

CANADA / JUDGMENT

K.S. v. C.W.K.

2024 BCSC 1459

COURT

Supreme Court of British Columbia

DECIDED

12 August 2024

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2024 BCSC 1459 K.S. v. C.W.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.S. v. C.W.K.,

2024 BCSC 1459

Date: 20240812

Docket: E11158

Registry: Prince Rupert

Between:

K.S.

Claimant

And

C.W.K.

Respondent

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the claimant:

W. MacGregor

Appearing on his own behalf:

C.W.K.

Place and Date of Trial:

Prince Rupert, B.C.

July 16-18, 2024

Place and Date of Judgment:

Prince Rupert, B.C.

August 12, 2024

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Introduction

- [1] The parties to this family law proceeding were married on February 9, 2009, in Iran. The respondent had lived in British Columbia since 1999. The claimant immigrated to Canada in November 2012, after which the parties lived together, first in the Vancouver area, then in Prince Rupert.
- [2] The parties' daughter, who was born in March 2014, is the only child of the marriage. For reasons set out below, I find that the parties were legally separated in December 2018. The claimant subsequently lived from time to time with the respondent, separately but in the same apartment.
- [3] I have granted an anonymization order in respect of this action.
- [4] In dispute between the parties is the status of three properties - one in Prince Rupert, and two in Mission (referred to herein as the "MacRae Avenue property" and the "7th Avenue property"). The registered owners of all three properties are the respondent and his brother. The claimant submits that the increase in the values of those properties during the parties' marriage is family property. The respondent claims that he has no beneficial interest in the properties and that his half-interests are held by him as a bare trustee for his brother.
- [5] The claimant also makes a claim for 850 gold coins (the "marriage portion" or "Maher") allegedly promised to her in the parties' Iranian marriage certificate. The respondent submits that the promise in the marriage certificate was only symbolic.
- [6] Interim orders regarding various matters, including parenting and support, were made by Justice Punnett in February and March, 2020.

Issues

- [7] The following issues are to be determined in this action:
 - a) What family property is to be divided between the parties, and in particular, does the respondent beneficially own the half-interests held legally by him in the three properties in Prince Rupert and Mission? If so, what was their increase in value since the parties' marriage, and how should that increase be apportioned between the parties?
 - b) What parenting arrangements are in the best interests of the child?
 - c) How should child support be calculated?
 - d) Is the claimant entitled to spousal support? If so, how should it be calculated?
 - e) Should the respondent's child support and spousal support obligations prior to the trial be reassessed?
 - f) Is the respondent liable for the "Maher" allegedly promised by the respondent to the claimant in their Iranian marriage certificate?

- [8] In addition, the parties have asked this Court to make a finding regarding their separation date and to grant them a divorce from each other. Those issues will be addressed at the end of these reasons.

Analysis

Property division

Legal principles

- [9] The claimant seeks an equal division of family property under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Section 81 of the FLA states that "spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution," and that "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".
- [10] Section 85(1)(a) provides that "property acquired by a spouse before the relationship between the spouses began" is excluded from family property. However, s. 84(2)(g) provides that family property includes "the amount by which the value of excluded property has increased since the later of the date (i) the relationship between the spouses began, or (ii) the excluded property was acquired."

Application to this case

- [11] The respondent has no significant assets that may be family property apart from his legal interests in the three properties in Prince Rupert and Mission. It appears that he has an interest in a business which has minimal value. He has an old car, also of minimal value. He has a chequing account, but no evidence was led as to his contents.

Does the respondent beneficially own an interest in the three properties?

- [12] The respondent is the registered joint owner of the three properties in Prince Rupert and Mission, together with his brother. The respondent submits that the three properties beneficially belong wholly to his brother, and that he owns a legal half-interest in each property for "estate planning purposes."
- [13] The respondent provided no documents to the Court, stating that the respondent is a trustee of his brother's beneficial interests. The respondent's brother was not called as a witness. There was no note or affidavit from the brother. The claimant's lawyers demanded information and documents from the respondent regarding his interests in these lands during the discovery process, but the respondent refused or otherwise did not respond to those demands.

