

CANADA / JUDGMENT

Lang v. Wang

2023 BCSC 1017

COURT

Supreme Court of British Columbia

DECIDED

13 June 2023

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2023 BCSC 1017 Lang v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lang v. Wang,

2023 BCSC 1017

Date: 20230613

Docket: E16217

Registry: Chilliwack

Between:

Dapeng Lang

Claimant

And

Alqing Michelle Wang

Respondent

Before: The Honourable Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

C.L. Gleeson

Counsel for the Respondent:

S.K.J. Chen

Place and Dates of Hearing:

Abbotsford, B.C.

January 19, 2023

Place and Date of Judgment:

Chilliwack, B.C.

June 13, 2023

Introduction

- [1] The principal issue in this proceeding is the division of family property. The claimant and respondent are 79 and 66 years old, respectively. The claimant is retired, save for a brief stint late in the parties' relationship when he taught in China. The respondent retired when she sold her business in or about 2002.
- [2] The claimant seeks spousal support but concedes that his claim will only succeed if the parties' capital position is significantly disparate after the division of property. He seeks an equal division of all assets after recognition of the excluded portion of the respondent's holdings.
- [3] All of the property in issue is registered in the respondent's name alone. Most of it was brought into the relationship by her. Two of the properties in issue, the Coquitlam condo and the Shanghai house were admittedly purchased during the parties' relationship using excluded property; funds brought into the relationship by the respondent.
- [4] There is an issue as to the characterization of another property still in the name of the respondent's deceased mother. The mother's estate has not been probated despite her death almost twenty years ago.
- [5] The respondent is named as both co-executrix and co-beneficiary of her late mother's estate. The claimant argues the respondent's status as a co-beneficiary leads to the result the Hong Kong, apartment still in then name of the respondent's late mother, being family property; at to least to the extent of the respondent's one-half entitlement to her mother's estate.
- [6] The respondent has other liquid assets such as bank accounts and insurance policies. Some of those funds are acknowledged to be excluded by the claimant; others are not.
- [7] The respondent says that the family property, once identified, should be reapportioned in her favour because the claimant mismanaged and/or misappropriated assets during the relationship.

- [8] The claimant concedes from his share of family property he needs to account for CA\$192,000 which he misappropriated from the respondent's accounts post-separation using a power of attorney (the respondent argues the amount is approximately CA\$196,000) and the CA\$100,000 advance he received via court order earlier in the proceeding.
- [9] The principal assets are three real properties: one in Coquitlam ("Heffley Crescent"), another in Shanghai (the "Shanghai House"), and an apartment in Hong Kong ("Kennedy Town") as well as liquid holdings approximating CA\$1,000,000. The first two properties are registered in the name of the respondent and are, after excluding the value of each at the time the parties commenced their marriage-like relationship, family property subject to division.
- [10] Kennedy Town remains in the name of the respondent's mother, Frances Wang Shu, and is occupied by the respondent's sister, Emily. Ms. Shu died in 2002. Her will has never been probated despite the respondent being a co-executrix and joint beneficiary.
- [11] A fourth property, an apartment in Hong Kong ("Seabird Lane"), was sold in 2017. The claimant acknowledges an excluded portion of the sale proceeds but seeks a compensation order in respect of the accretion to the property's value since the parties commenced cohabitation.
- [12] The respondent argues the CA\$1,000,000 (approximate) in liquid assets is excluded from division (once recognition is given to the claimant's entitlement to a division of the proceeds from the sale of the Seabird Lane).
- [13] Each of the parties seek a divorce.

Background

- [14] The claimant is currently 79 years of age and retired. His last available income tax return discloses an income from all sources, all of which are government sources, of approximately CA\$17,000.
- [15] The respondent is 66 years old. She retired in 2002 when she sold her trading company. She discloses income, from all sources, slightly in excess of CA\$5,000 from dividends and/or interest.
- [16] The claimant is university educated and came to Canada in the early 1990s. He was twice married prior to his relationship with the respondent and has children by both of his earlier marriages. His youngest son, Stephen Wang, testified at trial.
- [17] Following his arrival in Canada, the claimant taught English as a second language and provided tutoring. From all indications, his income was modest; seldom exceeding CA\$20,000 annually.

