

CANADA / JUDGMENT

Higgs v. Lear

2020 BCSC 194

COURT

Supreme Court of British Columbia

DECIDED

14 February 2020

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2020 BCSC 194 Higgs v. Lear

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Higgs v. Lear,

2020 BCSC 194

Date: 20200214

Docket: E16957

Registry: Duncan

Between:

Michael Lawrence Higgs

by his Litigation Guardian Melanie Jane Higgs

Claimant

And

Rosemary Lear, also known as Rosemary Higgs

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page and paragraph 3 on February 28, 2020.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Claimant:

R.B. McDaniel

J.A. Drozdiak

Counsel for the Respondent:

W. Murphy-Dyson

Place and Date of Trial:

Duncan, B.C.

January 6-10, 13-15, 2020

Place and Date of Judgment:

Duncan, B.C.

February 14, 2020

INTRODUCTION

- [1] This is a contested family matter.
- [2] The elderly parties, Michael Higgs and Rosemary Lear, were in a long-term relationship of some 35 years. They began living together in 1981 and they were married in 1984. Arising from concessions made on the first day of trial, the parties now agree that the date of separation was January 1, 2017.
- [3] On January 6, 2020, I granted an order for divorce of the parties in Action No. E16956 (Duncan Registry) (the "Divorce Action") based on a one-year separation.
- [4] The remaining issues between the parties, raised in this separate proceeding, relate to the property division of their substantial family property. Mr. Higgs' daughter, Melanie Higgs, brings this action as her father's litigation guardian, given his cognitive difficulties particularly relating to his financial affairs.
- [5] For the most part, the parties agree on the identification and valuation of the family property, valued at almost \$6 million on a pre-tax basis. Other amounts spent by the parties prior to the separation are in issue.
- [6] With respect to the family property, Mr. Higgs seeks an equal division of the family property. Dr. Lear seeks to exclude certain property under s. 85 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"). In addition, she seeks an unequal division of the family property, alleging that equal division would be "significantly unfair" in accordance with s. 95 of the FLA, given the parties advanced years and their anticipated needs into the future.
- [7] Neither party seeks spousal support.
- [8] Dr. Lear was the principal witness at this trial concerning the history of the parties. Melanie Higgs contended that her father was unable to testify on the issues arising at this trial. Nevertheless, as a condition of the compromise reached on the first day of trial, she agreed

to call her father as a witness so that Dr. Lear's counsel could cross examine him. That cross examination took place and largely confirmed that Mr. Higgs was in no position to recall anything relevant to most of the issues, stating that his memory was "random". This exercise was largely a waste of the Court's time and inconvenienced Mr. Higgs in his settled routine.

- [9] In these circumstances, Dr. Lear's evidence must be examined carefully for credibility and reliability, save where that evidence is confirmed by other means, such as contemporaneous documentation. This is particularly the case with respect to her claim to excluded property, on which Mr. Higgs was unable to comment.

BACKGROUND FACTS

- [10] The following are my findings of fact.

- [11] Mr. Higgs was born in August 1933. He is a retired airline pilot. Commencing in 1956, he worked for CP Air and then Air Canada until he retired in 1991. He is now 86 years old.

- [12] Dr. Lear was born in 1942. She worked as an endodontist during her career. In 1967, after attending graduate school at Harvard, Dr. Lear joined the Faculty of Dentistry at UBC. In the early 1970s, she began working in private practice. She is now 77 years old. She states that she is physically active and in good health.

- [13] Prior to the start of his relationship with Dr. Lear, Mr. Higgs was divorced from his first wife, Brenda Higgs. He was required to pay his former wife spousal maintenance of \$2,000 per month, which continued until her death in October 2019.

- [14] Mr. Higgs and his first wife have three adult daughters, Tracy Ford, Melanie Higgs, his litigation guardian, and Jessica Kelley. To avoid confusion with the names, respectfully, I will refer to the daughters by their first names where necessary.

- [15] Dr. Lear was previously divorced in 1979. She has no children.

The 1980s

- [16] Mr. Higgs and Dr. Lear began living together in 1981.

- [17] In May 1981, Dr. Lear incorporated Dr. Rosemary Lear Inc. (the "Company"). The Company was not used for the operation of her dental practice; rather, it was for investment purposes. She is the sole shareholder and director of the Company.

- [18] The parties were married on October 3, 1984.

- [19] Before the relationship began, Dr. Lear acquired a home on West 36th Avenue in Vancouver, BC (the "West 36th Property"). In the 1980s, she sold that property and acquired a home at 6-1980 Sasamat Drive in Vancouver (the "Sasamat Home"). Both parties contributed to the purchase of the Sasamat Home and the servicing of the mortgage.

- [20] At some point, the Sasamat Home was put into the name of the Company.

[21] In 1984 or 1985, Dr. Lear agreed to transfer the Sasamat Home from the Company and place title in joint tenancy. The respective contributions of the parties to that asset are the subject of Dr. Lear's excluded property claim.

[22] In 1989, Dr. Lear's mother died in Ireland. Dr. Lear was an only child and was the sole beneficiary of her mother's estate. Dr. Lear received an inheritance in an unknown amount.

The 1990s

[23] In 1991, Mr. Higgs retired from Air Canada given its mandatory retirement policy. He began receiving a pension via an HSBC bank account in their joint names. Throughout the relationship, this account was mainly used by Mr. Higgs since his pension, CPP, annuity and RRIF payments were deposited there.

[24] Upon his retirement, Mr. Higgs suggested, and Dr. Lear agreed, that she sell her dental practice so that they could go travelling for two years. Dr. Lear wound up her practice shortly thereafter.

[25] In 1993, the parties returned to Vancouver. Dr. Lear recommenced her dental practice as an employee at a dental office. While she considered that she was working full time, Dr. Lear took three months off every year so that she and Mr. Higgs could continue to travel around the world.

[26] In 1995, Mr. Higgs and Dr. Lear sold the Sasamat Home and jointly acquired a condominium at 2001-5775 Hampton Place (the "2001 Condo") for \$1,030,000. The 2001 Condo is a large penthouse on the University Endowment Lands in Vancouver. Both parties contributed to the cost of living in the 2001 Condo, including payments for utilities, strata fees and a mortgage of \$285,000.

[27] In or about 1997, the mortgage on the 2001 Condo was paid off. Dr. Lear alleges that she made this payment from her inheritance money.

The 2000s

[28] I heard extensive evidence about the relationship between Mr. Higgs' daughters and Dr. Lear. Melanie described the relationship as initially "cordial".

[29] Mr. Higgs and Dr. Lear were both generous to Melanie and Tracy. In 2000, Melanie received \$10,000 from each of them for a down payment on a house after she moved to Duncan. Tracy and her husband received funds from her father and Dr. Lear from time to time, including for a move to Victoria.

- [30] On June 26, 2004, the Company purchased a condominium located at 305-4685 Valley Drive in Vancouver (the "Valley Drive Condo") for \$418,000. The Valley Drive Condo has been rented since its acquisition to Dr. Lear's friend, currently at \$2,325 per month. The property was initially mortgaged for \$285,000, but it was paid off through the rental income and it is presently unencumbered.
- [31] In 2006, Melanie married Andreas Berglund and they continued to live in Duncan. As with Melanie, respectfully, I will refer to Mr. Berglund as Andreas.
- [32] In July 2006, Mr. Higgs signed a representation agreement appointing Dr. Lear as his representative with respect to his personal care and health care (the "Representation Agreement"). In the Representation Agreement, Mr. Higgs appointed Melanie and Jessica as alternates.
- [33] In early 2008, Mr. Higgs suffered from a cerebral hemorrhage. As a result, he began to suffer from cognitive difficulties, particularly affecting his short term memory. Dr. Lear described the deterioration in Mr. Higgs' health from 2008 onwards. She described his initial petit mal seizures, which were resolved by medication. She described his memory loss that continued to persist after this time.
- [34] Almost immediately after Mr. Higgs' medical incident, Dr. Lear retired from her dental practice in order to spend more time caring for Mr. Higgs. She was about 66 years old at the time.
- [35] Even after their respective retirements, the parties enjoyed considerable incomes from their pensions, annuities, CPP/OAS and rental income earned by the Company.

2010-2015

- [36] In October 2011, Mr. Higgs executed a will. Mr. Higgs appointed Dr. Lear as executor and also, left the residue of his estate to her if she survived him. If she died before him, the will provided that half of his estate would go to his daughters and the other half would be divided amongst a charity and numerous friends of Dr. Lear.
- [37] In June 2012, a dispute arose at a family gathering that significantly strained the relationship between Dr. Lear and Mr. Higgs' daughters and, to some extent, caused distress to Mr. Higgs.
- [38] Dr. Lear acknowledges that this dispute arose from her "testy" comments arising from Tracy's request for more money at that family gathering. Melanie and Jessica sent letters or emails to Dr. Lear, described by Dr. Lear and Mr. Higgs as very inflammatory and "venomous". Mr. Higgs requested that apologies be made; none were forthcoming.
- [39] Melanie describes the relationship as less "cordial" after that time. For example, Melanie rejected hearing any information directly from Dr. Lear concerning her father's health issues, taking the position that she could keep up to date through other means.

- [40] I would certainly describe the relationship between Melanie and Dr. Lear after 2012 as frosty; and, that situation certainly did not improve in the later years, as I will describe below. Mr. Higgs continued to regularly visit and stay with Melanie and Andreas in Duncan, particularly when Dr. Lear was travelling by herself or with her friends.
- [41] In June 2012, Dr. Lear and Mr. Higgs retained Shaun Cathcart, a Vancouver lawyer. In her recent letter, Ms. Cathcart confirms that she was retained to provide legal advice on estate planning options available to them. This advice included the possibility of creating a joint spousal trust to hold title to the 2001 Condo.
- [42] On June 28, 2012, Mr. Higgs executed a power of attorney in Dr. Lear's favour (the "POA"). That document also arose from the legal services provided to him by Ms. Cathcart.
- [43] Ultimately, Dr. Lear and Mr. Higgs decided against creating a spousal trust at that time. Dr. Lear advises that such a transaction would have required payment of property purchase tax and payment of deferred property taxes, which they decided did not justify taking that step.
- [44] On October 15, 2012, Dr. Lear executed a will. Her will was similar to that of Mr. Higgs; however, Dr. Lear appointed The Canada Trust Company as executor. She also allocated the value of the Company to her friends and charities and, somewhat akin to what Mr. Higgs had done in his will, divided the residue equally between Mr. Higgs' daughters and her friends/charities.
- [45] Also, on October 15, 2012, Dr. Lear executed a statutory declaration (the "Statutory Declaration") that was prepared for her by Ms. Cathcart. The Statutory Declaration is relevant to Dr. Lear's excluded property claim, as I will discuss below.

