

CANADA / JUDGMENT

Hofmann v. Miller

2022 BCSC 678

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2022 BCSC 678 Hofmann v. Miller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hofmann v. Miller,

2022 BCSC 678

Date: 20220429

Docket: 20867

Registry: Nelson

Between:

Katherine Ann Hofmann

Claimant

And

Bruce Geoffrey Miller

Respondent

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for Claimant:

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Counsel for Respondent:

J.F. Connolly

Place and Dates of Trial:

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September 15-17, 20-22, and

October 22, 2021

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Place and Date of Judgment:

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April 29, 2022

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Introduction

- [1] Katherine Hofmann and Bruce Miller were in a common law relationship for 15 and-a-half years between January 2, 2002 and June 2017. At time of trial, Ms. Hofmann was 52 years of age, and Mr. Miller was 61 years old. They are the parents of two children, Harlan, born in August 2003, and Hazel, born in August 2007.
- [2] The parties have resolved all issues relating to parenting arrangements and prospective child support for their children. The only outstanding issues related to child support are whether Mr. Miller should be required to pay retroactive child support and whether he should be imputed with greater income than his declared employment income.

- [3] Ms. Hofmann seeks retroactive expenses pursuant to s. 7 of the Child Support Guidelines. She seeks spousal support, both retroactive and prospective, with a lump sum in lieu of monthly support. In my view, there is no question that Ms. Hofmann is entitled to spousal support, but the quantum and duration must be determined, as must the question of whether a lump sum should be ordered. Both parties seek to have additional income imputed to the other for the purposes of determining the amount of spousal support Ms. Hofmann is entitled to.
- [4] The parties' major asset is the former family home. Mr. Miller bought the home in 1989. The parties moved into the house together when they starting living together in January 2002, and the family lived there throughout the parties' relationship. Ms. Hofmann was put on title as a joint tenant in 2009. She continues to live in the former family home today, from which she operates two home-based businesses, a pottery studio and a bed and breakfast suite. Hazel lives there with her, while Harlan is now attending university. Mr. Miller submits that his equity in the home as of the date of cohabitation is excluded property. Ms. Hofmann submits that her interest in the house was gifted to her, and that no part of the value of the home should be excluded. Mr. Miller seeks an order for the sale of the home, while Ms. Hofmann seeks to have the opportunity to buy out Mr. Miller's share. Mr. Miller also seeks occupational rent, and asks that this be considered in the property division analysis.
- [5] There are also a number of RRSPs, gifts and bank accounts in issue, with both parties seeking to have some amounts declared excluded property.

The parties and their relationship

- [6] Ms. Hofmann was born in 1969. She has a Bachelor of Science in Geology from the University of British Columbia which she earned in 1991. She worked in exploration geology for a few years after graduation.
- [7] Ms. Hofmann moved to Nelson with her then-partner in 1995 or 1996. Her partner had the choice of two work locations, and they chose Nelson because Ms. Hofmann wanted to attend the Kootenay School of the Arts ("KSA"). She took her first year in Vancouver, part-time at Langara College and Emily Carr University of Art and Design, and then studied two years at KSA, earning her fine arts diploma in ceramics in 1998. While studying, Ms. Hofmann worked in the geology field part-time, assisting with mapping and other work.
- [8] After graduating from KSA, Ms. Hofmann set up a ceramics studio in rented premises in Nelson, and she sold some pottery. Ms. Hofmann testified that her goal was to set up a studio where she could make and sell ceramics, and eventually to return to university to get her Master's degree. The parties started having a family, and it was not possible to take a Master's degree at KSA, and she has not been able to fulfil this goal. After the children were older, Ms. Hofmann started looking into the possibility of returning to university again. Sometime in or about 2015, she investigated whether it was possible to attend UBC-Okanagan on a "low-residency" basis, but that was not an option.

- [9] Mr. Miller was born in 1960 in California. His parents were students, and the family moved around a great deal before his mother finally moved to British Columbia in 1977. Mr. Miller has a high school education. He did one year of university studies in planning, but preferred working in the outdoors. Mr. Miller worked on and off as a forestry technician for some years before the parties' relationship, while also spending some time travelling in Europe.
- [10] Mr. Miller moved to Nelson in 1986. He rented the house that became the family home for three years before he bought it in 1989. The house was in poor shape, and effectively he bought it by just taking over the seller's mortgage of \$22,000.00. He soon started repairing and renovating the house. He had the mortgage paid off by 1994 or 1995. By this point, Mr. Miller's main employment was as a tree planter, although he also did some construction work, forest firefighting and other jobs.
- [11] The parties first met in the summer of 2000, when Mr. Miller returned to the Kootenays from Europe, where he had been living, to do some tree-planting. They started dating sometime after that, when he moved back to the Kootenays permanently. At the time, Ms. Hofmann was living in rental accommodation. Mr. Miller was staying with a friend in Nelson when not working out of town. He was renting out what would become the family home.

The house and the parties' financial and childcare arrangements

- [12] Both parties moved into the family home at about the same time, when they started living together in January 2002. At the time, Ms. Hofmann was already pregnant with their first child.
- [13] Initially, the parties maintained separate bank accounts. Ms. Hofmann testified they got a joint account sometime thereafter. Ms. Hofmann was pretty sure she let her personal account go when they opened the joint account. Mr. Miller was away tree-planting a good deal, and Ms. Hofmann started paying the household bills for things like utilities and groceries. Mr. Miller gave her money when she asked for it to pay bills out of their joint account.
- [14] Ms. Hofmann did not know if there was a mortgage on the house. She introduced some documentary evidence about Mr. Miller applying for a mortgage or personal line of credit secured by the home in 2001. I accept Mr. Miller's evidence that he obtained a line of credit, secured by the home, at that time, but he never drew down on it. It remains registered against title, as there have been administrative difficulties in getting it removed.
- [15] Ms. Hofmann's income during the parties' relationship was limited. Her most recent paid employment outside of her home-based businesses was in 2000-2002, when she worked as a barista at Oso Negro. She estimated her total income in this period between \$15,000.00 and \$18,000.00 per year. She went on maternity leave when Harlan was born in August 2002. She did some editing of a geoscientist's reports when Harlan was young, in 2004 or 2005.

- [16] Ms. Hofmann continued to rent a studio in which she made ceramics until about 2003 or 2004. When Harlan was young, the parties renovated the family home to build Ms. Hofmann a studio. Ms. Hofmann was not sure how much time she worked in the studio on average. She had Harlan in day care three days a week, but did not work all of the time he was in day care, also using the time for leisure and other activities. She made a small amount of income by selling ceramics on consignment and at craft fairs.
- [17] The studio was later extended so that Ms. Hofmann could teach ceramics classes in it. This was one of a number of renovations the parties did to the family home. Mr. Miller did almost all of the renovation work, although he occasionally hired tradespeople to do some aspects such as electricians and plumbers. Ms. Hofmann assisted, doing things such as nailing shingles and staining boards. Her father also helped out. Ms. Hofmann thought that Mr. Miller's father might have given them some money for materials, and when they were low on cash, Mr. Miller's mother gave them \$20,000.00. I return to the subject of gifts from the parties' parents below.
- [18] Hazel was born in August 2007, and Ms. Hofmann had a similar day care arrangement for her, as what she had for Harlan.
- [19] Mr. Miller worked a variety of jobs in the first years of the parties' relationship, including tree-planting, slope restoration and ski-hut keeping. His work would take him away for a few weeks a year. When Harlan was young, Mr. Miller's work focus switched to carpentry and home renovations, which meant he was no longer away from home for extended periods of time. Ms. Hofmann testified that Mr. Miller still worked a lot, including most weekends and sometimes for twelve hours a day. I accept that is true, given the nature of Mr. Miller's work.
- [20] Ms. Hofmann's evidence, which I accept on this point, was that she did all of the shopping, cooking, laundry and housework and most of the childcare for the family. For example, she said she put the children to bed every single night. She acknowledged that Mr. Miller often helped with dishes, fixed things and played with the children.
- [21] According to Ms. Hofmann, the family vacationed as a family on only a few occasions, with Mr. Miller travelling with her and the children to visit her father once or twice and her accompanying him and the children to the ski-hut once or twice. She testified that Mr. Miller mostly travelled on his own when he had time off, going sailing or skiing with friends. She took the children to Mexico twice on her own.

The other assets

- [22] Both parties' families provided them some financial assistance.
- [23] As mentioned earlier, Ms. Hofmann thought that Mr. Miller's father might have given them some money for home renovations. She recalled Mr. Miller's mother, Nancy, giving them \$20,000.00 when they were low on cash, which she said they put in their joint account and used for family expenses.

- [24] Nancy Miller gave the parties money every year to put in the children's RESPs. She would also give money to Mr. Miller or the children directly for various expenses.
- [25] Ms. Hofmann opened a personal savings account sometime after the parties started cohabiting. She received \$10,000.00 from her mother, and believed she opened the account to deposit that money into. Subsequently, Ms. Hofmann transferred those funds into the parties' joint account. There was a significant amount of evidence about these funds, which Ms. Hofmann claims as excluded property, a subject I return to below.

Mr. Miller had bank accounts and RRSPs separate from the parties' joint account. Ms. Hofmann had limited knowledge about these funds. Mr. Miller makes various excluded property claims with respect to these funds, which I discuss below.

Separation and post-separation living arrangements

- [26] Mr. Miller told Ms. Hofmann he wanted to separate on June 8, 2017. Both parties accept that is the date of separation. Their living situation did not immediately change, and Mr. Miller continued to live in the family home. He continued to sleep, as he had for some time, in a different room.
- [27] Mr. Miller moved out of the family home in January 2018. He continued to use his shop, which is part of the family home, for various purposes. Ms. Hofmann changed the locks on the family home in late 2018. Mr. Miller continues to have access to the shop, although he says Ms. Hofmann filled it up with his possessions, making it unusable. Mr. Miller lived with friends and at job sites until September 2018, when he started to rent accommodation with his new partner. He calculates his total rent paid since then as \$29,250.00, which he asks the Court to consider in relation to his occupational rent claim, which I deal with below.

Property

Family home

- [28] As mentioned, the family home is the parties' major asset, and the major bone of contention in this case. Ms. Hofmann wants to buy out Mr. Miller, which would allow her to continue to reside in the family home and to continue to operate her home-based businesses. Mr. Miller thinks this is entirely unrealistic, and seeks an order for the sale of the family home.
- [29] There are a number of subsidiary issues related to the family home. Mr. Miller claims the equity in the home at the time the parties starting living together is excluded property. Ms. Hofmann says that Mr. Miller gifted her a half-interest in the family home when it was transferred into their names as joint tenants, and that Mr. Miller's excluded property claim should be dismissed on that basis. Mr. Miller denies that he gifted Ms. Hofmann a half-interest in the home at that time.