- [18] When he divorced from, Jade Feng, Stephen's mother, he was ordered to pay CA\$129 per month of child support which, according to the current Federal Child Support Guidelines, SOR/7-175, equates to an income of slightly under CA\$17,000 annually.
- [19] Upon meeting the respondent in 2001, the claimant had no assets of significant value. He resided in a trailer, the ownership of which is not clear. The respondent says that when the parties met, or shortly after, the claimant sought to borrow a significant amount of money from her to pay overdue tax. The claimant denies this.
- [20] However, it is clear, that throughout the early stages of the relationship up to and including their marriage in January 2005, the claimant had little by way of income or assets.
- [21] The respondent, for her part, was previously married and has no children. She originally was trained in the medical field but in the early 1990s began an entrepreneurial enterprise trading gift items such as ties, pens, watches, etc. She ran that company for over 10 years.
- [22] Her business prospered such that she bought property on Seabird Lane together with her then husband as well as another property in Shanghai, an apartment registered in her name alone. She says the Shanghai property was for the joint benefit of her and her former husband. His name was not on the property as a matter of convenience; not of reflective of its actual ownership.
- [23] The respondent says that when she and the claimant commenced a marriage-like relationship, the date of which is in dispute, she owned an interest in both the Seabird Apartment and Shanghai apartment as well as liquid assets totaling approximately CA\$2,000,000.
- [24] The parties saw each other intermittently in 2001, 2002, and into 2003. They became sexually intimate. They did not cohabit with on another until after the purchase of Heffley Crescent.
- [25] Despite their differing views on the date that cohabitation commenced, both parties seemingly agree on the dates upon which to calculate the excluded portion of the respondent's previously acquired property.
- [26] The evidence establishes that the parties enjoyed an affluent lifestyle while together, including international travel, meals at expensive restaurants, massages, etc. All were funded by the respondent.
- [27] Given that she retired from her business before meeting the claimant, I infer the lifestyle the parties enjoyed during cohabitation was funded by a combination of investment return and encroachment on the respondent's capital.
- [28] In late 2003, the respondent purchased Heffley Crescent for approximately CA\$350,000. She supplied the whole of the purchase price together with all closing costs such as property purchase tax and legal fees. The property was placed in her name alone.

- [29] Approximately CA\$12,000 worth of furnishings were purchased. The claimant originally took credit for the purchases as if it were a contribution by him, but the documentary evidence makes clear the claimant was reimbursed by the respondent for the purchases he made.
- [30] The parties never intermingled their finances during marriage or before. The purchase of Heffley Crescent obviously eroded the respondent's cash position.
- [31] It is clear, throughout the whole of the parties' relationship, the respondent funded the parties' day-to-day expenses.
- [32] The claimant had access to some employment income early in the relationship and later to CPP, OAP and the old-age supplement. There is no evidence suggesting he used it for anything other than his own personal expenses.
- [33] Once Heffley Crescent was acquired, the claimant moved in. The respondent and her half-sister, Emma, went to stay with a relative in Richmond and assisted her after she had given birth.
- [34] In August 2004, the respondent purchased a BMW X3 for approximately CA\$55,000 in cash. She paid a further \$3,600 for insurance. The claimant originally paid for the insurance using his credit card, but was later reimbursed by the respondent. Later, in 2009, another vehicle, a Mini Cooper, was purchased by the respondent but ultimately placed into the name of the claimant.
- [35] In both instances, the BMW and the Mini, the respondent testified, and I accept, that the claimant asked that the vehicle be transferred into his name because, as a resident of BC, he "could pay lower insurance premiums". She complied in both instances.
- [36] On October 14, 2004, the respondent accompanied the claimant to HSBC Bank of Canada where she signed various documents including, unbeknownst to her she says, a power of attorney granting the claimant full power of attorney over her assets. The claimant later used the power of attorney to gain access to the respondent's accounts post-separation.
- [37] The claimant had earlier opened up a bank account with HSBC at the Coquitlam branch near her condominium and had transferred significant funds from Hong Kong. Some of those funds were used to purchase Heffley Crescent, the BMW and, later, the Mini Cooper. Some were invested.
- [38] The respondent testified that while she was able to converse in Cantonese or Mandarin with the staff members at the Coquitlam branch, she was taken by the claimant to the HSBC at West 41st Avenue and Granville Street because of the claimant's familiarity with a staff member there.