2015-January 2016

- [46] In 2015, Dr. Lear, assisted by medical advice she had received, formed the view that she could no longer care for Mr. Higgs in their home in the 2001 Condo. She began to look into long term care facilities for her husband, thinking that it would take some time to find a placement.
- [47] By September 2015, Dr. Lear and Mr. Higgs discussed this step and visited two facilities in Vancouver which were possible choices arising from Dr. Lear's research. Dr. Lear identified Braddan Private Hospital ("Braddan"), a private health care facility located in Vancouver, as a possible care home. Dr. Lear did this at least in part because it was close to their home. It was also a facility where the cost of care was covered by long term care insurance that the parties had purchased earlier.
- [48] At this trial, Dr. Lear referred to Mr. Higgs as having "dementia" although she did not adduce any medical diagnosis at this trial. In her correspondence introduced at this trial, she also referred to Mr. Higgs as having Alzheimer's disease.

- [49] Despite her own views of Mr. Higgs' current and declining mental capacity by at least 2015, and the advice she received from Mr. Higgs' doctors as to his condition, in fall 2015, Dr. Lear began to involve Mr. Higgs in substantial financial and legal transactions.
- [50] In October 2015, Mr. Higgs and Dr. Lear signed an agreement to sell the 2001 Condo for \$2 million. At the same time, they signed an agreement to acquire a condominium owned by the buyers of the 2001 Condo in the same building at 1701-5775 Hampton Place (the "1701 Condo"). The purchase price was \$1.2 million. Dr. Lear states that she and Mr. Higgs intended to renovate the 1701 Condo before they moved in. She also states that the intention behind the downsizing was to save money for their retirement.
- [51] In late October 2015, Mr. Higgs went to Duncan to stay with Melanie and Andreas for about two weeks while Dr. Lear was on a cruise vacation. Melanie did not notice any particular or unusual decline in her father's behavior at that time, including his cognitive abilities or his ability to substantially care for himself.
- [52] Mr. Higgs' statements to his daughter at that time would suggest that he had some understanding then that the 1701 Condo was to be renovated. He asked his daughter whether he could live with them while the renovations to the new condominium were underway. It is far from clear whether he truly understood the implications of the purchase and sale transactions that had been signed by him only days before.
- [53] Mr. Higgs returned to Vancouver and the 2001 Condo when Dr. Lear returned from her holiday.
- [54] Despite her expectation that it would take some time to find a placement in a care home, a room in Braddan became available at the end of November 2015. Dr. Lear says that Braddan was recommended by the doctors she consulted and that Braddan was chosen by Mr. Higgs. She refers to asking the doctors and the social worker whether she should accept the Braddan placement when it was offered. She states she "had no one else to ask", blithely ignoring that she could have asked Melanie and Mr. Higgs' other daughters too.
- [55] On November 25, 2015, the placement was accepted and Mr. Higgs was admitted to Braddan. Dr. Lear acknowledges that, upon his admission to Braddan, there was no likelihood that Mr. Higgs would ever live at home again. She says she told this to Mr. Higgs.
- [56] Dr. Lear states that she visited Mr. Higgs on a daily basis while he was in Braddan and often took him for outings. She also arranged for another person to take Mr. Higgs out once a week for a drive.
- [57] Dr. Lear did not advise Melanie, or, it appears, any of Mr. Higgs' daughters, that their father had been placed at Braddan.

- [58] Into fall 2015, Ms. Cathcart continued to act for Dr. Lear. In December 2015, with Ms. Cathcart's assistance, Dr. Lear embarked on other significant financial and legal matters for herself and Mr. Higgs, with absolutely no involvement by Mr. Higgs. Dr. Lear completed these transactions on behalf of Mr. Higgs using the POA and the services of Ms. Cathcart. Dr. Lear was the only person to instruct Ms. Cathcart. Ms. Cathcart does not assert that Mr. Higgs was her client at all in respect of these transactions.
- [59] Dr. Lear's counsel asserts that there is no evidence to suggest that Mr. Higgs had changed his mind from June 2012, when he had indicated that he would be amenable to considering entering into a spousal trust with Dr. Lear. In my view, the more appropriate question was whether, in December 2015, Mr. Higgs had affirmatively indicated his agreement to that step. It is more than apparent that Dr. Lear made no attempt to even discuss the matter with him, although I recognize that he was likely unable to understand the import and implications of this complicated transaction.
- [60] The transactions completed by Dr. Lear for herself, and for Mr. Higgs through the POA, included:
- a) Instructions to Ms. Cathcart to create a spousal trust for assets to be held by the parties (the "Spousal Trust"). On December 7, 2015, Ms. Cathcart prepared a Trust Deed that created the Rosemary and Michael Higgs Joint Spousal Trust which was then signed by Dr. Lear (the "Spousal Trust Agreement");
 - b) On Ms. Cathcart's recommendation, assigning the agreement to purchase the 1701 Condo to the Spousal Trust and completing the purchase of the 1701 Condo which was registered in the name of the Spousal Trust; and
 - c) Upon completion of the purchase/sale transactions on December 10, 2015, depositing the net sale proceeds (\$716,850) into the parties' joint Bank of Montreal ("BMO") account.
- [61] Immediately upon deposit of the net sale proceeds into the joint BMO account, Dr. Lear:
- a) paid down her BMO line of credit (\$25,769); and
 - b) transferred \$675,000 from the joint BMO account into an account held by Dr. Lear alone at Raymond James.
- [62] Dr. Lear then embarked upon an extensive renovation project for the 1701 Condo. During that time, she moved into a small rental apartment in the same building.
- [63] During Christmas 2015, about one month after Mr. Higgs' admission to Braddan, there were communications between Dr. Lear and Melanie and even the sending of a picture of the couple at a restaurant where they had Christmas dinner. Yet, Dr. Lear still had not advised Melanie that her father was at Braddan. Dr. Lear alleges that Mr. Higgs asked her not to tell his daughters.

- [64] In late December 2015, Dr. Lear was pressed into some form of communication with Melanie about Mr. Higgs. In part, this arose because Mr. Higgs' neurologist, Dr. Foti, was receiving calls from Melanie about her father; I surmise that he was uncomfortable telling Melanie the truth of her father's circumstances at Braddan when Dr. Lear had not seen fit to do so. Dr. Foti told Dr. Lear that she should tell Melanie the truth.
- [65] On December 30, 2015, Dr. Lear sent an email to Melanie regarding the "deterioration" of Mr. Higgs. She proposed to send a "chronological outline" of the last few years to her to bring her up to date. Melanie did not reply.
- [66] On January 5, 2016, Melanie learned of her father's admission to Braddan only by a second email from Dr. Lear. In this email, Dr. Lear outlined some of Mr. Higgs' medical history since January 2008. She confirmed that Mr. Higgs had been admitted to Braddan on November 26, 2015 and that he was "choosing to look upon it as respite only". Dr. Lear prepared this email with the assistance of her close friend, Ronald Boyd. Mr. Boyd recommended that Dr. Lear consider adding an "empathic sentence" to a draft email, commenting that he knew it would "not suit" her.
- [67] Melanie says she was shocked and horrified by the news that her father was in a hospital. Melanie immediately contacted her father at Braddan. He told her that his stay at Braddan was only while the renovations were underway at the 1701 Condo. He asked her to visit him.
- [68] On January 13, 2016, Melanie and Andreas visited Mr. Higgs at Braddan. Melanie described him as pale, disoriented and confused. At that time, he told his daughter and son-in-law that he would like to live with them while the renovations were being done at the 1701 Condo. After a short outing, Mr. Higgs returned to Braddan and Melanie and Andreas returned to Duncan.
- [69] Melanie immediately began discussions with her father's physician, Dr. Fritz. She met with him on January 18, 2016 to discuss why her father was at Braddan (which she considered inappropriate) and what other alternatives existed for his care. She says that Dr. Fritz advised her that Dr. Lear was not going to take Mr. Higgs back into their home, so Melanie concluded that some alternative had to be found.
- [70] Melanie made an attempt to have a family meeting with both her father and Dr. Lear. She wanted such a meeting in order for Dr. Lear to tell Mr. Higgs the "truth" about why he had been placed in Braddan, in that it was permanent and not just until the renovations at the 1701 Condo were completed. In the meantime, during phone calls, Mr. Higgs continued to advise Melanie that he was unhappy at Braddan and wanted to leave the "hell hole" it was. That family meeting did not happen on the scheduled date of January 28, 2016; in any event, after discussions with Dr. Fritz at the time, Melanie raised the possibility of taking her father home to Duncan pending another meeting. At the same time, Melanie also advised Dr. Lear that she thought it best if Mr. Higgs stayed with them for an extended visit. Dr. Lear agreed and she later brought some of Mr. Higgs' personal items to Braddan for his stay in Duncan.

- [71] On January 29, 2016, Melanie and Andreas went back to Braddan to retrieve Mr. Higgs and his personal belongings. They signed Mr. Higgs out for a temporary family visit until February 19, 2016. After Mr. Higgs was out of Braddan, he stated that he did not want to go back to that "hell hole". He then travelled to Duncan and commenced living with Melanie and Andreas in their Duncan home.
- [72] Melanie reports that when they got back to Duncan, her father was very tired and had worsening memory problems. After approximately two weeks, his condition improved.

February 2016

- [73] Commencing in February 2016, there was a more serious deterioration of the relationship between Melanie and Andreas and Dr. Lear with respect to Mr. Higgs' care and his financial affairs. Communications between Dr. Lear and Melanie virtually stopped altogether.
- [74] Melanie and Andreas took steps to determine Mr. Higgs' care needs. Dr. Lear heard of them considering other measures to address Mr. Higgs' care. Dr. Lear continued to enquire of Mr. Higgs and she also continued to advise Melanie of certain medical issues faced by Mr. Higgs of which she might not be aware.
- [75] Dr. Lear confirmed in her evidence that, after Mr. Higgs' move to Duncan, she was "open to suggestions" about what care facility would be appropriate. I heard no evidence that Dr. Lear took any steps on her own during this period to investigate other facilities, while herself acknowledging that Braddan was a "hell hole".
- [76] Over the ensuing months, Dr. Lear exercised control over Mr. Higgs' financial assets. Dr. Lear continued to control Mr. Higgs' bank accounts under the POA, as she had been doing for years previously. Over this same time, Melanie and Andreas increasingly sought to assist Mr. Higgs in regaining control over his financial affairs. Melanie and Andreas sought to learn what assets were held by Mr. Higgs so that he could deal with them.
- [77] The two factions each have disparaging depictions of the intentions and motivations of the other. Dr. Lear contends that Melanie meant to definitively end her father's relationship with her. She alleges that Melanie and Andreas spirited her husband away to that end, while also securing Mr. Higgs' financial assets for her and her sisters' inheritance and also, to ruin the parties' retirement and estate planning.
- [78] Melanie contends that Dr. Lear was happy to secure her father into a care home that was not suitable, while continuing to have full freedom to spend, for her own benefit, not only her own assets, but those of Mr. Higgs who did not have the mental capacity to understand or agree to any her spending activities.
- [79] It is not necessary to determine who is right and who is wrong in this debate for the purpose of deciding the issues.