- [14] In relation to the Prince Rupert property, the respondent relies on a statement of adjustments, which shows that \$81,000 was required to close the purchase. The documents also show that this amount was paid to the conveyancing solicitor by a cheque on the brother's bank account. The respondent also testified that the monthly costs in relation to the properties are paid by his brother and that his brother "takes care" of the properties.
- [15] With regard to the Prince Rupert property, the documentary evidence that the respondent's brother paid the purchase price gives rise to a presumption that the respondent received the money on a resulting trust. The conveyance of a half-interest in the legal title to the respondent is presumed not to be a gift, but the Court is required to determine the actual intention of the brother in this regard: *Beaverstock v. Beaverstock Estate*, 2011 BCCA 413 at para 9.
- [16] The respondent relies on his brother's will in support of his position regarding the three properties, but the will does not say anything about the properties. It appoints the respondent as executor and residual beneficiary of his brother's estate.
- [17] Further, the respondent relies on a statutory declaration which he made, apparently on November 6, 2012, stating "no spouse of mine is, was or shall be entitled to an interest in the [Prince Rupert] property pursuant to the Family Relations Act " The original purpose of this statutory declaration is unclear, but it is not an agreement, and it could not have unilaterally extinguished the claimant's legal entitlement to the Prince Rupert property if such an entitlement otherwise existed.
- [18] While neither the brother's will nor the statutory declaration is of assistance in determining the beneficial ownership of the properties, the respondent's evidence regarding the Prince Rupert property was not seriously contested by the claimant.
- [19] On the scant evidence before the Court, it is my view that the claimant has not overcome the presumption that the conveyance of a half-interest in the Prince Rupert to the respondent was not a gift. As the respondent's brother paid for the whole of the Prince Rupert property, I find that the respondent's brother, and not the respondent, is the beneficial owner of it.
- [20] With regard to the purchase of the Mission properties, there was no documentary evidence advanced by the respondent. The respondent testified that the Mission properties were taken care of by his brother, but the respondent did not produce any documents to prove this assertion.
- [21] The respondent testified that his brother "put my name on the properties so that if anything happened to him, there is no probate." However, this evidence could be consistent with either the respondent or the brother being the beneficial owner of the properties.
- [22] The respondent relied on the brother's will with regard to the Mission properties but, as stated above, the will does not say anything about the properties and is of no assistance in determining the properties' beneficial owner.

[23] The evidence regarding the Mission properties is even more scant than the evidence regarding the Prince Rupert property. The most probative pieces of evidence regarding the Mission properties are the land title registrations, which state that the respondent is their owner. The respondent has not advanced evidence sufficient to persuade this Court that the respondent does not beneficially own his half-interests in the Mission properties.

[24] Accordingly, I find that the respondent legally and beneficially owns half-interests in both of the Mission properties.

What is the value of the claimant's share in these three properties?

[25] Because the two brothers became co-owners of the Mission properties in 2008, well before the parties' marriage, those properties are excluded assets under the FLA. As stated above, family property includes the amount by which the value of excluded property has increased since the beginning of the parties' relationship or the date that the excluded property was acquired, whichever is later.

[26] As neither party has argued for an unequal division of family property, the claimant is entitled to a one-half interest in one-half of the increase in the value of each property between 2009, when the parties were separated, and the date of this trial.

[27] The documentary evidence shows that:

- a) The value of the McRae Avenue property in Mission was \$328,000 in 2009, and its present value is \$826,000. Therefore, the increase in the respondent's half-interest is \$249,000, and the claimant's share is half that amount, or \$124,500.
- b) The value of the 7th Avenue property in Mission was \$316,000 in 2009, and its present value is \$875,000. The claimant's share is one quarter of the total increase, or \$139,750.

[28] In total, the amount payable to the claimant by the respondent on account of the increase in the value of the two Mission properties is \$264,250.

Is there family debt to be divided?