- [30] Before considering the facts and law related to those issues, and making the necessary findings, I will first determine what the value of the family home was at the time the parties started living together, and what it is now.

Value of the family home

- [31] Two appraisals of the family home were introduced into evidence. The first was commissioned by Mr. Miller and is dated July 19, 2018 (the "First Appraisal"). The second was jointly commissioned and is dated July 5, 2021 (the "Second Appraisal"). Both appraisals were carried out by the same firm.
- [32] The First Appraisal appraised the family home as of January 1, 2002 at \$115,000.00. This is the only evidence of the value of the family home at the time the parties began living together, and I accept it is accurate.
- [33] The First Appraisal appraised the family home as of June 3, 2017 at \$435,000.00. This included a \$10,000.00 deduction to complete minor trim, flooring, siding and finishing related to the unfinished renovations done to the home. This is the only evidence of the value of the family home at the time of separation, and I accept it is accurate.
- [34] The family home was assessed by BC Assessment at \$566,000.00 in 2019.
- [35] The Second Appraisal appraised the family home as of July 5, 2021 at \$790,000.00. The Second Appraisal notes that residential property values in Nelson have been increasing in recent years, with the average residential sale price in the City of Nelson increasing by approximately 39% between 2010 and 2020.
- [36] The Second Appraisal contained what it calls "an extraordinary assumption" related to the effects of the COVID-19 pandemic on the accuracy of appraisals. The writer stated the opinion that less weight can be attributed to previous market evidence for comparison purposes. As a result, "less certainty - and a higher degree of caution - should be attached to this point-in-time valuation assignment than would normally be the case".
- [37] The Second Appraisal noted a "variety of detrimental and unfinished conditions" in the home, and recommended that a comprehensive building inspection be obtained. Concerns were noted about the state of the exterior older roof and exterior siding, and interior trim and finishing needed to be completed. The Second Appraisal proceeded upon a second "extraordinary assumption" that the detrimental and finishing work would cost \$30,000.00, but noted that this was merely an estimate, and recommended that a proper estimate be obtained.
- [38] In her evidence, Ms. Hofmann took issue with the accuracy of the Second Appraisal. She suggested the appraised value was inflated due to a "COVID bubble", and referenced hearing on the news that prices have sky-rocketed. She also thought it would cost more than the Second Appraisal estimated to fix the deficiencies noted.

[39] Ms. Hofmann's counsel did not press these concerns in final argument. This was sensible, as Ms. Hofmann had no evidence to support her expressed concerns. The Second Appraisal is the best and indeed the only evidence before the Court with respect to the current value of the family home. Of course, the value of the home may change in the future - that is the nature of the real estate market. But I accept the Second Appraisal's valuation of the house at \$790,000.00 as of July 2021. I also accept the Second Appraisal's estimate, rough as it, of how much it would cost to fix the deficiencies and complete the finishing work on the family home.

[40] Section 87 of the Family Law Act, S.B.C. 2011, c. 25 (FLA) provides as follows:

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or
 - (ii) of the hearing before the court respecting the division of property and family debt.

[41] Unlike with respect to some other property, there is no dispute that the value of the family home should be determined as of the date of the trial. On the basis of the July 2021 appraisal, I find the fair market value of the family home at trial is \$790,000.00.

Mortgage

[42] I deal here with an issue raised by Ms. Hofmann with respect to whether the home was subject to a mortgage when they started living together. She relied upon an unsigned mortgage document, which she testified she found in the house sometime after the parties' separated. Ms. Hofmann had no knowledge of whether the home was in fact mortgaged.

[43] Mr. Miller testified that he was offered a line of credit by his financial institution in 2001. He accepted the line of credit, but never used it. There is no evidence that he ever did use the line of credit.

[44] When the home was transferred in 2009, the line of credit appeared as a mortgage that had been registered against the home on August 15, 2001. Mr. Miller's evidence was that he contacted the bank on a number of occasions to ask them to remove the mortgage, but it never happened as it was going to cost money to remove it.

[45] I accept Mr. Miller's evidence with respect to the mortgage. A mortgage was registered against the family home prior to Ms. Hofmann moving in, but it was never actually used. It continues to appear on title, but there has never been any money owing to the bank in respect of it.

Mr. Miller's excluded property claim

[46] Mr. Miller purchased the family home in 1989. At the time the parties started living together in January 2002, it was worth \$115,000.00. Mr. Miller claims this amount as excluded property. Ms. Hofmann disagrees, relying on the 2009 transfer of the house into both their names as joint tenants.

[47] Mr. Miller's exclusion claim for the home is based upon ss. 81, 84 and 85 of the FLA.

[48] Section 81 provides that both spouses are equally entitled to family property and responsible for family debt, as follows:

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

[49] Section 84 provides that family property is all real and personal property owned by one or both spouses at separation. It further provides that family property includes the increase in value of excluded property. The relevant parts of s. 84 are as follows:

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

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (2) Without limiting subsection (1), family property includes the following:
 - (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.

[50] Section 85 defines what is excluded property in the following terms:

85 (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;
- (b.1) gifts to a spouse from a third party;

- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
 - (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
 - (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
 - (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the 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.
- [51] As Mr. Miller acquired the family home prior to the parties' relationship, he claims that the equity in the home, as of January 2002, is excluded property. Set up against that claim by Ms. Hofmann is the transfer of the home into the names of both parties as joint tenants in 2009. It is to that issue that I now turn.

Effect of the 2009 transfer

- [52] In order to determine the legal effect of the 2009 transfer, it is necessary to consider the law related to the presumption of advancement as it applies in the context of gifts between spouses under the FLA.
- [53] The presumption of advancement is a common law evidentiary presumption that a gratuitous transfer to a spouse is presumed to be a gift: *Hopson v. Hannon*, 2020 BCSC 794 [Hopson] at para. 157. There has been a substantial amount of judicial consideration, and some disagreement, as to whether that presumption survived the enactment of the FLA. Fortunately, the Court of Appeal has clarified much that formerly was unclear, making it clear that the presumption of advancement has not been abolished by the FLA, and remains available to assist courts when they are unable to discern the transferor's intention.

- [54] In *V.J.F v. S.K.W.*, 2016 BCCA 186 [V.J.F.] Madam Justice Newbury reviewed the competing lines of authority at some length, and concluded:
- [74] With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a "complete code" that "descends as between the spouses" and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses.
- [75] I do not interpret the FLA as reversing the gift or requiring that it be ignored because of the spouses' separation. Nor do I agree that the FLA effectively 'prohibits' gifts between spouses, as Mr. F. suggested. (See para. 56.) Gifts between spouses can continue as they have through the ages. It would take much clearer wording to render them suddenly revocable or null or illegal
- [77] In the absence of a clear statement abolishing the presumption of advancement, I also conclude that it continues to apply under the FLA (although I would not necessarily refer to it as a "right" within the meaning of s. 104). Had the Legislature intended to abolish the presumption, it would have been an easy thing to so state, as other provinces have done. It would also be an easy matter to provide, or perhaps clarify, that the presumption applies to common law as well as formal marriages and even that it should apply to gifts from a wife to her husband, not just the reverse.
- [55] V.J.F. makes clear that the presumption of advancement continues to apply under the FLA, and that spouses are able to gift property to one another, thereby losing what would otherwise be a claim to excluded property.
- [56] While the presumption of advancement continues to apply, it should not, however, be over-emphasized: *Hopson* at para. 157. The intention of the transferring spouse is key. As stated by Madam Justice Griffin in *Venables v. Venables*, 2019 BCCA 281 [Venables]:
- [95] 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.
- [57] Only if the court cannot determine the actual intention of the transferring party is it necessary to resort to the presumption of advancement. As explained by Mr. Justice Savage in *Namdarpour v. Vahman*, 2019 BCCA 153:
- [40] These decisions emphasize that evidentiary presumptions operate only where the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer. In my view, the following principles can be discerned from the case law: (1) a conclusion

about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those circumstances include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.

- [58] While traditionally, the presumption of advancement only applied to gifts between married spouses, and between parents and children, more recent case law has favoured the view that it also applies to common law relationships: *Lawrence v. Mulder*, 2015 BCSC 2223, at paras. 65-75 [Lawrence]. I agree with the view expressed by Mr. Justice Steeves at para. 75 of *Lawrence* that the presumption does apply in common law relationships. Like him, I find persuasive the statement from *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at p. 413, cited at para. 74 of *Lawrence*, that "there would be something archaic in withholding the presumption when parties live together without being married".
- [59] Can Mr. Miller's actual intention at the time of the transfer be discerned? Mr. Miller's direct evidence was that Ms. Hofmann was unhappy about the fact he owned the family home and that she was not on title. He said that, in a relationship, you try to make the other person happy. They did three things at the same time: he took his money out of his separate account and deposited it in their joint account, and they went to a lawyer, who assisted with putting Ms. Hofmann on title, and preparing wills for estate planning purposes. When asked what his intention was, Mr. Miller said it was to try to make Ms. Hofmann happy and a little more stable, as she was quite mad at the time. He also testified that he thought she would get it anyway, so it was not a big deal, and that it was also a "letting go". Mr. Miller testified that, after taking these steps, that issue was off the table, and he thought Ms. Hofmann felt more empowered, and was no longer mad at him for hiding a bank account. It helped the relationship in the long term.
- [60] Mr. Miller was not cross-examined about this evidence.
- [61] For her part, Ms. Hofmann testified that that she felt uncomfortable being financially dependent on Mr. Miller, and always having to ask him for money, which she felt created a big power imbalance between them. She wanted to make things more solid and equal. They went to counselling in 2009 to discuss her concerns.
- [62] As a result, Mr. Miller agreed to put his income directly into their joint account. In November 2009 he also transferred the family home into both of their names as joint tenants. According to Ms. Hofmann, there was no discussion or agreement between them about the existing equity in the home. Both parties also executed wills, under which the other was their beneficiary.