- [80] I will not recount all of the actions and transactions undertaken by Dr. Lear, Mr. Higgs, Melanie and Andreas in this "sorting out" period in spring 2016. I will only highlight what I consider is necessary to provide the background and context for some of the property division issues. The history during this somewhat chaotic time includes:
- a) By the end of January 2016, the joint HSBC account was in overdraft. Dr. Lear says that it was often in overdraft, caused by Mr. Higgs. This prevented Mr. Higgs from withdrawing money from it, including his Air Canada pension payments, when he was in Duncan;
 - b) On February 3, 2016, Dr. Lear withdrew \$2,600 from Mr. Higgs' CIBC account;
 - c) On February 10, 2016, Dr. Lear resigned as Mr. Higgs' representative under the Representation Agreement. This resignation was sent by Ms. Cathcart to Melanie given that Dr. Lear understood that Melanie had assumed her father's care. Melanie was an alternate representative under that Representation Agreement, along with Jessica;
 - d) On February 16, 2016, Dr. Lear withdrew \$10,000 from the parties' joint line of credit and applied it to her lines of credit at BMO;
 - e) On February 25, 2016, Dr. Lear wrote a \$30,000 cheque on the BMO joint account payable to her contractor, Midas Construction, for the renovation costs for the 1701 Condo;
 - f) On February 25, 2016, Dr. Lear withdrew \$15,000 from Mr. Higgs' TFSA account at Raymond James and deposited it into the joint HSBC account, which reduced the overdraft;
 - g) On February 26, 2016, Dr. Lear wrote a cheque on the joint HSBC account of \$2,800 to Ms. Cathcart to pay Mr. Higgs' "share" of the legal account for the creation of the Spousal Trust;
 - h) On March 8, 2016, a family meeting took place in Vancouver with Dr. Fritz, Mr. Higgs, Dr. Lear, Melanie and Dr. Lear's friend. Dr. Lear acknowledged that she placed Mr. Higgs in Braddan "for good" because of his care needs and her needs;
 - i) On March 11, 2016, Dr. Lear transferred \$637,563 from her Raymond James account (what was left from the net sale proceeds of the 2001 Condo) to the Spousal Trust's account at Raymond James;
 - j) On March 14, 2016, Dr. Lear instructed Ms. Cathcart to write Melanie asking for details of the care facility that was being considered for Mr. Higgs, instead of Braddan. Ms. Cathcart indicated that Dr. Lear wished to meet with the facility, with that meeting principally focussed on ensuring that the long term care insurance was in place to pay for the costs. Of particular note is Ms. Cathcart's assertion in her letter that, without the insurance costs being paid, Mr. Higgs "cannot afford to pay his care costs". This was an inaccurate assertion at best, particularly given his pension and other income and the large balance in the Spousal Trust, of which he was a 50% beneficiary. Melanie confirms a previous discussion with Dr. Lear in early March 2016 before the family meeting with the same import, unseemly suggesting that an independent living facility would not invoke the insurance coverage and would cost too much, reducing income available to her for her retirement;

- k) Between January and April 2016, Dr. Lear spent approximately \$300,000 on renovations to the 1701 Condo. Mr. Higgs had absolutely no input into these renovations at all. Dr. Lear funded this amount through a variety of accounts at Raymond James and BMO, funded from the net sale proceeds of the 2001 Condo. In late April 2016, she moved into the 1701 Condo where she currently resides. It appears that Mr. Higgs has never even seen the 1701 Condo, post-renovation; and
- l) On April 7, 2016, Mr. Higgs retained new counsel in Duncan. Arising from that legal advice, Mr. Higgs executed an Enhanced Representation Agreement and revoked the existing POA that he had granted to Dr. Lear. Mr. Higgs appointed Melanie and Andreas as his new representatives. Dr. Lear was told of this change.

LITIGATION AND LITIGATION STEPS

- [81] On April 15, 2016, Mr. Higgs filed the Divorce Action. The grounds were a one-year separation (since November 25, 2015) and adultery. As already discussed in the Introduction of these reasons, the Divorce Action was resolved by the parties' agreement as to the date of separation (January 1, 2017). The matter proceeded by consent and a divorce order was granted on the first day of trial.
- [82] In addition, on April 15, 2016, Melanie, as her father's litigation guardian, commenced this action seeking an equal property division of the family assets.
- [83] On April 20, 2016, Dr. Lear was personally served with both actions.
- [84] On May 3, 2016, Mr. Higgs and Andreas went to the HSBC branch in Nanaimo, BC to retrieve Mr. Higgs' Air Canada pension funds from the joint HSBC account. By this time, Dr. Lear had blocked the account. Nevertheless, Mr. Higgs secured the monies from the deposit of his last monthly pension payment (\$5,131). He then opened a Scotiabank account in Duncan for his banking needs. He has used that account since that time, including writing most of his cheques on that account.
- [85] Also, on May 3, 2016, Dr. Lear attended at the HSBC safety deposit box held jointly by the parties. She says that she withdrew two ingots of gold valued in total at approximately \$2,500.
- [86] Sometime in early May 2016, Dr. Lear continued to move money from accounts (joint or held by the Spousal Trust) into her own accounts. This included a \$50,000 transfer on May 10, 2016.
- [87] One day later, on May 11, 2016, Melanie filed an application for a restraining order with the intention of obtaining an order preventing Dr. Lear from dealing with certain assets owned jointly by the parties, including their Raymond James accounts. The hearing was scheduled for May 16, 2016. By this time, Dr. Lear had retained counsel. Her lawyer requested an adjournment; Melanie agreed to reschedule the hearing to May 30, 2016.

- [88] One particular source of controversy arises from Dr. Lear's actions while this application was pending or, indeed, after it was heard.
- [89] On May 20, 2016, knowing of the impending application and the new hearing date of May 30, 2016, Dr. Lear moved \$100,000 from the Spousal Trust account at Raymond James into her own BMO account.
- [90] On May 30, 2016, Justice Johnston granted the restraining order over the objections of Dr. Lear. That order prohibited Dr. Lear from disposing of, transferring, converting or exchanging into another form, any property in certain accounts, including the joint accounts at CIBC, HSBC and BMO and the "Raymond James accounts" (the "Restraining Order"). The Restraining Order was immediately served on the financial institutions identified in the order, including Raymond James.
- [91] That same day, on May 30, 2016, Dr. Lear wrote a cheque for \$100,000 on her BMO account to her contractor, Midas Construction.
- [92] On June 20, 2016, Dr. Lear transferred \$25,000 from the Raymond James Spousal Trust account to her own BMO account. She acknowledges that she did so in clear breach of the Restraining Order. She did so to fund the issuance of a further cheque on her BMO account for \$32,311 for the renovation costs of the 1701 Condo.
- [93] After assessment, Mr. Higgs' doctor formed the view that he could live in an independent living facility for seniors. In late June or early July 2016, Mr. Higgs moved into Sherwood House in Duncan ("Sherwood"). There, he is provided with accommodation and meals and other assistance as needed. He is otherwise independent in all other aspects of daily living. He often visits Melanie and Andreas and they help him with matters from time to time, such as his finances and organizing medical appointments. He has resided at Sherwood ever since.
- [94] As things stand, the parties have each secured their own accounts now and other assets remain subject to the Restraining Order and therefore, frozen.
- [95] In May 2016, Mr. Higgs changed the beneficiaries under his three life insurance policies to his three daughters. One of those policies had previously named Dr. Lear as the beneficiary of the \$100,000 death benefit. Finally, in May 2016, Mr. Higgs removed Dr. Lear from his Pacific Blue Cross Group Benefit Plan with Air Canada.
- [96] Throughout 2016 and into 2017, Dr. Lear continued to have sporadic contact with Mr. Higgs. I acknowledge that the tenor of many communications between them was one of love and concern for their respective well-being. While Dr. Lear alleges that she was kept from communicating with Mr. Higgs during much of this time, or that Melanie monitored his emails, there is no evidence to support that accusation.

[97] In July 2016 and October 2017, Dr. Lear wrote to Mr. Higgs to try to convince him to withdraw the divorce proceedings, while maintaining the separation. She threatened to subject him to a comprehensive competency assessment if he did not do so. She alleged in one letter that there was an issue of "exploitation and persecution of elderly parents by adult children for their own personal gain". Dr. Lear's efforts were unsuccessful and, as stated, the divorce order was granted and this action proceeded.

FAMILY PROPERTY HELD BY PARTIES

[98] There is no dispute concerning the principles upon which this family property division exercise is to proceed.

[99] Presumptively, a right to an equal division of family property arises on the separation date: FLA, s. 81(b). Mr. Higgs seeks such a division. Family property is determined under the FLA in accordance with Part 5, Division 2, and provides that it includes all property owned by either spouse on the separation date: FLA, s. 84(1)(a).

[100] Family property and family debt are valued on the date of trial and the value is the fair market value at that time: FLA, s. 87(b).

[101] On September 21, 2018, Justice Gaul ordered that Raymond Hui be appointed as a joint expert to value the major assets held by the parties, namely, the 1701 Condo and the Valley Drive Condo. In addition, Gaul J. ordered that an expert (later identified as Neil Chicoine) be appointed as a joint expert to value the pension and annuity interests of the parties.

[102] The following table sets out the family property in dispute between the parties, including property held jointly and separately by the parties at the time of separation.

[103] For the purpose of this exercise, I have not considered the balance in Mr. Higgs' TFSA account (\$31,000) which he closed in May 2016 after a significant earlier withdrawal by Dr. Lear herself when using the POA. In addition, I have not considered a vehicle (2013 Audi A6) that Dr. Lear leased during the relationship and which she acquired after the separation. These assets do not come within the meaning of family property as neither were held at the date of separation, being January 1, 2017: FLA, s. 84(1)(a).

[104] The attached table as Appendix "A" includes the agreed (or undisputed) pre and after-tax values of the various other assets. The relevant tax rates for each of the parties was determined by Mr. Chicoine.

RRIFs / ANNUITIES / PENSIONS

[105] The parties agree that the above financial assets, being the RRIFs, annuities and pension entitlements held by the parties, are "family property" under the FLA. Section 84(2)(e) specifically states that family property includes a "spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan".

