

CANADA / JUDGMENT

Julka v. Wadhera

2025 BCSC 1396

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1396 Julka v. Wadhera

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Julka v. Wadhera,

2025 BCSC 1396

Date: 20250702

Docket: E66135

Registry: New Westminster

Between:

Anil Kumar Julka

Claimant

And

Sunita Wadhera

Respondent

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

P. Mann

Counsel for the Respondent:

M. Ossudallah

Place and Dates of Trial:

New Westminster, B.C.

June 9-13, 16-18, 2025

Place and Date of Judgment:

New Westminster, B.C.

July 2, 2025

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Introduction

- [1] THE COURT: The claimant in this family law case seeks a division of family assets. Nearly all of the assets said to be family assets are registered in the name of or are in the possession of the respondent.
- [2] There were two primary issues at trial:
- (a) A determination of the parties' separation date - the claimant says they separated in February 2022, while the respondent says they separated in July 2003; and
 - (b) Whether there should be an unequal division of assets pursuant to s. 95 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [3] The respondent advances a claim for unjust enrichment, which I understood to be advanced primarily in the alternative.

Facts

Background

- [4] The claimant, Mr. Julka, was born in Delhi, India in 1956. He is now 68 years old and retired. He grew up in a family of four children. His siblings remain in Delhi. His parents passed away in 1994 and 2007, respectively.
- [5] The respondent, Ms. Wadhera, was born in India in 1959. She is now 65 years old and retired. She is the youngest of 13 children. She moved to Canada with her family when she was 14 or 15 years old, initially living in Vancouver.
- [6] The respondent says that she does not recall what her father did other than that he worked in a government job. Her mother was a homemaker. She said that her siblings all obtained higher education, but she did not.

- [7] The claimant graduated from high school in 1974 and began working in his father's factory during the day, while studying for a commerce degree at night. When he graduated from college in 1978, he continued working for his father's factory. In about 1980, he began also working part-time at a wholesale liquor store in Delhi.
- [8] The respondent graduated from high school in 1978. She moved to Winnipeg with her father and two brothers. One of the two brothers was Ravinder Varma, who was about 12 years older than her. [The respondent was not sure why two of her siblings had a different surname.] In Winnipeg, she worked at an agricultural business established by Ravinder.
- [9] The parties' relationship was an "arranged marriage". With respect to that:
- (a) the claimant said that in about 1978, relatives that the parties had in common began inquiring of him whether he would be interested in moving to Canada for purposes of marriage. He said that prior to those inquiries he had no intention of moving to Canada, but he expressed a willingness to consider it.
 - (b) The respondent's recollection was that it was about 1979 when she travelled to India. She said that her sister had arranged for her to meet another boy, but that turned out to not be a good match, so her sister then suggested they stop by the claimant's house. He was not there. However, they eventually began corresponding and met once she next travelled to India.
- [10] In about 1980, the claimant travelled to Canada with a view to seeing the respondent and learning about Canada. However, he did not have the proper paperwork in place and he was not allowed to enter the country.
- [11] Ultimately, it was decided that the parties would marry. The marriage ceremony was on December 8, 1980 in Delhi, India. The respondent described it as a small ceremony. The parties then stayed at the home of the claimant's parents for a few weeks, with the claimant going to work every day. The respondent said that she was harassed by the claimant's family for not bringing a dowry. The claimant said that he had not asked for a dowry and was not angry that there was no dowry.
- [12] The respondent said that she returned to Canada within a short time (variously described as 15 to 17 days, three to four weeks, and a month). She said that the claimant's family was not happy that she left. She did, however, visit India twice over the next couple of years. The respondent sponsored the claimant to emigrate to Canada. He arrived on September 8, 1984.
- [13] There was no evidence as to the claimant's immigration status on his arrival and as to when he eventually became a Canadian citizen.

- [14] By the time the claimant arrived, the respondent had moved from Winnipeg back to Vancouver. The claimant gave evidence that the respondent told him that if he wanted to live with her in Canada, he needed to break off contact with his own family in India. He said that for about 10 years he was not in contact with his family. There was, however, evidence from both parties that in about 1986 or 1987, they travelled together to India for about a month.
- [15] When the claimant first arrived in Canada, the parties lived in an apartment with the respondent's parents and either one or two of her brothers. After between one and two months, they moved to an apartment on East Broadway.
- [16] The respondent was working at a Mac's convenience store owned by her brother Satish Wadhera, also referred to as Steve. The claimant's evidence was that about a week after he arrived he began working at the same Mac's convenience store. He said that he did three graveyard shifts a week at Steve's store. Eventually, he began working two graveyard shifts a week at another Mac's convenience store owned by another brother, Kuldip Wadhera. He said that the respondent worked the afternoon shift at Steve's store, so they were not working at the same time. The respondent's evidence was that she did not recall if the claimant worked at her brother's store.
- [17] The claimant said that he did not receive any paycheques for work done at either of these two stores. He said that if there was compensation being paid for his work, it was going to the respondent, but he did not ask for details of that. The claimant's evidence was that it was not until 1989 - five years after he began living in Canada - that he opened his first bank account in the country.
- [18] It appears to be common ground that the parties have never had a joint bank account. Each has kept their finances separate, to the extent they had any, from the start of their relationship to date.

Mac's Convenience Stores

- [19] In 1985, the respondent arranged to obtain a Mac's Convenience store dealership. She said that she had to take a course from the company which took four to six weeks and then incorporate a company in order to qualify for a franchise. She was also required to pay what she referred to as a "deposit".
- [20] On May 29, 1985, the respondent incorporated Sunita Enterprises Ltd. She was the sole director and shareholder. She established a company bank account for which she was the sole signing officer.
- [21] The respondent said that the arrangement with Mac's was that Mac's would provide and pay for the inventory and allow the dealership to retain a commission on its sales. Her responsibility was to bring in the inventory, staff the store, do cleaning and any necessary decorating of the store, and pay Mac's in respect of her sales.

- [22] The parties then moved to Nanaimo where Sunita Enterprises operated a Mac's convenience store dealership in a mini mall. The parties lived in a nearby apartment building.
- [23] The parties' evidence as to the claimant's role in this Mac's convenience store (and others run by the respondent) differed dramatically.
- [24] The claimant said that the Nanaimo store was initially a 24-hour store and that initially the two of them shared the shifts. The respondent would work 8:00 a.m. to 2:00 p.m., then he could come in until 8:00 p.m., and the respondent would come back until 11:00 p.m., then he would work 11:00 p.m. to 8:00 a.m. He recalled that after about three months the respondent hired a couple of people who could cover graveyard shifts and weekend afternoons. After that, on weekdays the respondent would work mornings/early afternoons; the claimant would work the later afternoon/evening shifts, and a staff person would do the graveyard shift, while on weekends the claimant would work the morning/early afternoon shifts and the other staff would cover the other shifts.
- [25] The claimant said that he was not paid for his work at this or any of the Mac's convenience stores run by Sunita Enterprises. He said he understood it to be their family business and that the respondent assumed responsibility for all of the family finances. He said that the store revenues went to Sunita Enterprises. The respondent obtained funds from Sunita Enterprises as available to cover their family expenses and occasionally he would be given some cash, if necessary, for family expenses.
- [26] The respondent, on the other hand, gave evidence at trial that the claimant did not work at the store. She agreed that the claimant was never paid as an employee, but said that was because he never worked there. She said the store was open only 15 to 16 hours a day, that she was putting in most of the hours, and that she had two staff that would fill in the other shifts. She said that she encouraged the claimant to find a job elsewhere. She said that even in 1985, they did not get along and so she did not want to work with him. She said that he was jealous, suspicious, and controlling; that he would show up at the store and just stand outside and watch; and that he would regularly accuse her of having affairs with anyone he saw her talking to. He would occasionally come into the store, then refuse to leave, swear at her, and eventually take some cigarettes from the shelf and some money from the till and leave.
- [27] The respondent was asked if the claimant would interact with customers. She said that he might if she was in the back room, but that it did not happen very often. The respondent was asked if she knew what the claimant was doing with all of his time. She said that she was busy with her work, so she had no idea what he was doing.
- [28] The respondent did agree with one part of the claimant's evidence. Her evidence was that she was paying for all of the parties' living costs, like rent and groceries, and that the claimant was not contributing to any of those costs.

[29] In about early 1986, the respondent's Mac's convenience store dealership was transferred to a new store in Langford near Victoria that had a gas bar. This was a bigger store than the Nanaimo one and there was hope that it would be busier. It turned out not to be busier. The claimant's evidence was that it was initially a 24-hour location, but then that was reduced to 16 hours per day.

[30] The claimant's evidence was that staffing for this store was similar to the Nanaimo store, with him working the afternoon/evening shift on weekdays plus weekend mornings, the respondent doing weekday mornings, and other staff covering the graveyard shifts and weekend afternoons. He continued to work on the understanding that this was a family business for which he was not being paid as an employee.

[31] The respondent's evidence at trial was that the claimant did not work at the Langford store either. She said that she was encouraging him to get a job but he did not. She said that the claimant just wanted to "be where I am."

[32] At her discovery in 2024, the respondent's evidence on this point was different. When asked whether the claimant assisted at the two Mac's convenience stores she operated in the Victoria area, she asked for clarification of what the word "assisted" meant. She did say that she did not hire him as an employee and that he was not on her payroll. Her answer to the final question in this series was as follows:

99 Q That was not my question. Regardless of whether he was on your salary or as an employee, did Mr. Julka work labour at the convenience stores for Mac's?

A Yes, he did.

[33] The respondent gave evidence that they had arguments. She said that one of their arguments was about her encouraging the claimant to get a job, while others were about his suspicions that she was having affairs. She said that after they had an argument, "he would run away for weeks or months."

[34] This was not specifically put to the claimant, but he did give evidence that in about 1987, he left for three to four months because the respondent was having an affair. The claimant said that he lived with the respondent's brother Steve, then eventually heard indirectly that everything was fine and he could come back to Victoria, which he did.

[35] Before moving on from this point, I will note that during the course of the trial, each of the parties accused the other of infidelity. Each of the parties vehemently denied the allegations made against them, while maintaining their allegations against the other. I do not need to make any findings on these allegations, but if I did, I would conclude that none of them were established on a balance of probabilities. That said, I have no doubt that accusations of infidelity were made during the course of the relationship, and that they were seen by the parties to be particularly hurtful allegations to make. I also note that there was clearly a tendency to respond in kind when hurtful allegations were made.

- [36] After a year or more in Langford, the respondent transferred her dealership to a different Mac's convenience store, this one in Oak Bay. The claimant said that he continued to work at this new store without being paid. The respondent said that the claimant never worked at the Oak Bay store.
- [37] It was common ground that throughout their time at both Langford and Oak Bay, the respondent continued to pay all family expenses such as rent and groceries.
- [38] In about late 1987 or early 1988, the respondent transferred her Mac's convenience store franchise to a store on Cornwall Street in the Kitsilano area of Vancouver. This was another 24-hour store. The respondent said that she wanted to be closer to her various family members in Vancouver.
- [39] The claimant said that he continued to work long hours at this store, typically 1:00 p.m. to 11:00 p.m. weekdays, and the morning shift on weekends. He continued to work these long shifts without being paid.
- [40] The respondent said at trial that the claimant did not work at this store. However, he "showed up at the store a lot" and "obviously wants to work." She said she would not want to argue with him, so when he got "aggressive", she would go into the back room until he decided to leave. She said that if the respondent had a chance, he would take two packs of cigarettes from the shelf and some cash from the till and then leave.
- [41] On her examination for discovery, the respondent's evidence was that:
- 108 Q Dr. Mr. Julka work at the store in Kitsilano Mac's?
- A He was not hired as an employee.
- 109 Q Yes, but was he working?
- A Yes.
- 110 Q And how much was he working?
- A No idea. I can't remember.
- [42] When these questions were put to the respondent at trial, she explained that when the claimant came in, it would be for half an hour or 15 minutes and that is not really work - he was just there to check on her. She said that he performed no actual labour for the store.
- [43] The respondent said that for the eight or so years that she owned the Cornwall Mac's convenience store she had no idea where the claimant was working. She explained that "we had no communication". The parties were ad idem that throughout those eight years, the respondent was covering all family expenses for housing, groceries, etc.

- [44] The claimant's evidence was that he also helped this Mac's convenience store through occasionally purchasing extra grocery items to be resold. The respondent denied this, saying that with Mac's, she was required to purchase all inventory through the company.