- [63] Ms. Hofmann was cross-examined on this issue. She testified that the purpose of the wills was estate planning for the parties' children. It was put to her that Mr. Miller complied with her request to transfer the home, not to give her a gift, but to appease her demand. Ms. Hofmann disagreed that it was a demand. She referred to having two small children, doing a lot of work on the house, seeing other people get married, and wanting to solidify her sense of stability and equality in the relationship.
- [64] Mr. Miller submitted that the evidence showed that the transfer was not a gift freely given, but was a request or demand that was complied with. He submitted that it was for estate planning purposes.
- [65] On a review of all the evidence, I find that Mr. Miller's actual intention in transferring the home into the parties' joint names was to give a gift to Ms. Hofmann. The fact it was done at her request does not suggest that was not his intention. If Mr. Miller's submission on this point were to be accepted, it would mean that he was, in essence, engaging in a ruse, complying with Ms. Hofmann's "demand", but without actually intending to provide her with anything to ground the sense of stability and equality in the relationship she was clearly seeking. Mr. Miller's own evidence was that he thought Ms. Hofmann would get "it" anyway (which I take to be a reference to the home on dissolution of the relationship), that it was not a "big deal", and he was "letting go". All of that suggests to me that he knew and intended to give Ms. Hofmann a half-interest in the home, and that he did not intend to reserve to himself, as excluded property, the equity he had in the home at the time the parties started living together.
- [66] There was no evidence that there was, as referred to in Venables, an agreement that Mr. Miller's previous equity in the home would remain excluded property. I find that Mr. Miller intended to transfer the home, including the previous equity, into the parties' names as joint tenants, and that this was a gift to Ms. Hofmann.
- [67] It is therefore not necessary for me to resort to the presumption of advancement. But in the alternative, if the evidence were insufficient to determine Mr. Miller's actual intention, I would apply the presumption of advancement and arrive at the same result.
- [68] I therefore conclude that the equity existing in the family home at the time the parties started living together is not Mr. Miller's excluded property. The entire value of the family home is family property. As I have already indicated, I find that the family home is to be valued at \$790,000.00, presumptively to be divided equally, subject to Ms. Hofmann's request for an unequal division of property, which I deal with at the end of these reasons.

Other excluded property claims

- [69] Both parties claimed certain funds as excluded property. I have already set out the relevant statutory provisions in considering the family home. I deal with the parties' other excluded property claims in this section of my decision.

- [70] In considering these claims, it is necessary to determine if the funds claimed are traceable to what once would have been excluded property. In approaching this question, I find the following passage from Mr. Justice Wilson's decision in *Liapis v. Keshaw*, 2021 BCSC 502, to be of assistance:
- [253] Whether an exclusion can be traced into a subsequently acquired asset, the party asserting the exclusion has the burden of proving that the subsequent property was derived from the excluded property on a balance of probabilities: *Shih* at para. 42.
- [254] In some cases, the process is straightforward. An excluded asset is sold and a new one is purchased in its stead. It is easy to identify, much like adding a box to a shelf. However, in some cases, it is not so easy and straightforward. This is particularly so in the case of bank accounts, such as is the case here. When an asset that includes both family property and excluded property is sold and the proceeds deposited into an existing account that itself contains funds that may or may not be excluded, the question of determining which portions are excluded property and which are family property is difficult because it is more like adding water to a pool than putting a box on the shelf.
- [71] Some of the excluded property claims in this case more resemble adding water to a pool than putting a box on the shelf. In each case, the court must determine if the party claiming the exclusion has met their burden of showing the property claimed was derived from excluded property. Overall, as stated by Madam Justice Dillon in *C.M. v. N.L.*, 2020 BCSC 3, at para. 174, "the object of the tracing exercise is to balance ease, clarity and simplicity with fairness." The party seeking exclusion must prove their claim with clear and cogent evidence, but the exercise should not be overly complicated or burdensome.
- [72] I start by providing an overview of the parties' bank accounts and other financial assets.

Overview of bank accounts

- [73] The parties had an array of joint and separate bank accounts. In this section I provide an overview of their bank accounts, and the parties' positions with respect to each one.
- [74] The parties disagree about the relevant date for the purposes of dividing their financial assets. Depending on the account, Ms. Hofmann says it should either be the date of separation at the beginning of June 2017 or the date of trial. Mr. Miller generally says it should be the end of August 2017, when he says the parties separated their financial matters or the date of trial. I address this issue later as necessary in dealing with each account.

Mr. Miller's accounts

Tangerine

- [75] Mr. Miller held a Tangerine account with a client number ending in 6440. He had a savings sub-account with a balance of \$3,254.58 at separation, and \$289.40 at time of trial. Ms. Hofmann says this is family property, and should be divided at separation. Mr. Miller agrees the Tangerine saving account is family property. Generally, Mr. Miller argues that most bank accounts should be divided as of the end of August 2017, when they separated their finances, but a statement as of that date does not appear to be in evidence.
- [76] Mr. Miller also had an RSP sub-account with a balance of \$54,446.80 at separation and \$52,276.73 at trial. He also had a TFSA sub-account with a balance of \$3,947.52 at separation and \$4,080.23 at trial.
- [77] Ms. Hofmann submits that the latter two Tangerine accounts are family property that should be divided as at trial. The basis for her different position with respect to the savings and other two Tangerine accounts is that she says she should have had access to her share of the savings account since separation to do with as she pleased, while she is entitled to the increase in value of the other two investment accounts since separation.
- [78] Mr. Miller says that both the Tangerine RRSP and the TFSA are excluded property, as they are traceable to pre-relationship non-registered savings
- [79] Mr. Miller also held a Tangerine account jointly with his mother with a client number ending in 7250. It had a balance of \$101,073.37 in April 2017, and \$104,720.58 on August 12, 2021.
- [80] Mr. Miller testified his mother gave him \$100,000.00 in 2015, and that the funds in this account are from that gift and that he never withdrew any funds from that account. Mr. Miller submits that the \$100,000.00 gift from his mother is excluded property, and that Ms. Hofmann has a claim only to the increase in its value.
- [81] Ms. Hofmann says this account should be divided at August 12, 2021, or in the alternative, that the increase in the account should be divided as of that date. Ms. Hofmann also submits that, if this gift is excluded property, it should be taken into account in determining whether it is appropriate to divide the parties' assets unequally.

NDCU

- [82] Mr. Miller held an account with the Nelson and District Credit Union ("NDCU"), with an account number ending in 7613. His shares sub-account had a \$0 balance at separation, as did his RSP Variable savings sub-account. His RSP Bond Buster sub-account had a value of \$58,499.47 at separation. At trial, the shares and RSP Variable sub-accounts continued to have a \$0 balance. The RSP Bond Buster sub-account had a balance of \$60,632.45 at trial. Mr. Miller had also opened sub-accounts in Harlan's and Hazel's names: Harlan's had a balance of \$15,761.83 and Hazel's had a balance of \$15,763.84 at trial. The children's accounts are not family property and are not in issue.

- [83] Ms. Hofmann's position is that Mr. Miller's NDCU RSP Bond Buster sub-account is family property which should be divided as at trial.
- [84] Mr. Miller's position is that the funds in his NDCU RSP Bond Buster sub-account are excluded property which find their origin in RRSPs he held prior to the parties living together. I will explore further below the history of these and Mr. Miller's other RRSP funds.

RBC

- [85] Mr. Miller has a number of RBC accounts. His RBC US dollar account ending in 5293 did not exist at time of separation; at trial, it had a balance of \$14,552.51. Mr. Miller testified that he had used this account to pay for some costs related to his father's estate.
- [86] He also has an RBC Canadian dollar account ending in 7560. This account was originally held jointly with his father, John Miller. At separation, this account had a balance of \$11,629.41, and \$13,467.01 at the end of August 2017. The most recent statement in evidence for this account is dated February 17, 2021, which shows a balance of \$5,641.92. Ms. Hofmann submits Mr. Miller used this account regularly for day-to-day expenses during the relationship, and that this account should be divided at time of separation. Mr. Miller agrees this account is family property, and says it should be divided, less excluded funds Mr. Miller received in relation to his father's estate, as of August 2017. I return to the issue of the funds from Mr. Miller's father's estate below.
- [87] Mr. Miller also has an RBC Canadian dollar account ending in 5995. The first statement in evidence for this account is May 2018, and shows a balance of \$20.00. The most recent statement is dated February 17, 2021, and shows a balance of \$24,765.57. Ms. Hofmann does not make any claim to the funds in this account, but submits it is relevant to Mr. Miller's occupational rent claim, which I deal with separately.

Ms. Hofmann's accounts

- [88] All of Ms. Hofmann's accounts are with NDCU. Her individual accounts are sub-accounts of the joint member account ending in 3053, which I discuss below.
- [89] At separation, Ms. Hofmann had two NDCU sub-accounts for Harlan and two accounts for Hazel. Save for Mr. Miller's submission that these accounts should be put into his name because the original source of the funds was his mother, these accounts are not in issue as it is agreed that they are not family property. I take this opportunity to note that there is no evidence Ms. Hofmann and the children are managing their accounts in anything other than a responsible fashion. It is not necessary for them to be put into Mr. Miller's name, and I decline to make such an order.
- [90] Ms. Hofmann's only individual savings sub-account at separation ended in 7987. It had a balance of \$9,012.39 at separation and \$10,024.00 at the end of August 2017. It is Ms. Hofmann's position that the funds in her NDCU savings account were the product of a

\$10,000.00 gift to her from her mother, and as such are excluded property. Mr. Miller disagrees, and submits that the original \$10,000.00 gift was put into the parties' joint account and spent during the relationship and no longer exists. He says her account is family property, and should be divided as of the end of August 2017. I will return to this issue below.

- [91] The most recent statements for Ms. Hofmann's accounts are dated February 2021. The account ending 7987 had a balance of \$1,016.55 at that date. Ms. Hofmann opened a new account post-separation, ending in 2745. It had a balance of \$25,731.66 in February 2021. Her August 13, 2021 F8 Financial Statement showed a balance in this account of \$29,329.65. Ms. Hofmann's evidence was that this amount was the result of funds being transferred from the account ending 7987 and CERB and CRB payments received by her. The four accounts for the children continued to exist, and there were three additional locked-in accounts for the children, into which the majority of the funds in their other accounts had been moved. Ms. Hofmann also had a shares sub-account with a balance of \$35.24.

Joint account

- [92] At time of separation, the parties had a joint account with NDCU ending in 3053. It was a sub-account of Ms. Hofmann's NDCU account. At separation, it had a balance of \$1,637.31. It no longer exists, having been closed post-separation. I will return to a closer examination of this account later, as the movement of funds in and out of it, both pre and post-separation, is important in considering Ms. Hofmann's claim to retroactive spousal and child support, and retroactive s. 7 expenses.