- [39] When at HSBC, she purchased bonds in her name and signed a power of attorney in favour of the claimant. She says the later was not explained to her at the time and she did not come to learn of its existence until the judicial case conference held after this litigation was commenced. The claimant explained the power of attorney by saying the respondent wanted him to oversee her investments while she was out of BC.
- [40] The claimant was unable, in my view, to satisfactorily explain why these transactions took place at a branch distant from where the parties resided and where the respondent had already some deposits on account. He testified the respondent was fully aware of the signing of the power of attorney, although he acknowledges he did not inform her of his making use of it following their separation.
- [41] The respondent testified, and I accept from the documentation produced, that she wrote a cheque to the claimant for CA\$26,000 to pay off indebtedness on his credit card. The claimant denied the transaction took place but the historical accounting records of the respondent appear to say otherwise.
- [42] In January 2005, the parties married. The claimant argues the marriage-like relationship began much earlier but, given the seeming agreement on the valuation of the excluded property, not much turns on the issue of when the parties commenced living together in a marriage-like relationship.
- [43] Shortly following their marriage, the respondent transferred CA\$100,000 to the claimant for the purpose of investing in mutual funds. The claimant confirmed receipt of the CA\$100,000 and says he used it to purchase mutual funds in his BMO mutual fund account. The respondent testified the advance was at the request of the claimant who told her it would generate a further CA\$500 a month in regular income for their household. The claimant acknowledged he had no investment expertise. The transfer came some five days after they were married.
- [44] On October 24, 2005, a further sum of CA\$137,395.85 was deposited into the claimant's BMO mutual fund account. The claimant originally said this came from the respondent but later, when confronted with his own handwritten note, testified he received it from his former wife, Ms. Feng. He simply said he had forgotten about it.
- [45] A passage from his examination for discovery was put to him to show that he had specifically denied earlier, under oath, that Ms. Feng had asked him to hold her money in his bank account. The records from the claimant's BMO account show a number of transactions entitled "Internet purchase". The claimant's explanation was that those were all done by bank staff at the BMO and that the respondent was well aware of all of the decisions or transactions that were taken. He testified that the respondent would review the mutual fund statements on a regular basis. The respondent denied that, and further denied knowing that funds she advanced to the claimant had been intermingled with funds he received from his former wife.

- [46] When asked what happened to the mutual fund investment, the claimant said the stock market crash of 2008 caused substantial losses in both the mutual fund and the stock portfolio he later opened with additional funds advanced by the respondent. When asked what happened to the balance of the mutual funds, those not lost through market erosion, he said they were provided to Ms. Wang and she later invested them herself.
- [47] As to Ms. Feng's portion of the investment, the claimant testified that Ms. Feng never asked for her money back so, in effect, whatever monies were actually returned to the respondent were in part, the funds of his former wife. The respondent testified she never received any of the CA\$100,000 investment back from him and that he simply told her that it was "all gone".
- [48] In addition to the CA\$100,000 advanced to the claimant, the respondent testified to three other advances to the claimant totaling US\$270,000. Three transactions were documented and acknowledged by the claimant: February 8, 2005, US\$20,000; August 16, 2005, US\$50,000; and October 31, 2006, US\$200,000.
- [49] The claimant said those funds were transferred voluntarily by the respondent, despite his lack of investment knowledge. Unlike the mutual fund statements, he says the respondent never reviewed the stock portfolio statements.
- [50] The respondent testified she was coerced into making the transfers, which the claimant denied. The respondent testified she advanced the requested funds under duress when he became angry with her after she initially declined to do so. The respondent testified that she was compelled to make the last US advance in October 2006 after the claimant pounded the table, threw a can on the floor, and verbally abused her.
- [51] She testified she was generally unaware of what he did with the funds she advanced. The respondent testified that in 2008, the claimant advised her of the losses but said he never returned any of the investment to her. When asked he simply said the money was "all gone".
- [52] The claimant made all investment decisions with the funds through to 2007/2008. He testified that when the stock market crashed in 2008, the stock portfolio suffered significant losses and that he returned the remaining unspecified balance of the funds to the respondent.
- [53] The respondent demonstrated a far more conservative practice of investing in bonds, term deposits, mutual funds, and real estate.
- [54] According to the respondent, in 2008, he demanded further funds from her when they were in Shanghai but she demurred. In 2007, the Shanghai apartment was sold for 2,170,000 RMB. In its place, using the sale proceeds, the Shanghai House was purchased and extensively renovated between 2008 and 2010. The claimant testified that he was integrally involved in the design and oversaw the construction.