Acquisition of Nelson Avenue

- [45] When the parties first moved to Vancouver, they lived in an apartment in the West End.
- [46] In 1988, the respondent became pregnant with the parties' first child, Nikhil. Nikhil was born in June 1989.
- [47] In early 1989, the parties moved into a house on East 64th Avenue near Knight Street. The house was purchased in the respondent's name. It had a basement suite that was rented out. The claimant's evidence was that the parties discussed this purchase, and that because the parties were working offsetting shifts and had no common time together, he told the respondent to just go ahead and purchase the property in her name. The respondent did not specifically respond to this evidence.
- [48] Although no title documents were in evidence, it was common ground that this first property was purchased solely in the respondent's name. It was also common ground that the claimant did not contribute financially to the purchase price. As I have previously noted, the claimant's evidence was that it was not until 1989 that he even had a bank account in Canada.
- [49] In August 1992, the parties had their second child, a daughter, Ayesha.
- [50] In November 1992, the parties moved to a new home on Nelson Avenue in Burnaby - one of the properties in issue in this litigation. Title was taken in the name of the respondent alone. The respondent was able to produce the statement of adjustments from the purchase. It showed a purchase price of \$347,000, a deposit previously paid of \$15,000, mortgage proceeds of \$100,000, and a balance to complete of \$236,911.91.
- [51] It was common ground that the purchase funds came primarily from the sale of the property on East 64th Avenue. The respondent recalled that that property sold for about \$250,000. The respondent's evidence was that the remaining funds came from her own personal savings and some money that she got from her parents. The claimant said that shortly before the purchase, he had received \$8,000 from an ICBC claim that was also used for the purchase. The respondent did not agree with this.
- [52] The claimant's evidence was that he knew that the respondent was putting title in her own name. He explained that at the time she was looking for the house, they were working different shifts and that she was looking after all of the arrangements. As well, he noted that she controlled all the money.

- [53] As noted, the purchase was funded by mortgage funding which came from CIBC. The principal amount was \$100,000 with interest at 7.5% and a three-year term. The sole mortgagor was the respondent and there was no guarantor. Title documents show that the mortgage was cancelled in August 1996.
- [54] The claimant said that a couple of years after they had moved to Nelson Avenue, the respondent told him that the mortgage was paid off. However, he said that he did not have direct knowledge because she was controlling all of the finances.
- [55] The claimant's evidence was that in about 1995 or 1996, he was contacted by a woman who told him that her husband was having an affair with the respondent. He said that around this time, he quit working at the Mac's convenience store for a month or so and began looking after the children full-time.
- [56] The respondent tendered in evidence a letter dated February 1996, written in Hindi, addressed to the claimant from one of his relatives in India. The respondent said that she found this letter in 1996 and had kept it since that time. The letter identified various relatives who lived in Calgary and Toronto in case he wanted to go there and that he could (per translation) "explain your problem to them, what you want and how they can help you." It went on to say:

So, you can do whatever you think is right after thinking carefully. But take all your decisions very carefully because these decisions are not for a day or two but affect the whole life. So, do whatever you think is right.

We also love our children as much as you do. Therefore, my advice is that you should keep the children with you.

- [57] The claimant's evidence is that he went to the Calgary relatives for three to four days, then returned. He said that he also took the children to the home of the respondent's brother Steve, staying there for 10 to 15 days, although it was not clear in the evidence whether that was around the same time as his time in Calgary or on a different occasion. The claimant said that when he came back, the respondent had written something up that she demanded he sign before he enter their house. He said he signed it without reading it.
- [58] The claimant said that he decided to stay with the respondent for the sake of their children and that the incident in 1995/1996 was very damaging to their relationship.
- [59] The respondent's evidence is that the last time the parties were intimate was in 1996. She also said that 1996 was when they last attended a social event together. The claimant's evidence was that they were last intimate in 2004 and that they rarely attended social events together at any time because of their differing work shifts.
- [60] There was evidence as to a number of other events in 1996. Because very few documents were in evidence, it was difficult to ascertain the exact sequence.

- [61] The claimant's evidence was that at one point, in response to complaints about never being paid, the respondent gave him a \$5,000 cheque from Sunita Enterprises. He does not remember exactly when that occurred. He said that it was not a blank cheque and he specifically denied that he had to write in his own name.
- [62] The respondent said that she had window cleaners coming in and had left a blank cheque at the store to be given to them. The cheque went missing and did not get cashed for some time. Then, when she went to the bank to take out money for her son's tuition fee, she learned that the \$5,000 cheque had been processed and that it was paid to the claimant.
- [63] At some point in 1996, the respondent's Mac's convenience store dealership was terminated. She said that she was not given a reason. She says this occurred about a month or two after she had banned the claimant from entering the store. [I note that it was never put to the claimant that he had ever been so banned.] The respondent appears to believe that the claimant was the cause of this termination but had no admissible evidence with respect to that.
- [64] The respondent said that normally when a dealership is terminated there is a limited amount of money to pay out employees and to tide over the owner. However, she said that because the claimant had "cleaned out the bank account", she was in financial difficulty.

Express Lane Foods

- [65] At some point in 1996, the claimant purchased an Express Lane Foods store on Yew Street in Kitsilano from her brother Steve. This was another 24-hour convenience store. The claimant recalled that this occurred a month after the Mac's convenience store dealership was terminated. The respondent said that it was more like five months.
- [66] The respondent said that she did not have money to buy the store but applied for a loan and was approved. No loan documents were in evidence; nor was the purchase agreement for Express Lane Foods. Her evidence is that she bought the store for either \$60,000 or \$70,000 plus the value of the inventory.
- [67] Land title documents indicate that on July 2, 1996, the respondent refinanced the mortgage on the Nelson Avenue property. A new mortgage was registered on title with a principal amount of \$110,000 (which was greater than the amount of the earlier 1992 mortgage), with an interest rate of 6%. The respondent recalled that this was simply a balance transfer and could not explain why the principal amount was higher after nearly four years of payments. She did not recall whether this transaction occurred around the time of her purchase of Express Lane Foods.
- [68] Another document that the respondent had kept from 1996 was a letter addressed to the claimant, at the Nelson Street address, from the Employment Standards Branch. The letter was dated August 6, 1996, and advised the claimant that his "complaint" had been assigned to a specific officer who would contact him in due course. The claimant said that at one

point he had called the Branch to find out what his rights were given that he had been working long hours for several years without being paid. He said they took down some information and said they would get back to him. The claimant did not recall any outcome to this matter. His evidence was that he had never seen the August 6 letter that was addressed to him.

[69] The respondent said that she had found the letter and kept it. She said that the claimant was not home when the letter arrived. She said that when she spoke with the Branch she told them the claimant was never hired by her.

[70] Another document the respondent had retained from 1996 is a handwritten note that stated:

I Anil Julka R/O Nelson Ave Bby agree to not to play any swearing game at home or at work with Sunita Wadhera as I did the past no more setup recording And I don't have any duplicate of any things. A.J.

August 12/96 10:30 am

I signing at 2205 1st Ave at her work place in front of her. A.J.

[71] The address shown is that of Express Lane Foods.

[72] The claimant's evidence was that on two or three occasions he was asked to initial notes that had been handwritten by the respondent. He said that this document was in her handwriting but the initial was his. She demanded that he initial it before he was allowed into their house and he generally did so without reading what had been written because he was trying to avoid arguments. He said that one occasion that this happened was the time he took the children and stayed with them at her brother Steve's home for about 10 days. Another time this occurred was when he went to Calgary for a few days.

[73] The respondent's evidence is that this note was written by the claimant and that he did so because "he always fights, and then runs away, then comes back." At one point, he had said he never apologizes, so she insisted that there be a written record of an apology.

[74] The claimant's evidence was that once the respondent had begun running Express Lane Foods, he continued to work there seven days a week, generally from 1:00 p.m. to 10:00 or 11:00 p.m. weekdays and from 8:00 a.m. to 4:00 p.m. on Saturdays. He said that the respondent generally worked Monday to Friday from 8:00 a.m. to 1:00 or 2:00 p.m., while other staff filled in the other shifts. He continued to work without pay. He said that if he asked for money, the respondent would ask him why. He said that she told him that it was a family business, and that is why he was working without a paycheque.

[75] The respondent said that the claimant was not employed at the store; rather, she had several regular employees.

- [76] The claimant said that he did some shopping for the Express Lane Foods store, purchasing items that were not being supplied by suppliers who delivered, with the respondent paying him back with cash when he did so. The respondent denied this and said that all of the inventory came from suppliers who delivered.
- [77] By the time the store was purchased, Ayesha was three and Nikhil was seven or eight. The claimant said that he helped with childcare in the mornings, including delivering Nikhil and Ayesha to school. The respondent said that it was mostly her sisters-in-law that helped with childcare. She said that the claimant sometimes took the children to school but that he was not reliable.
- [78] On December 7, 1998, the Bank of Montreal mortgage was discharged from title to Nelson Avenue. The respondent was asked on cross-examination to confirm that Express Lane Foods was generating enough income to retire a \$110,000 mortgage within two-and-a-half years. She said that she was unable to recall.
- [79] There was very little evidence with respect to events over the next several years other than that Express Lane Foods continued to operate.

The Respondent's Alleged 2003 Separation Date

- [80] Both parties gave evidence with respect to a time that the claimant stayed for a period of time with a family friend named Randy. The claimant's evidence was that they had an argument and he left the house at Nelson Avenue and stayed for three to four days with a friend named Randy. The claimant said that there was a BC election going on and that Randy found him a brief casual position at the Elections Office near Boundary and Kingsway. He said that when he came back from that work one day, Randy told him that the respondent had arrived and taken away all of the clothes that the claimant had at Randy's place.
- [81] The claimant said that he did not recall which year this occurred, only that it happened at the time of a BC election. Counsel for the claimant noted that there were general elections in 2001, 2005, and 2009.
- [82] The claimant said that at no time in 2003, or around the time he was staying with Randy for a few days, did the respondent say that they were separating. He said that, throughout this time, he believed that they were still in a marital relationship. He says that he understood right through those years that they were living together and working together for the sake of their children. He said that in 2003 and 2004, they had a difficult relationship, but that despite the fact that he was working 65 or more hours a week, he and the respondent were still intimate "once in a while, but not much."
- [83] The respondent's evidence was radically different. She said that in about June 2003, the claimant left the house and she did not know where he was. Then she got a call out of the blue from Randy who asked her to come and take the claimant. She asked why she should since the claimant left on his own. Randy told her that she needed to come and see. So, she

drove to Randy's place, walked in, and saw the claimant lying there naked with another woman. The respondent says she walked out, came home by herself, and moved all of the claimant's belongings downstairs to the basement at Nelson Avenue. She said that when the claimant came home, she told him he was moving downstairs.

- [84] On cross-examination, the respondent was asked whether she continued to support the claimant with housing and groceries after this. She said that she did not support the claimant directly. She would buy food for her children, but she would not keep track of who was eating it.

The Respondent as Mortgagee

- [85] A number of documents were produced during the course of trial. Many of them were searches done by counsel for the claimant during breaks in the trial. Counsel explained that things said by the respondent in her direct examination caused him to do a Land Title name search and some historical title searches, and that those searches uncovered various documents registered in the Land Title Office by or in respect of the respondent.
- [86] These documents had not been listed on a List of Documents. As a result, absent an order of the court, they could not be tendered at trial: SCFR 9-1(18). After submissions from the parties, I concluded that these documents could be used for cross-examination at trial, having made reference to the factors summarized by Justice Riley, as he then was, in *Cook v. Kang*, 2020 BCSC 575, at para. 27:
- (a) whether the opposing party will be prejudiced by the proposed use of the document; (b) whether a reasonable explanation has been provided for the failure to properly disclose the document; (c) whether refusing permission to use the document would be an impediment to determining the merits of the case; and (d) whether, in the circumstances of the case, the ends of justice require that permission be given to use the document despite the failure to properly disclose it
- [87] I did, however, provide an opportunity for the respondent to review these documents with her counsel before she could be cross-examined on the additional documents.
- [88] I note that since giving these directions, I have come across the ruling of Justice Voith, as he then was, in *Walker v. Doe*, 2012 BCSC 1091, which considers those same factors in the context of a case in which it was clear that the party now seeking to tender documents was not previously aware of their existence and was clearly not withholding them for a strategic purpose (see para. 15 of *Walker*). I see Justice Voith's ruling in *Walker* as confirming the appropriateness of the direction I gave at trial.