Gift from Ms. Hofmann's mother

- [93] Ms. Hofmann testified that her mother gave her a gift of \$10,000.00 in June 2013. She was pretty sure she opened up her NDCU sub-account to put the \$10,000.00 into. She withdrew those funds from her sub-account and deposited them into the parties' joint NDCU sub-account on August 21, 2013. She testified that the \$10,000.00 was a gift to her alone from her mother, who wanted her to use it for eventual retraining or upgrading when the children were older. Ms. Hofmann testified that Mr. Miller did not want her to have this money separate, so she put it in their joint account at his request. In essence, her position was that the \$10,000.00 would get drawn upon for family expenses when the joint account was low, but that as soon as she could, she would return it to her account. She said that she kept trying to save this money in her account because she was concerned that when the time came for retraining there would be no money for it because Mr. Miller would say no.
- [94] It was put to Ms. Hofmann in cross-examination that those funds were used by the parties and no longer existed. She disagreed. It was Ms. Hofmann's testimony that she kept putting the \$10,000.00 back into her own account.

- [95] I find that Ms. Hofmann has not met her burden of establishing that the \$10,000.00 given to her by her mother is excluded property. I accept that it was her hope to use the funds given to her by her mother for retraining. But the fact is that they were deposited into the parties' joint account in August 2013. The parties' bank accounts do not show that she was ever able to return and maintain those funds to her individual account. The money from Ms. Hofmann's mother was used for family expenses.
- [96] I therefore accept Mr. Miller's position that the funds in Ms. Hofmann's individual NDCU account are family property. I must decide the division date for this account. There was \$9,012.39 in this account at separation and \$10,024.00 at the end of August. Given that it took some time for the parties to entirely disentangle their finances, any date will be somewhat arbitrary. I find that it is more appropriate to use the date of separation for this and all other accounts that the parties used for day-to-day family finances, as it provides more certainty than the end of August. Ms. Hofmann's individual NDCU account is therefore to be divided as of the date of separation, when it had a balance of \$9,012.39.
- [97] Presumptively, this and all other family property is to be divided equally. Mr. Hofmann submits that there should be an unequal division of family property, which I deal with below.

Gift from Mr. Miller's mother

- [98] I accept that Mr. Miller has met his burden of establishing that the \$100,000.00 given to him by his mother and held in a joint account with her, ending in 7250, is excluded property. The account is in both his name and his mother's. I accept his evidence that she gave the funds to him when she sold her condo and gave each of her three children \$100,000.00 out of the proceeds. He never withdrew any funds from that account and did not intermingle the funds with family funds.
- [99] With respect to this and other property that the parties did not use for day-to-day expenses, I find that date of trial is the appropriate valuation date. The balance as of August 12, 2021 was \$104,755.59. Presumptively, Ms. Hofmann is entitled to half the increase in value to time of trial, which is \$4,755.59. One-half of \$4,755.59 is \$2,377.80. I deal separately with Ms. Hofmann's submission that she should be entitled to an unequal division of family property, and the significance of this account to that analysis.

\$7,000 USD from Mr. Miller's father's estate

- [100] Mr. Miller received \$7,000.00 USD from his father's estate in January 2017. A significant amount of time in this trial was spent dealing with evidence relating to this payment, the transfer of funds relating to it between the parties' accounts, and miscommunications between them about it. At the end of day, it is not necessary to consider this evidence in detail, as Ms. Hofmann ultimately appeared to agree it is excluded property. In my view, it clearly is excluded property.

- [101] As this money was dealt with by the parties, various equivalents in Canadian dollars were provided. I proceed on the basis of the \$8,939.07 cheque deposited by Mr. Miller in August 2017.
- [102] Mr. Miller submits this amount should be deducted from his RBC Canadian dollar account, ending in 7560, which the parties agree is family property. This account was originally held jointly with his father, John Miller. It was used by Mr. Miller for day-to-day family expenses. As at separation, this account had a balance of \$11,629.41, and \$13,467.01 at the end of August 2017. The most recent statement in evidence for this account is dated February 17, 2021, which shows a balance of \$5,641.92. Mr. Miller says this account should be valued as of August 2017. For the reasons I already gave in relation to Ms. Hofmann's NDCU account, I find that the date of separation is the appropriate date. I therefore deduct \$8,939.07 from \$11,629.41 to arrive at \$2,690.34, which presumptively should be divided equally between the parties.

Mr. Miller's RRSPs

- [103] Mr. Miller holds a number of RRSPs, all of which he claims are excluded property.
- [104] When the parties began living together, Mr. Miller had registered accounts with Investor's Edge that had a combined value of \$67,469.76. He also had registered accounts with CIBC that had a value at that time of \$9,022.20. Mr. Miller claims that these funds continue to exist today and always remained in registered accounts in his sole name. On this basis he claims \$76,491.96 as excluded property.
- [105] The RRSP funds have not remained static since 2002. Mr. Miller testified that in 2004 he transferred \$34,322.04 from the Investor's Edge accounts to an account with ING, ending in 838. Bank records show that this amount was transferred in March 2004. Mr. Miller testified that, after this transfer, \$36,616.00 remained in his Investor's Edge accounts. Those funds remained there until February 2009, when he deposited \$49,548.52 into an RRSP with NDCU.
- [106] Also in March 2004, Mr. Miller deposited the funds he had had in CIBC, which at that time amounted to \$8,142.00, into the ING account.
- [107] The ING accounts continue to exist, although the institution changed its name to Tangerine in the intervening period.
- [108] The most recent statements in evidence show that, as of August 31, 2021, Mr. Miller had a registered account with NDCU with a balance of \$60,632.45, and registered account with Tangerine with a value of \$56,276.73.

[109] I am satisfied that Mr. Miller has shown that the funds in these two accounts are traceable to the funds he had in registered accounts at the time the parties started living together. The total excluded value is \$76,491.00, to which Mr. Miller is entitled. The current value is \$116,908.00. The increase in value is \$40,417.00, which is to be divided between the parties, presumptively on an equal basis.

Mr. Miller's other savings

[110] Mr. Miller also makes an excluded property claim for funds in non-registered savings accounts. Mr. Miller did not introduce any bank statements to show the amount of funds in these accounts prior to the parties living together. From a June 2002 CIBC statement, taken together with a March 2002 ING statement, it would appear he transferred \$10,000.00 from the former account into the latter account in April 2002. This resulted in a balance of \$10,548.64 in the ING savings account as of June 2002. Mr. Miller testified that he split these funds into two different ING accounts, one a tax-free savings account, ending in 675 (the TFSA account), and the other, a savings account, ending in 676.

[111] At separation, the TFSA had a balance of \$3,254.59, and the savings account had a balance of \$3,947.52. As of January 2021, the last available statements, the TFSA had a balance of \$4,077.84, and the savings account had a balance of \$289.26.

[112] Mr. Miller testified that he was forced to use the funds in the savings account for family expenses, and therefore does not claim an exclusion for that account. He does claim an exclusion for the TFSA in the amount of \$4,077.84.

[113] I am not satisfied that Mr. Miller has shown that the funds in the ING TFSA account are traceable to savings held by him pre-cohabitation. The documentary record is incomplete and insufficient to trace the funds. I therefore dismiss this claim for excluded property. Ms. Hoffman submits the savings account should be divided as of the date of separation, and the TFSA accounts as of trial. I agree with those dates.

Save On Points

[114] During the course of the parties' relationship, Ms. Hofmann collected points from Save On Foods. Some of these points were used during their relationship for a trip to Mexico.

[115] After he left the family home, Mr. Miller used some of these points to purchase a number of household items such as a duvet and a skillet. He used 178,000 points, with an estimated value of \$100.00 per 25,000 points, for a total estimated value of \$712.00.

[116] After Ms. Hofmann learned that Mr. Miller had used these points, she cashed in the remaining points for travel vouchers. The value of those vouchers was \$5,800.00. Ms. Hofmann testified that she had been saving the points for flights to and from the children's universities when the time came, and intended to use these vouchers for that purpose.

[117] Mr. Miller asserts a half-interest in the value of the vouchers less the value of the points he used. Given a total of \$5,800.00, less the value of the points he used, his half interest would amount to \$2,544.00. Ms. Hofmann made limited submissions on this point.

[118] On the evidence before me, I find that the travel vouchers are non-refundable. They are family property. Mr. Miller is entitled to one-half of the travel vouchers, less the value of the points he used. He is to receive travel vouchers with a value of \$2,544.00, or should Ms. Hofmann prefer, she may pay him that amount of money instead of the vouchers.

Spousal Support

Parties' incomes

[119] Each party submits the other should be imputed with a greater income than they have declared. The parties have the following declared and assessed income on their tax returns:

2015

2016

2017

2018

2019

2020

Hofmann

Not available

\$3,715

\$6,656

\$8,362

\$17,285

\$28,919

Miller

\$36,702

\$37,712

\$40,051

\$39,946

\$57,650

\$69,986

Ms. Hofmann

[120] Mr. Miller questions Ms. Hofmann's income in two ways. First, he submits that her available income is not accurately reflected in her tax returns. Second, he submits that she is capable of earning more than what she is currently earning. He submits that she should be imputed with a greater income than she has declared, perhaps equivalent to minimum wage, which he submits would be \$31,616.00 per year.

[121] Ms. Hofmann's 2016 income consisted of a \$1000.00 Creative Spark grant to do ceramics with children and some income from teaching ceramics. Her 2017 income was derived from another Creative Spark grant and ceramics teaching. Her 2018 income was almost entirely from ceramics teaching. Very late in 2018, Ms. Hofmann opened up her home bed and breakfast business, from which she received \$299.15 in gross income that year. Ms. Hofmann's income increased significantly in 2019, which is attributable to income from the bed and breakfast business in addition to continuing ceramics teaching. Her income increased again in 2020, which included CERB and CRB payments totalling \$17,000.00. Those payments will not continue indefinitely. Ms. Hofmann testified that she might need to repay those payments, but the evidence on that point was lacking. She testified that her ceramics teaching and bed and breakfast businesses are both increasing, except for COVID-19 related cancellations.