- [55] The renovations included a redesign of the interior of the house as well as the addition of a sunroom. The renovations were essentially complete by September 2008, save for the sunroom project. The respondent testified she paid all of the costs of the renovation project amounting to 650,000 RMB (approximately CA\$130,000). For the most part those amounts were confirmed through withdrawals from the Bank of China. The respondent's view of the oversight of the redesign and renovation of the Shanghai House was markedly different than that of the claimant's.
- [56] The claimant intimated he played a major role in overseeing the construction. The respondent testified they had a head contractor who oversaw the project but that her and the claimant would stop by generally on a daily basis to see the progress that was being made. They would chat with the contractor but no directions were given by either her or the claimant as to the day-to-day work on the house. She acknowledged that both she and the claimant went shopping for some of the building supplies, which were then delivered to the project. While living in Shanghai, their social life consisted of occasional trips outside of Shanghai to other towns, shopping, visiting friends, getting massages, and eating out in restaurants. All of this, or significantly all of it, was funded by the respondent.
- [57] There was no suggestion by the claimant that he contributed financially to the renovation project or the parties' day-to-day living expenses which remained affluent, if not extravagant.
- [58] In 2010 and 2011, the claimant, off and on, was teaching at a private school in Shenzhen. He told her, although he denied saying this, he was making 20,000 RMB per month plus bonuses.
- [59] The parties continued to travel internationally.
- [60] In 2012, the respondent signed another power of attorney in favour of the claimant. The claimant told her he wanted to run for election on the strata council at Heffley Crescent. They attended a notary public who spoke neither Mandarin nor Cantonese. The claimant said the sole purpose of the unrestricted power of attorney was to allow him to run for strata council.
- [61] She signed the document without having anyone explain or interpret its contents or the extent of its scope. She understood that it only allowed him to run for strata council and could be revoked at any time.
- [62] One of the two powers of attorney the claimant held was later used to withdraw CA\$172,000 from the respondent's bank account after they had admittedly separated.

- [63] While in Shanghai during the later stages of cohabitation, and while the respondent was in Hong Kong with her sister Emily, the claimant testified an offer was made on the Shanghai House and, after discussions between himself and the claimant, he accepted the offer on her behalf and received a 100,000 RMB deposit (approximately CA\$20,000) towards the purchase price.
- [64] The sale collapsed and the claimant retained the CA\$20,000 deposit. He told the respondent; admittedly a lie, that hackers had taken it from his account. The respondent was left to repay the deposit from her separate funds.
- [65] The claimant acknowledges that both CA\$172,000 and CA\$20,000 need to be accounted for in the division of family property. The respondent testified that the claimant also fraudulently claimed to have paid strata fees and an assessment by council, totaling CA\$3,608, by taking the amount from her account.
- [66] The respondent's banking records demonstrate the strata council had automatically withdrawn that amount from the respondent's Canadian account and the claimant simply kept the withdrawn funds. The claimant explained this by saying that the strata charged her twice then and that they provided a receipt to him after he had withdrawn the money from her account.
- [67] The acknowledged sum of CA\$192,000, according to the claimant, was gambled away after the claimant "sank into depression" because of the parties' separation in October 2014.
- [68] Events leading to the separation, according to the respondent were that her younger sister, Emily, who has been diagnosed with schizophrenia, "disappeared" causing Ms. Wang to attend Hong Kong to oversee Emily's institutionalization. Eventually, in approximately December 2014, the claimant returned to Canada and took up residence in Heffley Crescent. The respondent remained in either Hong Kong or Shanghai until her return to Canada in June 2016.
- [69] The claimant lived in Heffley Crescent in the meantime. During his occupation, the respondent remained responsible for the various charges associated with the apartment by way of automatic withdrawals from her accounts, including strata fees, a special levy for the water leak, property taxes, utility accounts, etc.
- [70] On June 30, 2016, the respondent returned to Heffley Crescent with a friend, Ms. Shao, and according to her testimony when she arrived at the apartment, the claimant wielded a metal club to threaten both of them at the elevator door banging loudly on the frame, forcing them to leave. Ms. Shao confirmed these events.