- [106] These financial assets have been valued by Mr. Chicoine as of March 2019. No party sought to update these values as of the date of trial. As such, I will use the values determined as of that date.
- [107] The annuities end when the owner of the annuity dies. Since they were valued by Mr. Chicoine on the basis of actuarial tables based on life expectancy, the values attributed to Dr. Lear are higher (\$1,012,602 versus \$227,101 on a pre-tax basis).
- [108] RRIFs are an instrument that can be divided or equalized by a spousal rollover under the income tax legislation on a tax free basis. The value of Dr. Lear's RRIF greatly exceeds the value of Mr. Higgs' RRIF (\$664,082 versus \$130,300).
- [109] Mr. Higgs' Air Canada pension is also a valuable asset that generates income now for Mr. Higgs. The pre-tax capital value of that asset was determined at \$117,246.
- [110] In addition, the parties agree that Dr. Lear has been irrevocably designated to receive a survivor's pension from Air Canada, should she outlive Mr. Higgs. This value, again based on Mr. Chicoine's actuarial assessment, is \$306,900 pre-tax.
- [111] As they have for many years now, both parties enjoy substantial income from their assets. In 2018:
- a) Dr. Lear's line 150 income was \$166,261, consisting mainly of OAS/CPP, RRIF payments, annuity payments, interest and dividends (including from the Spousal Trust account); and
 - b) Mr. Higgs' line 150 income was \$142,716, consisting mainly of OAS/CPP, his Air Canada pension, RRIF payments and annuity payments.
- [112] Dr. Lear argues that the annuities and the Air Canada pension amounts should not be capitalized and divided between the parties as family property.
- [113] Dr. Lear argues that she should not have to share her substantial annuities since she may never receive the capital value of them should she die before that time. In addition, she argues that she should not effectively share her Air Canada survivor pension; she may not outlive Mr. Higgs and even if so, she may not fully realize the value now ascribed to that asset depending on when she dies.
- [114] At bottom, Dr. Lear argues that, in light of these contingencies, the Legislature could not have intended the division of such assets under the FLA.
- [115] The difficulty with this argument is that the FLA has mandated that such interests are family property. The FLA also mandates a presumptive equal sharing of that property after that property is valued at trial.
- [116] In the alternative, Dr. Lear argues that the annuity payments should be shared (for example, off set) on a month by month basis to remove the uncertainty that exists.

- [117] In my view, such a resolution is anything but ideal. This would require ongoing contact between the parties (or in Mr. Higgs' case, Melanie). It would defeat the normal approach in these types of cases to divide the family property so as to allow the parties to restart their separate lives without entanglement from their previous relationship. I conclude that it is unworkable in the circumstances here.
- [118] If such assets are family property, the parties have not suggested anything other than factoring the pension and survivor benefits into the overall consideration of the division of the property held by the parties. That said, the general suggestion from both parties is that Mr. Higgs would keep his pension entitlement and Dr. Lear would similarly keep her survivor entitlement.
- [119] In *Tarr Estate v. Tarr*, 2014 BCCA 315, the court discussed survivor pension entitlements within the context of the previous legislation, the Family Relations Act, R.S.B.C. 1979, s. 121. This case principally considered whether the wife had relinquished her entitlement to the survivor pension. At para. 44, the court described the survivor's right to such a pension as one vesting upon the commencement of the member's pension, while the receipt of the benefit was contingent upon the spouse surviving the member. At para. 60, the court stated that the survivorship interest was "effectively the separate property" of the spouse.
- [120] Here, Mr. Higgs retired in 1991 and Dr. Lear's right to the survivor pension vested at that time. With respect to the Air Canada survivor pension to which Dr. Lear is entitled, she has not offered to waive her entitlement pursuant to s. 126 of the FLA. On that account, I can only assume that she recognizes the value of that property and intends to and hopes to benefit from it.
- [121] I conclude that both Mr. Higgs' pension and Dr. Lear's survivor pension entitlements are family property and should be valued and divided on a pre-tax basis if they are to be shared. Effectively, this means that Dr. Lear would be required to transfer the difference in values to Mr. Higgs.
- [122] There can be no doubt that all of these financial assets have value. Capitalization of such assets is a normal valuation approach that seeks to provide as much certainty as could possibly be achieved in the circumstances. Dr. Lear is, of course, correct that the valuation is driven by actuarial tables and specifically, when she and Mr. Higgs are expected to die. The actual dates are not, of course, known. Having said that, I do not possess a crystal ball into the future and this Court has no other means of arriving at a fair value of the assets beyond this well-known approach.
- [123] As Mr. Higgs' counsel argues, many issues that arise in litigation are rife with uncertainty and contingencies. Income loss issues that arise in motor vehicle cases are but one example. Such circumstance does not allow this Court to throw up its hands and neglect the valuation exercise, in this case one mandated under the FLA. More specifically, I see no basis upon which to accept Dr. Lear's argument that this situation was not contemplated under the FLA. To the contrary, these types of assets were specifically addressed in s. 84(2)

(e) and the FLA does not allow, under the property division provisions, some exemption on the basis of the particular circumstances faced by these parties.

[124] In the further alternative, Dr. Lear argues that it would be significantly unfair to divide the annuities and Air Canada pension amounts. I will address this argument below in the context of all of Dr. Lear's arguments in that respect.

[125] Finally, Dr. Lear points to her heavy reliance on her RRIF payments to support her lifestyle. She asserts that, if there is to be a division, it should be accomplished by a spousal rollover. This would amount to a reduction of her income by approximately \$20,000 and a corresponding increase to Mr. Higgs' income of that amount. I agree that this is the preferred method of division with respect to the RRIF holdings, if those holdings are to be equalized.

EXCLUDED PROPERTY ISSUES

[126] Section 85 of the FLA provides:

- (1) The following is excluded from family property:
 - (a) property acquired by a spouse before the relationship between the spouses began;
 - (b) inheritances to a spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[127] Dr. Lear contends that \$483,000 of equity now held in the 1701 Condo arose from her separate property acquired before the relationship or through an inheritance she received from her mother. Accordingly, Dr. Lear seeks to exclude the net value of \$483,000 in the 1701 Condo under the FLA.

[128] Dr. Lear alleges that she held \$385,000 in equity in the West 36th Property at the start of the relationship. She further alleges that this value gave rise to equity in the Sasamat Home when she purchased it. She also acknowledges that Mr. Higgs should be credited with \$102,000 as his property acquired before the relationship; he contributed this amount to the Sasamat Home by a reduction in the mortgage after their relationship began.

[129] Accordingly, she claims that the sum of \$283,000 represents the net difference of the contributions of the parties to their first home, namely the Sasamat Home, in the early 1980's. This home was owned jointly from that time until it was sold in 1994 when the 2001 Condo was purchased.

[130] In addition, Dr. Lear contends that, in 1997, she used \$200,000 of inheritance money received from her mother's estate to pay down and retire the 2001 Condo mortgage.

Were There Contributions?

- [131] Both the FLA (s. 85(2)) and the case law confirm that Dr. Lear bears the onus to prove, on a balance of probabilities, that she contributed excluded property to what is now family property, such that the present family property was "derived" from the earlier property.
- [132] In *Shih v. Shih*, 2017 BCCA 37, the court commented on the need for "clear and cogent" evidence to establish the exclusion, particularly if documentation is not available:
- [40] The flaw I see in the Asselin analysis adopted by the judge is that it rests on the assumption that the FLA demands "precision" or "mathematical certainty". I can see nothing in the Act that demands "precision" or "mathematical certainty" in the standard of proof for establishing a claim to excluded property.
- [41] The inherent challenge which confronts litigants under the FLA is that in many relationships of any significant length, documents will have been destroyed and memories dimmed. A legal standard that demands mathematical certainty or precision risks defeating legitimate claims.
- [42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.
- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [Emphasis added.]
- [133] See also *C.P. v. K.W.A.*, 2018 BCSC 332 at paras. 91-95; *Wickstrom v. Ng*, 2019 BCSC 1685 at paras. 148-149.
- [134] The first issue is whether Dr. Lear can prove that she held such equity prior to the relationship with Mr. Higgs and that she acquired the inheritance from her mother in 1989 when her mother died. Assuming she satisfies that burden, she must then prove as fact that these amounts were indeed contributed to the Sasamat Home (\$385,000) and the mortgage on the 2001 Condo (\$200,000).
- [135] Dr. Lear has not provided any documentation concerning the value of the equity she now says that she held in the West 36th Property in the early 1980s. This is not particularly surprising given that those matters took place about 40 years ago.

- [136] She states that the purchase price for the Sasamat Home was \$680,000, which was paid by a vendor take-back mortgage of \$31,000 and another mortgage. She asserts that the amount she contributed to the purchase was \$385,000 arising from her equity in the West 36th Property.
- [137] It is not in dispute that Dr. Lear held the West 36th Property and that she later purchased the Sasamat Home before she transferred it into the Company's name. I agree that the lack of documentation is not fatal to Dr. Lear's assertion; however, she has not offered any explanation for the lack of documentation, as I would have expected, given the onus she bears.
- [138] For example, she has not even indicated details of any attempt to locate documents, including banking records, legal files and the like. She has not proffered any publicly available land title documents which may have assisted in determining the sequence of ownership of the respective properties and charges on those properties. Those public documents might have assisted in corroborating what she now suggests is her perfect memory of the events in question. I can only speculate that she considers it beyond question that she does not have the documents and that they are simply unavailable through other means - and expects this Court to accept that assertion at face value. I do not.
- [139] The same can be said of Dr. Lear's contention that, in 1997, she used some of her inheritance monies (\$200,000) to pay down the mortgage on the 2001 Condo, although this purported event is more recent. Dr. Lear does not offer any cogent explanation as to why she maintained monies in Ireland from her mother's estate when her mother had died in 1989, about eight years earlier, where she was the only beneficiary of that estate. She confirms the estate administration was resolved quickly and that the monies were left in a UK bank account.
- [140] She does not offer any evidence that she searched for relevant legal files relating to her mother's estate or the banking records in Ireland that would have indicated the source of funds from the estate and their transfer to Canada. She confirms that the UK bank account was active to July 2015, when she brought "the last instalment" of her inheritance into Canada. In fact, she has produced no documents relating to the estate at all.
- [141] In addition, she has not offered any explanation for the lack of any Canadian banking or mortgage records that would have confirmed that any monies were in fact applied to the 2001 Condo mortgage, resulting in a discharge of the mortgage, which would be a publicly available document.
- [142] Simply put, save for one item, there is absolutely no other evidence, documentation or otherwise, that supports Dr. Lear's bare assertions.
- [143] Dr. Lear purports to have a clear recollection of very specific amounts when one might have considered that the mists of time would have dulled her memory. Mr. Higgs has no memory of his wife contributing more money to the Sasamat Home beyond his own contribution.