[122] Mr. Miller has calculated Ms. Hofmann's gross income, declared expenses and net income year over year, as follows:

Ceramics

Year

Gross Income

Expenses

Net Income

2017

\$10,785

\$2,502

\$8,283

2018

\$11,958

\$1,761 (or \$2,024)

\$10,197

2019

\$11,272

\$3,972

\$7,300

2020

\$16,321

\$6,695

\$9,626 (or \$10,584)

Bed and Breakfast

Year

Gross Income

Expenses

Net Income

(loss)

2018

\$299

\$4,641

(\$4,342)

2019

\$12,207

\$6,686

\$5,521

2020

\$10,460

\$3,128

\$7,332

- [123] I accept that those figures are an accurate reflection of the source documents provided by Ms. Hofmann.
- [124] Mr. Miller submits that Ms. Hofmann's book-keeping leaves a lot to be desired, that her expenses, particularly for the bed and breakfast, are excessive, and that she has manipulated her income on her sworn financial statements.
- [125] Ms. Hofmann is not an accountant or a book-keeper and her records are not perfect. I do not find that she has intentionally inflated her expenses or manipulated her income. Ms. Hofmann's business expenses have been fairly considerable in comparison to the income received from her home businesses. This was particularly true for the bed and breakfast, especially in the first couple of years. I accept that Ms. Hofmann would have had some start-up costs, but find it difficult to accept that all of the expenses she has claimed for the bed and breakfast are accurately attributable to it.
- [126] Mr. Miller questions whether Ms. Hofmann has made reasonable efforts to achieve self-sufficiency. Ms. Hofmann testified that in the wake of the separation she attempted to increase her income. She was interested in applying for the West Kootenays Teacher Education Program, which requires applicants to volunteer for 75 hours in the classroom, so she did the required volunteer hours. She applied for this program in 2018 and 2019, and her application was rejected on both occasions. She testified she was unable to complete the required prerequisite courses.
- [127] Ms. Hofmann introduced limited evidence of her job search efforts. She applied for a customer service position on January 9, 2018, which she did not receive. She testified that she lost the previous job applications she had made when her computer broke down and was repaired on December 15, 2017. She testified about approximately six applications she had made in the fall of 2017. She introduced an email exchange with a geoscientist, who lived down the street, in which she advised that she had separated and needed to find work. The only interview Ms. Hofmann received was with the Kootenay Country Store Co-op (the "Co-op") in September 2017 for a sales position. She was unsuccessful.
- [128] Ms. Hofmann has not applied for any jobs since January 2018. She testified it was really humiliating to apply for minimum wage jobs. She decided to focus on teaching in her studio and developing a new line of ceramics to get that business going, which is what she loves.
- [129] Ms. Hofmann's efforts to find paid employment since separation have been modest. However, she did apply for positions that likely paid minimum wage or close to it, and was unsuccessful in obtaining any interviews, except for the position at the Co-op, which she did not receive. Given the time Ms. Hofmann has been out of the paid workforce, I find she is likely to continue to have some difficulty obtaining a job. The experience on her resume is dated, and she did not present herself particularly well in the job search emails introduced into evidence. She would benefit from some job search coaching.

- [130] In her circumstances, I am unable to say that Ms. Hofmann has acted unreasonably in focussing her efforts on her ceramics and bed and breakfast businesses in preference to finding employment outside the home. Ceramics is her passion and what she knows best and has the most relevant and recent experience and reputation in. The bed and breakfast business is a sensible enterprise. Ms. Hofmann says both businesses are increasing, save for challenges presented by the COVID-19 pandemic, and her income has increased year over year.
- [131] I do have some concerns about Ms. Hofmann's inability to provide any sort of reliable estimate for how much time she has been devoting to either the bed and breakfast or ceramics business. I think it unlikely she has been working full-time hours between the two businesses combined. I find she could be devoting more time to increasing the profitability of her businesses, or to finding a part-time job to supplement her income from the businesses.
- [132] Taking all of the evidence into account, including the fact that the two businesses are doing better over time and are likely to continue to do so as the pandemic eases, and that Ms. Hofmann, despite the challenges she faces, could devote more time to those businesses or to finding supplemental sources of income, I consider it appropriate to impute an income of \$25,000.00 to her. This is roughly \$7,500.00 more than her reported 2019 income, but less than her reported 2020 income, which included \$17,000.00 in one-time CERB and CRB payments.

Mr. Miller

- [133] Ms. Hofmann submits that Mr. Miller should be imputed with a greater income than is reflected on his tax returns on the basis that he has received additional cash income. Mr. Miller denies that he continues to receive any additional cash income.
- [134] Mr. Miller began working for the Co-op as the building manager for in 2018. He earned \$9,123.10 from the Co-op in 2018.
- [135] A letter from the Co-op's human resources manager, dated March 15, 2021, states that Mr. Miller's base salary in 2020 was \$57,723.51. He worked 32 hours per week. In addition to his base salary, he received vacation pay, a cell phone benefit, a holiday bonus, a storewide employee bonus, a COVID-19 bonus and a banked hours-in-lieu bonus. The COVID-19 bonus was quite substantial at \$8,199.06, and the letter stated this was exceptional and would not repeat in years of normal operations.

- [136] Ms. Hofmann's evidence was that, during their relationship, Mr. Miller would sometimes get paid in cash for jobs. On one occasion, she recalled him giving her an envelope with \$1,200.00 in it, and telling her to make sure to take cash out of their joint account to spend so it would not look suspicious. She also remembered when Harlan was a baby finding cash in the sleeve of a record album. Shortly before they separated, she recalled a neighbour telling her that he had paid Mr. Miller \$500.00 for fixing their fireplace.
- [137] On the basis of this history, Ms. Hofmann submitted that Mr. Miller was likely continuing to earn additional cash money, which he was not declaring on his income taxes. This was the basis for her position that he should be imputed with a higher income.
- [138] I find that Ms. Hofmann has not established that since Mr. Miller began working for the Co-op in 2018 he has earned cash money from other jobs that he has not declared on his income taxes. Ms. Hofmann acknowledged in her evidence that she does not know if Mr. Miller is still doing any carpentry work on the side. The fact he occasionally was paid in cash and did not declare such income in the past, does not mean he is doing so now, or indeed had been doing so with any regularity in the past. The evidence before me does not support imputing Mr. Miller with any additional income on this basis.
- [139] Going forward, Mr. Miller is unlikely to continue to receive the substantial COVID-19 related bonus he received in 2020. There is no evidence whether he received a similar bonus in 2021. Subtracting it from his total 2020 income would result in a figure of \$61,786.94. Mr. Miller's income from the Co-op has increased each year, even disregarding the COVID-19 bonus. This is likely to continue. The letter from the Co-op Human Resources manager says he was working 32 hours a week. It is reasonable to think that the number of hours worked could increase. Taking all factors into account, I find that Mr. Miller's income for the purposes of calculating spousal support is \$69,986 per year.

Spousal support findings

- [140] I have imputed Ms. Hoffman with an income of \$25,000.00 and found Mr. Miller to have an income of \$69,986.00. They were in a common law relationship for 15 and a half years. At trial, they were 52 and 61 years of age, respectively.
- [141] Section 161 of the FLA states that the court must, in determining entitlement, consider the objectives of spousal support:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

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

[142] In determining the quantum and duration of spousal support, s. 162 states that the following must be considered:

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

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

[143] Ms. Hofmann asks the court to order the payment of a lump sum in lieu of monthly spousal support, which is permitted under s. 170(c). She relies on both compensatory and non-compensatory grounds.

[144] Mr. Miller does not challenge Ms. Hofmann's evidence that she played a larger role in caring for their children during the early years of their relationship, but submits that the nexus between her role and any economic disadvantage is tenuous. He also submits that any economic advantage bestowed on him by her efforts is questionable. Mr. Miller also submits that while both parties have suffered economically due to the breakdown in their relationship, he has borne the brunt of it. He also submits that Ms. Hofmann has not made appropriate or reasonable steps to become self-sufficient.

[145] In *Chutter v. Chutter*, 2008 BCCA 507, Madam Justice Rowles summarized the purposes of both compensatory and non-compensatory support at paras. 50-61. At para. 50 she wrote the following with respect to compensatory support:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise. The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success.

(internal citations omitted)

[146] With respect to non-compensatory support, Rowles J.A. wrote at para. 54:

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

(internal citations omitted)

[147] In my view, it is clear that Ms. Hofmann is entitled to spousal support on both grounds.

[148] The parties' relationship lasted for 15 and-a-half years.

[149] Ms. Hofmann is clearly in a financially disadvantaged position relative to Mr. Miller. The parties disagree about whether this is attributable to either their relationship or its breakdown or the financial consequences of the care of the parties' children.

[150] As I have discussed in dealing with the parties' property, Mr. Miller has significantly greater savings, resulting largely from a gift from his mother and pre-relationship RRSPs. That financial advantage is not attributable to the parties' relationship or child care responsibilities.

[151] Nonetheless, I find that Ms. Hofmann was financially disadvantaged by the parties' relationship and her child care responsibilities. This was a traditional relationship. Mr. Miller worked outside the home and financially provided for the family. His work, especially in the early years of their relationship, sometimes took him away from home for periods of time to do things like tree-planting. As he shifted his focus to home repairs, Mr. Miller was no longer away from home for weeks at a time, but he worked long hours and often on weekends. Ms. Hofmann was the primary care-giver for the parties' children and the home-maker. She did earn some income from her pottery studio, but it was minimal during the parties' relationship. She provided Mr. Miller with some assistance on home renovations, although Mr. Miller was clearly the person primarily responsible for them.

[152] Ms. Hofmann's work caring for the parties' children and home enabled Mr. Miller to work outside the home and provide for the family. Ms. Hofmann had had aspirations to return to university to obtain her Master's degree, but this was impossible in light of where the parties lived and her child and home responsibilities.

- [153] At present, Ms. Hofmann has a relatively minimal income. She is making efforts, as I have already outlined, to build her home-based businesses and increase her income. Her extended time out of the paid workforce has presented challenges for her in obtaining a job. She is not economically self-sufficient at present, but is endeavouring to become so. It will be difficult for her to do so.
- [154] Mr. Miller, on the other hand, was able to move away from his home repair business and obtain a good paying stable management position at the Co-op. The apparent ease with which he did so contrasts starkly with the fact the only interview Ms. Hofmann was able to obtain was for a sales position with the Co-op, and she was not offered a position.
- [155] To this point, neither party has experienced significant economic hardship as a result of the breakdown of their relationship. Ms. Hofmann has been able to remain in the family home, which fortunately is mortgage-free. Mr. Miller has had to obtain rental accommodation, but has had no difficulty in doing so, and is able to share expenses with his new partner. He has the advantage of holding substantial savings, and the income from his new job. He has also received some further financial assistance from his mother. I am unable to accept his submission that he has suffered the brunt of the financial consequences of the breakdown of the relationship.
- [156] Once this decision is rendered, things will change substantially for Ms. Hofmann. If she is to buy Mr. Miller out of the family home, she will have to obtain a mortgage to finance the house. This will increase her expenses substantially. If she is unable to obtain financing, and the house has to be sold, she will have to either buy a home or obtain rental accommodation for her and Hazel, which would also increase her expenses substantially. In the latter scenario, she would also likely be unable to continue either of her home-based businesses, and will be forced to obtain outside employment to earn an income. On either scenario, she will suffer serious economic disadvantage as a result of the breakdown of the relationship. She will also be without access to the retirement income Mr. Miller will have as a result of his RRSPs, income which they would have both benefitted from had they stayed together, despite the fact, as I have found, that the RRSPs themselves are excluded property.
- [157] This was a family of relatively modest income, but they were able to live a comfortable life together. They did so for some 15 and-one-half years. Mr. Miller will be able to continue living a comfortable life in future. Ms. Hofmann's prospects of doing so are far more precarious.
- [158] For all of the reasons I conclude that Ms. Hofmann is entitled to spousal support on both compensatory and non-compensatory grounds, and in particular, I find that she has a strong compensatory claim.