- [71] Later, in a WeChat exchange, the claimant, although the translation is subject to debate, told her "no one would collect your corpse" which, according to the respondent is a curse in her culture. Finally, the respondent testified that when they met at a Coquitlam mall in July 2016 to exchange keys for the condominium and the power of attorney, the claimant became angry and said he wanted to kill the respondent "charging at her three times". Ms. Shao was present for "the altercation" and confirmed the testimony of the respondent.
- [72] All of the evidence of the claimant's post-separation behaviour was adduced to support the respondent's contention that the funds advanced in 2005; CA\$100,000 and US\$270,000 were advanced under threats made by him and thus, according to her counsel, ought to be repaid to the respondent together with interest from the claimant's share of family property.
- [73] Generally, the respondent testified that the claimant freely spent on personal items, some with his funds but some underwritten by her funds. They travelled extensively during their period of cohabitation, the claimant had significant dental work done first in Shanghai and then, post-separation, in Canada (the latter funded by his son, Stephen).
- [74] The claimant had never been to the Seabird Apartment and had nothing to do with it during its ownership by the respondent. The respondent testified that when it sold in 2017, she took her share of the sale proceeds and invested them. The sale proceeds form a major portion of the almost CA\$1,000,000 of liquid assets she retained at trial.
- [75] The respondent testified, and the sales document reflects, her former husband owned one-half of the property. The respondent's one-half share of the net proceeds was close to CA\$750,000 depending on the conversion rate used.
- [76] As to Kennedy Town, both the claimant and his son Stephen visited the Hong Kong apartment once with the respondent. It was occupied at the time by the respondent's sister Emily. All four of them stayed at the apartment for a matter of days or perhaps a week.
- [77] Documents relating to Kennedy Town were not disclosed during the discovery process. Ms. Shu's will was not produced until late in the trial after Stephen Wang testified that he had done a property search online and determined that the legal owner of the property is the respondent's mother who died in November 2002.
- [78] The respondent was asked at discovery for details of her mother's will but denied knowledge of its contents. She was never directly asked to produce the will or whether she could obtain a copy.
- [79] Despite her denial of knowledge regarding the will's contents, the respondent was able to produce it following Stephen Wang's testimony. The will, written in English, provides the respondent and her half-sister, Emma, are the co-executrices of the will and are joint beneficiaries of the estate in equal shares. No mention is made of Emily.

- [80] The respondent testified that prior to her mother's passing, her mother gave instructions to both Emma and the respondent they were to look after Emily who suffered from mental illness for a long time.
- [81] The respondent further testified that after the death of her mother, the respondent and Emma agreed they would take no steps to probate the will so as not to disturb Emily's continued occupation of Kennedy Town based on their understanding of their mother's instructions to them. She testified she did not understand the contents of the will.
- [82] Following her return to Canada, the claimant moved out of Heffley Crescent. He receives pension income and top-ups from the government, but has no other income. He has lived modestly since in subsidized accommodation.
- [83] The respondent resides at Heffley Crescent and discloses a modest income of less than CA\$5,000 annually. I conclude the liquid assets in her name would, if invested conservatively, produce an income more substantial than that claimed by the respondent.
- [84] Post-separation, Stephen Wang has loaned his father approximately CA\$120,000 for dental implants and legal fees.
- [85] Earlier in the proceeding, an order was made providing the claimant receive an advance from the respondent for legal fees. The amount advanced was CA\$100,000. Although little was mentioned of it during closing submissions, this amount needs to be accounted for in the final division of the remaining property.
- [86] The late disclosure of Ms. Shu's will caused significant disruption to the trial process. The will came into evidence during the respondent's evidence.
- [87] Once the respondent had closed her case and the claimant had made closing submissions, Ms. Wang sought to introduce an expert opinion from a Hong Kong lawyer as to the legal effect in Hong Kong of an un-probated will naming the respondent as co-beneficiary as to the nature of her interest in Kennedy Town.
- [88] The claimant, not surprisingly, objected to (1) the late service of the report; (2) the fact the respondent had closed her case and was attempting during submissions to adduce evidence, and (3) the report was not a joint expert report as required by the Supreme Court Family Rules. Any one of the objections was sufficient to preclude admission of the report.
- [89] At the conclusion of the respondent's submission, I expressed the view, but did not order, that an appraisal of Kennedy Town was needed. Such did not occur until late October 2022.
- [90] What followed, post-trial, was an application by the claimant for an appraisal of Kennedy Town and a cross application to re-open the respondent's case so as to introduce the opinion evidence that had been improperly put forward after the evidence was closed.
- [91] I allowed both applications in oral reasons delivered November 9, 2022.

- [92] The claimant obtained an opinion from a Hong Kong lawyer and an appraisal of Kennedy Town was mutually commissioned.
- [93] The parties argued the impact of the 'new evidence' in January 2023. The focus of the opinions and argument of counsel was whether Kennedy Town, given the status of its legal title and the will naming the respondent as both co-executrix and joint beneficiary, created an interest in property held by the respondent that was capable of division under the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [94] When it was pointed out to counsel that the pleadings did not reference foreign law, no amendment was sought. Ultimately, the respondent argued the application of BC law resulted in the same conclusion; the un-probated will did not create an interest 'in trust' but rather gave the respondent a 'chose in action' against the executors, and that such was not family property under the FLA.
- [95] Both parties argue the other of them has not fully disclosed all of their assets. The claimant argues the respondent has an interest in her mother's estate which owns Kennedy Town; the respondent argues the claimant has undisclosed assets derived from investments in his name which she funded with excluded funds back in 2004 and 2005.
- [96] The respondent's younger sister, Emily, remains in occupation of Kennedy Town since her mother's passing. The respondent testified she and Emma, her half-sister, hold the apartment for Emily's benefit because Emily, by virtue of mental illness, is unable to fend for herself in life.
- [97] No other evidence was presented as to the extent of the mother's estate. It has not been probated.