[29] The respondent has given evidence of debts, mostly owed to financial institutions, that accumulated during the course of the marriage and that he has since paid. These debts totalled approximately \$72,000.

[30] The claimant's half share of that debt, in the amount of \$36,000, is to be offset against her share of the family assets.

Conclusion as to family property

[31] The amount payable to the claimant by the respondent in respect of the division of family property and debt is \$228,250.

[32] In addition, the claimant seeks an order that the parties' Canada Pension Plan pensions be divided equally. Equal division is the default outcome under the FLA, and I have been made aware of no sufficient reason to depart from it. The order sought is granted.

Parenting arrangements

- [33] The FLA includes a list of factors to be considered in determining the parenting arrangements that are in the best interests of the child: s. 37(2). Further, under the FLA, no particular parenting arrangements are presumed to be in a child's best interests, including that parental responsibilities or parenting time should be shared equally or that decisions should be made separately or by more than one guardian together: 40(4).
- [34] The Orders made by Justice Punnett in February and March of 2020 provided, on an interim basis, for shared parenting of the child.
- [35] The claimant claims that the respondent has not been exercising his shared rights since she moved from the house, and this fact demonstrates that he is not interested in the child. She also has testified about vague complaints made by the child when living with her father.
- [36] In turn, the respondent insists that he is a loving father. He testified that he spends a lot of time with the child, almost every day. He testified that he takes the child to school and that he cares for her when he is able given his work schedule. He testified that he takes her outside for physical activity and running, and that if the child has any problems at school, he is the one who will go to the school to talk to the teacher. He testified that he helps her with her homework and buys her things, including her cell phone, when they are needed. He stated that he tries to be helpful and to make her happy. He opined that she is happier with him, although he is quick to say that the child loves both of her parents.
- [37] In my view, the evidence demonstrates that both parties are caring, capable, and interested parents, and that although the respondent has not fully exercised his entitlement to parenting time in the past, there is no reason to order, going forward, that one ought to have more time with the child than the other.
- [38] I was not asked to impose a specific schedule on the parties, and it appears that the parties have been able to work out issues regarding the care of the child between them in the past. The respondent submits, and I agree, that Justice Punnett's order for shared parenting should continue. The parties shall share the parenting of the child, and each parent shall be entitled to have the child stay with him or her approximately half the time.

Support obligations

Income attribution for the purpose of support

- [39] The respondent earns income largely as a truck driver. His income for the years 2021 to 2023 was:

- a) \$67,311 in 2021, not including RRSP income that he took to pay debts, and which is not appropriately included in income for the purpose of determining support;
 - b) \$83,939 in 2022;
 - c) \$141,470 in 2023, not including RRSP income.
- [40] At the time of trial, the respondent was unemployed, having lost his most recent job in June 2024.
- [41] The claimant testified that she has worked, during the past few years, at Safeway, Tim Hortons, and MacDonald's. She worked for a company called "Thompson" as a support worker and at a restaurant in Prince Rupert. For various reasons, most of which were unclear on the evidence, she was unable to keep any of those jobs for more than six months or so.
- [42] Recently, she has taken a course to be qualified as a medical assistant. However, she has not been able to find an employer with whom to complete her practicum, which is required before she can receive certification. She is continuing to take courses. It appears that the claimant is making efforts to gain skills and to ultimately obtain better employment, and so I am not prepared to impute income to her beyond the amounts that she actually earned.
- [43] The claimant's income in the years 2021 to 2023 was:
- a) \$11,282 for 2021;
 - b) \$41,783 for 2022;
 - c) \$26,886 for 2023.

Child support going forward

- [44] Child support is determined by reference to the Federal Child Support Guidelines. Given that the parents will share equally in the parenting of the child, future child support is governed by s. 9 of the Guidelines which provides as follows:

Shared parenting time

- [9] If each spouse exercises not less than 40% of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared parenting time arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

- [45] The child support payable under the Guidelines is to be determined, in accordance with s. 9(a) of the Guidelines, by offsetting the amounts payable, as set out in the applicable tables, for each of the spouses.
- [46] As the parties have significantly variable incomes, it is appropriate in my view to calculate their support obligations based on the average of their last three years of income. The respondent's average income for the years 2021 to 2023 was \$97,573, and the claimant's average income for those three years was \$26,650.
- [47] Accordingly, commencing in August 2024, the respondent shall be obliged to pay child support in the amount of \$694 per month. This child support obligation shall continue unless varied by the Court, or until the child is no longer a child of the marriage as that term is defined in the FLA.