- [144] In this respect, I must, as the authorities comment, consider the credibility and reliability of Dr. Lear's evidence.
- [145] I consider that Dr. Lear has presented her evidence in a very selective manner. While purporting to have a clear recollection of events some decades before, she was decidedly and conveniently forgetful in respect of more recent matters concerning her actions while she was managing their joint assets and Mr. Higgs' assets in 2015 and 2016. This was particularly the case when the facts did not reflect well on her.
- [146] In addition, Dr. Lear has attempted to present herself as naïve in respect of financial matters. In my view, the evidence overwhelmingly supports that she is anything but.
- [147] Since at least the 1980s, Dr. Lear has been involved in various legal and other transactions. She has been a high earner and she has done well in improving her financial position arising from her income, no doubt with the assistance of various professionals, including accountants, lawyers and insurance brokers. Through these efforts and those of Mr. Higgs, the parties have garnered substantial and sophisticated financial assets and resources. She has been at the helm of the family financial ship since at least 2008, when Mr. Higgs suffered his haemorrhage.
- [148] The parties have executed various sophisticated documents dealing with those assets and they have addressed the management of those assets through such instruments as wills, powers of attorney, representation agreements and trust agreements. I have no doubt in concluding that Dr. Lear has an excellent grasp of financial matters affecting the parties, including the extent of the couple's assets and the rights attached to those assets.
- [149] As a result, I have serious doubts about Dr. Lear's credibility and the reliability of her evidence in respect of this issue. That evidence was given by Dr. Lear knowing of Mr. Higgs' cognitive difficulties and his inability to remember the circumstances toward either agreeing or disagreeing with her various assertions.
- [150] Having said that, Dr. Lear does present one document that she argues serves to corroborate her evidence, namely, the Statutory Declaration prepared by Ms. Cathcart that Dr. Lear executed on October 15, 2012. This document was prepared in conjunction with Dr. Lear's will that she signed at the same time.
- [151] The Statutory Declaration provides, in part:
2. I am making this declaration as a record of the financial genesis of my assets, as well as my testamentary intentions.
 7. I want to leave a clear record of my contributions to my and Michael's combined net worth in case there is any attempt by oldest stepdaughter to argue that she and her sisters are entitled to a larger share of my estate or of their father's estate.

8. Prior to our marriage, I lived in a house on West 36th Avenue which I wholly owned. I sold it for \$485,000 and purchased 6 - 1980 Sasamat Street for \$680,000; Michael added his share of the proceeds of his matrimonial home, \$102,000. There was a small mortgage of \$31,000 which I assumed from the previous owner as well as negotiating a mortgage for the balance. At that time, interest rates in Canada soared to about 23% and I was unable to service the mortgage although with Michael's help, we paid off the mortgage for \$31,000. My accountant arranged for me to get a private mortgage but when interest rates fell again to about 12%, I formed a company and sold the house to the company. I was then able to put the house back in my name because I sold a waterfront home in Maui in which I had a 50% share. Michael then suggested (and I agreed) that the house should be in joint-tenancy. Michael has right of survivorship should I predecease him in order to maintain his comfort, and care if needed, even though all major assets have been earned (purchased) by me.
9. In 1994, I put a down payment on a penthouse where we currently live. We sold the house for \$850,000. In June 1995 we moved into the penthouse; the costs was \$1,030,000. I negotiated a mortgage which I paid without assistance. The payments were weekly to facilitate a quick pay-out. Shortly after that, I was able to afford a larger weekly payment; Michael was furious with me for doing this. Then, in about 1997, I paid out the mortgage with \$200,000 of my Mother's money which had been left to me. We have been mortgage-free ever since.

[152] It is apparent that, while the Statutory Declaration confirms that Dr. Lear held some equity in the West 36th Property, it does not confirm that she used the specific amount of \$385,000 arising from the net sale proceeds of that property to purchase the Sasamat Home. In the Statutory Declaration, she refers to selling the West 36th Property for \$485,000 and it is anyone's guess whether there was a mortgage to be paid off, if Dr. Lear used the net sale proceeds for other purposes or how the alleged sum of \$385,000 became available. Dr. Lear also makes no mention of the amount of the mortgage then placed on the Sasamat Home in the Statutory Declaration to confirm the amount of her net contribution.

[153] At trial, Dr. Lear says that Mr. Higgs' \$102,000 contribution arose after the Sasamat House purchase and then was used to pay down the mortgage (which one is not specified). Yet, the timing and use of his contribution is not mentioned in the Statutory Declaration and it is ambiguous as to when Mr. Higgs put that money in and for what purpose.

[154] Dr. Lear suggests that the Statutory Declaration was done to protect the estate planning which she and Mr. Higgs had undertaken through their wills. She says she wished to protect their joint wishes, presumably by using the document to potentially blunt any attack on Mr. Higgs' will by his daughters under the wills variation legislation (per para. 7). Dr. Lear has suggested in her evidence that both she and Mr. Higgs were distressed by the tenor of the daughters' reaction to the June 2012 family incident. Dr. Lear says that Mr. Higgs supported her in fending off what they both considered as an attack on their relationship and in cooperating up their estate planning to address any future attacks.

- [155] In those circumstances, I question why Dr. Lear did not have Mr. Higgs sign a document in October 2012 (possibly by signing the Statutory Declaration itself) to confirm their respective contributions to the Sasamat Home when they both seemed to be of the same mind, as she now contends. Again, Mr. Higgs is unable to contribute to any consideration of that issue.
- [156] As the court in Shih commented at para. 44, this Court is allowed to draw reasonable inferences from less than certain or precise evidence in order to do justice between the parties.
- [157] I have no difficulty concluding that both Dr. Lear and Mr. Higgs brought equity into the Sasamat Home when it was purchased in the early 1980s. That is Dr. Lear's direct evidence and the clear and reasonable inference arising from the Statutory Declaration. However, in all the circumstances, I do not accept Dr. Lear's oral assertions as to the specific amounts that she contributed and the Statutory Declaration does not assist in that respect. She bears the onus of proving that amount, by direct evidence or reasonable inference. She has failed to do so, particularly in light of my concerns about her credibility and reliability. I specifically do not accept her oral evidence on the issue, without something more.
- [158] I find that Dr. Lear has failed to establish the value of any equity she transferred into the Sasamat Home that arose before her relationship began with Mr. Higgs. In addition, I find that Dr. Lear has failed to establish that she indeed held \$200,000 in funds from her mother's estate and that she contributed those funds to pay down and retire the mortgage on the 2001 Condo in 1997. I do not accept her oral evidence in that respect. Also, I do not accept the Statutory Declaration as confirming anything other than her position in October 2012, which again is unsubstantiated by any documentation.

Has the Exclusion Been Lost?

- [159] My conclusions on the above issues are sufficient to dispose of the excluded property issue. However, in the alternative, I will also consider Mr. Higgs' argument that, even if Dr. Lear held excluded property value in the family assets, any exclusion was lost by reason of her gifting that value to Mr. Higgs through later transactions.
- [160] As with the first issue discussed above, Dr. Lear bears the onus of proving that the value now found in the 1701 Condo, through the Sasamat Home and 2001 Condo holdings, and the inheritance, remained as "excluded property" in the separation.
- [161] In *Venables v. Venables*, 2019 BCCA 281, the court confirmed that the intention of the parties is a key consideration in deciding whether a transfer of excluded property from a spouse to another remains excluded property or was a gift. Following earlier authority from that court (*V.J.F. v. S.K.W.*, 2016 BCCA 186 and *Namdarpour v. Vahman*, 2019 BCCA 153), the court held:

- [195] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property: V.J.F. at paras. 74-79; Namdarpour at para. 46.
- [162] It is an undisputed fact that Dr. Lear was the party who placed the Sasamat Home in joint tenancy with Mr. Higgs. It is unclear on the basis of the evidence, including Dr. Lear's oral evidence and the Statutory Declaration, as to when Mr. Higgs put his contribution into the Sasamat Home. The clear inference from para. 8 of the Statutory Declaration is that Dr. Lear would have had great difficulty in financing the purchase of that property without the financial assistance of Mr. Higgs. She refers to requiring his help in servicing the mortgages after the purchase.
- [163] In those circumstances, Mr. Higgs' request that the Sasamat Home be placed into joint tenancy is perfectly understandable given his substantial contribution to that property, both by his own equity brought into the relationship and his later financial assistance to maintain the property.
- [164] In her counterclaim by which she claimed the exclusions, Dr. Lear asserted:
- Any such excluded property put into the joint names of the parties was done so for estate planning purposes only to provide for [Mr. Higgs] in the event that [Dr. Lear] predeceased him while the marriage continued but not in the event of a marriage breakdown.
- [165] There is no evidence that, when the Sasamat Home was purchased and then transferred into joint tenancy, the parties discussed or even agreed that their respective contributions would be anything other than as reflected on the title. In her evidence at this trial, Dr. Lear stated that, in putting the Sasamat Home into joint tenancy, she had no particular intention beyond acceding to Mr. Higgs' request to put the property in joint names. It is her intention at the time of this transfer that is relevant to what was intended by placing the property into joint names.
- [166] There is no evidence that would support that, in the early 1980s, when Dr. Lear agreed to put the Sasamat Home in joint tenancy, she intended to preserve any value in the property that she then held as her separate property. There is no suggestion that the parties were discussing their estate planning at the time. In my view, Dr. Lear put the Sasamat Home into joint tenancy to recognize and establish both parties' respective contributions to the purchase and their ability to maintain the property as their home from the date of purchase and into the future.
- [167] In V.J.F., the court observed:

- [78] I acknowledge that judges may in some cases have to determine whether transfers of excluded property that may have taken place years before, were gifts or not. This seems likely to occur most often in cases where inherited property is transferred by the heir to his or her spouse or into joint names. (Of course, the presumption of advancement was invented as a way of resolving such questions where the evidence is unclear or equivocal.) That said, there are means by which the inheriting or recipient spouse can protect against 'losing' the exclusion. Subject to other relevant provisions of the FLA, for example, the transferor can require the transferee to acknowledge that no gift of the excluded property (or its value) is intended.
- [168] Dr. Lear now suggests, in argument that, in placing the Sasamat Home into joint tenancy, she intended to preserve her excluded asset value. However, she took no steps to confirm that intention by requesting an acknowledgement by Mr. Higgs. The clear and reasonable inference from the facts set out in the Statutory Declaration was that he thought an equal sharing of the Sasamat Home was appropriate, consistent with his own contributions.
- [169] I conclude and find as a fact that, when the Sasamat Home was placed into joint tenancy, Dr. Lear intended that Mr. Higgs would be recognized as an equal owner without regard to any unequal contribution she had made to that property as excluded property she held prior to the relationship.
- [170] The parties' intentions are further cemented by the later sale of the Sasamat Home and the purchase of the 2001 Condo in 1995. Dr. Lear had another opportunity to confirm her contributions at that time; yet, she again chose to put the 2001 Condo into the joint names of the parties. She took no steps to acknowledge any unequal contribution she had made to that property stemming from her original contribution to the Sasamat Home. As with the earlier purchase, there is no suggestion of any estate planning at this time.
- [171] The same can be said of Dr. Lear's alleged pay down of the mortgage on the 2001 Condo in 1997. Again, if she intended to preserve the equity in the 2001 Condo that arose from that payment, it would have been an easy matter to record it and even request Mr. Higgs' acknowledgement and agreement.
- [172] It is possible that Mr. Higgs considered that these transfers and payments by Dr. Lear equalized other contributions that he made to the Sasamat Home and/or the 2001 Condo. For example, in para. 10 of the Statutory Declaration, Dr. Lear refers to Mr. Higgs paying, not only ongoing costs relating to the 2001 Condo, but also special assessment amounts. Whether this occurred is, of course, unknown.
- [173] At bottom, it would have been an easy matter for Dr. Lear to obtain Mr. Higgs' input and agreement on these alleged contributions.