- [159] Given the parties' incomes, and the \$665.00 child support the parties have agreed to, the Spousal Support Advisory Guidelines provide for a 'with child support' formula of \$0 per month at the low end, \$132 at the mid range, and \$390 at the high end, with a minimum duration of 7.75 years and a maximum of 15.5 years from the date of separation. Calculated as a lump sum, the range goes from \$0 to \$15,806 to \$43,519. These figures assume a spousal support duration of 11 years, 8 months.
- [160] Ms. Hofmann seeks to have spousal support paid as a lump sum in order to use the funds as part of her hoped for buyout of Mr. Miller's share of the family home. In *Parton v. Parton*, 2018 BCCA 273 [Parton] at paras. 47-48, Madam Justice Dickson discussed the principles to be applied in considering whether to order lump sum spousal support. A lump sum award should not be made in the guise of support for the purpose of redistributing assets. In considering such an award, the court must weigh its advantages and disadvantages within the context of the specific case.
- [161] I am persuaded that a lump sum award is appropriate in this case, particularly in light of the time and resources Ms. Hofmann has put into developing her home-based businesses. Those businesses provide Ms. Hofmann with her best opportunity to achieve economic self-sufficiency and to provide for herself in retirement. If she is to be able to pursue these endeavours, she needs access to capital now. Further, Mr. Miller has access to the capital to pay a lump sum award, but he may not be able to continue to pay periodic spousal support in the future, should he decide to retire. Given the strength of Ms. Hofmann's spousal support claim, I consider it appropriate to order a lump sum spousal support payment of \$43,500.00. This amount is inclusive of any claim for retroactive spousal.

Retroactive child support and s. 7 expenses

- [162] The parties have agreed that, on the basis of his \$69,986.00 annual income, Mr. Miller will pay Ms. Hofmann \$665.00 per month in child support for Hazel starting September 2021. They have also agreed that they will share their income tax returns by June 30th of each year, and their Notices of Assessment as soon as they are received from CRA, and child support will be determined going forward on the basis of that information. They have further agreed that future s. 7 expenses will be shared in proportion to their incomes. They have also agreed to the division of certain chattels. Those orders will be made by consent.
- [163] Ms. Hofmann seeks retroactive child support from the date of separation to the end of 2018. Mr. Miller began paying \$900.00 per month in child support in January 2019. A consent order was made at a Judicial Case Conference on July 11, 2019 under which Mr. Miller was ordered to pay \$810.00 per month in child support commencing August 1, 2019. Mr. Miller has complied with that order.
- [164] Ms. Hofmann also seeks s. 7 expenses from the date of separation to trial.

- [165] Mr. Miller opposes both types of retroactive awards. In support of this position, Mr. Miller says that he contributed significantly to household expenses and covering family debt since separation, and that his contributions were in excess of his obligations.
- [166] Neither party made any submissions on the legal principles applicable to retroactive child support. Those principles were summarized by Justice Fleming in *Delaunier v. Massicotte*, 2018 BCSC 1857 [Delaunier], at para. 105, where she wrote:
- [105] A retroactive award pursuant to s. 170(b) is discretionary. The court considers holistically the factors identified in *D.B.S. v. S.R.G.*, 2006 SCC 37. Those factors include the delay in applying for child support, the payor parent's conduct, the children's circumstances and any hardship caused by a retroactive award.
- [167] None of those factors suggest that, in the present case, the court ought not to make a retroactive award for child support. I will consider the claims for retroactive child support and retroactive s. 7 expenses on the basis of the evidence presented by both parties.

2017

- [168] Ms. Hofmann submits that, based on his income of \$40,051.00 in 2017, Mr. Miller should have paid \$636.00 in child support per month for June-December 2017, for a total of \$4,452.00 owing for that year.
- [169] In terms of s. 7 expenses, Ms. Hofmann submits that on their basis of their respective incomes, Mr. Miller should have been paying 83% and Ms. Hofmann 17% in 2017. She says she paid \$356.62 and Mr. Miller paid \$820.00, for a total of \$1,176.52, meaning that he would owe her \$156.52 for 2017.
- [170] Mr. Miller accepts that child support would have been payable in the amount claimed by Ms. Hofmann, but says that his various contributions to family expenses in 2017 exceed both that and any spousal support that would have been payable. He disputes whether all of the expenses claimed by Mr. Hofmann actually qualify as s. 7 expenses. He also submits that he incurred a total of \$930.00 in s. 7 expenses, \$110.00 more than Ms. Hofmann credits him with.
- [171] Both parties made extensive submissions with respect to expenses incurred and financial contributions made in 2017. The parties separated in June 2017, but Mr. Miller remained living in the family home until he moved out in January 2018. I agree with Mr. Miller that the parties made no meaningful efforts to separate their finances until September 2017. Further, even after that date, their finances remained somewhat intertwined, with Mr. Miller continuing to make some contributions to family expenses, and receiving the benefits of living in the family home, until he moved out.
- [172] In my view, in these circumstances, it is unrealistic to attempt to parse out the parties' finances in 2017 with precision. I will comment on a few specific issues raised in the parties' submissions with respect to this period.

- [173] First, Mr. Miller had a Scotiabank credit card and Ms. Hofmann had a subsidiary card on that account. Mr. Miller cancelled Ms. Hofmann's subsidiary card in or about September 2017. Prior to that, both parties used their Scotiabank cards for household expenses, Ms. Hofmann to a greater extent. Mr. Miller also used his card for business expenses. The September 18, 2017 statement showed a number of expenses on Ms. Hoffman's card, including \$924.00 to ICBC for Ms. Hofmann's car insurance, and total debits of \$1,669.26. There was a dispute between the parties with respect to who paid for the debits on Ms. Hofmann's card. I accept Mr. Miller's evidence that he paid the September 18, 2017 statement, in full, including Ms. Hofmann's portion, from his RBC account on October 10, 2017. This is one example of Mr. Miller continuing to contribute to household expenses in the latter part of 2017.
- [174] Second, Mr. Miller received the \$7,000 USD, as previously mentioned, from New York Life in relation to his father's estate, in January 2017. The parties ultimately agreed, and I accept, that these funds are excluded property of Mr. Miller. But they were nonetheless the subject of a substantial amount of evidence in this trial, and it is important to attempt to trace them through the parties' accounts as they relate to the parties' finances more generally in 2017. Ms. Hofmann, as part of her regular banking on behalf of the family, mistakenly deposited the cheque in the parties' joint NDCU account on January 20, 2017. At the time, Mr. Miller did not know the cheque had been received. Their NDCU statement indicates that the funds (\$9,353.41 CDN) were returned to New York Life on January 30, 2017, although both parties were unaware of it at the time.
- [175] At some point thereafter, Mr. Miller learned about the cheque having been deposited. He was angry with Ms. Hofmann, and they had an argument about the matter. On May 18, 2017, Mr. Miller, unaware the funds had already been withdrawn and returned to New York Life, wrote a cheque for \$9,300.00 on the parties' joint account, intending to recover the funds. In August 2017, Mr. Miller received a replacement cheque in the amount of \$8,939.07 CDN, and deposited it into the parties' joint account on August 9, 2017. In doing so, he was correcting the error he had made in May 2017 in withdrawing the funds. It was not "new" money, but a replenishment of the parties' savings.
- [176] Mr. Miller sought to rely on the fact he deposited approximately \$11,000.00 into the joint account in August 2017, which he testified was more than sufficient to cover the running of the household. It is true that Mr. Miller did deposit approximately \$11,000.00 into the joint account in August 2017, but nearly \$9,000.00 of that amount was paying back the amount he had taken out in error in May 2017.
- [177] Third, as of the end of August 2017, the parties' joint account had a balance of \$9,202.80. Mr. Miller told Ms. Hofmann at or around this time that he wanted to separate the family's finances. Thereafter, Mr. Miller did not make any deposits into the parties' joint account. Ms. Hofmann did make some deposits into it in September 2017. Ms. Hofmann testified that she became concerned Mr. Miller was draining their joint account, so on September 17, 2017 she withdrew \$11,780.00, almost the entire balance, and deposited it in her own

account. I have already held that the funds in the joint account were family property, to be valued and divided as of the date of separation, and thus have dealt with the consequences of Ms. Hofmann withdrawing these funds.

- [178] Considering the evidence as a whole, I conclude that no retroactive orders should be made for child support or for s. 7 expenses for that year. Mr. Miller did contribute to household expenses in various ways while he remained living in the family home.

2018

- [179] Ms. Hofmann submits that, based on his income of \$39,946.00 in 2018, Mr. Miller should have paid \$634.00 per month in child support. She accepts that he gave her \$3000.00 at her request in March 2018, which should be deducted from what he owes, leaving a total of \$4,608.00 owing for child support.
- [180] In 2018, Ms. Hofmann submits that Mr. Miller should have been paying 79% and she 21% of s. 7 expenses. She says she paid \$2,945.11 and Mr. Miller did not pay any. On this basis, Ms. Hoffman submits that Mr. Miller owes her \$2,326.64 for s. 7 expenses in 2018.
- [181] Mr. Miller points to the fact he paid various utility bills and property taxes for the family home in 2018 in support of his position that he does not owe any retroactive child support or other payments for that year. He also submits that he could not pay his income taxes in 2016 and 2017, and paid these off in 2018 in the amount of \$14,261.23, half of which should be credited to him as paying Ms. Hofmann's share of the income tax debt. In total, he submits that his contributions exceed the child and spousal support he would otherwise have been obliged to pay by \$7,864.62. The only s. 7 expense he claims is \$660.00 for guitar lessons for Harlan.
- [182] In my view, the property taxes on the family home should be considered and dealt with separately. Mr. Miller paid them in 2018. Ms. Hofmann paid them in 2019, 2020 and 2021. They were a substantial expense, necessary to preserve the family home. I have taken into account the fact that Ms. Hofmann paid the majority of the property taxes in considering Mr. Miller's claim for occupational rent below.
- [183] I view the plumbing bill incurred for a new hot water tank in 2018 in a similar light. This was an expense for the benefit of the family home, necessary to preserve it and its value. The total amount paid by Ms. Hofmann was \$2,602.49. I have also taken it into account in considering Mr. Miller's claim for occupational rent below.
- [184] So far as the utility bills Mr. Miller paid in 2018 are concerned, Ms. Hofmann also paid utility bills that year. The evidence does not disclose exactly how much each party paid for utilities for the family home. Mr. Miller was no longer living there in 2018, but he did maintain his shop there, and therefore would have obtained some benefit from the utilities. I say this notwithstanding his evidence that the shop was unusable because Ms. Hofmann put his things in it. Mr. Miller's possessions had to go somewhere, and if they were in his way in the shop, he could have moved them elsewhere.