- [89] The first of these documents was a mortgage registered on December 22, 2006, in which Mohan Holdings Ltd. was borrower, a Mr. Mohan was guarantor, and the respondent was shown as the lender. The mortgage was for a principal amount of \$200,000 with an interest rate of 6% and a one-year term. The mortgage was registered by a notary public, a Mr. Narwal, with a different notary having witnessed the signatures of Mr. Mohan. The mortgage was discharged in June 2008.
- [90] The respondent denied having advanced any money to Mohan Holdings or Mr. Mohan. She explained that Mr. Mohan was a builder and developer who she has known for many years. She said that Mr. Mohan had asked her to assist by registering this mortgage, which she understood would help Mr. Mohan obtain credit elsewhere. She said that both notaries were working for Mr. Mohan and not for her. She never advanced funds and never received a payment on discharge.
- [91] The claimant said that in the spring of 2007 he travelled to India. He said this was his first trip since the time he and the respondent had travelled there in 1987. After just over two weeks, his son called and told him he had to come back for his high school graduation ceremony. When he got back, he discovered that the respondent had put all of his clothes in the back yard and he had to sign a note drafted by the respondent in order to re-enter the house.
- [92] The respondent produced another handwritten note which the claimant says is probably the one from the spring of 2007. It says:
- I Anil Julka apologize to Sunita Wadhwa for my behaviour. I will not use bad language and swear. I will not threat to leave for India or anywhere else. If I do I will not be allowed back in the house. I agree to work Sunita's _ at _ with ____ on. No accusations to Sunita of any man.
- [93] The spots left blank in the quotation above are locations on which what was originally written has been overwritten with what appears to be a Sharpie marker, leaving the original words indecipherable, particularly on what is not a very good photocopy. The first two words written with a Sharpie are "get" and "job". The third is indecipherable. The respondent said that she did not know what happened to the original. She denied that the Sharpie edits were hers.
- [94] The claimant's evidence was that on his birthday in November 2007, the respondent told him that starting the following week, he would not be working at Express Lane Foods and he should go find a job. The next day, he spoke with a store manager at the Metrotown Save-On Foods and was offered a position right away. He started about a week later with his work involving primarily overnight shifts beginning at 10:00 or 11:00 p.m. He was initially paid \$8 an hour, with that increasing over time. He started on a part-time basis, but before long, was working five nights a week.
- [95] The claimant's evidence was that after a short time, he began working shifts at Express Lane Foods again on his days off from Save-On Foods.

- [96] The claimant also said that once he started working at Save-On Foods, he assumed primary responsibility for purchasing groceries for the home, which he paid for from his earnings. He said that if the respondent had any special requests, she would let him know; otherwise, he had a standard set of things he would purchase each time.
- [97] The claimant said that upon moving to a graveyard shift, he had to be able to sleep in the daytime. He found there was too much noise on the main floor and so he set up a bed in the basement rec room and began sleeping there. He said that he began doing this on his own initiative in late 2007 and that it was a result of his need for daytime sleep. He denied that he had been sleeping in the basement since July 2003.
- [98] The claimant said that when he was awake and not working, he would regularly spend time on the main floor of the house. He said that he would also do his cooking there. He said that most of his living was upstairs. He said that he kept his clothing downstairs because the master bedroom closets were completely full of the respondent's items.
- [99] The claimant said that over the course of his initial years working at Save-On Foods, the respondent would typically wake him up around noon before she left for work. He would pick up the children after school, and then he would go to sleep around 7:00 p.m. and get ready to work later on in the evening. [I assume it would have been Ayesha he was picking up from school given that by 2007 Nikhil was 18 years old.]
- [100] After a few months working at Save-On, the claimant was entitled to extended health and dental benefits. He says that he put the respondent on the benefit plan as his spouse and both his children were on there as well until they finished their education. Documents produced in evidence indicate that the respondent made use of these benefits through to early 2021.
- [101] On September 21, 2009 there was a further mortgage granted by Mohan Holdings to the respondent. This mortgage showed a principal amount of \$175,000 and an interest rate of 4%. Again, this mortgage was registered by Mr. Narwal with a different notary witnessing Mr. Mohan's signature. This mortgage was not discharged from title until August 2013.
- [102] The respondent said that Mr. Narwal was not her notary and that she had not advanced any money to Mohan Holdings. She said that she was not sure exactly why, but that Mr. Mohan, who was a developer, was having a hard time getting a mortgage and they needed "someone on the papers."
- [103] On August 24, 2010 a further mortgage was granted by Ram Mohan and Kamla Mohan personally to the respondent. This mortgage had a principal amount of \$130,000 and an interest rate of 6%. It was registered by a different notary, Mr. Singh, with another notary having witnessed the signatures of the Mohans. This mortgage was discharged in December 2011.

- [104] Once again, the respondent said that she had not advanced any funds to the Mohans and did not receive any payment from them. Her explanation for this filing was that the Mohans were having difficulties with a mortgage and they wanted her to help out. They drafted the papers, she trusted them, and there was no money given and no money taken.
- [105] The respondent said that her mother, who had returned to India a year before her death, passed away in 2009 or 2010 or maybe 2008. Subsequently, she received an inheritance by way of a term deposit made by her mother in India in her name. She provided a power of attorney to a sister who cashed it on her behalf and then sent the money to the respondent. She believed it was about \$9,000 or \$10,000.
- [106] On December 30, 2010, the respondent obtained a judgment against a Ms. Bernadette for \$10,201. She explained that Ms. Bernadette was a friend who owned a convenience store. The store had a robbery and all of its cigarettes were stolen. Her friend needed some money, so she loaned \$10,000, but then had trouble getting the money back. The judgment was registered against real property belonging to Ms. Bernadette and was eventually paid when that real property was sold.

The Vancouver Condo

- [107] On March 12, 2011, the respondent entered into a contract of purchase and sale for a condominium unit to be built in Vancouver (the "Vancouver Condo") for a price of \$527,900. The contract required a payment of a deposit of \$52,790 upon execution, \$26,395 about three months later (June 30, 2011 or later), and \$26,395 three months after that.
- [108] The respondent said that she paid these deposits from her personal funds. She said that her personal funds at that point included the \$9,000 or \$10,000 she had received from her mother as well as a payment of around \$7,000 that she received from the settlement of a claim against McDonald's for spilling hot coffee on her. No documents were produced in respect of either the inheritance or the McDonald's claim.
- [109] The respondent also said that she had told her brother Ravinder that she was interested in buying the condominium and that Ravinder told her he had been intending to give her money to reflect her help 30 years earlier with his Winnipeg business, and that he would give her that money to help buy this condominium.
- [110] On December 9, 2011, a new mortgage was granted by Ram Mohan and Kamla Mohan to the respondent. This mortgage was for a principal amount of \$115,000 with an interest rate of 6% and a one-year term. The document was again registered by a notary, Mr. Singh, with a different notary witnessing the Mohans' signatures. The respondent again explained that Mr. Mohan had a number of properties and was having a hard time getting a mortgage, so they wanted to "add me on" so they would qualify. Her evidence was that both notaries, Mr. Singh and Ms. Ewan, were hired by Mr. Mohan. She said that she never advanced this \$115,000 and never received repayment.

- [111] Four days after this, on December 13, 2011, the August 2010 Mohan mortgage was discharged.
- [112] In 2012, the claimant was transferred from the Metrotown Save-On Foods (which closed) to the UBC Save-On Foods. This position had a later start, at either 3:30 or 5:00 a.m. The claimant's evidence was that it was also in 2012 that he stopped working at Express Lane Foods. He said that union rules prohibited a member from working at a different grocery store, that one of the other employees at Save-On complained, and that he was told he could not keep working at both.
- [113] Also, in about 2012, Ayesha purchased a dog, Juvy. Both parties indicated that within a short time they became primarily responsible for caring for Juvy. The respondent's evidence was that when she went to work in the morning she would drop Juvy with a dog sitter and that the claimant would pick Juvy up when he came home from his work at UBC.

Events of 2012-2013

- [114] The first income tax document in evidence is a CRA summary of the claimant's 2012 tax return. It shows the claimant having a T4 income of \$32,597.29. It shows the claimant's marital status as "married".
- [115] The claimant's evidence is that he provided his T4 slip each year to the respondent who had her accountant take care of filing all the tax returns. The respondent, on the other hand, said that she had attempted several years earlier to file a tax return showing her status as separated, but that the claimant had ripped it and thrown it at her. The respondent did not dispute that she had an accountant every year who took care of her various tax filings.
- [116] The purchase of the Vancouver Condo completed on August 9, 2013. The respondent was represented by a notary, Mr. Singh (notably, the same notary who had filed several of the mortgages granted by the Mohans). The statement of adjustments reflects the amount of the three deposits paid in 2011 which total \$105,580, mortgage proceeds of \$120,026, and a balance to complete of \$350,122.74. Other documents indicated the mortgage funds came from Scotiabank with a 30-year amortization, a two-year term, and an interest rate of 2.69%.
- [117] The evidence included a bank draft from the Bank of Montreal branch at which the respondent did all of her banking payable to Mr. Singh, in trust, in the sum of \$350,122.74, the amount of the balance to complete. The respondent's evidence at trial was that this money was a gift to her from her brother Ravinder.
- [118] On cross-examination, the respondent could not recall how Ravinder got this money to her. She also said that bank statements from 2013 are no longer available and she has no records herself from that time.

- [119] On August 18, 2013, the respondent entered into a residential tenancy agreement with a Ms. Jonas with a rent of \$1,700. Her evidence is that this tenancy agreement remains in place and that she has not in the subsequent 11 plus years increased the rent. She says that Ms. Jonas is a very good tenant and takes good care of the unit and that she has on one occasion provided a discount to Ms. Jonas.
- [120] Notably, two mortgages from the Mohans were discharged on August 23, 2013, 10 days after completion of the purchase of the Vancouver Condo. The first was the September 2009 mortgage by Mohan Holdings Ltd. for which the principal amount was \$175,000. The second was the December 2011 mortgage by the Mohans for which the principal amount was \$115,000. The two amounts add up to \$290,000. As noted above, the respondent denies that there was any transfer of funds involved in either of these mortgages.
- [121] In November 2013, there was water damage to the house at Nelson Avenue when a pipe broke under the kitchen sink. That led to significant restoration work, which included replacement of most of the kitchen cabinetry and some of the appliances, as well as tearing out and replacing several walls. The house had to be vacated for four to five months to allow this to occur and the insurance company provided the parties with temporary accommodations at a building near the south end of Victoria Street in Vancouver. The claimant's evidence is that the four of them stayed in a two-bedroom condo. The respondent's evidence was that they actually had two apartments, a two-bedroom unit in which the respondent, the claimant, and Ayesha stayed, and a one-bedroom unit in which Nikhil stayed.

Events of 2014-2018

- [122] A summary of the claimant's 2013 income tax return which was filed on April 4, 2014, shows his status as married.
- [123] On May 24, 2014, there was an incident between the parties. The claimant's evidence is that there was an argument over whether a spot on the carpet near where the claimant had fed the dog had been adequately cleaned up by the claimant. The claimant said that the respondent ended up throwing a slipper at him and that he threw it back at her and the respondent ran away and he went to bed.
- [124] The respondent's evidence was that she was providing the claimant with instructions on how to clean up the dog food when he started swearing at her, and then somehow got her in a headlock and punched her. She also said that he threw something at her face but was not sure what it was. Their daughter came in and yelled at him to stop. He left and the respondent called the police.
- [125] The daughter's recollection was that she heard a lot of yelling from her room, came out, and saw her dad throw a slipper at her mother, after which she separated them. She was asked if she witnessed any physical altercation and said "just the slipper".

[126] The RCMP attended and decided to arrest the claimant. Photos taken by the police of the respondent show a mark under her left eye. The respondent was cross-examined with respect to a statement she gave to the RCMP. In it, she described the claimant as her husband. She is also recorded as having said:

He sleeps downstairs and I'm upstairs. We are kind, we kinda separated but not legally separated.

[127] The respondent recalled being interviewed, did not recall using the word "husband", but did recall the other statements.

[128] The claimant spent the night in a cell and was released the next day on terms that prevented him from contacting the respondent or attending at the Nelson Avenue house pending trial of an assault charge.

[129] Nikhil and a cousin picked up the claimant. He stayed for the next few weeks at the home of one of the respondent's brothers. After a period of time, he found an apartment near Imperial in Burnaby which he rented. Ayesha came to stay with him. They lived in that apartment for about a year and then moved to a basement suite near Canada Way where they stayed until late 2017 or early 2018.

[130] On about January 8, 2015, a stay of proceedings was directed with respect to the assault charge. The respondent said that she asked that the charge not be proceeded with.

[131] The parties each filed their own tax returns for 2015, 2016, and 2017, but continued to file them on the basis that their marital status was married.

[132] On May 24, 2016, Mohan Holdings granted a further mortgage to the respondent. The principal amount on this mortgage was \$100,000. The interest rate was 5.4% and the term was one year. It was registered by a lawyer, Mr. Kaushal. A notary public witnessed the signature of Mr. Mohan. The respondent's evidence was again that Mr. Kaushal was not acting for her, that the papers were all prepared by Mr. Mohan, and that the \$100,000 was neither advanced, nor repaid.

[133] On May 27, 2016, the respondent received \$72,719.27 in settlement of two claims arising from motor vehicle accidents. She did not recall where the funds were deposited. She thinks that she used some of the funds for house expenses, to fix up some of the house, and possibly to pay some debt (although no specific debt was identified).

