshold have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: at para. 32.

- [134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* [v. Kostanski, 2016 BCCA 286] at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.
- [135] Keeping the foregoing in mind, I turn to consider the interpretation of s. 95(2)(i) and whether the factors the judge relied on properly fall within its scope.
- [136] Section 95(2)(i) is a general term, allowing consideration of "any other factor that may lead to significant unfairness." As a general term preceded by a list of specific items, the rule of statutory interpretation known as *ejusdem generis* ("of the same kind"), or the limited class rule, may apply. In *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, La Forest J. explained the rule thusly at 1040:

Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.

- [137] Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada: 2014) at pp. 235-236, sets out three requirements for this rule of statutory construction to apply: first, the specific items in the list must belong to a single identifiable class; second, this class must be narrower in scope than the general words that follow the list; and third, the rule cannot be invoked if the specific class inferred from the list has nothing, apart from those items, to apply to.
- [138] Applying these requirements to the provision at issue, if the rule applies, the class cannot be any factor "that may lead to significant unfairness" as this would violate the second requirement as set out by Sullivan. The other factors enumerated in s. 95(2) suggest consideration of aspects of the relationship between the spouses, including its duration, the terms of any agreement, as well as the characteristics of family assets and debt and how the spouses have influenced their value. One of the considerations in s. 95(2)(g) includes an analysis of a spouse's good faith or motive. These factors are broad. Nevertheless, in my view, they all relate to a limited class, namely, the economic characteristics of a spousal relationship.

[139] The economic characteristics of a spousal relationship is a broad class, but one that is narrower than the general term in s. 95(2)(i). With regard to Sullivan's third requirement, there are clearly other factors relevant to the class that are not enumerated in s. 95(2)(a)-(h). For example, this limited class would allow for the consideration of the relative contribution of spouses to the acquisition, preservation, maintenance, or improvement of family property during the relationship, as suggested by Jaszczewska at para. 44.

[Garson J.A.'s emphasis.]

b) The Claimant's Claim for 60% of the Increase in Value of the Meadedale Residence

[43] As noted, the respondent says that the claimant should not share at all in the appreciation of the Meadedale residence she owns because it would be significantly unfair. I agree for four reasons.

[44] First, the relationship was a short one. According to the claimant, it lasted 37 months: FLA, s. 95(2)(a).

[45] Second, the claimant did not make a relatively significant financial contribution to the parties' relationship or the Meadedale residence in particular (other than construction of rental units which the claimant valued at approximately \$10,000): Singh, para. 139; FLA, s. 95(2)(i).

[46] In his written submission, the claimant asserts that he spent \$200,000 "on maintaining the relationship" with the respondent. His tax information shows net income of approximately \$14,000, \$26,000, and \$25,000 for his 2015 to 2017 taxation year respectively, for a total of approximately \$65,000. In these years, the claimant also was obligated to pay spousal and child support in relation to his first marriage (on February 22, 2017, in the proceedings involving his first wife, Justice Blok found the claimant to have \$42,000 of in Guideline Income). The claimant showed no sources of capital or borrowings from which he could have spent approximately \$200,000 over the 37-month relationship with the respondent. In sum, the claimant has not provided "sufficiently clear, convincing, and cogent" evidence to support his assertion: F.H. v. McDougall, 2008 SCC 53 at para. 46. I also accept the respondent borrowed funds from her family members to fund many family expenses.

[47] Third, the claimant has failed to fully disclose his assets. With respect to RRSPs and TFSAs in his name, these are addressed in the separation agreement dated May 9, 2018 and supplemental agreement dated August 10, 2018 that the claimant executed with his first wife. He attaches the separation agreement (and supplemental agreement) to his January 15, 2020 Form F8 financial statement filed in these proceedings but does not set forth that he has approximately \$29,000 in financial assets for his benefit remaining under his separation agreement (and supplemental agreement) with his first wife.

[48] Similarly, in the claimant's separation agreement (and supplemental agreement) executed with his first wife, a CAD \$400,000 apartment in Wuhan, China is set forth. In his January 15, 2020 Form F8 financial statement, he lists the apartment as having a value of CAD \$300,000 with the following details:

Assets

Details

Date Acquired

Value

Apartment in Wuhan China

The real property bought on 21/May/2001 by the Claimant's sister.

My parents have interest on it and they pay the management fees for the property.

The Claimant has sole ownership of the property on or after 12/Jun/2018.