- [185] Mr. Miller claims that he is entitled to credit for paying his 2016 and 2017 taxes in 2018, on the basis that they were family debts. I was provided no authorities that spoke to the question of whether an individual's personal taxes, interest on arrears and penalties are a family debt.
- [186] Family debt is defined in s. 86 of the FLA to include all financial obligations incurred by a spouse during the relationship and until separation, and after separation if incurred for the purpose of maintaining family property. This can include tax debts, as discussed in *J.D.G. v. J.J.V.*, 2016 BCSC 2389, at paras. 182 and 187, but only if they accrued prior to separation: *Schnedier v. Owers*, 2019 BCSC 528, at para. 272. Tax debts accrued post-separation are not family debts.
- [187] Case law suggests that income tax fines and penalties are treated differently. As stated in *Chang v. Chang*, 2020 BCSC 1783, para. 89:
- [189] There is authority for the proposition that it is improper to treat fines or penalties arising from a tax debt as family debt: *Gaita v. Gaita*, 2008 BCSC 1111 at para. 165. Concerning the division of family debt under the FLA, penalties payable in relation to a party's tax debt may go to the issue of fairness: *T.T. v. J.M.H.*, 2014 BCSC 451 at para. 106, citing *Gaita* at paras. 155, 158 and 160.
- [188] The documentary evidence introduced in support of this claim includes an RBC bank statement showing a \$10,000.00 withdrawal on April 25, 2018; Mr. Miller's CRA Notice of Assessment for 2016, which shows \$5,955.41 in taxes payable, total credits of \$10,000.00, and after various penalties and interest charges, a refund of \$2,422.16; and Mr. Miller's CRA Notice of Assessment for 2017, which shows \$6,999.64 taxes payable and a payment on filing of \$6,707.87. The latter is supported by a cancelled cheque in that amount dated June 11, 2018. As I understand his position, Mr. Miller says that he used the \$10,000.00 withdrawn from his RBC account to pay off his 2016 and 2017 taxes. I do not know how or when he says the additional \$4,261.23 owing was paid, other than that it was by him.
- [189] In my view, the evidence does not support taking Mr. Miller's tax and related payments into account in determining retroactive child support and s. 7 expenses for 2018. Amongst other things, there is no evidence about how much of the taxes, interest and penalties payable were attributable to pre-separation as opposed to post-separation income in 2017. Nor is there any evidence as to why Mr. Miller did not pay his 2016 taxes when they were due in 2017, and waited until, on his evidence, sometime after April 25, 2018 to pay them, particularly in light of the fact that Mr. Miller has independent savings he could have used to pay his taxes, thereby avoiding the penalties and interest. Consistent with the cases I have noted, it would, in these circumstances, be unfair to view fines, penalties and interest on income taxes as family debt.
- [190] In my view, Ms. Hofmann has established that Mr. Miller should pay retroactive child support of \$4,608.00 for 2018. I find that Ms. Hofmann paid \$2,835.37 in s. 7 expenses in 2018. In my view, the absence of some receipts is not fatal to her claim, but I have not

accepted the lice treatment and calculator claimed as they are not extraordinary expenses. Mr. Miller paid \$660.00 that year for guitar lessons for Harlan. The total expenses incurred were therefore \$3,495.37. Ms. Hofmann was responsible for 21% of those, or \$734.03, and Mr. Miller 79% or \$2,761.34. Mr. Miller owes Ms. Hofmann the difference between that and what each of them paid, amounting to \$2,101.34.

2019

[191] Mr. Miller began paying child support effective January 2019, so only s. 7 expenses are in issue for this year. In 2019, Ms. Hoffman submits that Mr. Miller should have paid 70% and she 30% of s. 7 expenses. She says that she paid \$4,930.00 for s. 7 expenses, and Mr. Miller paid \$750.00 and paid her an additional \$2,000.00 in contribution towards these expenses. She submits that Mr. Miller therefore owes her \$701.00 for s. 7 expenses in 2019. Mr. Miller disputes some of Ms. Hofmann's claimed expenses, and says he paid \$1,892.00 in s. 7 expenses in total. His submissions put the \$2,000.00 payment in the next year. I will consider it in 2019.

[192] I accept all s. 7 expenses claimed by both parties in 2019, with the exception of \$200.00 in school supplies claimed by Ms. Hofmann. This means that Ms. Hoffman paid \$4,730.00 and Mr. Miller paid \$1,892.00, for a total incurred of \$6,622.00. Ms. Hofmann's 30% comes to \$1,986.60 and Mr. Miller's 70% comes to \$4,435.40. Before the \$2,000.00 already paid by him, Mr. Miller owed Ms. Hofmann \$2,743.40 for 2019 s. 7 expenses. Deducting the \$2,000.00 already paid, Mr. Miller owes Ms. Hofmann \$743.40.

2020

[193] Once again, only s. 7 expenses are in issue for 2020. In 2020, Ms. Hoffman submits that Mr. Miller should have paid 83% and she 17% of s. 7 expenses. This calculation assumes Ms. Hoffman's CERB payments are excluded. If they are included, the percentages shift to 59% and 41%. I see no basis for excluding Ms. Hoffman's CERB benefits, and will therefore proceed on the basis of the latter percentages. Ms. Hoffman says she paid \$2,537.48 in s. 7 expenses in 2020. If the court accepts that Mr. Miller paid for a cell phone for Harlan for the whole year, then he paid \$564.00. On that basis, Ms. Hoffman says that Mr. Miller owes her \$843.11 for s. 7 expenses in 2020.

[194] Mr. Miller again disputes some of Ms. Hofmann's claimed expenses. He says that he paid \$360.00 for Harlan's cell phone and plan, and \$190.00 for both children's debate expenses. I have already dealt with his \$2,000.00 payment to Ms. Hofmann in 2019.

[195] I accept both parties' claimed expenses, with the exception of the school supplies claimed by Ms. Hofmann. This means that Ms. Hofmann paid \$2,426.30 and Mr. Miller paid \$550.00, for a total of \$2,976.30. At 41% and 59% respectively, that means that Ms. Hofmann should have paid \$1,220.28 and Mr. Miller should have paid \$1,756.02. Mr. Miller therefore owes Ms. Hofmann \$1,206.02 for 2020 s. 7 expenses.

2021

- [196] In 2021, Ms. Hoffman submits that (assuming her CERB benefits are included), Mr. Miller should have paid 59% and she 41% of s. 7 expenses. She says she incurred \$2,665.78 and accepts that her claim should be reduced to \$2,230.62 to reflect expenses incurred by Mr. Miller in relocating Harlan to university. She also acknowledges Mr. Miller e-transferred her \$1,000.00 and paid \$342.00 in monthly phone costs. In the end result, Ms. Hoffman says Mr. Miller owes her \$892.07 for s. 7 expenses in 2021.
- [197] Mr. Miller says that neither he nor Ms. Hofmann incurred any s. 7 expenses in 2021.
- [198] I find that some of Ms. Hofmann's claimed expenses in 2021 do not qualify as s. 7 expenses, in particular costs she incurred in driving Harlan to and from work and gas and van expenses. I deduct \$500.00 from her claim for those items. I therefore find that Mr. Miller owes Ms. Hofmann \$392.07 for s. 7 expenses in 2021.

Occupational Rent

- [199] Mr. Miller seeks occupational rent, and requests that this claim be considered in the property division analysis. He relies on the fact that Ms. Hofmann has occupied the family home exclusively since he moved out in January 2018. There is no mortgage to pay, and she has been required merely to cover property taxes and utilities. She also has used the family home to generate income from her home-based businesses.
- [200] Mr. Miller testified that he asked Ms. Hofmann for rent. On January 31, 2019, Ms. Hofmann wrote Mr. Miller an email about the children's expenses in which she stated she was "not in agreement with your statements concerning what is owed for taxes, rent etc. As well, all that type of financial stuff will be settled eventually and has no bearing on your obligation to be paying support in the meanwhile."
- [201] Mr. Miller seeks to offset the costs he incurred in paying rent elsewhere starting in September 2018, which he calculates at \$29,250.00 in total. He asks to be credited with this amount in the division of family property.
- [202] Ms. Hofmann opposes this claim. She submits that she stayed in the family home with the children, had limited financial means and that Mr. Miller was not paying proper child support or any spousal support. As a result, it would have been impossible for her to pay rent.
- [203] Mr. Justice McEwan helpfully summarized the principles applicable to a claim for occupational rent in *Piderman v. Piderman*, 2015 BCSC 475 at paras. 50-53:

[50] With those adjustments, the respondent's claim for occupation rent fails. While he was notionally kept out of his half of the enjoyment of the house, he made no suggestion of any such claim while the claimant occupied the house. In the aftermath of a marriage breakdown the accommodation of one or the other spouse in the family home, particularly while it remains a "home" to children (even as adults) is often a sensible way to mitigate the effects of the family break-up.