[134] The respondent's evidence was that she sold Express Lane Foods in either 2016 or 2017. She did not produce any documents with respect to the sale but recalled that she sold it for \$60,000 plus the value of the inventory, basically the same amount that she had paid for the store over 20 years earlier. She said that all of the money she received was used to pay debts, including GST, PST, and rent arrears. She was unable to say how much she was in arrears or what was owing for any of the tax debts; nor were any documents produced in respect thereof.

- [135] After selling Express Lane Foods, the respondent began working at the Hudson's Bay store on a part-time basis. That position lasted until the Covid-19 pandemic in which she was laid off and never recalled.
- [136] The only business record produced with respect to Sunita Enterprises Ltd. is a CRA information summary with respect to a May 2016 tax return for the company. That return indicates sales of \$276,132 and a net income of \$12,862. The respondent could not say if any subsequent tax returns were filed for the company.
- [137] A company search for Sunita Enterprises indicates that the final annual report was filed with the Registrar of Companies as of May 29, 2016, and that the company was dissolved for failure to file its annual reports as of November 12, 2018. The respondent's evidence is that the company's bank account is inactive.
- [138] The parties were ordered at the JCC in April 2023 to produce bank statements going back to the beginning of 2017. The respondent produced documents relating to two of her personal accounts going back that far, a day-to-day chequing account #8912 and a US dollar chequing account #1982, but with respect to the interest-bearing account #3984, she only disclosed information going back to April 8, 2020. She was adamant that she had produced everything she was asked for, but given that the account 3984 had an opening balance in April 2020, it was clear that this was not the start of that account.
- [139] The opening balances in January 2017 for the respondent's two disclosed accounts were \$956.38 (account 8912) and \$10,520.62 (account 1982).
- [140] The claimant's bank account at this time had a balance of just over \$10,000.
- [141] The documents include a photograph taken on the claimant's birthday in November 2017. It shows the parties, their two children, and the dog. It appears from the evidence that this was taken at the Canada Way basement suite. The claimant says that this was from a birthday celebration that they were all at. The respondent says that she was just stopping by to pick up the dog but that her daughter insisted that she come in and pose for the picture.
- [142] In either late 2017 or early 2018, the landlord of the basement suite that the claimant and Ayesha were living in advised that he was selling and that they could not stay. The claimant's evidence was that he learned through Ayesha that the respondent would allow him to move back to the house if he would contribute \$1,000 per month to home expenses. They did so. He said that when he moved back the respondent suggested that they do "not too much talking."
- [143] It was common ground that upon returning to the house, the claimant resumed sleeping in the room in the basement. He provided \$1,000 per month to the respondent - usually in cash. The parties have different characterizations of this payment. The claimant said that he understood he was making a contribution to costs like property taxes, cable, and utility bills, all of which were being paid by the respondent. The respondent sought to characterize this as rent. The respondent, however, acknowledged that at no point did she

report rental income on her tax returns in respect of these payments.

[144] The claimant said that once he was back living at the house, the respondent took care of filing his tax returns for him again. A notice of assessment for his 2017 income tax return shows his status as married and shows both his income and the amount of the respondent's income.

Events of 2020-2021

[145] In June 2020, the claimant took a medical leave from his work in order to have surgery on his foot. Unfortunately, the foot became infected and he spent about nine of the next 18 months in hospital. When he was home, his mobility was generally very limited. He would order food from food services. The food would be delivered to the main entrance of the house and the respondent would bring it down to the basement. The claimant ultimately did not return to work due to mobility issues.

[146] As noted above, the respondent's disclosure of her account 3984 begins on April 8, 2020. There are a number of transactions of note in that disclosure including:

- (a) A \$20,000 interbranch transfer on July 20, 2020; and
- (b) A \$160,000 interbranch transfer into the account on August 26, 2020.

[147] The claimant did not recall where either of these amounts came from.

[148] Also, on August 26, 2020, the May 2016 mortgage granted to the respondent by Mohan Holdings for which the principal balance is \$100,000 was discharged. The respondent's evidence is that she did not receive any money in connection with this discharge and that it was not connected to the \$160,000 that she deposited to her account 3984 that same day.

[149] By October 6, 2020, the balance in account 3984 was up to \$210,000.

[150] The first income tax return produced by the respondent is for her 2020 income taxes. It was prepared by an accounting firm and filed on March 18, 2021. It shows the claimant as her spouse, EI or CERB benefits of \$17,500, CPP disability benefits, rental income of \$15,900 gross and \$3,712 net, and a small amount of employment income. The respondent was unable to say why the gross rental income was less than the \$1,700 per month shown on the lease other than to say she recalls giving the tenant a discount at some point. However, the tax returns for all of the subsequent years also show gross income of less than \$1,700 per month.

[151] The documents include a printout of all claims made on the claimant's extended health and dental benefits beginning in 2013. They show the final use of those benefits by the respondent on May 29, 2021. The claimant said that his benefits terminated in November 2021 when he retired, but that until that time, the respondent had access to benefits as his spouse.

- [152] There was a second incident in which the RCMP was called. In 2021, the claimant called the RCMP to report that the respondent had stolen his smartphone. The respondent said that she thought he had hidden her phone, so she started looking through his room for it and she said that he pushed her and then called the police on the speakerphone. She acknowledged that when the police came later that day, she told them that what the claimant had said was all a lie, but they asked her to leave for 24 hours in any event.
- [153] On August 26, 2021, the claimant returned to hospital for further treatment and did not return to the house for three months. After one of his final surgeries, he had trouble with his vision. He said that he was ultimately told that he had probably had a stroke during the surgery. That led to a recommendation that he no longer drive. After that, his vehicle was primarily used by Nikhil, and in 2022, he transferred title to the vehicle to Nikhil.

The Claimant's Alleged 2022 Separation

- [154] The claimant's evidence is that his medical EI lasted only six months and that he had been unable to work for nearly 18 months, so that by the end of 2021, he was unable to pay the \$1,000 amount to the respondent. His evidence was that on January 23, 2022, the respondent said he needed to move out at the end of January. He told her that he would move out but asked for some time. He eventually moved out of the house on February 28, 2022.
- [155] The claimant's bank balances as of February 28, 2022, including a TFSA, totalled about \$14,000.
- [156] The respondent's bank balances as of that date totalled just under \$160,000. I note, however, that some of the transactions by which the balance of account 3984 was reduced from \$210,000 to just under \$150,000 were not addressed in evidence.
- [157] The value of Nelson Avenue as of the time the claimant moved out was \$1.875 million.
- [158] The value of the Vancouver Condo at that time was \$1 million. There remained and remains a small mortgage registered against title to the Vancouver Condo.

Events After February 2022

- [159] Both parties filed their 2021 income tax returns on the basis that their marital status was married. The claimant said that the form required him to provide marital status as of December 31, 2021, which is why he said "married", even though he had moved out at the end of February 2022.
- [160] In April 2022, Nikhil was married in Victoria. There were also multiple receptions at the Riverside Banquet Hall in Vancouver. The respondent paid for the Vancouver events.

- [161] On May 4, 2022, the respondent loaned \$100,000 to a family friend, a Mr. Grewal. These funds came from account 3984, which after that withdrawal was down to a balance of just over \$8,000. Mr. Grewal repaid those funds in July 2022.
- [162] The present action was started on November 9, 2022. In the notice of family claim, the claimant asserts that the parties separated on February 28, 2022. A certificate of pending litigation was registered against title to both Nelson Avenue and the Vancouver Condo and a without notice order was obtained from Associate Judge Krentz preventing any disposition of items in a safety deposit box that the respondent has. Photographs taken by counsel show a number of items of jewelry in that box plus a number of small gold and silver bars.
- [163] At some point, the claimant filed a document with the CRA indicating that he was separated. In January 2023, the respondent received a GST tax credit notice which confirmed that there had been a change to her marital information, and a resulting change in her credits.
- [164] On January 10, 2023, the respondent filed a counterclaim in this action. That counterclaim asserted a separation date of 2003, without specifying the month or day. It also asserted that the Vancouver Condo was purchased using a settlement award of damages and an inheritance. There was no reference to a gift from Ravinder.
- [165] On January 11, 2023, the respondent made an ex parte application for a protection order. The order was granted for two months and expired without being renewed. The respondent's explanation was that this was around the time the claimant had left and she was worried about him coming around and that she did not feel safe. In fact, it was more than 10 months after he had moved out and other than Nikhil's wedding, there was no evidence of the parties having had any contact during those 10 months.
- [166] At a judicial case conference ("JCC") on April 12, 2023, each party was ordered to produce all their bank statements dating back to January 1, 2017.
- [167] The respondent's 2022 income tax return was prepared by her son-in-law-to-be, Kevin. The last page of her December 31, 2022 mortgage statement includes a note to Kevin that rent was \$1,602.85 per month and it goes on to say:

Do claim disability credit, not married, separated now

The respondent says she gave this instruction because of the letter she had received from the CRA about the GST credit. With respect to the rental income, she said that this was a discount from the \$1,700 in the lease agreement.

- [168] The claimant's 2022 income tax return was prepared using UFile, a tax software. It shows his marital status as separated.

- [169] Ayesha was married in September 2023. The respondent paid for the wedding. The respondent advised Ayesha that she could invite her father, but that if he attended, then she would not. The claimant said that he did not attend and that Ayesha and Kevin stopped by his place for two minutes after the marriage ceremony in order to get the blessing and then continued on.
- [170] The respondent retained new counsel in November 2023. An amended counterclaim was filed in February 2024. This document specifies the separation date as July 2003. It adds a claim for divorce and also adds a claim for unequal division of family property. It again does not claim any exclusion of property in respect of a gift from Ravinder. Counsel for the claimant asserted that it was not until the respondent's direct examination at trial that this claim of exclusion became known.
- [171] The respondent was examined for discovery on September 3, 2024. She acknowledged that when asked at that examination where the money for the Vancouver Condo came from, she did not mention a gift from her brother. She said that she "couldn't remember" at that point. She was not sure when she remembered the gift.
- [172] Ravinder Varma was ill in 2024. He was in his early 70s and had a couple of falls in 2023 or 2024, suffering neck injuries that had him hospitalized for lengthy periods of time. On September 3, 2024 - later the same day as her examination for discovery - the respondent typed up a document in an affidavit form and took it to Ravinder's hospital room. At the time, Ravinder's wife and nephew were both there. They read it and Ravinder signed it as presented. The respondent said that Ravinder had told her he would be willing to give a document and that they did not know what his recovery time would be, so she decided to type up this document and get it signed by him.
- [173] The respondent acknowledges the document said nothing about any gift of money for the Vancouver Condo. She explained that they had not talked about that and that the main things for the document were the gold bars and the abuse.
- [174] Ravinder died on September 25, 2024, having not returned home from hospital.
- [175] Ravinder's wife, Harindra, gave the respondent a bank draft for \$21,000 on October 12, 2024. The respondent says this was because she needed money to pay her credit card bill.
- [176] A Scotiabank Total Equity Plan statement for December 31, 2024, shows that the mortgage balance on the Vancouver Condo mortgage was down to \$79,300.22. The document also shows that the respondent's total available credit was \$282,400, which meant that she had access to a further \$200,000 through a line of credit.
- [177] Appraisal reports obtained in January 2025 show values for the two properties of
- (a) \$1.8 million for Nelson Avenue; and
 - (b) \$1,025,000 for the Vancouver Condo.

Both parties confirmed that they accept those valuations.

[178] On March 31, 2025, the respondent withdrew \$100,000 from her Scotiabank line of credit. This money was for legal fees.

[179] The claimant's most recent F8 statement shows about \$34,000 in his TFSA. He said that the increases since he moved out reflect an ICBC settlement, CRA reassessments, and resulting refunds based on a disability tax credit, as well as his most recent tax refund.

Positions of the Parties

[180] The claimant says that the Court should conclude that the date of separation was February 28, 2022 as alleged by the claimant, and that the family assets should be shared equally based on the assets that existed as of that date, including Nelson Avenue and the Vancouver Condo.

[181] The claimant says that the respondent has failed to make out any significant unfairness or compelling reasons that would result in a departure from the mandated presumptive date of valuation and an equal division of property based on that date. Generally speaking, the claimant says that he worked 65 or more hours a week without pay in the family business held in the name of the respondent from 1985 to 2007 and that the assets generated by the respondent over the years are reflective of the fruits of both of their efforts in that business. He notes as well that:

- (a) This is a long-term marriage;
- (b) All major debts of the family were paid off by December 1998, other than the Vancouver Condo mortgage which is nominal and covered by the tenant; and
- (c) The evidence tendered by the respondent with respect to work performed on the Nelson Avenue property was general and not time-specific; much of the work constituted maintenance and upkeep rather than upgrades; the one major upgrade that occurred was paid for by an insurer; and the appraisals from 2004 and 2025 make clear that all of the increase in the value of the Nelson Avenue property is due to land value and not the value of the house.