The Issues

- [98] At issue is the identification of both family and excluded property. Such depends on the dates upon which the parties commenced their relationship, its end date, and whether Kennedy Town is "family property" for the purpose of the FLA. The nature of the respondent's interest in Kennedy Town is contested. The issue is whether it is family property or an incomplete gift.
- [99] A further issue arises as to whether it would be significantly unfair to divide the identified family property equally, as suggested by the claimant or, as submitted by the respondent: value family property at the date of separation and then divide it unequally in favour of the respondent.
- [100] Lastly, whether the claimant is entitled to spousal support and, if so, in what amount and for how long.

Position of the Parties

- [101] The claimant argues the family property consists of the accretion in value, post-marriage, of Heffley Crescent, the Shanghai House, the Seabird Apartment (sale proceeds received in 2017), and the accretion in value to one half of Kennedy Town.
- [102] The claimant also argues that the respondent has failed to provide evidence of the excluded value of her liquid assets (save for the Seabird Apartment proceeds) and that funds in excess of the sale proceeds are family property.
- [103] The claimant concedes an adjustment is necessary to reflect the value he has already received, whether CA\$192,000 as conceded, or CA\$195,600 as asserted by the respondent. Also, the CA\$100,000 advance needs to be accounted for.
- [104] The claimant submits that all family property ought to be divided equally.
- [105] The respondent concedes only that the accretion to Heffley Crescent, her one-half share of the Seabird Apartment, and the Shanghai House are family property. She submits through counsel that the valuation of all three should be as at the date of separation and that the accretion of family property, should be divided 75%/25% in her favour.
- [106] The respondent submits that from his share of family property, the claimant must repay the respondent for the CA\$195,600 taken post-separation, the CA\$100,000 advance, and the whole of the advances made in 2004-2006 (CA\$100,000 and US\$270,000), together with pre-judgment interest on those amounts from the date they were advanced.
- [107] Additionally, she seeks occupational rent for the time the claimant spent at Heffley Crescent post-separation.
- [108] The cumulative result is a suggested CA\$467,000 payment by the claimant to the respondent.
- [109] The respondent opposes the payment of support.
- [110] The mutual claims for divorce are unopposed.

Credibility

- [111] In these proceedings, credibility impacts the determination of the identification of family property and, to the extent it is relevant, the role played by each in the accumulation and/or maintenance of the property said to be family property.
- [112] For instance, the respondent testified that she entered the relationship with approximately \$2,000,000 cash, or the Canadian equivalent thereto, in liquid assets derived mainly from the sale of her business and the accumulation of savings over the course of her lifetime. She presented no historical financial records that substantiate an estate of this magnitude.

- [113] The claimant admittedly entered the relationship with little, if any, by way of financial assets and likely entered the relationship with significant tax and/or credit card debt.
- [114] Further, the claimant acknowledges the loss of significant funds advanced to him by the respondent, but says the advances were done by her voluntarily, and that she was kept apprised of the nature of the investments such that it can be argued the respondent is entitled to reapportionment of those remaining assets found to be family property.
- [115] The claimant points to the respondent's failure to produce the will of her late mother until late in the trial after his son, Stephen, had obtained some evidence that Kennedy Town remained in the name of the respondent's late mother despite a 20-year lapse between her death and the date of trial.
- [116] Each accuses the other of failing to accurately disclose their assets and/or liabilities on their statement of property. The respondent, despite acknowledging liquid assets of approximately \$950,000, states their income is under \$5,000 annually.
- [117] The claimant, for his part, despite his testimony to the contrary, makes no allowance for debt he says he is owing to his former wife, Ms. Feng.
- [118] The respondent suggests this is because Ms. Feng, not the respondent, received the residue of the investment accounts after the 2008 crash.
- [119] As the trier of fact, I am entitled to accept, or reject, some or all of the evidence of a witness. Rejection of their evidence on one point does not mean I might not prefer their evidence over the evidence of another party on a separate issue.
- [120] As I noted in *Bilin v. Bilin*, 2018 BCSC 804:
- [121] Credibility is a question for the trier of fact. In assessing the credibility of each witness, I consider the following: the consistency of their evidence, its harmony with the totality of the evidence, their interest in the outcome of the litigation, and whether, during the course of their testimony, their previous statements are inconsistent with their evidence at trial.
- [123] As was stated in *Mac v. Mak*, 2016 BCSC 1140, at 127:
- [127] I must also consider the plausibility of the evidence, which includes a consideration of whether one party's version of events makes sense, or whether it is connected with the evidence as a whole. It is also important to consider the demeanor of the witnesses when giving evidence, but this is only considered in the context of the plausibility of their testimony and the evidentiary record.
- [128] In the often-cited *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole: *Faryna* at 357. The factors were also considered by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.*(R.D.), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at 357).