- [174] In June 2012, the dispute arose between Mr. Higgs' daughters and the parties. A short time later, in October 2012, Dr. Lear obviously had a keen eye on legal matters and protecting her property interests and her potential use of their joint assets - including fending off potential claims by Mr. Higgs' daughters. She could easily have had Mr. Higgs acknowledge her statements in the Statutory Declaration that she had Ms. Cathcart prepare for her at that time. That she failed to do so in light of the circumstances at that time is telling.
- [175] Dr. Lear does not suggest that Mr. Higgs would have been incapable of understanding such an acknowledgement in late 2012. Indeed, years later in October 2015, Dr. Lear had no problem involving Mr. Higgs in significant legal transactions - including the sale of the 2001 Condo and the purchase of the 1701 Condo.
- [176] Finally, what is also particularly telling is that, in late 2015, Dr. Lear was clearly in a position to implement a transaction to reflect these alleged contributions without any involvement by Mr. Higgs at all. Dr. Lear was the only person instructing Ms. Cathcart in respect of the preparation of the Spousal Trust Agreement, the assignment of the 1701 Condo purchase agreement to the Spousal Trust and the taking of title to the 1701 Condo in the name of the Spousal Trust.
- [177] By late 2015, Dr. Lear was very much doing estate planning, for both herself and Mr. Higgs. It is unknown whether Mr. Higgs was capable then of understanding the effects of the complex legal transactions undertaken by Dr. Lear, let alone agreeing to them. Dr. Lear was the person calling the shots, taking the position, for what it is worth, that she was only effecting what the parties had discussed as a possible estate planning option some three years earlier.
- [178] In those circumstances, Dr. Lear took no steps to confirm unequal interests of the parties in the 1701 Condo held by the Spousal Trust, despite having a clear path to do so on her account. Section 6.8 of the Spousal Trust Agreement confirms that the parties were to hold "equal shares". There was no reference in the Spousal Trust Agreement to Dr. Lear's "excluded property". This omission is even more glaring since the estate planning lawyer - Ms. Cathcart - preparing the Spousal Trust Agreement was the same lawyer who prepared the Statutory Declaration in October 2012 and can be presumed to have recalled its contents and Dr. Lear's then assertions of excluded property. In December 2015, Dr. Lear had also not forgotten about the earlier document.
- [179] Despite having received legal advice from Ms. Cathcart - and with both Dr. Lear and Ms. Cathcart being fully aware of these supposed contributions - absolutely no mention of any excluded property is found in the Spousal Trust Agreement.
- [180] Mr. Higgs' counsel refers to Dr. Lear's July 25, 2016 letter to Mr. Higgs after this litigation was commenced. She offered up a visit to the 1701 Condo, stating "after all, you are a 50% owner". I would not place any particular reliance on such a statement. In any event, it only confirms what the Spousal Trust Agreement already provided.

[181] In summary, I find that Dr. Lear's intention in the early 1980s in transferring the Sasamat Home into joint tenancy was to gift that interest to Mr. Higgs, if she indeed had contributed more to its acquisition by reason of assets held prior to the relationship. Dr. Lear's intentions are confirmed by her later actions in agreeing to, in 1995, the parties taking joint title of the 2001 Condo and by the later placing of the title, in December 2015, of the 1701 Condo in the name of the Spousal Trust, which clearly reflects equal interests. Such a result in this case is consistent with the reasoning and conclusions found in Wickstrom at paras. 157-161 and Yerbury v. Yerbury, 2019 BCSC 271 at paras. 28-30.

[182] In addition, if Dr. Lear indeed contributed \$200,000 from her inheritance to pay down the 2001 Condo mortgage in 1997, I conclude that Dr. Lear's intention in doing so was to benefit or gift to Mr. Higgs that value.

[183] Dr. Lear has failed to establish that she did not intend these gifts and their corresponding benefit to Mr. Higgs by those transactions. Accordingly, the equal presumption found in s. 81 of the FLA applies, subject to a consideration of Dr. Lear's arguments for unequal division of property under s. 95.

EQUAL / UNEQUAL DIVISION

[184] The parties have competing claims for an unequal division of the family property.

Dr. Lear

[185] In her pleadings, Dr. Lear seeks an unequal division of the family property. In her counterclaim, she asserts in support:

[Mr. Higgs] is significantly older than [Dr. Lear] and [Dr. Lear] therefore has greater need for her property during her lifetime than does [Mr. Higgs] who has a pension.

[186] Dr. Lear contends that this unequal division of the family property should be achieved by:

- a) Each party retains their own pension entitlements, annuities and RRIFs;
- b) Dr. Lear retains her TFSA, her investment and the furniture in the 1701 Condo;
- c) Mr. Higgs retains his life insurance policies and his investment;
- d) The Valley Drive Condo is sold and the Company wound up, with net proceeds to be divided equally;
- e) The Spousal Trust account is divided equally;
- f) The 1701 Condo remains in the Spousal Trust and is occupied by Dr. Lear until the death of the survivor as between them, when it is sold and the proceeds equally divided; and
- g) Each party receives one gold ingot.

- [187] This result would see Dr. Lear retain financial assets of approximately \$2 million versus those held by Mr. Higgs of about \$576,000. They would each obtain approximately \$670,000 through the immediate sale of the Valley Drive Condo and the distribution of the balance in the Spousal Trust account.
- [188] Dr. Lear also proposes that Mr. Higgs would be required to pay her a small compensation payment of approximately \$58,000 to equalize the other assets.
- [189] Clearly, another substantial benefit under this proposal for Dr. Lear arises from her ability to continue to occupy the 1701 Condo until her death, all without financial compensation to Mr. Higgs. Given that, actuarially speaking, Mr. Higgs is expected to die before Dr. Lear, in that event he will not see any benefit arising from the value held in the 1701 Condo through this proposal.

Mr. Higgs

- [190] When this litigation began, Mr. Higgs' position was that Dr. Lear was required to account for the \$300,000 that she spent on renovations to the 1701 Condo. That position was confirmed in Mr. Higgs' counsel's opening statements at the trial. This position was premised on Mr. Higgs asserting a separation date of November 26, 2015 and asserting that Dr. Lear had dissipated these family funds after that date.
- [191] However, at the commencement of the trial, the parties began discussions and came to an agreement that resolved the major issues arising in the Divorce Action. The parties agreed that the separation date was January 1, 2017, which allowed the Divorce Action to be resolved on the first day of trial, as I described above.
- [192] However, the concession as to the separation date had a number of other consequences with respect to the property division. Consistent with s. 84(1) of the FLA, this meant that Mr. Higgs' TFSA (which was closed in 2016) and Dr. Lear's vehicle (which she did not yet own in January 2017) were not held by the parties on the date of separation and therefore, are not family property to be divided.
- [193] Although Mr. Higgs' counsel did not directly address the matter, this also resulted in a change in the characterization of Dr. Lear's payment of the renovations costs from December 2015 to April 2016, before the separation date.
- [194] In argument, Mr. Higgs' counsel asserted that this circumstance could be considered in ordering an unequal division of the family property in Mr. Higgs' favour. This position is not found in the pleadings. However, the course of the trial was not affected by that circumstance, again given everyone's understanding that it was an issue to be addressed at the trial. Dr. Lear's counsel did not assert any prejudice arising from allowing this argument to be advanced at the end of the trial.

- [195] I agree that no prejudice arises to Dr. Lear in that respect. Mr. Higgs has always asserted that Dr. Lear should have to repay to him one half of those renovation costs. The transformation of this argument from one of dissipation of family assets into an argument for unequal division is not significant.
- [196] In the circumstances, I exercise my discretion to allow Mr. Higgs to advance an argument for unequal division of the family property based on Dr. Lear's payment of the renovation costs. A similar approach was taken in Yerbury at para. 58.
- [197] Mr. Higgs' argument rests on his contention that Dr. Lear was acting in bad faith in spending the Spousal Trust monies arising from the purchase of the 1701 Condo. He argues that, contrary to Dr. Lear's assertion that the downsizing to the 1701 Condo was to "save money", Dr. Lear went on to spend approximately 40% of those monies almost immediately. He also argues that the extensive renovations were undertaken without his agreement or input and were only done by Dr. Lear to benefit herself; it was clear that Dr. Lear intended at that time for Mr. Higgs to be in a care facility on a permanent basis.
- [198] Otherwise, Mr. Higgs seeks an equal division of the family assets. His proposal for achieving the equal division of family property is as follows:
- a) Each party retains their own pension entitlements and annuities;
 - b) Dr. Lear transfers her RRIF, TFSA and investment to Mr. Higgs;
 - c) Dr. Lear retains the 1701 Condo and the furniture in the 1701 Condo;
 - d) Mr. Higgs retains his RRIF, life insurance policies and his investment;
 - e) The Valley Drive Condo is sold and the Company wound up, with net proceeds paid to Mr. Higgs;
 - f) The Spousal Trust account is divided equally;
 - g) Dr. Lear retains the gold ingots and pays half the value to Mr. Higgs;
 - h) Dr. Lear pays \$150,000 to Mr. Higgs for half of the renovation costs; and
 - i) Dr. Lear pays Mr. Higgs a small equalization payment (estimated at \$28,000).
- [199] By Mr. Higgs' calculations, this would result in Dr. Lear transferring approximately \$1.12 million to Mr. Higgs, by which they would each receive approximately \$2.5 million in after-tax value in their respective assets.

The Statutory Parameters

- [200] Section 95 of the FLA requires a finding of "significant unfairness" before unequal division can be ordered. The relevant provisions are:

-
- (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;
 - (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.
- [201] As discussed by Justice Butler (as he then was) in *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44, the "significant unfairness" test requires more than just unfairness. He stated that it means "more than a regular impact - something weighty, meaningful, or compelling".
- [202] Dr. Lear relies on ss. 95(2)(b) (agreement between the parties) and 95(2)(i) (other factors).

- [203] Mr. Higgs relies on s. 95(2)(g), alleging that Dr. Lear, other than in good faith, substantially dissipated the balance in the Spousal Trust account for the renovations in a manner where Mr. Higgs' interests in the account (and also the 1701 Condo itself) were adversely affected.