[182] The claimant says that the respondent is not credible and that the other witnesses she called added little to any material issue. The claimant says as well that the respondent's minimal disclosure should lead to inferences being drawn against her. The claimant says that the respondent's various claims to exclusions have not been made out.

[183] The claimant submits that the respondent should be given 45 days to arrange funding to buy out the claimant's interest in the properties. If not, then one or both should be sold. The claimant says that the parties should share equally any capital gains taxes that may arise in respect of the Vancouver Condo.

- [184] The claimant also seeks recovery of half of the net rental revenue received from the Vancouver Condo from March 1, 2022 to date. The claimant also seeks an award of \$80,000 in respect of the money in the respondent's bank accounts, submitting that the dissipation of the over \$200,000 that was in those accounts before separation has not been explained. The claimant says that the respondent should be solely responsible for the \$100,000 withdrawn on her line of credit shortly before trial as well as any other debts incurred post-separation.
- [185] The claimant says that he has no issue with the respondent retaining the personal jewelry items contained in the safety deposit box and trusts that she will pass them on in due course to both children. However, he submits that the gold and silver bars in the TD safety deposit box should be equally divided. He does not accept that these were gifted to the respondent by third parties. The respondent had the means over the years to purchase these gold and silver bars, while her evidence that her brother Ravinder was wealthy and gave several of them to her should not be believed.
- [186] The claimant seeks leave to speak to costs after determination of these issues.
- [187] The respondent says that the Court should conclude that the date of separation is July 1, 2003. The respondent says that the only relevant family asset is the Nelson Avenue property and says that given the substantially unequal contributions of the parties, the property should be valued as of that date.
- [188] The respondent says that an equal division would be significantly unfair because:
- (a) The respondent discharged the 1998 mortgage with her ICBC settlement funds; and
 - (b) She has paid for numerous repairs and renovations during the over 30 years that she has owned the property.
- [189] The respondent says that the Vancouver Condo is not family property as it was acquired many years after separation. In the event it is considered family property, she seeks an exclusion for the \$350,000 paid to complete on the basis that it was a gift from her brother Ravinder. She also says that if it is considered family property, an equal division would be significantly unfair because she is the one who put the tenant in place and who arranged to use the money from the tenant to pay the relevant expenses.
- [190] The respondent says that all of the items in the TD safety deposit box are gifts from third parties and are thus excluded property. The respondent says the only exception to this are the three gold bars purchased from 2017 to 2019 which are not family property because they were acquired post-separation. She also says that the gold and silver bars were provided to Ayesha and Nikhil.

[191] The respondent says that the ICBC settlement funds received in 2016 are also excluded. She says that those funds were used toward living expenses as well as maintenance of the Nelson Avenue property and says that this either gives rise to exclusion or contributes to her claim for an unequal division.

[192] Alternatively, the respondent says that if the date of separation is February 28, 2022, then the claimant is unjustly enriched by an interest in the Vancouver Condo. The respondent says that she has given a benefit to the claimant through preservation and maintenance of the two properties, and there would be a detriment to the respondent if they are divided equally as she is the one who maintained, contributed to, and carried the costs of these properties. She argues that the claimant would receive a windfall because he would receive the benefit of: (a) funds that ought to be excluded; and (b) an increase in value of property he did not contribute to.

[193] The respondent seeks costs against the claimant.

The Varma Statement

[194] The claimant objected to the admissibility of the document signed by Ravinder Varma shortly before his death. The respondent argued that it should be admitted pursuant to the principled exception to the hearsay rule.

[195] In *Sarzynick v. Skwarchuk*, 2021 BCSC 443, at paras. 159-160 and 162, Justice Morellato considered the admissibility of statements made by the deceased in a civil case related to the estate of the deceased declarant, concisely summarizing the applicable approach:

[159] A number of hearsay statements were made during the course of the trial. Hearsay is an out-of-court statement in the absence of contemporaneous cross-examination that is tendered for the truth of its contents. Hearsay is presumptively inadmissible because it has the potential to jeopardize the truth-seeking function of the court and trial fairness. Nevertheless, hearsay can be admitted through either one of the traditional exceptions to the hearsay rule, or what the Supreme Court of Canada has called "the principled approach": *R. v. Khelawon*, 2006 SCC 57 at para. 47.

[160] The principled approach requires that the impugned hearsay be both necessary and reliable to pass the threshold for admissibility: *Khelawon*, at para. 47. The criterion of necessity mandates that the hearsay evidence must be required to facilitate the interest of justice and the search for the truth in any given case. Reliability can be addressed in one of two ways. First, a statement can be deemed procedurally reliable if there are adequate substitutes for testing the veracity of the statement. Alternatively, a hearsay statement can be substantively reliable when there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy: *R v. Moir*, 2020 BCCA 116 at para. 87; *R. v. Bradshaw*, 2017 SCC 35 at para. 27.

- [162] In addition, if the hearsay passes the threshold admissibility stage (i.e., it is necessary and reliable) as well as the judge's residual discretion to nevertheless exclude the hearsay evidence, it is still subject to the weight ascribed to the statement by the trier of fact: *Khelawon*, at para. 49; *Surespan Structures Ltd. v. Lloyds Underwriters*, 2021 BCCA 65 at paras. 95-96.
- [196] A useful list of factors to be considered in assessing reliability for this purpose can be found in *Gutierrez v. Gutierrez*, 2015 BCSC 185. This was a resulting trust case in which the parties, all of whom were siblings, sought to rely on out-of-court statements attributed to their deceased father. Justice Voith, as he then was, summarized the approach to be taken at paras. 31-35:
- [31] Since Mr. Gutierrez is deceased, his direct evidence is no longer available to the court and so the requirement of necessity is met; *R. v. Blackman*, 2008 SCC 37 at para. 34.
- [32] In *Khelawon*, the Court addressed the need for threshold reliability and observed that "the central underlying concern is the inability to test hearsay evidence" and that a principled approach should be adopted in order to identify "those cases where this difficulty is sufficiently overcome to justify receiving the evidence"; at para. 61. The Court then identified two scenarios where this might be the case: where the truth and accuracy of the statement can still be sufficiently tested despite an inability to cross examine the declarant under oath in court, or where the circumstances are such that there is no concern about the trustworthiness of the statement; at paras. 62-63. The Court then noted:
- [92] When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not
- [33] Here, the Deceased did not leave a sworn or taped statement, nor were there early opportunities to cross examine him under oath, and so the first *Khelawon* circumstance, the presence of adequate substitutes, does not apply; *Khelawon* at para. 106. Turning to the second circumstance, inherent trustworthiness, I must consider whether there are "indicia of trustworthiness sufficient to displace the general exclusionary rule"; *Blackman* at para. 38.
- [34] A number of factors can be considered when assessing the threshold reliability of a hearsay statement, including:
- 1) the presence or absence of a motive to lie (*Blackman* at para. 42; *Khelawon* at para. 67);

- 2) independent corroborative evidence that "goes to the trustworthiness of the statement" (Blackman at para. 55; Khelawon at para. 67; R. v. Couture, 2007 SCC 28 at para. 83);
 - 3) timing of the statement relevant to the event, contemporaneity (Khelawon at para. 67);
 - 4) the declarant's mental capacity at the time of making the statement (Khelawon at para. 107);
 - 5) solemnity of the occasion and whether the declarant's statement was made "in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized" (Couture at para. 89; Khelawon at para. 86).
- [35] Applied to this case, any evidence of what Mr. Gutierrez told the defendant, the plaintiff, and others, including Ms. Ewen, is hearsay and presumptively inadmissible. Thus, while such alleged statements meet the necessity requirement, I am also required to address and consider the reliability of such statements to determine whether the statements should be admitted for the truth of their contents. With this in mind, I have addressed the reliability of particular pieces of hearsay evidence in my analysis below.
- [197] The determination of whether a hearsay statement is inherently trustworthy has become known as an inquiry into its "substantive reliability".
- [198] In Bolton v. Vancouver (City of), 2002 BCSC 1061, a deceased witness to a motor vehicle accident had made statements by cellphone to an emergency dispatcher and given a written statement to a police officer within hours of the accident, had spoken to the same police officer approximately one month later, and had given a statement to an insurance adjuster several months later. Justice Henderson concluded that the first two were admissible; the latter two were not.
- [199] Dealing with the question of necessity, Justice Henderson commented at paras. 12-13:
- [12] In this case, the declarant is dead. Traditionally, that was enough to prove the necessity element at common law for the purpose of the relatively large number of historic exceptions to the hearsay rule. The traditional rules, although they no longer govern our approach to hearsay, continue to inform it. An extensive discussion of this aspect of the principled approach is found in the Supreme Court of Canada's decision in Starr v. The Queen, [2000] 190 D.L.R. (4th) 591.
- [13] No case has been cited where, although the declarant was dead, the court nevertheless found that necessity had not been established because some other witness had observed the same events. In my view, that approach is not viable. The death of the declarant in and of itself satisfies the necessity principle. Evidence of the same value is not available in this case in the sense that this witness, who could have been called (had she been living) to corroborate Mr. Morrow, is now unable to give the evidence. That satisfies the necessity principle.

[200] Dealing with reliability, Justice Henderson commented at paras. 16-17:

[16] The question to be asked is whether the party tendering the evidence has established on the balance of probabilities that the taking of the statement was attended by a circumstantial guarantee of trustworthiness, to use Wigmore's phrase. In this regard, the court is to consider such things as whether the declarant had any motive to lie, or bias; whether the statement was adduced through leading questions; whether the statement was preceded by the taking of an oath or, alternatively, by a warning of the importance of telling the truth; whether the declarant evidenced some awareness of the solemnity of the occasion and the importance of accuracy; whether the declarant evidenced any mental impairment due to alcohol, drugs, shock or fatigue; and whether the declarant had an opportunity to reflect and therefore to tailor her evidence.

[17] In my view, it is also relevant to consider under this head whether or not the statement was taken by an independent investigator. In a civil case, one should consider whether the statement was taken by a party, or an agent of a party, or an agent of a potential party, in the litigation.

[201] His conclusion with respect to the statement taken by the adjuster is at para. 21:

[21] The statement to the adjuster I also find to be inadmissible. It was taken two and a half weeks after the accident. He was working for a potential party to the litigation at the time, I.C.B.C. Ms. Hamfeldt was not under oath. The statement was not taped, although it could have been. (It was written and signed). I am not satisfied that it attains the threshold level of reliability required for this principled exception to the hearsay rule.

[202] If a statement taken by an adjuster after interviewing a witness is inadmissible, then it seems clear to me that a statement prepared by a party in a contentious family law case and then taken to a potential witness and signed as is would be even less admissible. It is my conclusion that the statement is not sufficiently reliable to meet the applicable test as set out in the cases I have cited. Its only value in this case is as a prior statement prepared by the respondent and available for purposes of cross-examination.

[203] I would note that even if I had found the statement admissible, given its provenance I would have assigned it no weight.

Reliability and Credibility

[204] I recently dealt with the principles of reliability and credibility in *O.M. v. V.G.*, 2025 BCSC 209, at paras. 217-220:

[217] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.), cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[218] In considering these matters, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).

[219] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. It includes:

- a) The ability and opportunity of the witness to observe events;
- b) The firmness of their memory;
- c) Their ability to resist the influence of interest to modify their recollection;
- d) Whether their evidence harmonizes with independent evidence that has been accepted;
- e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;
- f) Whether their evidence seems generally unreasonable, impossible or unlikely;
- g) Whether the witness has a motive to lie; and
- h) The demeanour of the witness generally.

[220] A trier of fact may accept none, part or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[205] I am going to begin with the evidence of the respondent. I did not find her to be a credible witness. I saw her departures from her discovery evidence, which I have highlighted above, as substantial. I am also of the view, as averted to above, that her disclosure of relevant documents has been minimal, at best. She clearly did not provide the disclosure required by the JCC order with respect to bank statements. I simply do not believe that she has been unable to access the records of her company, Sunita Enterprises. The lack of any documentation reflecting the sale of that business is highly problematic. I also find it difficult to believe that she was able to produce certain documents from 1996, yet claims to

have discarded all of the documents related to funds that she now claims as exclusions.