[214] Finally, I turned to the oft cited decision of the B.C. Court of Appeal *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), wherein O'Halloran J.A. stated the following at 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be 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.

[121] Each of the principal witnesses, the claimant and respondent, have a decided interest in the outcome on the determination of various issues that arise in this trial.

[122] To be clear from the beginning, I find each has tailored their evidence on occasion to achieve the most beneficial result whether it be as to the role they played during the period of cohabitation (the claimant) or the aggressive behaviour said by the respondent to have occasioned her advancing funds to the claimant, which are now beyond her reach.

[123] As examples of what I conclude are either deception or, at best, unreliability on behalf of the evidence advanced by the claimant, I note the following examples below.

[124] The claimant testified that it was at the respondent's instance that she advanced funds to him in 2005 to begin buying mutual funds and stocks. When confronted in cross-examination with his own handwritten note, he testified he received CA\$137,396 from his former wife, Ms. Feng, to invest on her behalf. He noted he kept meticulous records for Ms. Feng and the investments on her behalf but when questioned, was unable to distinguish which belong to "us" and which belong to "Jade". Ms. Feng apparently received nothing from the distribution of the residue of the co-mingled investment funds.

- [125] The claimant vacillated as to the source of the funds and testified that he forgot the advance from Ms. Feng. I find that unbelievable.
- [126] Further, he says he disclosed to the respondent the investment on Ms. Feng's behalf (a proposition never put to her). I find that an unlikely scenario given the blending of funds.
- [127] The claimant testified he returned what was left to the respondent but has no record evidencing the return of funds to the respondent in any amount.
- [128] He concluded on this topic by noting he had not paid back Ms. Feng any money and that he had "lost it when investing in stocks". However, that stands in stark contrast to his evidence that he paid the remainder to the respondent but never returning any funds to Ms. Feng. He could not remember the amount he gave the respondent and never told her "she got some of Jade's money".
- [129] The claimant's property and financial statement makes no reference to any debt owing to Ms. Feng. When, finally, asked whether he used any of the money remaining from the investments to pay for Ms. Feng's apartment he replied "I don't recall giving her money". Further, he says Ms. Feng never asked him for any of the money back.
- [130] His narrative in this regard does not accord with the limited documentation available or common sense.
- [131] The rationale given for investing on behalf of Ms. Wang was that she, as a non-Canadian citizen/resident, was unable to do so. The same does not apply to Ms. Feng who is both. Further, Ms. Wang did invest with Edward Jones, belying the assertion the money was advanced because she was unable to invest in her own name.
- [132] The claimant acknowledged, improper use of the power of attorney to the extent of withdrawing CA\$170,000 post-separation to fund both his gambling habit and to buy a trailer which was later sold.
- [133] He did not acknowledge until documents were presented to him the preparation of what I find were to be false receipts in respect of strata fees paid by him and the receipt by him of approximately CA\$20,000 from the aborted sale of the Shanghai House until pressed on cross-examination. Then he finally acknowledged that the amount owing to the respondent was more like CA\$192,000 than the CA\$170,000 he suggested earlier. Further, such does not take into account what I conclude was a false representation as to the payment by him of strata fees thus resulting in another CA\$3,600 approximately having been misused by him.
- [134] Based on the claimant's evidence-in-chief, one would have thought him to have been the contractor in charge of the renovation/expansion of the Shanghai House. He testified as to daily meetings with the contractor and the provision of designs in respect of the renovations.