Spousal support going forward

- [48] Section 161 of the FLA provides:

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

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [49] The first two objectives are commonly referred to as the compensatory grounds, and the second two as the non-compensatory grounds.

- [50] Regarding the compensatory grounds, it appears that the claimant was primarily responsible for the care of the child while the respondent was working full time. As her childcare responsibilities diminished her ability to pursue her own educational or career goals, there are some grounds for compensatory support. On the other hand, the respondent argues that the claimant's marriage to him advanced her life in important ways: in particular, she was able to immigrate to Canada from Iran and ultimately to become a Canadian citizen.

- [51] Given the disparity in income between the parties, the claimant's lack of proficiency in the English language, and limited skills, there are non-compensatory grounds for support, although the claimant's needs-based claims are mitigated by the property award set out above in these reasons. Counsel for the claimant conceded at the outset of the trial that if a significant award were made in favour of the claimant as a result of her property claim, the needs-based portion of her spousal support claim would not be as strong as otherwise.
- [52] In my view, there is a claim for non-compensatory support, at least until the property claim is paid, and a weaker claim for compensatory support.
- [53] I have concluded that spousal support shall be paid by the respondent to the claimant at the mid-range amount of the Spousal Support Advisory Guidelines ("SAAG") based on incomes of \$97,573 for the respondent and \$26,650 for the claimant, assuming shared parenting. Accordingly, commencing in August 2024, the respondent shall be obliged to pay spousal support in the amount of \$1,249 per month.
- [54] The SAAG provides that the duration of spousal support is informed in part by the "length of marriage test," which provides that the upper end for duration is one year of support for each year of marriage, while the lower end is one-half year of support for each year of marriage. There is also a second test relating to the age of the child, but that test weighs less heavily in this case because of the equal parenting arrangements ordered by this Court.
- [55] Given that the duration of the relationship in this case was slightly less than 10 years, spousal support might reasonably be paid for between five and ten years. Approximately 4.5 years of support have been paid to date since Justice Punnett made orders for interim support in February 2020.
- [56] In my view, when the property award above has been paid, the claimant's non-compensatory claim will be significantly diminished. Further, the lower end of the duration range under SAAG will have been reached, or will be, at most, a few months away.
- [57] For these reasons, I have concluded that the respondent's obligation to pay spousal support shall cease when the property award set out above has been fully paid.

Support obligations before trial

- [58] The law provides, and the claimant's counsel accepted, that evidence available at trial may result in different support being ordered in a final order as compared to in an interim order: *Macdonald v. Macdonald*, (sub nom. *S.R.M. v. I.A.M.*) 2002 BCCA 46 at para. 20.
- [59] In my view, it is appropriate in this case to reassess the interim support orders that were payable before trial. Unfortunately, the basis upon which Justice Punnett made the interim orders is not clear on the record, and those orders appear to exceed the guideline amounts. The interim support orders ought to be reassessed both as to the periods of time they ought to have been payable and as to quantum.