- [206] The evolution of the claim to an exclusion for an alleged \$350,000 gift from her brother in 2013 renders that claim entirely unbelievable and undercuts her credibility on all matters. As well, I simply do not believe her evidence that the series of mortgages granted to her over the years by Mr. Mohan and his company do not represent actual lending transactions. The timing of the discharges of some of those mortgages close to other financial transactions renders that evidence unbelievable.
- [207] The respondent's evidence that her brother Ravinder was a wealthy man who provided her with numerous financial gifts, as well as gold bars, is very difficult to reconcile with Mr. Varma's litigation history. That litigation history includes a judgment and foreclosure proceedings in 1995 which led to the Varmas selling their home in Burnaby. They have rented that home ever since. Around the time Mr. Varma was supposedly promising to make a gift of \$350,000 to the respondent, he was being sued in an action commenced in May 2011 by an ATM company for \$41,582 and subject to a default judgment for \$50,805 plus costs of \$4,137 in a different proceeding in February 2013. In 2018, he was sued by another ATM company for some \$115,000.
- [208] While I have fewer concerns with the claimant's evidence, I still approach it with caution. I am concerned about his denials with respect to the respondent's injuries in May 2014, which are difficult to reconcile with the photographic evidence - although I do acknowledge that his evidence as to the throwing of slippers is more consistent with Ayesha's evidence than was the respondent's. The weight of the evidence is that the claimant made use of the basement bar fridge, yet he was quite insistent that he did not.
- [209] In terms of other witnesses, I have concerns about the reliability of the evidence of the cousin, Rahul. He attributed events to 2002 (including the claimant living in the basement and paying rent) that other witnesses said happened much later. Yet, he then talked about how a few months later, in early 2003, he was asked to help move a mattress from the main floor to the basement. Nothing in the evidence explained why there was a spare mattress on the main floor of the house.
- [210] I did not find the evidence of Harindra Varma helpful. She professed complete ignorance of her financial affairs other than two specific items that by coincidence were helpful to the respondent - that being the \$350,000 contribution to the Vancouver Condo and the giving of gold bars. She was unaware of being sued for foreclosure proceedings. She was not sure how she went from an owner to a tenant of her home in the 1990s.
- [211] That leaves the evidence of Ayesha and Nikhil. Even though both are adults, it was clear that testifying at this trial was extremely awkward and difficult for them. They clearly both have good relationships with both parents, although clearly both look to their mother as the family provider. Their evidence was in some ways consistent with each of their parents at points in time. They did not agree as to whether the claimant after 2007 cooked upstairs every day or only once a week or every two weeks. Having witnessed many arguments, they

clearly saw their parents as both having played a role in those arguments, both verbally and physically. Strangely, neither one could remember a time when their father was not sleeping in the basement, while the primary conflict between the parties on that point was whether he started sleeping downstairs in 2003 or 2007. Similarly, both children disclaimed having much of any recollection of being at Express Lane Foods. At best, the children's recollections were selective, and I am of the view that caution is necessary in considering their evidence.

Legal Context

Date of Separation

[212] I dealt with the legal test for date of separation in *O.M.*, at paras. 239-257:

[239] Both the FLA and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), contain provisions with respect to separation. Although their language differs, the same legal principles are in practice applied regardless of which statute applies in a particular case: *C.L.D. v. J.J.P.D.*, 2024 BCSC 1123 at paras. 12-13. Among the influential authorities are some dealing with similar definitions under the old Estate Administration Act (*Austin v. Goerz*, 2007 BCCA 586 and *Gosbjorn v. Hadley*, 2008 BCSC 219) as well as with respect to Canada Pension Plan benefits (*Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357).

[240] The present proceeding is brought under the FLA, and the question of separation is relevant primarily in respect of property division under Part 5 of the FLA. Section 3 of the FLA deals with when a person is a spouse. Section 3(4) provides that:

- (4) For the purposes of this Act,
 - (a) spouses may be separated despite continuing to live in the same residence, and
 - (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

[Emphasis added.]

[241] Section 8 of the Divorce Act provides, among other things, for the granting of a divorce where spouses have lived separate and apart for a sufficient period of time. Section 8(3) provides that:

Calculation of period of separation

- (3) For the purposes of paragraph (2)(a),

- (a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and
- (b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated
- (i) by reason only that either spouse has become incapable
- (ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

[242] It is clear from the authorities that separation is not necessarily a bilateral decision. It does not require a "meeting of the minds", or that both parties agree to separate: *Nearing v. Sauer*, 2015 BCSC 58 at para. 54; recently cited with approval in *Gupta v. Kumar*, 2023 BCCA 106 at para. 13.

[243] Rather, as summarized by Justice Gray in *Gosbjorn* at paras. 137-138 and 142:

[137] The parties agreed that Ms. Gosbjorn and Mr. Krompocker had a 12 year common-law relationship. As suggested in para. 42 of *Hodge*, "cohabitation" in this context can be defined to mean that there was a mutual intention to continue the relationship, and cohabitation will cease when either party regards the relationship as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one.

[138] As discussed in *Hodge*, use of that analysis for determining the end of the relationship permits the court to make a decision without putting inordinate emphasis on any particular event or lack of action. It allows the bridging of gaps as being brief "cooling off" periods.

[142] Using the analysis suggested in *Hodge*, parties cease to live and cohabit in a marriage-like relationship when either party regards the relationship to be at an end, and by his or her conduct, demonstrates in a convincing manner that this particular state of mind is a settled one. If the parties separate without either or both of them ending the relationship in that way, s. 98 will apply if they were separated for not less than one year with the mutual intention to live separate and apart.

[Emphasis added.]

[244] While *Gosbjorn* is an Estate Administration Act case, its analysis has been adopted and applied in cases involving the Divorce Act (including the influential judgment of Justice Dardi in *H.S.S. v. S.H.D.*, 2016 BCSC 1300 at para. 44, rev'd on oth grounds 2018 BCCA 199) and the FLA (*Y.T.C. v. J.C.V.*, 2018 BCSC 773 at para. 22). Another influential judgment - that of Justice Fleming (as she then was) in *Nearing* applies both the Divorce Act and the FLA.

[245] The requirement that the intention to separate be "a settled one" is well established in the authorities, although there are some cases in which those words are not included in statements of the test - see, by way of example, *S.A.H. v. I.B.L.*, 2018 BCSC 544 at para. 55. In my view, that reflects the fact that whether the intention was settled was not in issue in those cases, and not a change in the legal requirements to establish a separation. The requirement is also somewhat implicit in the use of the word "permanently" in s. 3(4) of the FLA, which I have quoted above.

[246] In *Hodge*, Justice Binnie described the applicable legal principles as follows at para. 42:

[42] The respondent terminated cohabitation and cohabitation is a constituent element of a common law relationship. "Cohabitation" in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof. Such periods of physical separation as the respondent and the deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue. I agree with the observation of Morden J.A. in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429 (C.A.), at p. 432, that, subject to whatever provision may be made in a statute, a common law relationship ends "when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one". On this point, Professor Fodden observes:

... turning to a (constructed) mental phenomenon permits the court to make a decision as to the critical moment a relationship ended without having to place inordinate stress upon any particular event or lack of action. It allows for the bridging of gaps in the relationship as being "brief cooling-off period[s]" and perhaps gives courts some freedom to protract the continuation of cohabitation past the last physical symptom, where to do so might be just.

(S. R. Fodden, *Family Law* (1999), at p. 60)

[247] Justice Dardi adopted this approach in *H.S.S.* where, leading up to her adoption at para. 44 of Justice Gray's statement of the law (from para. 142 of *Gosbjorn*, cited above), she noted at paras. 42-43:

[42] The Court's task is to assess objectively, on the totality of the evidence, whether one spouse held a settled intention to separate and communicated that intention through his or her conduct to the other spouse. An express statement is only one of the factors for consideration in what is necessarily a contextual analysis.

[43] The Ontario Court of Appeal in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429 (C.A.), held, in the context of a common law relationship, that a relationship has come to an end "when either party regards it as being at an end, and by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one": at 432. This statement was cited with approval by the Supreme Court of Canada in *Hodge v. Canada* (Minister of Human Resources Development), 2004 SCC 65 at para. 42.

- [248] In my view, this is precisely the sort of case where there is ambiguity as to the intention of the parties, and the question of whether the claimant's intention was settled is key.
- [249] Having noted the importance of a settled intention, I would otherwise adopt Justice Shergill's distillation of the applicable principles in S.A.H. at para. 55:
- [55] As is evident from the case authorities, the determination of the parties' date of separation is a very fact specific exercise. I have found the following questions, framed in the form of a test, useful to determining the date of separation here:
1. Did at least one spouse have the intention to separate?
 2. Was the intention to separate communicated to the other spouse?
 3. Was the intention to separate acted upon? In other words, using generally accepted characteristics of marriage, did one or both spouses take action that is consistent with the separation, such as:
 - a. changing how they behaved with each other in public; and
 - b. changing how they behaved with each other in private.
- [250] As noted, determination of whether one or both spouses acted upon a settled intention to separate is often informed by consideration of what are referred to as the generally accepted characteristics of the marriage: Nearing at para. 56. It is often useful to compare the behaviour of the parties both before and after an alleged separation date to determine whether they are living separate and apart: *Rose v. Guiguet*, 2008 BCSC 1225 at para. 70. As noted in Nearing at para. 56:
- [56] Typically when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage including the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events: *Sachdeva* at para. 87. The court will also consider a range of other factors, including a clear statement by one of the parties of his or her desire to terminate the relationship. Sexual involvement, or lack thereof, is not conclusive: *Newth v. Booth*, 2011 BCSC 317 at para. 17.
- [251] The cases reflect that courts have, over the years, identified certain generally accepted characteristics of a marital or marriage-like relationship. Those characteristics, and their relative significance, evolve as societal norms change. As set out in *Austin* at para. 59, generally accepted characteristics of a conjugal relationship include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the social perception of the couple - however, "these elements may be present in various degrees and not all are necessary for the relationship to be found to be conjugal". In *Austin*, a 2007 judgment, the Court noted that while financial dependence may at one time have been considered an essential element of a marital relationship, this is no longer so (para. 55.).

[252] A useful summary can be found in H.S.S. at paras. 46-50:

[46] The Court in *Weber v. Leclerc*, 2015 BCCA 492, recently considered the definition of "spouse" under the Family Law Act. The Court reviewed the appellate authorities that have evaluated the characteristics of a "marriage-like" relationship and observed that the jurisprudence has evolved in accordance with the changing societal norms surrounding marriage. The Court must apply a holistic approach, having regard to all aspects of the relationship. While the Court must consider the evidence expressly describing the parties' intentions, the Court must test that evidence by considering whether the objective evidence of the parties' lifestyle and interactions is consonant with those intentions: at para. 23.

[47] I turn to consider the factors which inform the analysis of whether the parties are living as spouses.

[48] It emerges from the authorities that although the living arrangements of the parties are not determinative, this factor is frequently accorded significant weight: *Routley v. Paget*, 2006 BCSC 419.

[49] Additionally, the following factors have been accepted as informing the analysis of whether the parties are living as spouses:

- Whether the parties vacationed together;
- Presence or absence of marital relations;
- How the parties conducted their financial affairs, including any financial planning they undertook as a couple and how they filed their tax returns. Notably, the authorities establish that financial dependence is no longer considered an essential element of a marital relationship;
- Estate planning;
- Making shared plans for the future;
- Participation in joint social activities and the manner in which the spouses presented themselves to others.

[See *Eisener v. Baker*, 2007 BCSC 83 at paras. 29-30; *Nearing* at paras. 56-58; *Oswell v. Oswell* (1990), 74 O.R. (2d) 15 (H.C.J.) aff'd (1992), 12 O.R. (3d) 95 (C.A.); *Routley v. Paget*, 2006 BCSC 419; *Greaves v. Greaves*, [2004] O.J. No. 2522 (S.C.J.); *J.J.G. v. K.M.A.*, 2009 BCSC 1056; *Fuller v. Mathews*, 2007 BCSC 444.]

[50] In summary, the authorities mandate a contextual and holistic inquiry, having regard to all aspects of the relationship. The Court in *Weber* affirmed that there is no checklist of characteristics that will invariably be found in all marriages. The presence or absence of any particular factor is not determinative of whether the parties carried on a spousal relationship: *Weber* at para. 21, citing *Austin v. Goerz*, 2007 BCCA 586 at para. 58.

[253] A more recent discussion of these objective factors is found in *Tam v. Li*, 2022 BCSC 1412 at paras. 12-13:

[12] In assessing whether or when two spouses separated, the court will consider the following factors:

- financial interdependence;
- living arrangements;
- objective evidence of the parties' lifestyle and interactions such as shared vacations and activities;
- family events and social events attended or shared together, including how the parties present themselves to others;
- whether the parties engaged in sexual relations and other indicia of intimacy including fidelity and sharing personal information; and
- clear statements pertaining to the parties' intention to remain in the marriage or terminate the marriage.