\$300,000

[49] At trial, the claimant also testified that he only recently acquired full ownership of the Wuhan apartment (previously he says he had only a partial interest). According to the claimant, his sister and parents had had interests in the apartment. Other than the claimant's testimony, there was no evidence of the transfer of interests (by gift or otherwise) by the claimant's parents or sister to him or payment by the claimant for such interests. In cross-examination, the claimant agreed that he and his first wife treated the Wuhan apartment as family property. I am also satisfied that if the claimant's parents or sister had given (or sold) their respective interests in the Wuhan apartment to the claimant, the claimant would have caused such to be reflected in his separation agreement with his first wife.

[50] The relevant land registry certificate issued on November 14, 2005 by the Wuhan Dongxihu District People's Government shows the claimant as the sole "land use right holder". In related documents issued on August 11, 2005 by the Wuhan Real Estate Registration and Certificate Issuing Centre, the claimant is shown as the "owner". The space for showing joint ownership is left blank. I reject the claimant's testimony that he was not the sole owner of the Wuhan apartment at all relevant times.

[51] With respect to any claim by the respondent to the claimant's property in China, the claimant, in cross-examination, testified:

Q I asked you are you seeking a division of property which you say that Ms. Guo owns in China?

A Increased value.

Q Increased value?

A Yes. That's the -- I know that's the excluded property.

Q So you would agree that Ms. Guo would also be entitled to the increase in value of property that you own in China?

A No.

Q No, she's not?

A She's not. She has not -- has not been in China, nor any contribution. I don't take that one into my relationship -- our relationship and that one is not only mine, that's not sole owned by me, that's my -- my parents and my sister's --

Q So --

A -- and my ex-wife's. In that time, I not hundred percent own my Chinese property.

[52] It would be significantly unfair to allow the claimant to share in the appreciation in value of the Meadedale residence where he falsely denies sole ownership of his Wuhan apartment.

[53] A fair division of family property cannot be achieved where a party does not fully disclose the relevant assets and their related values. Where a party frustrates the process and the application of the relevant law, it would be significantly unfair for that party to share in the known family property.

[54] Singh is authority for considering undisclosed assets in determining significant unfairness within s. 95(2)(i) of the FLA: Singh, para. 140.

[55] Fourth, it would be unfair, and significantly so, to condone the claimant's malicious act of filing the baseless Immigration Marriage Fraud Report.

[56] The FLA is not a complete code: V.J.F. v. S.K.W., 2016 BCCA 186, paras. 73-74. Our Legislature, in using the word "unfair", in my view, intended to incorporate foundational notions of fairness and justice.

[57] Justice Harris's reasons in Jaszczewska reflect the Legislature's emphasis where he states (at para. 42):

one can say that reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense.

[58] Similarly, as quoted above, Justice Garson in Singh states (at para. 134):

[134] There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

[59] By filing the false Immigration Marriage Fraud Report, the claimant has deliberately attempted to cause financial harm to the respondent and emotional harm to the respondent and her son. There is a close connection to the relief the claimant seeks and his conduct.

- [60] The claimant seeks a monetary award related to property division while maliciously trying to harm the respondent financially.
- [61] For example, the claimant seeks to justify his claim on the basis that his immigration sponsorship of the respondent and her son has resulted in significant past and future financial savings for the respondent by having her son not classified as an international student. In the past, the result was lower school tuition fees. The claimant then includes his estimate of future tuition savings (\$120,000) as part of his justification for a 60% share of the appreciation in value of the Meadedale residence while, without any basis, having reported to our immigration authorities that the respondent's and her son's permanent residency status had been obtained through fraud. I find that if forced to leave Canada, the respondent would suffer financial harm.
- [62] The claimant's sponsorship of the respondent was an economic characteristic of the parties' relationship which arose during the course of the relationship. The claimant's threats in relation to the respondent's immigration status constitute "family violence": FLA, s. 1(d), "family violence".
- [63] The claimant's filing of the baseless Immigration Marriage Fraud Report was designed to cause the respondent's immigration status to be revoked and thereby destroy the economic component which forms part of one's immigration status.
- [64] In sum, the claimant is not entitled to any portion of the increase in the value of the Meadedale residence.
4. other matters
- a) Property Owned by the Respondent in China
- [65] The claimant asserts that the respondent owns property and has savings in China. The respondent's February 3, 2020 Form F8 financial statement does not list any such assets or show any such assets as having been disposed of in the previous two years. In her 2018 tax return, the respondent also certifies that she did not own or hold at any time in 2018 specified foreign property with a total cost of more than CAD \$100,000.
- [66] With the respondent's sworn financial statement and certification, I find that the claimant's assertion that the respondent owns property in China has not been established. The claimant has not established a basis to not accept the respondent's sworn Form F8 financial statement or certified tax return. I also find that no properties were purchased in China by the respondent's first husband for the respondent or her son. The March 24, 2015 "Supplemental Agreement" was orchestrated by the claimant and has been disregarded by the respondent's first husband.
- b) The Respondent has \$500,000 in Hidden Savings

[67] The claimant also asserts that the respondent has approximately \$500,000 in hidden savings in Canada.