- [60] Regarding the appropriate time period, the interim support obligations commenced in February 2020, at the time of Justice Punnett's first order. Shortly after that date, the claimant began living at the respondent's residence with the child and remained there until October 2021. It is unknown whether Justice Punnett knew about, or gave consideration to, the parties' living arrangements when he confirmed the interim support orders in March 2020.
- [61] The respondent testified that while the claimant and the child were living with him at his residence, he fully supported both of them and paid all of the family's expenses. That evidence was not seriously challenged by the claimant.
- [62] In those circumstances, in my view, the respondent was not obliged to pay spousal support or child support at all up to October 2021.
- [63] Further, his past support obligations should account for the loss of his job in June of this year.
- [64] Therefore, support should have been payable by the respondent only for the period between October 2021 to the end of May 2024, inclusive.
- [65] Regarding the quantum of support for this 32-month period, it is my view that the support obligations owed by the respondent ought to be re-calculated using the same basis as for the calculation of future support - that is, the average of the parties' income during the years 2021 to 2023.
- [66] Although the respondent was a caring and active parent between October 2021 and May 2024, he exercised his parenting rights for less than 40% of the time during that period, and therefore, child support for that period must be calculated under s. 3(1)(a) of the Child Support Guidelines - based only on the income of the spouse against whom the order is sought. As the respondent earned an average income of \$97,573 during this period, his child support obligations during this period are reassessed at \$925 per month.
- [67] For that same period, the respondent's spousal support obligations shall be set at the mid-range of the amounts suggested by the SAAG. On the basis that the respondent's average income was \$97,573, and the claimant's average income was \$26,650, the respondent's spousal support obligations during this period are reassessed at \$781 per month.
- [68] In total, the respondent's past support obligations that have accrued in the 32 months between October 2021 and May 2024, total \$54,592. This amount is comprised of \$29,600 in child support and \$24,992 in spousal support.
- [69] As against these obligations, the respondent has made significant payments. A chart made by the Family Maintenance Enforcement Program shows that, in total, the respondent has paid \$79,727.16 in spousal and child support to the claimant.

[70] The past amount paid in support by the respondent exceeds his obligations, as they have been reassessed, by \$25,135. This difference shall be credited to the respondent as an offset against the property award set out earlier in these reasons. The respondent's arrears of child support and spousal support are extinguished.

The "marriage portion" or "Maher"

[71] The parties' accounts of the circumstances surrounding their marriage, their signing of the marriage certificate, and what was said at the time differ significantly.

[72] The marriage was a traditional one, in that it was arranged at least in part between the parties' families. The parties did not know each other and did not spend any significant time together before being married.

[73] The marriage certificate, as translated from Persian, states in part:

Marriage Portion: One volume of the Holy Koran, a pane of mirror and a pair of candlesticks all received by the wife and 850 Gold Coins (Full Bahar Azadi) plus the cost of one Hajj Tamatto travel which remain the husband's liabilities and payable to the wife upon her demand.

[74] The respondent testified that on the day of the marriage in Iran, he attended at the marriage commissioner's office with members of his family and the claimant's family. He said that he was "surprised" by certain parts of the marriage certificate, including the "marriage portion" clause set out above.

[75] The respondent testified that once he saw the marriage portion clause, he tried to leave the marriage commissioner's office, and was pursued by both the claimant and the marriage commissioner. He testified that the claimant told him not to worry, that the clause was in the marriage certificate to make her father happy, and that it was only symbolic. The respondent testified that, on this basis, he agreed to be married and signed the certificate.

[76] The claimant testified that before they were married, the respondent told her that he had many assets and that he showed copies of documents to the claimant's father which showed that he was wealthy. She testified that the respondent was happy during the process leading up to their marriage and did not complain about anything, including the marriage portion clause in the certificate. She denies that he tried to leave the ceremony or that she had to reassure him about the marriage portion clause.

[77] There was no expert evidence advanced by either party regarding marriage portions clauses found in Iranian marriage certificates, but such clauses have been dealt with previously by this Court: see, for example, *Kariminia v Nasser*, 2018 BCSC 695, and *Mohammadi v. Mohammadi*, 2016 BCSC 1873.

[78] In *Mohammadi*, Justice Fisher, then of this Court, held:

[45] The parties' Iranian marriage certificate includes a "Marriage Portion" which provides as follows:

A volume of Holy Koran, a pane of mirror, a pair of candleholders, which are all submitted to the Wife and she admitted receipt, plus 700 Full Bahar Azadi Gold Coins, being the husband's liability and payable to the Wife upon her demand. Signed by the two spouses.