See: H.S.S. at paras. 48-49 citing, among other authorities, *Nearing* at para. 56-58; *Routley v. Paget*, 2006 BCSC 419; and *J.J.G v. K.M.A.*, 2009 BCSC 1056 at paras. 35-39. - also *C.L.D. v. J.J.P.D.*, 2024 BCSC 1123

[13] A happy or functional relationship is also not a pre-requisite for a marriage to be ongoing: *Surrett v. Butkiewicz*, 2018 BCSC 2194 at para. 72. Ongoing sexual intimacy and financial interdependence have, in the past, been seen as hallmarks of the presence of a marriage-like relationship or determinative that the parties are not living separate and apart. More recently, the clear authority is that no factor is determinative. The court must take a holistic view of the evidence, taking all relevant matters into account and weighing all the factors, rather than using these factors as a checklist: *Weber v. Leclerc*, 2015 BCCA 492 at paras. 22-25, and *Austin v. Goerz*, 2007 BCCA 586 at para. 58.

[254] These characteristics of a marriage are often described as "objective factors" that can help the court resolve competing views as to whether a separation has occurred. While they are relevant to ascertaining the parties' actual intentions, it is important to keep in mind that the objective factors will rarely be determinative in and of themselves: *Gosbjorn* at para. 136, citing *Takacs v. Gallo*, [1998] B.C.J. No. 600 (C.A.) at para. 55.

[255] The application of these principles in *S.A.H.* is instructive. In March 2004, Ms. H. had commenced divorce proceedings which was communicated to Mr. L. However, a few months later the parties reconciled, and no steps were taken in the proceedings until the fall of 2013. At paras. 62-67, the court concluded:

- [62] In addition, their day-to-day life did not measurably change after the commencement of family law proceedings, either in terms of their private behaviour or how they interacted with each other in public. The evidence establishes that the parties' remained financially inter-dependent at the same level as they had always been, until October 1, 2013. They also continued to reside in the same home; share their financial resources; eat and cook their meals together; manage a joint household; parent their children together; do family activities together; and take family vacations together.
- [63] While the existence or absence of sexual intimacy is not determinative of the issue, I do not accept Mr. L.'s evidence that all sexual contact ended after the fall of 2002. There is uncontroverted evidence that Ms. H. became pregnant after this time. I accept Ms. H.'s evidence that sexual contact between the parties' continued well after 2004, albeit infrequently.
- [64] Their public life also did not change: they continued to attend social functions together and present themselves publically as a married couple. Indeed, it appears that no-one, except the parties and the claimant's father and her lawyers, was even aware that the claimant had filed for divorce in March 2004. Their children were still giving them anniversary cards until at least 2008, and up until her political campaign of 2014, all of Ms. H.'s political campaign materials had her marriage to Mr. L. featured prominently.
- [65] These events show that the parties are making a slow, incremental move towards separation, but are not evidence of separation. The most significant of these, Mr. L. sleeping in the basement of the family home, could at best be described as a distancing, rather than a clear break, in the parties' relationship. Notably, item 5 of the Reconciliation Terms describes Mr. L.'s desire to have quality time to himself, including a "place where [I.] can relax and play recorded music at high volume without bothering anyone (basement room)". Despite sleeping in the basement, the parties continued to share the same bed during family vacations, and were intimate with each other even after Mr. L. started sleeping in the basement.
- [66] Although it appears that the parties' broached the topic of separation again in 2010, they did not follow through and instead, continued in the same manner until they could no longer tolerate living in the same home.
- [67] On an objective basis, the evidence supports a finding that the parties separated on October 1, 2013, when Ms. H. moved out of the family home pursuant to the Interim Separation Agreement.

- [256] Finally, I note two recent judgments in which the court considered the situation of parties who were not living together even before the alleged separation - a situation that is becoming more and more common, particularly where spouses feel there are better economic prospects in one country, while better conditions for the education or other needs of a child in a different country. In *Quirion v. Lovett*, 2022 BCSC 1693, Justice Ahmad noted at paras. 72-73:
- [72] Typically, when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristic of marriage, including factors such as the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events: *Nearing v. Sauer*, 2015 BCSC 58 at para. 56, citing *Sachdeva v. Sachdeva*, 2013 BCSC 313 [*Sachdeva*] at para. 87.
- [73] However, in this case, because the parties did not physically reside together at the relevant time, their relationship did not include many of the generally accepted characteristics that would otherwise be associated with a marriage-like relationship. In these unique circumstances, I have considered the overall context in which the parties conducted themselves, including their interactions and communications with each other and with third parties, following the January 3, 2018 phone call.
- [257] In *Arcand v. Arcand*, 2023 BCSC 747, Justice Lamb noted at para. 87:
- [87] Many of the generally accepted characteristics that would otherwise be associated with a married couple may be absent when the parties do not physically reside together at the relevant time: *Quirion v. Lovett*, 2022 BCSC 1693 at para. 73. In such circumstances, the Court may consider the overall context in which the parties conducted themselves, including their interactions with each other and with third parties.
- [213] The cases I discussed in *O.M.* required a settled intention to separate on the part of one party, with that intention to separate communicated to the other spouse and acted upon in some way. The cases consider a range of factors. As noted in the *Austin* case, such factors may include shared shelter, sexual and personal behaviour, services, social activities, economic support, and children, as well as the social perception of the couple. However, "these elements may be present in various degrees and not all are necessary for the relationship to be found to be conjugal." Similarly, the representations made to the Canada Revenue Agency as to marital status are a factor to consider but are not necessarily conclusive.
- [214] In addition, representations made to an extended health benefits provider that the parties are in a spousal relationship is also a factor to consider as can be the shared caretaking responsibilities for a pet: *Vigen v. Murley*, 2025 BCSC 365, at paras. 30, 32 and 54, *Jones v. Davidson*, 2020 BCSC 1371, at paras. 41-42; *aff'd* 2022 BCCA 31, at para. 27.
- [215] In *Austin*, Justice Frankel quoted with approval from *Yakiwchuk v. Oaks*, 2003 SKQB 124:

[101] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property - in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together - others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine.

[216] These observations are particularly apt in the present case.

Family Property, Excluded Property, and Unequal Division

[217] I dealt with the legal principles governing Part 5 of the FLA, including determination of family property, excluded property, and unequal division of property in O.M, at paras. 258-273:

[258] Division of family property and debt is governed by Part 5 of the FLA. Section 81 provides that:

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.

[259] What is family property is defined by s. 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;
- (b) after separation,

(i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or

(ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

[260] In this case, there are no claims of excluded property. That is because all of the parties' pre-relationship assets were lost through a bad investment after the parties were married.

[261] Section 86 defines "family debt" to include all financial obligations incurred by a spouse during the relationship.

[262] With respect to valuation, s. 87 provides that:

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.

[263] Section 95 sets out those circumstances in which the court may order an unequal division of family property or debt:

- (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.

[264] These provisions, which came into force in 2013, are substantially different from the previous statute (the Family Relations Act or FRA). As noted by Justice Harris in *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 36:

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

- [265] Justice Harris concluded at para. 38 that one can see in the FLA an intention "to limit the circumstances in which a departure from equal division of family property could be justified because of unequal contributions to its acquisition, preservation, maintenance or improvement". He noted at para. 39 that:
- [39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.
- [266] Turning to the discretion in s. 95 to depart from an equal distribution, Justice Harris noted at para. 41 that the test of "significant unfairness" imposes a more stringent threshold than the test that was applied under the FRA. As well, he noted at paras. 43-44 that:
- [43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the FRA. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1)(f) of the FRA. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c)) and to post-separation increases in value beyond market trends caused by one spouse (95(2)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the FLA division of property regime.
- [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.
- [267] In *Khan v. Gilbert*, 2019 BCCA 80, the Court allowed an appeal from a trial judgment which departed from equal division based on one spouse having earned significantly less than the other, and whose contributions to the family economy and burdens during the relationship had been significantly less. Justice Fenlon referenced the comments of Justice Harris in *Jaszczewska* at paras. 43-44, and commented at paras. 31-32 that:

[31] In *Slavenova v. Ranguelov*, 2015 BCSC 79, Justice Savage (as he then was) said:

[60] The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions.

[Emphasis added.]

[32] Cases in which unequal contribution to family expenses and burdens were found to make it significantly unfair to divide family property equally have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: *Nanara v. Nanara*, 2017 BCSC 1447; *E.H.H. v. C.L.M.*, 2017 BCSC 1299.

[268] Thus:

[36] In summary on this issue, in my respectful view the judge erred in principle in his approach to the reapportionment of family property, basing it on a dollar for dollar comparison of contribution to expenses which does not reflect the nature of marriage as a family venture. In most marriages, one spouse will earn more than another and therefore contribute more to the family finances. As noted at para. 43 of *Jaszczewska*, allowing relative contribution to become a regular consideration in the context of s. 95 would create uncertainty and complexity, contrary to the legislative objectives underlying the Family Law Act division of property regime.

[269] These issues were considered again in *Singh v. Singh*, 2020 BCCA 21, where Justice Garson commented on the "significant unfairness" threshold at paras. 133-134:

[133] In *V.J.F. v. S.K.W.*, 2016 BCCA 186, Justice Newbury described s. 95 as requiring a high threshold of "significant unfairness" to depart from equal division: at para. 81. Other cases have reached similar conclusions about the high threshold necessary to reapportion assets under s. 95. In *Khan v. Gilbert*, 2019 BCCA 80, for example, Justice Fenlon noted that cases in which unequal contribution was found to reach the significantly unfair threshold have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: at para. 32.

[134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

- [270] Justice Garson went on to consider what "other" factors could fall within the scope of s. 95(2)(i). She noted the comments of Justice Harris in *Jazczewski* at para. 44, which are cited above. She concluded at para. 138, based on consideration of established rules of statutory interpretation, that items (a) through (h) of s. 95(2) are part of a limited class - that being the economic characteristics of a spousal relationship. She concluded at paras. 139-140 that:
- [139] The economic characteristics of a spousal relationship is a broad class, but one that is narrower than the general term in s. 95(2)(i). With regard to Sullivan's third requirement, there are clearly other factors relevant to the class that are not enumerated in s. 95(2)(a)-(h). For example, this limited class would allow for the consideration of the relative contribution of spouses to the acquisition, preservation, maintenance, or improvement of family property during the relationship, as suggested by *Jaszczewska* at para. 44.
- [140] Accordingly, I find that the limited class rule is applicable and I must consider whether the factors the judge relied upon are properly the subject of s. 95(2)(i). In my view, they are. The economic characteristics of a spousal relationship would clearly encompass the existence of undisclosed assets. This class would also permit consideration of the costs of bankruptcy, and a party's motivations for entering bankruptcy, as the trial judge did in the case at bar, and the consequent impact on the value of the asset.
- [271] More generally, I note a helpful summary of key principles to be applied in dealing with claims for unequal division, as summarized by Justice Abrioux (as he then was) in *Nanara v. Nanara*, 2017 BCSC 1447 at para. 63:
- (a) the FLA espouses a presumption of equal division of family property, the entitlement to which exists independent of contributions or use. However, unequal contribution after separation can be a relevant consideration in reapportionment: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 44;
 - (b) the court must first "go through the notional exercise" of equal division, then consider if equal division would be significantly unfair. "Significantly unfair" means "compelling or meaningful having regard to the factors set out in s. 95(2)". There must be "very persuasive reasons" from departing from equal division: *Parton v. Parton*, 2016 BCSC 1528 at para. 71 [Parton]; *Dheenshaw v. Gill*, 2017 BCSC 319 at paras. 44-45; *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44;
 - (c) lack of financial disclosure is a factor which may be taken into account in considering whether an unequal distribution is appropriate: *Bamford v. Mulyati*, 2017 BCSC 945 at para. 43; *Ahmadi-Abbasabadi v. Ahmadian*, 2017 BCSC 648 at para. 171;
 - (d) reapportionment is meant to remedy substantial unfairness but does not require both parties to be in absolute equality. *Parton* at para. 108.

- [272] Finally, I note *S.A.T. v. D.I.T.*, 2022 BCSC 1176 at para. 246, in which Ms. T claimed reappportionment:
- [246] essentially on the mental and physical abuse she has suffered as result of Mr. T's misconduct. Of course, this is not one of the enumerated bases under s. 95(2) which would militate in favour of a finding of significant unfairness. However, family violence has still factored into the reappportionment analysis where it has had a "connection to the economic characteristics of the spousal relationship": *Chang v. Chang*, 2020 BCSC 1783 at paras. 121-122; *Salman* at para. 122.
- [273] As explained in *Salman v. Astifan*, 2021 BCSC 1395 at paras. 121-122:
- [121] *Chang* provides some authority to reappportion family assets in circumstances where there has been bullying conduct on the part of one of the spouses but there were a number of other factors at play in that case that led the court to reappportion the family assets on a 75%-25% basis. Not all those factors are present in this case.
- [122] However, I find that Mr. Salman's abuse and violent outbursts is a factor I may consider in this case because it does have a connection to the economic characteristics of the spousal relationship. I find as a fact that Mr. Salman's conduct made it very difficult for Ms. Astifan to devote herself to the restaurant business in the manner that she would have liked and had intended in the final years of the relationship. I accept Ms. Astifan's evidence in this respect. Were it not for Mr. Salman's violent, abusive, and degrading conduct towards Ms. Astifan, I find it more likely than not that the restaurant would have been more successful in those years. I am not able to quantify this but I will take this into account as part of the totality of the evidence in considering whether an equal division of the assets is substantially unfair and, if so, what reappportionment should be ordered.