Discussion

- [204] I will first address Mr. Higgs' arguments concerning the renovation costs. In order to consider this argument, I must first determine whether Dr. Lear was acting other than in good faith in incurring the renovation costs, as s. 95(2)(g) requires.
- [205] The evidence at this trial involved a consideration of many financial transactions by Dr. Lear throughout 2015 and 2016 dealing with both funds held by her and the parties' joint funds. Despite that fact, Mr. Higgs does not argue for any particular relief arising from those payments, save as they give context to her actions in relation to the \$300,000 in renovation costs that Dr. Lear spent from the Spousal Trust funds arising from the net sale proceeds of the 2001 Condo.
- [206] Dr. Lear describes that renovations to the 1701 Condo included changes to the kitchen, two bathrooms, flooring, painting, lighting, a sound system, taking out a fireplace, opening up rooms by removing walls and improving the walk-in closets. Dr. Lear asserts that these renovations were necessary because the 1701 Condo was otherwise "unlivable", an extreme assertion that I suspect the former occupants would not accept. I accept that, by Dr. Lear's very high standards, the former state of the 1701 Condo was not adequate for her needs, tastes and wants.
- [207] I agree that the parties appeared to have discussed renovations to the 1701 Condo around the time that the purchase agreement was signed in October 2015. However, whether Mr. Higgs understood the true extent of the plan formulated by Dr. Lear is anyone's guess. As Dr. Lear herself indicates, the intention to downsize their home was to save money for the couple's retirement.
- [208] What is clear enough is that, following the completion of the purchase, Dr. Lear did not preserve a significant portion of the sale monies with perhaps more modest renovations being done; rather, she undertook a plan to completely remodel the 1701 Condo at a substantial cost, without any involvement or input from Mr. Higgs as to whether he agreed to spend almost half of what the parties then held in net sale proceeds. She did so knowing, at least at that time, that she would be the only person to enjoy the fruits of that exercise.
- [209] Dr. Lear's intentions in respect of the renovation exercise became even more concerning when this litigation began. By April 20, 2016, she had been served and she was aware that Mr. Higgs was asserting an interest in the family assets, which would have included the balance then held in the Spousal Trust account. By the end of April 2016, the balance in the account was approximately \$577,000.

- [210] Yet, Dr. Lear was undeterred by the litigation in respect of the renovations. On May 10, 2016, she transferred \$50,000 from the Spousal Trust to her own account to fund the renovations. The next day, May 11, she was served with Mr. Higgs' application for a restraining order to prevent any further payments from this account.
- [211] Dr. Lear's counsel sought an adjournment of this application from May 16 to May 30, 2016, to which Mr. Higgs agreed. On May 20, 2016, Ms. Lear withdrew \$100,000 from the Spousal Trust account and on May 30, 2016, the very day of the application, she issued a cheque to her contractor for that same amount.
- [212] I do not consider the timing of these transactions to be a coincidence. Dr. Lear attempted in her evidence to suggest that she was not really aware of this application and the fact that her counsel sought an adjournment of the application.
- [213] This is nonsense and I reject her evidence. I find as a fact that Dr. Lear was well aware of the application and the scheduled hearing date and that she was seeking to delay it so as to continue to use the Spousal Trust account monies. I conclude and find that Dr. Lear instructed her counsel to seek the adjournment and that she was advised by her lawyer that it was granted and that the application was re-scheduled for May 30, 2016.
- [214] Even more egregious were Dr. Lear's actions following the application in arrogantly ignoring the Restraining Order that she knew prevented any distributions from the Spousal Trust account. In my view, she plainly and contemptuously decided that she was not going to abide by the Restraining Order and that she would continue with her plan to improve her own living conditions at the expense of the couple's resources. She said as much in her evidence.
- [215] In all of the above circumstances, I have no hesitation finding that Dr. Lear was not acting in good faith in respect of her actions in relation to the Spousal Trust account and the spending of \$300,000 for renovations to the 1701 Condo.
- [216] Dr. Lear then argues that, even if she did act other than in good faith, the amount spent on renovations was transferred into the present value of the 1701 Condo, such that there was no conversion of this family property that "defeated or adversely affected" Mr. Higgs' 50% interest in the Spousal Trust account.
- [217] The evidence on this issue is not very satisfactory. The 1701 Condo was purchased in October 2015 for \$1.2 million. It was appraised by Mr. Hui at \$1,435,000 as of October 29, 2018, three years later. There are two possible explanations for that increase: the renovations having upgraded the property (per Dr. Lear) and/or the real estate market having risen (per Mr. Higgs).
- [218] As concluded by Justice Gomery in Yerbury at para. 41, I cannot assume that the renovations increased the value of the 1701 Condo dollar for dollar. I have reviewed the evidence as to the renovations. As expected, it includes the cost of many items which would have been incorporated into the 1701 Condo and therefore, can be considered as now

reflected in the value determined by Mr. Hui. This would include such things as the upgraded kitchen (including appliances), upgraded bathrooms, upgraded closets, flooring and the like. I agree that some of that value is now reflected in the appraised value.

- [219] However, many of the renovation cost documents show various "soft costs" such as furnishings, moving costs and management costs to the contractor. These would not be reflected in the appraised value.
- [220] Doing the best I can given the state of the evidence, I conclude that Dr. Lear dissipated \$100,000 of Spousal Trust funds for the renovations which is not currently reflected in the value of the 1701 Condo. I also conclude that it is significantly unfair that Mr. Higgs be required to suffer this cost in the circumstances. Mr. Higgs will receive a credit of half that amount (\$50,000) from the family property division.
- [221] I will now address Dr. Lear's argument that the family property should be divided unequally between the parties, in accordance with her proposal set out above.
- [222] Firstly, Dr. Lear argues that one factor to be considered is the Spousal Trust Agreement, in accordance with s. 95(2)(b) of the FLA. I have no hesitation in rejecting this factor as a relevant consideration.
- [223] Dr. Lear was plainly the only person involved in the creation of that document; Mr. Higgs was not involved and he had absolutely no input whatsoever. It would be manifestly unfair for a party, such as Dr. Lear, to create a document using a POA for the other party and then insist that it was a binding agreement meant to reflect the true wishes of both parties as to their property division.
- [224] Further, I do not agree that the Spousal Trust Agreement is a document intended to be addressed under s. 95(2)(b) of the FLA. That section is clearly intended to direct consideration of an agreement when the spouses have turned their minds to how family property would be divided in the event of the end of the relationship. The Spousal Trust Agreement only addresses how the parties would hold the 1701 Condo and the Spousal Trust account during their lifetimes with certain provisions as to how it would be distributed upon their deaths. It does not address the consequences of a marital breakdown, such as needs to be addressed here.
- [225] At this point, I also reject Dr. Lear's argument to reappportion the family property arising from the cashing in of Mr. Higgs' TFSA in May 2016, under s. 95(2)(g)(ii) of the FLA. Mr. Higgs did so, with the assistance of Andreas, to obtain money for his legal fees. I see no basis upon which to conclude that it was done without good faith and resulted in a dissipation of family assets.
- [226] The "other factors" asserted by Dr. Lear under s. 95(2)(i) are (reworded and paraphrased for readability):
- a) Dr. Lear's relatively young age and good health and fitness;

- b) Dr. Lear should be permitted to continue in the lifestyle which she has worked to achieve and has maintained until this Court proceeding was begun by Melanie;
- c) Mr. Higgs is much older than Dr. Lear and in relatively poor health;
- d) Dr. Lear quit work in 2008 in order to care for Mr. Higgs after his cerebral hemorrhage (at age 66 while her dentist partner continues to work at age 75);
- e) Dr. Lear has been deprived of any life insurance on Mr. Higgs' death;
- f) If Mr. Higgs gets the Spousal Trust account and the Company's assets, including the Valley Drive Condo, Dr. Lear will lose approximately \$13,500 per year in income;
- g) It is Dr. Lear who worked hard and planned for retirement; and
- h) Dr. Lear should not be forced to pay Mr. Higgs now for capitalized values of her Manulife annuity and the Air Canada survivor pension which she may or may not get in the future.

[227] I will address these factors globally.

[228] Dr. Lear has attempted to frame this discussion as being premised on her hard work and careful planning for retirement which has resulted in the substantial family assets being available. That is true; however, her depiction of the relationship disregards what I consider were Mr. Higgs' significant contributions to that asset accumulation, arising from his own hard work and retirement planning.

[229] When married, both parties had significant incomes and enjoyed a very comfortable lifestyle. Throughout their cohabitation (1981-2016), both parties, not just Dr. Lear, contributed to that lifestyle and the accumulation of assets. Each supported the other in their respective careers. The sharing of expenses contributed to Dr. Lear's ability to amass her significant financial assets. In addition, Mr. Higgs fully contributed to the acquisition of the real estate in their names over the years and also acquired investments for retirement.

[230] It is not possible or even desirable in this proceeding to attempt to discern the respective contributions of the parties over the decades, as Dr. Lear suggests, toward parsing those contributions as supporting "significant" unfairness. I agree with Justice Fleming who stated in *Nearing v. Sauer*, 2015 BCSC 58 that:

[141] Section 95(2) does not appear to allow for the wide ranging examination of each spouse's contribution to the accumulation of family assets and their respective capacities that occurred pursuant to s. 65(1)(f). Instead the court may consider a spouse's contribution to the career or career potential of the other spouse under s. 95(2)(c) or a spouse's detrimental impact on to the value of family property or potential family property under s. 95(2)(g) which appears focused on the spouse's direct actions vis-à-vis the value of family property. I interpret the words "spouse's contribution" in s. 95(2)(c) as including the full spectrum of all levels of contribution from one spouse negatively impacting on the other spouse's career to greatly enhancing the career or career potential of the other spouse.

- [231] I acknowledge, as discussed above, that many of the values of the family property are contingent. Those include the capitalized values for the parties' annuities and the Air Canada pensions. However, Dr. Lear does not suggest any reasonable means of eliminating these contingencies. She certainly does not suggest a liquidation of their annuities. She does not suggest a division of Mr. Higgs' Air Canada pension under Part 6 of the FLA to provide certainty in that respect. She has not indicated a willingness to waive her right to the Air Canada survivor pension, no doubt relying on the likelihood that Mr. Higgs will die before she does.
- [232] By not suggesting these means to remove the contingencies, I can only conclude that Dr. Lear wishes to capitalize on the better chance that she will survive Mr. Higgs and continue to enjoy these substantial assets. She cannot have it both ways.
- [233] Dr. Lear's argument for unequal division substantially rests on the expectation that she will outlive Mr. Higgs. She argues that, in that event, she has more use for the income and assets held by the parties than Mr. Higgs. She asserts that Mr. Higgs does not need much income and assets to meet his present needs and his needs into the future. This assertion is justified at present since his income presently exceeds his expenses. In addition, I agree that Mr. Higgs will continue to require a care facility and, if his care needs increase, it is likely to give rise to his admission to another facility where the long term care insurance would cover at least part of the costs.
- [234] Put simply, Dr. Lear focusses, not on her needs, but wants, and on Mr. Higgs' lack of need.
- [235] Dr. Lear relies on *Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143. In that case, the parties also had a long relationship of some 36 years. There was a significant disparity in the parties' financial circumstances and standard of living after separation: paras. 119-124. At para. 126, Justice Harris found significant unfairness and ordered a reapportionment of certain property in favour of the wife. She did so on the basis of s. 95(3) of the FLA, having considered the parties' positions with respect to both the spousal support that the wife sought and the property division issues: paras. 31-33
- [236] The circumstances of the wife in *Lahdekorpi* are significantly different than those faced by Dr. Lear.
- [237] Firstly, s. 95(3) of the FLA is not engaged here since Dr. Lear does not seek spousal support.
- [238] Secondly, in 2018, Dr. Lear earned over \$166,000 of income. Dr. Lear's Form F8 financial statement sworn June 5, 2019 refers to her anticipated annual expenses of \$170,742. However, I conclude that amount has been inflated by certain non-recurring expenses, such as a special assessment, a UBC levy and legal fees, which would reduce that figure by about \$50,000 per annum.
- [239] Dr. Lear argues that she should not have to reduce her lifestyle by reason of the property division. I dare say that most family law litigants who enter these types of proceedings do so with that hope (if not expectation) in mind. The reality is that a division of assets

between two people who previously enjoyed a shared life almost invariably leads to that result. I acknowledge that an equal sharing of the assets here will reduce Dr. Lear's income. However, even so, she will still have a substantial income and substantial capital assets upon which she may draw (for example, through a take-back reverse mortgage in respect of the 1701 Condo). That income may be supplemented by her Air Canada survivor pension, should Mr. Higgs die before she does. If necessary, she will also have access to the same long term care insurance that Mr. Higgs accessed while at Braddan.