- [46] The respondent testified that the value of the 700 gold coins referenced in the marriage portion is approximately \$276,000. It appears that the dowry is a contract between the husband and the wife. The respondent described it as both a contract between the families and a contract just between the parties. She said that she has never claimed this amount and did not plan to claim it in Iran, but at the same time, she has never given up her right to claim it.
- [47] The claimant testified that the marriage portion of the marriage certificate was purely symbolic. He never had the equivalent of 700 gold coins and that number was based on a numeric calculation of the respondent's name. His understanding is that the dowry is security for housewives in Iran who do not work. In any event, he said that the respondent had agreed not to seek her dowry in Iran and submitted that she should not be able to do so here.
- [48] Similar claims to enforce provisions of these kinds of marriage documents have been accepted in British Columbia where the evidence established that they met the definition of "marriage agreement" in the former Family Relations Act, RSBC 1996, c. 128 (repealed): *Delvarani v. Delvarani*, 2012 BCSC 162; *N.M.M. v. N.S.M.*, 2004 BCSC 346; *Amlani v. Hirani*, 2000 BCSC 1653. Given that the Iranian marriage certificate in this case was signed in 1999, the provisions of the Family Relations Act apply to issues involving the enforcement of marriage agreements, per s. 252(2)(a) of the Family Law Act.
- [49] The Family Relations Act, in s. 61(2) defined a "marriage agreement" as:
- ... an agreement entered into by two people before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for ...
- (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.
- [50] In *Delvarani*, the court reviewed these cases and concluded that the marriage portion of an analogous religious marriage certificate "has been interpreted to be in the nature of a reverse dowry or sum of money agreed upon by the parties, which is to be paid by the husband to the wife in the event of a separation" (at para. 202). However, it was emphasized that the evidence must support that conclusion in each case.

- [51] In Amlani, the court was satisfied that it was a term of the marriage contract that the "marriage portion" amount ("maher" or "mehr" in that case) was payable upon dissolution of the marriage. A similar finding was made in N.M.M. In both of these cases, the marriage portion was enforced as a marriage agreement. In Delvarani, it was not, as the judge was not satisfied that an agreement had in fact been reached.
- [52] Even if the dowry is a valid marriage agreement under the Family Relations Act, it is subject to being set aside if the court determines it to be unfair, a less stringent standard than that under the Family Law Act. In Amlani and N.M.M., the amounts claimed were relatively modest, in the range of \$50,000. In this case, the amount claimed is quite substantial, assuming the respondent's estimated value of \$276,000 is accurate.
- [79] As is evident, the situation in Mohammadi was very similar to that in this case.
- [80] In Mohammadi, as in this case, the husband testified that he thought that the Maher obligation was symbolic.
- [81] Further, this case is similar to both Mohammadi and Kariminia, in that the marriage certificates in all three cases were signed while the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] was in effect. Therefore, the provisions of the FRA apply.
- [82] Section 61(2) of the FRA defines a "marriage agreement" as "... an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for ownership in, or division of, family assets or other property during marriage "
- [83] Sections 65 and 66 of the FRA permit this Court to vary marriage agreements if they are "unfair."
- [84] In Mohammadi, the gold coins had an estimated value of \$276,000. Justice Fisher held that the marriage portion clause was a marriage agreement as that term was used in the FRA, and that the marriage portion clause was unenforceable because it was unfair, given the "substantial amount involved and the [husband's] limited financial resources."
- [85] In Kariminia, Justice Forth cited Mohammadi with approval but upheld a marriage portion clause requiring payment of a Maher valued at approximately \$50,000.
- [86] In this case, the respondent submits, although he has not advanced any expert evidence to this effect, that a Full Bahar Azadi gold coin contains exactly $\frac{1}{4}$ of an ounce of "fine gold." 850 coins would therefore contain 212.5 ounces of gold. The price of gold in Canada has recently ranged between \$3,300 and \$3,400 per ounce. It follows that, even without accounting for any premium which might attach to Full Bahar Azadi coins in excess of their value as gold, the claimant's claim for Mahar is for an amount exceeding \$700,000.