Analysis

Date of Separation

- [218] The parties' conduct in the years from 2004 onward must be considered in the context of their conduct from the time the claimant arrived in Canada in 1984. My conclusions on reliability and credibility have been set out above. In light of those conclusions, I accept the evidence that both parties worked long hours in their family business, particularly once the parties moved to Nanaimo, Victoria, and then back to Vancouver. Their long hours were mostly offsetting, which was probably a good thing given that they did not get along very well.
- [219] Given the nature of the parties' work lives, not all of the factors set out in the cases I have reviewed will be material to this case. For example, there was no evidence of the parties at any time after 1984 engaging in extensive social activities together. This is a case in which the comments I have quoted from in *Yakiwchuk* are particularly apposite.

- [220] In my view, the evidence as to anything happening in 2003 that might have indicated a separation is weak. Given my review of the record and, in particular, my conclusions on reliability and credibility, I conclude that the claimant's move to begin sleeping in the basement on an ongoing basis occurred in late 2007 when he began working a graveyard shift at Save-On Foods.
- [221] Given the evidence as to the parties' relationship, that probably was not a bad thing for them. I accept that their relationship was volatile. It appears to me that each was stubborn and had strong views as to the other's conduct and as to what the other should be doing. My sense from the other witnesses was that both were prone to yelling and swearing at the other and that those altercations on occasion led to pushing. All of that said, it is my view that both parties were utterly dedicated to their children and to providing them with support and opportunity. Their mutual stubbornness was also reflected in their unwillingness to depart from the institution of marriage and their determination to remain in a spousal relationship for the benefit of their children.
- [222] In my view, even if I accepted that the claimant began sleeping in the basement in July 2003, there is no evidence - and certainly no reliable evidence - of a communication by the respondent to the claimant at or around that time of an intention to separate. As I have said, my conclusion is that the claimant began sleeping in the basement in 2007 and I accept his evidence that this largely reflected a need for sleep given his work schedule at Save-on Foods. It was not reflective of an intention to separate and neither party gave notice of such an intention in 2007.
- [223] Neither party advanced an argument that the claimant's moving out of the Nelson Avenue property in May 2014 reflected a separation. That is presumably because his move was initiated and compelled by judicial imposition of an undertaking. There was no voluntariness to his ceasing to live at the house and no evidence of either party communicating an intention to separate at that time.
- [224] The claimant moved back to Nelson Avenue in early 2018. There was evidence of a request that he pay \$1,000 per month. I do not see that as necessarily reflective of an intention to separate. Whereas, prior to 2007, the respondent had taken care of all the family's financial arrangements, after 2007 the claimant was earning an income himself and it would have been reasonable for him to be contributing to the household expenses in any event. After 2012, the claimant was no longer contributing to the family business.
- [225] In my view, the circumstances of this case are such that it is appropriate to give some weight to the manner in which the parties filed their tax returns and the fact that the respondent was not only registered as the claimant's spouse for extended health and dental benefits, but also regularly made use of those benefits. While the cases make clear that neither of these is necessarily a determinative factor, they are factors to be weighed as part of the assessment.

[226] I acknowledge the respondent's evidence as to the claimant ripping up and throwing at her a tax return at some undefined time in the past. I have difficulty accepting that evidence. I accept the evidence that it was the respondent who retained and instructed accountants in most years to file both of their returns. Given the involvement of third parties in the tax filing process, who had a responsibility to ensure accuracy in those returns, I see the respondent's evidence on this issue as doubtful. In any event, the evidence seemed to be common that for 2015 and 2016, at least, the parties filed their tax returns completely independently, yet they continued to file on the basis that they were married.

[227] The legal test as enunciated above requires communication of an unequivocal and settled intention to separate, together with an action in that regard. In my view, the only evidence that I accept of that occurring was on January 23, 2022, when the respondent told the claimant he should move out. He agreed to do so and plans were made for that to happen on February 28, 2022.

[228] In my view, the date of separation is January 23, 2022.

Family Property and Debt

[229] Given this conclusion, the primary family assets for division in accordance with the FLA, subject to any applicable claims for exclusion, are

- a) The Nelson Avenue property;
- b) The Vancouver Condo;
- c) The parties' bank accounts of which the primary account of value is the respondent's account 3984; and
- d) The gold and silver bars in the respondent's TD safety deposit box.

[230] In terms of debt, I accept that the mortgage on the Vancouver Condo is family debt. I also agree that there is a liability for capital gains on the Vancouver Condo that will have to be shared between the parties. The other borrowed funds shown in the respondent's F8 financial statement, including the recent advance on her line of credit, are all post-separation debts.

Exclusion Claims

[231] In my view, none of the parties' claims for exclusions were made out on the evidence.

[232] Each of the parties gave vague evidence about having received funds that were used for the 1992 purchase of Nelson Avenue. The respondent talked about receiving some money from her parents, while the claimant talked about an \$8,000 settlement from ICBC. No documents were produced by either party to substantiate those claims. I conclude that they have not been proved on a balance of probabilities. The same would be said for the respondent's assertion that she had some money that she used to assist with retiring the

mortgage in 1998.

- [233] The respondent asserted that some of the funds used for the deposits in the Vancouver Condo came from her mother and some from a settlement with McDonald's. Again, there was no specificity as to an amount or timing and no documents provided to substantiate either claim. Neither of these claims have been established on a balance of probabilities.
- [234] The respondent also asserted the \$350,000 used to complete the purchase of the Vancouver Condo was a gift from her brother. I do not believe this evidence. In my view, it is far more likely that the funds largely came from the repayment of monies accumulated over the years through the Express Lane Foods business, and with some of those funds having been lent to and repaid by Mr. Mohan and his company. Whether or not that is the case, it is clear that no claim for an exclusion has been established.
- [235] Finally, the respondent sought to claim an exclusion in respect of her 2016 ICBC settlement. None of those monies are reflected in 2017 banking documents the respondent has produced. There is no evidence on which it could be concluded that these funds can be traced into any assets. In my view, the funds were most likely dissipated over time. No exclusion has been established in respect thereof.
- [236] With respect to the safety deposit box, the only items at issue are the 12 gold and two silver bars. The respondent claims that many of these are gifts from either her brother Ravinder or from her parents, and that only the three for which she provided receipts were purchased by her. For the reasons set out above, I do not accept that Ravinder was sufficiently wealthy to be making gifts like this. Nor do I accept that the respondent's father as a government employee who had 13 children was similarly able to do so. In my view, no exclusion has been established in respect of the gold and silver bars.

Unequal Division

- [237] The claimant presented the parties' situation as being a hard-working immigrant family in an arranged marriage that turned out to be not all that happy, but doing their best to make a go of it in a small business, while at the same time being dedicated to ensuring their children had a solid education and opportunity. Having considered all of the evidence, I accept that as an apt characterization. The proposition that an individual who worked while going to college, then held down two jobs in India before moving to Canada, and then beginning in 2007, worked for over a decade in a physical job involving five graveyard shifts a week, would spend the 23 intervening years doing nothing but stopping by his wife's small business from time to time to harass her and otherwise do nothing is not, to use the language of Faryna, in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

- [238] I accept, in particular, that up to 2007, both the respondent and the claimant worked very long hours in the family business. I accept that the respondent insisted on having the business in her name and on dealing with all financial matters, and that the claimant acquiesced in that. While it may have made sense in the early days of his time in Canada, it is clear that he chafed at the situation as time went by, but the financial framework established in 1985 remained in place for over 30 years.
- [239] I accept as well that the parties had disagreements and that at times the claimant would absent himself for periods of time. That caused real difficulties for the respondent who had to ensure that their business continued even with the claimant having these temporary absences. I see that conclusion as consistent with some of the notes the respondent demanded that the claimant sign. I also see it as consistent with the evidence of the cousin, Rahul, who described having worked at Express Lane Foods for about three weeks in 2005 when the respondent had a sudden staffing issue.
- [240] In light of these conclusions, I am simply not able to conclude that the respondent's claim for an unequal division is made out. While I accept that the respondent used funds held by her to pay for the various maintenance and renovations that were done at Nelson Avenue, it is my view that the claimant contributed indirectly to those funds through his work in the family business. In any event, I also accept the claimant's submission that, on the appraisal evidence, it appears that the value of the house (as distinct from the underlying land) has not actually increased. Thus, the money that has been spent on it over the years has maintained the house and its value, and personalized the house for the respondent's taste, but the increase in value of the property has all come as a matter of increased land value.

Unjust Enrichment

- [241] The respondent relies in support of this claim on the basis of two authorities, *Wilson v. Fotsch*, 2010 BCCA 226; and *Ibbotson v. Fung*, 2013 BCCA 171, both of which involve common-law relationships in which the litigation predates and is not governed by the Family Law Act. Those cases proceed on the basis of the three-part test for unjust enrichment: that is (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, at para. 30.
- [242] The Family Relations Act, which is the predecessor of the FLA and was in effect when the facts arose in *Wilson* and *Ibbotson*, did not provide a statutory regime for property division amongst common-law spouses. Part 5 of the Family Relations Act did not apply to persons who had not been legally married. That changed when the FLA came into effect, and almost all property division claims involving common-law couples these days are now determined in accordance with Part 5 of the FLA. Of course, in the present case the parties were married, so even prior to the FLA, the division of property would have been governed by the then-applicable statutory scheme.

[243] Fundamentally, the respondent's claim is that the statutory scheme for property division in the FLA operates in an unjust manner. It is my view that given that a statutory scheme exists, it cannot be said that there is an absence of a juristic reason. The statutory scheme is by definition a juristic reason. The claim for unjust enrichment cannot stand.

Conclusion

[244] In my view, there should be an equal division of the Nelson Avenue property and the Vancouver Condo net of the mortgage debt. As well, the capital gains tax in respect of the Vancouver Condo should be shared equally by the parties.

[245] I do not think there need to be any adjustments in respect of either post-separation expenses with respect to the properties or post-separation rental revenue from the Vancouver Condo. In my view, those amounts will roughly cancel each other out.

[246] With respect to the bank accounts, the parties' bank accounts that were in evidence, other than account 3984, were small and had roughly equivalent value as of the date of separation. Account 3984 held just under \$150,000; however, the depletion of that account from October 2020, when it held \$210,000, to January 2022 was not explained. I have also expressed my concerns above in respect of the respondent's disclosure. In all of the circumstances, I see the claimant's request that the claimant receive \$80,000 from the respondent in order to effect an equal division of the parties' bank accounts as being a reasonable one and I would adopt it.

[247] The gold and silver bars in the TD safety deposit box should be divided equally between the parties.

[248] The respondent is solely liable for other debts, including her Scotiabank line of credit and any loan from Ms. Varma.

[249] I understand that the respondent wishes to keep one or both of the Nelson Avenue property or the Vancouver Condo. It may only be realistic for her to keep one of those two. In any event, I would direct that she have 90 days to see if she can arrange financing to purchase the claimant's interest in one or both properties. If she is unable to do so then the properties should be put up for sale and the parties have leave to apply to me for directions with respect to implementing this direction.

[250] One of the parties asked that the question of costs be left for further submissions once the result at trial is known. My preliminary thought is that the order I am making is not that different from the claimant's closing submission, and that as a result it may be that the claimant has been substantially successful and thus entitled to costs. However, I am not deciding that at this point and acknowledge that there may be other facts not known to me. I thus grant leave for submissions as to costs in the event the parties are unable to resolve that question directly.

- [251] Any submission seeking costs should be made through Supreme Court Scheduling within six weeks of today's date. Any submission in response should be made within three weeks thereafter. The applicant may submit a brief reply submission within seven days of the other party's submission. I will determine after reviewing the submissions whether a hearing is necessary.
- [252] If I have failed to deal with any matter that was properly before me, or if there are any mathematical errors in the calculations I have made, those can be drawn to my attention by way of submissions that should be made in accordance with the same timeline as for submissions on costs.

Divorce Claim

- [253] There is also a claim for divorce. However, there is not yet a certificate of clearance in the court file. While I heard evidence in respect of the requirements for an order of divorce, I am unable to grant such an order until a certificate of clearance is obtained.
- [254] The parties have leave to bring the application for a divorce back before me once a clearance certificate has issued.

"Veenstra J."

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