- [240] In the event of equal division (or close to that), Dr. Lear will have to consider how to spend that reduced income as she solely determines, whether continuing to live in the 1701 Condo, as she presently wishes, or otherwise. She will certainly not be left in the very limited financial circumstances as was the wife in Lahdekorpi.
- [241] Dr. Lear points to the limited needs of Mr. Higgs and states that "he has far more than he needs or could possibly spend". I am not aware of any authority - and Dr. Lear's counsel has not referred me to any - that would allow consideration of this argument. The objective of the property division provisions in the FLA is to achieve a fair result between the parties so that the parties can take their respective shares of the family property and carve out new paths in their lives. The parties will also be free at that point to decide how their estates are to be distributed after their death, free of any estate planning that was contemplated, if not implemented, during the halcyon days of their relationship (such as was done by Mr. Higgs and Dr. Lear).
- [242] It would be anathema to those objectives under the FLA to allow one spouse to dictate what the other spouse "needs" in terms of altering his or her share of the family property under the usual equal sharing regime (or any other sharing based on particular FLA provisions, such as relating to excluded property).
- [243] This argument certainly holds no substance toward finding that Mr. Higgs' present circumstances give rise to "significant unfairness" so as to allow Dr. Lear to take what would otherwise be his share of the family property for her own purposes to enjoy as she moves forward in her now separate life.
- [244] In my view, the only substantive argument advanced by Dr. Lear toward significant unfairness arises from the fact that she retired in 2008 to care for Mr. Higgs when he was facing significant health issues after his cerebral hemorrhage. I accept Dr. Lear's evidence that she had no intention at that time to retire from her dental practice but she felt compelled to do so given the circumstances and level of in-home care her husband needed. It is unclear from the evidence when Dr. Lear would have normally retired.

- [245] I find that, but for Mr. Higgs' condition, Dr. Lear would have continued to be employed as a dentist and she would have continued to earn a substantial amount for many years after. I accept that this further income would have allowed Dr. Lear to add to her retirement savings beyond what she currently holds. She was making contributions to an RRSP at the time, which were eventually used to purchase the Manulife annuity.
- [246] I conclude that it would be substantially unfair to equally divide the Manulife annuity held by Dr. Lear in the above circumstances. I would order that Dr. Lear be entitled to 60% of its value, which results in her being entitled to a further 10% of its value as a balancing item.

PROPERTY DIVISION / COMPENSATION

- [247] Section 97 of the FLA provides the Court with a wide discretion to give effect to the property division in a fair manner. Section 97(2) allows the Court to, among other things, declare ownership of property, order the transfer of property and order that compensation payments be made to achieve that result.
- [248] I intend to address the assets and debts individually and leave it to the parties' counsel to complete the mathematical exercise and the implementation of those results. I have substantially adopted the division of family property proposed by Mr. Higgs' counsel, with some adjustments, as set out above and as noted below.
- [249] I order the following steps to be taken to accomplish the property division of the family property:
- a) Pensions: Dr. Lear will have 30 days from the date of these reasons to advise if she waives the rights to her Air Canada survivor pension. If so, Mr. Higgs' Air Canada pension will be divided in accordance with Part 6 of the FLA. If not, their respective pension rights will be equalized on the basis of the capitalized after-tax values, with Dr. Lear compensating Mr. Higgs for the difference;
 - b) The 1701 Condo/Contents: Dr. Lear will have 30 days from the date of these reasons to advise if she wishes to retain the 1701 Condo. If so, the value will be equalized between the parties at the appraised value and Mr. Higgs will be removed as a beneficiary of the Spousal Trust. If not, the 1701 Condo will be sold and the net sale proceeds distributed equally to the parties. In either event, Dr. Lear will retain the furniture as appraised, with the values to be equalized;
 - c) Annuities: Both parties will keep their respective annuities and they will be equalized on an after-tax basis, subject to Dr. Lear's entitlement to a further 10% of her annuity in any event, also on an after-tax basis;

- d) RRIFs: Mr. Higgs will retain his RRIFs. Dr. Lear will transfer her RRIF to Mr. Higgs to equalize the pre-tax values by a spousal rollover, if necessary to compensate for other assets retained by Dr. Lear, such as the 1701 Condo and her annuities. Otherwise, the RRIFs are to be equalized on a pre-tax basis by a spousal rollover;
- e) TFSA: Dr. Lear will transfer her TFSA to Mr. Higgs to equalize the values, if necessary to compensate for other assets retained by Dr. Lear, such as the 1701 Condo and her annuities. Otherwise, she retains her TFSA and is to equalize the value with Mr. Higgs;
- f) Spousal Trust Account: The Spousal Trust account is to be equally shared. The balance will be distributed to Mr. Higgs to equalize the values, if necessary to compensate for other assets retained by Dr. Lear, such as the 1701 Condo and her annuity;
- g) The Valley Drive Condo: The Company will sell the Valley Drive Condo. Dr. Lear will then wind up the Company and cause the Company to distribute the net proceeds held (whether by reason of the sale or otherwise) to her. The net distribution to be paid to Dr. Lear (after wind-up costs and taxes due by the Company and including any repayment to Dr. Lear for shareholder loans) will then be distributed equally to the parties, after deducting applicable taxes to be paid by Dr. Lear arising from the distribution to her. Dr. Lear's share will be payable to Mr. Higgs, if necessary to compensate for other assets retained by Dr. Lear, such as the 1701 Condo and her annuity;
- h) Miscellaneous Assets: The value of Mr. Higgs' 442 investment and Dr. Lear's investment will be equalized on an after-tax basis;
- i) Life Insurance: Mr. Higgs will retain his life insurance policies. The cash surrender values are to be equalized with Dr. Lear;
- j) Debts: Debts held by Dr. Lear as of the date of separation will be equalized between the parties;
- k) Renovation Costs: In addition to any compensation payment required to be made, Dr. Lear will make a further compensation payment of \$50,000 to Mr. Higgs for the renovation costs to the 1701 Condo; and
- l) Gold Ingots: Dr. Lear will deliver one gold ingot to Mr. Higgs.

[250] My order leaves some uncertainty as to how the division will proceed, particularly in light of the decisions to be made by Dr. Lear. My intention is to equalize all of the values, subject to the unequal sharing of Dr. Lear's annuity and the renovation costs, as set out above. I appreciate that a payment may be required from Dr. Lear to Mr. Higgs depending on the outcome. In that event, I order that Dr. Lear will have 60 days from the date of her decisions within which to pay any required amount.

[251] I grant leave to the parties to seek further directions concerning the property division, as required.

CONCLUSION

[252] The final matter relates to costs. Mr. Higgs seeks costs on the basis of what I have determined to be his substantial success. He seeks a costs award under the Supreme Court Family Rules, Appendix B, s. 1(1) as being a case of more than ordinary difficulty.

[253] I agree that the issues in this case were complex given the nature of the assets held by the parties. The litigation was further complicated by the substantial and complex records produced as to the financial transactions by the parties, particularly by Dr. Lear in 2015 and 2016 while she was still in control of the family assets and using the funds. This required some forensic analysis by Melanie and Andreas to follow where the monies went.

[254] Finally, there is the matter of Dr. Lear's blatant disregard of the Restraining Order which was intended to stabilize matters. While her egregious actions do not rise to the level to justify special costs, they did add to the complexity of understanding the consequences of her actions in relation to the family property.

[255] I would accede to Mr. Higgs' submissions on the matter of costs. Costs will be assessed in his favour on the basis that this matter involved more than ordinary difficulty.

"Fitzpatrick J."

APPENDIX "A"

PART 1: JOINT ASSETS

Joint Assets

Description

Pre-Tax Value

After-Tax Value

Notes

1701 Condo

\$1,435,000

\$1,435,000

Held in Spousal Trust (FLA, s. 84(3))

Contents of 1701 Condo

\$13,405

\$13,405

Jointly held

Spousal Trust Account balance

\$482,940

\$482,940

FLA, s. 84(3)

TOTAL:

\$1,931,345

\$1,931,345

PART 2: DR. LEAR'S NET ASSETS

Dr. Lear's Net Assets Description

Pre-Tax Value

After-Tax Value

Notes

Investments

\$1,702

\$1,243

Held by Dr. Lear

TFSA

\$64,789

\$64,789

Held by Dr. Lear

RRIF

\$664,082

\$484,780

Held by Dr. Lear

Annuity

\$1,012,602

\$739,200

Held by Dr. Lear

Air Canada Pension (Survivor)

\$306,900

\$224,037

Held by Dr. Lear from Mr. Higgs' Air Canada pension

Valley Drive Condo

\$1,360,000

\$852,599

Held by the Company that is owned by Dr. Lear. Does not include other miscellaneous assets held by the Company

Gold from Safe Deposit Box

\$2,500

\$2,500

Held by Dr. Lear in ingots

Debt (Credit Cards)

(\$21,666)

(\$21,666)

Owed by Dr. Lear

TOTAL:

\$3,390,909

\$2,347,482

PART 3: MR. HIGGS' ASSETS

Mr. Higgs' Assets Description

Pre-Tax Value

After-Tax Value

Notes

RRIFs

\$130,300

\$89,907

Held by Mr. Higgs

Investment Club

\$3,677

\$3,677

Held by Mr. Higgs

Air Canada Pension

\$117,246

\$80,900

Held by Mr. Higgs

Annuities

\$227,101

\$156,700

Held by Mr. Higgs

Life Insurance

\$98,482

\$98,482

Held by Mr. Higgs re Cash Surrender Value of Policies (Manulife / RBC)

TOTAL:

\$576,806

\$429,666

GRAND TOTAL:

Parts 1-3

\$5,899,060

\$4,708,493

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