[87] In my view, given the assets owned by the respondent, his income, and the other orders made in these reasons, including the property award and the support awards, it would be unfair to enforce the marriage portion clause in the parties' marriage certificate against the respondent. For these reasons, the claim for Maher advanced by the claimant is dismissed.

Separation date

[88] The parties have asked the Court to determine their separation date. To do so, the Court is not required to find that the spouses agreed that they were separated on a particular date. Further, parties can live in the same residence and be considered separated: *S.A.H. v. I.B.L.*, 2018 BCSC 544 at para. 49. As stated in *H.S.S. v. S.H.D.*, 2016 BCSC 1300 at paras. 40 to 42 (rev'd on other grounds, 2018 BCCA 199), the determination of a separation date is a contextual analysis done in the circumstances of each case:

[40] It is clear that the law does not require a meeting of the minds with respect to the intention to separate. A physical separation, coupled with one party's intention to live separate and apart, is sufficient: *Nearing v. Sauer*, 2015 BCSC 58 at para. 54. The legal framework for determining that spouses have lived separate and apart requires that the Court find, first, an intention of one spouse to repudiate or end the marital relationship and, second, action consistent with that intention.

[Emphasis added]

[89] The claimant's pleadings state that the parties were separated in December 2018. She testified that in December 2018, she told him that there is no reason for her to continue to live with him as his wife and that she could not stay any longer.

[90] Although there is evidence that the parties continued to live under the same roof after this date, I find that the claimant intended to end the marital relationship as of December 2018, and that her subsequent conduct was not inconsistent with that intention. The claimant's evidence in this regard was not seriously challenged by the respondent. For these reasons, I find that the parties were separated as at December 2018.

Divorce

[91] As indicated above, both parties seek a divorce. They have lived separate and apart for at least one year immediately preceding the determination of this proceeding, and were living separate and apart at the commencement of the proceeding. I am satisfied that there is no possibility of the reconciliation of the spouses, and that there has been no collusion, condonation, or connivance within the meaning of s. 11 of the Divorce Act, R.S.C. 1985, c. 3. Reasonable arrangements for the support of their only child are set out in these reasons.

[92] As the statutory requirements are satisfied, I grant a divorce to the parties which shall take effect on the thirty-first day after the day on which these reasons are issued, in accordance with s. 12(1) of the Divorce Act.

Conclusions and summary

[93] In summary:

- a) The respondent is liable to the claimant for \$228,250 in relation to the division of family property and debt.
- b) The parties' Canada Pension Plan pensions shall be divided equally.
- c) The parties shall have shared parenting of their child.
- d) As against the property award set out above, the respondent shall be credited with the sum of \$25,135 arising from the overpayment of support, as reassessed.
- e) As at July 31, 2024, the respondent is not in arrears of either child support or spousal support.
- f) Beginning in August 2024, the respondent shall pay to the claimant \$694 per month in child support, until further order of the Court or until the child is no longer a child of the marriage as that term is defined in the FLA.
- g) Beginning in August 2024, the respondent shall pay to the claimant \$1,249 in spousal support, until the property award set out above is fully paid, at which time his spousal support obligation shall cease.
- h) The claimant's claim for Maher is dismissed.
- i) The parties were separated as at December 2018.
- j) The parties are divorced, effective 31 days after the date of these reasons.

Costs

[94] No costs shall be payable by either party. I have reached this conclusion because the results of the trial have been mixed. The claimant substantially succeeded on the division of property issue, but the respondent succeeded on the Maher issue and to some extent on the support issues.

[95] In addition, in my view, it is important not to upset the balance achieved by this Court's award on the other issues addressed in these reasons, by an award of costs: see *M.N. v. C.G.F.*, 2020 BCSC 2071 at para. 7, citing *Gold v. Gold*, [1993] B.C.J. No. 1792 at para. 20, 1993 CanLII 1248 (C.A.).

"The Honourable Justice Loo"

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Prepared on 29 October 2026 · Esheria