[51] In *Ross v. Ross*, 2013 BCSC 1716, Verhoeven J. cited *Casey v. Casey*, 2013 SKCA 58, on the principles pertinent to occupations rent:

[47] I observe that in other Canadian jurisdictions, the law does not focus upon the question of ouster, or of claims for expenses by the spouse remaining in occupation. The principles applicable in Saskatchewan were recently summarized in *Casey v. Casey*, 2013 SKCA 58, at para. 48:

From the jurisprudence the following principles may be drawn regarding the awarding of occupational rent on a matrimonial home:

1. Occupational rent is a remedy which may be utilized to obtain justice and equity in appropriate circumstances.
2. The remedy is exceptional and should be used cautiously.
3. The following factors, where relevant, are appropriately considered:
 - The conduct of both spouses, including failure to pay support, the circumstances under which the non-occupying spouse left the home, and if and when the non-occupying spouse moved for a sale of the home (Peltier at paras. 16-17; Wilgosh at paras. 99 and 109; Good at para. 90).
 - Where the children are residing and who is supporting them (Good at para. 90; Peltier at paras. 16-17; Wilgosh at para. 108).
 - If and when a demand for occupational rent was made (Wilgosh at paras. 100 and 106, Good at para. 90, and Peltier at para. 16).
 - Financial difficulty experienced by the non-occupying spouse caused by being deprived of the equity in the home (Peltier at paras. 16-17; Wilgosh at para. 106).
 - Who is paying for the expenses associated with the home. This includes who is paying the mortgage and other upkeep expenses (maintenance, insurance, taxes, etc.). If there is no mortgage, occupational rent may be needed to equalize accommodation expenses (Good at para. 90; Peltier at paras. 16-17; Wilgosh at paras. 105-106 and 108).
 - Whether the occupying spouse has increased or decreased the selling value of the property (Peltier at paras. 16-17).

- Any other competing claims in the litigation that may offset an award of occupational rent (Wilgosh at para. 108; Good at para. 92).

4. The remedy is a discretionary one requiring the balancing of the relevant factors to determine whether occupational rent is reasonable in the totality of the circumstances of the case.

[52] At para. 50 Verhoeven J. made the following observation:

[50] On the approach used by other jurisdictions, as I interpret it, the overriding question is whether occupational rent, as a discretionary remedy to be used cautiously, should be utilized in order to achieve justice and equity in all of the circumstances of the case. This approach appropriately places little if any emphasis on the question of fault or blame for the decision of one spouse or the other to leave the matrimonial residence.

[53] I think this is the proper way to approach occupation rent, that is, as a tool to achieve fairness. Were I to take a stricter approach, treating occupation rent as something akin to an entitlement, the outcome would, I think trigger other issues about fairness. I would think that, in general, claims for occupation rent ought not to be hoarded and advanced for the first time at trial. Failure to give notice of such a claim is apt to be interpreted, in the complex emotional aftermath of a marriage, as acquiescence, or a form of spousal or child support. I find that to be the case here. I dismiss the claim for occupation rent.

[204] The authorities make clear that occupational rent is an exceptional remedy, and is to be used cautiously. I have concluded that Mr. Miller has not established that occupational rent is necessary to achieve justice and equity in all of the circumstances of this case.

[205] Mr. Miller chose to move out of the family home, and decided when he would do so. He did ask Ms. Hofmann to pay rent in or about January 2019, but only amended his counterclaim on July 28, 2021 to seek occupational rent. I appreciate that Ms. Hofmann did not have to make mortgage payments, but as I have already indicated she was otherwise responsible for the upkeep, such as the plumbing bill, and the majority of the property taxes on the family home. She lived there with the children, which provided them with a stable home. Given her income, and the lack of any spousal support paid by Mr. Miller, or any child support until January 2019, it would have been impossible for her to pay the rent necessary to provide the children with anything approaching equivalent accommodation. The evidence does not establish that Mr. Miller has experienced financial hardship as a result of being unable to live in the family home.

[206] For these reasons, I deny the claim for occupational rent.

Unequal Division of Property

[207] Ms. Hofmann submits that the court should make an unequal division of family property in her favour. Mr. Miller opposes this request.

[208] As already set out, s. 81 of the FLA provides that each party has a right to an undivided half-interest in all family property as a tenant in common. Section 95 provides that the court may order an unequal division if it would be significantly unfair to order an equal division, in the following terms:

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

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [209] In considering this provision, the Court of Appeal stated in *Jaszczywska v. Kostanski*, 2016 BCCA 286 [*Jaszczywska*] at paras. 40-41:
- [40] Nonetheless, the scheme contemplates judicial discretion to depart from an equal division. That discretion is recognized in s. 81 and further articulated in s. 95. Section 95 defines both the test and the factors for a court to consider in exercising its discretion.
- [41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.
- [210] More recently, in *Storey v. Terry*, 2020 BCCA 30, the Court of Appeal referred to *Jaszczywska*, and stated at para. 24:
- [24] When faced with claims for unequal division of an asset of significant value based on alleged differences in contribution, a court must consider all of the provisions of Part 5 of the FLA. That is what the judge did here. She recognized that property and debt are presumptively to be divided equally. The values of the property and debt are to be determined as of the date of trial and the court can order unequal division only where it would be "significantly unfair" to divide property and debt unequally. She set out and applied the test for significant unfairness as explained in *Jaszczywska* at paras. 41-43. Any unfairness must be significant or weighty having regard to the factors set out in s. 95(2) of the FLA. In order for a trial judge to reapportion the family property or family debt, there must be "something objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszczywska* at para. 42.
- [211] As stated by Riley J. in *N.D.S. v. J.A.S.*, 2020 BCSC 1034 [NDS], at para. 77, under s. 95(3), "[i]f a spousal support order is contemplated, but the objectives in s. 161 of the FLA have not been met by that spousal support order, this may result in or contribute to a finding of significant unfairness so as to justify an unequal division of family property".

- [212] Has Ms. Hofmann established that equal division of the family property would be significantly unfair? In support of her position, she relies on ss. 95(2)(a), (c) and (i), and s. 95(3) of the FLA, and the analysis of the relevant provisions of the FLA in Delaurier and Parton.
- [213] I have already determined that Mr. Miller is to pay Ms. Hoffman \$43,500.00 as lump sum spousal support. In Parton, it is made clear at paras. 42 and 75 that a spouse may be entitled to both spousal support and reapportionment of assets.
- [214] In considering whether an unequal division should be ordered, I start, as Fleming J. did in Delaurier, with what an equal division would provide each party. I will therefore summarize the determinations I have already made with respect to family property, starting with the former family home. It is the parties' major asset, with a value of \$790,000.00. Divided equally, each party would be entitled to \$395,000.00.
- [215] Ms. Hofmann's NDCU individual account was \$9,012.39 at separation. Half of that is \$4,506.20.
- [216] The increase in value of the excluded gift to Mr. Miller from his mother to time of trial was \$4,755.59. Half that is \$2,377.80.
- [217] Mr. Miller's RBC account, less the \$8,939.07 from his father estate, was \$2,690.34 at separation. Half that is \$1,345.17.
- [218] The increase in value of Mr. Miller's excluded RRSPs at trial was \$40,417.00. Half that is \$20,208.50.
- [219] Mr. Miller's ING TFSA account was \$4,077.84 at trial. Half that is \$2,038.92.
- [220] Mr. Miller's ING savings account at separation was \$3,947.52. Half that is \$1,073.76.
- [221] An equal division of family property provides each party with \$422,500.35. This figure of course assumes the former family home is sold and that the parties each receive one-half its appraised value.
- [222] Considering s. 95(2)(a), the length of the parties' relationship, there is nothing unfair, let alone significantly unfair, about an equal division. The same is true under s. 95(2)(c), considering the spouse's contribution to the other's career.
- [223] Section 95(2)(i) leads me to a different conclusion. The evidence before me made clear that Mr. Miller exercised substantial financial control in the parties' relationship. He was effectively the sole money earner. In the early years of their relationship, Ms. Hofmann had to ask him for money in order to pay the family's bills. He kept his finances separate and apart from the family's finances, and ensured that Ms. Hofmann was not aware of the details of his finances. While he agreed to open a joint account with Ms. Hofmann in 2009, and thereafter deposited his earnings into that account, he continued to keep his RRSPs and other accounts separate from the family's. By doing so, he was able to ensure that his

significant assets beyond the house, that is his RRSPs and the \$100,000.00 gift from his mother, maintained their excluded status on the dissolution of the relationship.

- [224] At the same time, however, Mr. Miller refused to permit Ms. Hofmann to keep the \$10,000.00 gift from her mother separate, telling her to deposit it into their joint account, where it was used for family expenses, and lost its excluded character.
- [225] As a result, Ms. Hofmann is left with no independent savings, and in particular nothing she can look to in retirement, and Mr. Miller has fairly substantial savings. In my view, in the circumstances of this case, this leads to significant unfairness.
- [226] In addition, as in *Delaunier* at para. 176, s. 95(3) is also relevant in this case. Even with the \$43,400.00 lump sum spousal support payment I have ordered, I am of the view that the objectives of spousal support under s. 161 will not be met. An equal division fails to adequately recognize the economic advantages and disadvantages to the parties arising from their relationship and its breakdown, and fails to apportion between them the financial consequences of caring for their children. Mr. Miller has a substantially higher income, greater earning capacity, and greater assets than Ms. Hofmann. He is in a much better position than her to buy a home, should he wish to do so, and to provide for himself in retirement.
- [227] As in *Delaunier* at para. 178, without some reapportionment, Ms. Hofmann is unlikely to be able to remain in the former family home or purchase anything remotely comparable. Indeed, even with some reapportionment she may not be able to do so, although her chances of doing so, and with it, pursuing her home-based businesses, and achieving economic self-sufficiency, are certainly improved by an unequal division of family property.
- [228] I have considered what reapportionment is sufficient to address the significant unfairness I have found an equal division would result in. In *Delaunier*, Fleming J., at para. 179, ordered that the family property portion of the former family home be unequally divided, with the claimant receiving 60%. In *Bodine-Shah v. Shah*, 2014 BCCA 191 at paras. 50-60, the Court of Appeal upheld a decision which had reapportioned the former family home 100% to the respondent. At para. 52, the court noted that if this had been the only family asset, such an order might be clearly wrong after a 12-year marriage, and that a court would rarely reapportion family assets 100% after a marriage of that length. In *NDS*, Riley J. ordered that the proceeds from the sale of the family home were to be divided 75%/25%.
- [229] In my view, a more modest reapportionment like that ordered in *Delaunier* is appropriate in this case. I therefore order that Ms. Hofmann is entitled to 60% of the value of the former family home, and Mr. Miller 40%, resulting in her share being \$474,000 and his \$316,000.00 In my view, that is sufficient to remedy the significant unfairness that would arise under an equal division pursuant to ss. 95(2)(i) and 95(3).

Conclusion

[230] As I stated at the outset, Ms. Hofmann's chief goal in this litigation has been to stay in the former family home. She has 60 days from the date of this decision to buy out Mr. Miller. Should she be unwilling or unable to do so, there will be an order for the sale of the former family home.

[231] Counsel are at liberty following receipt of these reasons for judgment to arrange to speak to any matter arising from this decision, including, if necessary, the terms of the order for sale of the former family home, any arithmetical issues arising from my calculations, and costs, should they be unable to agree. Counsel are to contact Scheduling within 60 days to arrange a hearing to deal with any such issues.

"Lyster J."

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