[68] The respondent's February 3, 2020 Form F8 financial statement does not show any such savings. Similarly, the respondent's 2018 income tax return does not show income or capital gain (or losses) from such savings.

[69] Again, with the respondent's sworn financial statement and certification, I find that the claimant's assertion has not been established.

c) The Claimant's RRSP

[70] As noted, the claimant has an RRSP of approximately \$29,000. I have little information as to the amount by which the claimant's RRSP may have increased in value during the parties' relationship. The amount involved is likely relatively small. In such circumstances, I will make no award in the respondent's favour with respect to the claimant's RRSP.

d) Surrey Townhouse and Wuhan Apartment

[71] The claimant owned a townhouse in Surrey, BC with his first wife. The claimant, in his January 15, 2020 Form F8 financial statement, says that he "never brought it into the parties' relationship" and "the parties had no contribution on it".

[72] In the claimant's May 9, 2018 separation agreement with this first wife, the Surrey townhouse is shown as an asset of the claimant and his first wife with a value of \$660,000 (with a \$226,000 mortgage).

[73] Under the May 9, 2018 separation agreement, the claimant's first wife received the Surrey townhouse.

[74] During legal argument, respondent's counsel stated that if the respondent was entitled to the Meadedale residence without the related claim by the claimant to any share of the appreciation in value, the respondent would drop her claims in relation to either the Wuhan apartment or the Surrey townhouse.

[75] With my dismissal of the claimant's claim with respect to the Meadedale residence and the representation of respondent's counsel, I will dismiss any claim the respondent may have had with respect to the Wuhan apartment or the Surrey townhouse.

[76] I will also dismiss any claim by the respondent to any personal property the claimant may have in China. There was little evidence of such personal property beyond possibly some furnishings in the Wuhan apartment.

e) Family Debt

- [77] Excluding the arrears in property tax and city utilities (approximately \$24,000), and funds borrowed by the respondent from her family members (approximately \$133,000), the respondent has family debt of approximately \$17,000. A mortgage on the Meadedale residence (approximately \$650,000 is the current principal amount) had been registered at the time the Meadedale residence was acquired on August 26, 2014, prior to the parties' relationship. The original principal was approximately \$733,200.
- [78] The claimant says that his family debt is approximately \$35,000. The respondent says that a portion of this debt is debt arising from the claimant's business activities. I agree. In cross-examination, the claimant stated that he had one car. The claimant's tax returns show various claims in relation to automobile expenses as business-related.
- [79] In order to bring final resolution to this matter, I will order each party is responsible for the debt that is their respective names. The claimant has not separated the business-related debt from the family debt to the extent that I am satisfied that his actual family debt in his name is greater than the approximately \$17,000 family debt described above in the respondent's name. I also have considered both the significant decrease in principal of the mortgage on the Meadedale residence, which is an amount greater than 60% of the loans made to the respondent by her family members, and the reasonable possibility that all or a portion of the loans may be forgiven.
- f) The Claimant's Claim to a Share of Gross Rental Income
- [80] As noted, the claimant seeks approximately \$10,000, representing the funds he spent on constructing rental suites in the Meadedale residence.
- [81] I will dismiss this claim by the claimant. The respondent made greater financial contributions for the claimant's benefit than the claimant did for the respondent's benefit.
- g) Spousal Support
- [82] I am satisfied that the respondent is entitled to spousal support she seeks on both a compensatory and non-compensatory basis. It will help promote the respondent's economic sufficiency after the claimant's baseless Immigration Marriage Fraud Report.
- [83] Since September 2019, the respondent has been studying acupuncture at Vancouver at Career College. The course will complete in 2022.
- [84] The respondent currently rents an apartment for herself and her son while earning rental income from the Meadedale residence.
- [85] The spousal support sought is modest and well within the range of reasonableness.
5. conclusion

[86] The claimant's claims are dismissed. The respondent is awarded the spousal support she seeks of \$1,000 per month for 12 months (\$12,000). All other claims by the respondent are dismissed. Each party will be responsible for the debt in their respective names.

[87] For greater certainty, the respondent is entitled to 100% in the appreciation in value of the Meadedale residence and the claimant has no claim to or interest in the Meadedale residence.

6. costs

[88] If either party wishes to address costs, they should contact Supreme Court Scheduling within 60 days of these reasons to schedule a 55-minute 9 a.m. hearing before me.

"Funt J."

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