- [135] What emerged, and what I find, is that the claimant and the respondent stopped by frequently as their rental premises were near the Shanghai House to view the project and occasionally bring beer and meat to the workers to "maintain good relations with the crew". The claimant agreed as to the accuracy of his examination for discovery questions where he acknowledged that he and the respondent would stop and chat for a few minutes.
- [136] Instead, it is apparent from his cross-examination and questions posed to him on discovery that while the repairs/renovation were ongoing there was lots of time for recreation with dinners out, massage treatments, dental work and various trips outside of Shanghai to visit the respondent's friends. Substantially all of those expenses were funded by the respondent.
- [137] When the respondent confronted the claimant about what happened to the down payment he received in respect of the proposed sale of the Shanghai House he acknowledged he originally lied to her by telling her it was lost to a "computer hacker". He said he told that falsehood because he was ashamed of his gambling addiction and that he was lonely and depressed.
- [138] While he testified he contributed to living expenses, he was vague as to how. He acknowledged that the expenses for the renovation to and upkeep of the Shanghai House were paid by the respondent, as were all of the costs associated with Heffley Crescent.
- [139] I conclude, based on the document contained at Tab 151 of the respondent's documents, that the claimant wrote a cheque to himself for CA\$3,608.60 to reimburse himself, he says, for fees paid to the strata, when in fact the same amount was automatically withdrawn from her account directly paying the strata. Instead, he took that money and provided a fake receipt, so in total he took approximately CA\$195,600 post-separation.
- [140] The claimant's use of the respondent's funds surreptitiously following separation speak poorly of his honesty.
- [141] Lastly, there is his disingenuous response to communications and interactions when the respondent returned in July 2016. When she arrived at Heffley Crescent, he was holding what he described as a white metal rod. Later he sent her a message which he says was not a threat but refers to "collecting your corpse" after she demanded revocation of the power of attorney (the one she knew about). His benign explanation for each event is, in my view, contrary to common sense.
- [142] The respondent's testimony fares no better. Much of her evidence was problematic for the reasons outlined below.
- [143] Major amongst the concerns I have about her credibility, is the lack of production of the will and her response, when asked on discovery, as to her knowledge of her mother's will. She stated she did not know about the will. That stands in stark contrast to her evidence at trial wherein: (1) she produced the will on a moment's notice once it had been noted in the evidence of Stephen Wang that Kennedy Town was still in her mother's name; and (2) her

evidence concerning her mother's instructions to she and her half-sister Emma about looking after Emily.

[144] She testified she and Emma agreed not to probate the will; a statement which implies knowledge of the will's contents.

[145] Neither of the above assertions is consistent with a professed lack of knowledge as to her entitlement to one-half the assets of her mother under the will. Further, I agree with the claimant's counsel that the respondent's denial of being involved romantically with the claimant prior to their marriage or moving into Heffley Crescent together is unbelievable. While romantic involvement does not necessarily militate in a finding the parties were in a marriage-like relationship, the respondent seemed overly anxious to distance herself from any kind of relationship with the claimant until late 2004.

[146] The respondent was also evasive and frequently failed to answer the question posed, but instead departed into a separate narrative about her fear of the claimant. Certain of the documents produced to the respondent, notably her instructions to her investment advisor at Edward Jones and her letter to the Chinese government respecting the Shanghai House, are supportive of the claimant's contention that the respondent acted in concert with the claimant on financial decisions and not as a result of oppression or duress as she suggests in her evidence.

[147] In summary, I find that both the parties have, where it suited them, been less than forthright or, more charitably, unreliable in their version of events. Such makes documents prepared by either of the parties or others coincidental with the happening of events all the more important in determining the actual state of affairs, be it the amount of liquid holdings the respondent had at the time of the commencement of their marital-like relationship or the ownership and/or characterization of any of the assets that are in dispute.

The Legislative Regime

[148] The division of property in matrimonial actions is governed by the FLA.

[149] Upon separation, each spouse is entitled to a presumptive one-half interest in all family property as a tenant in common and is equally responsible for family debt: FLA, s. 81.

[150] Family property includes all real and personal property a spouse owns or has a beneficial interest in at the date of separation, as well as property derived from family property: FLA, s. 84(1).

[151] Property acquired before the commencement of the relationship or derived from property owned prior to the commencement of the relationship by one or the other of the spouses is excluded property: FLA, s. 85. The spouse claiming an exclusion bears the onus to satisfy the requirements of s. 85.

- [152] Where circumstances warrant it, as is suggested here by the respondent, the Court may order an unequal division of family property if it would be significantly unfair to divide family property equally: FLA, s. 95(1).
- [153] Significant unfairness requires something objectively unjust, unreasonable, or unfair in some important or substantial sense having regard to the enumerated factors set out in s.95(2): see: *Jaszczevska v. Kostanski*, 2016 BCCA 286.
- [154] Here there is no debt to consider. The claimant acknowledges the debt incurred by either of them following separation does not qualify as family debt.
- [155] Generally, property division is to be determined before considering spousal support: *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 86. But where a party seeks an unequal division of family property under s. 95(3) of the FLA, the Court may consider 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".
- [156] Therefore, it is appropriate to consider the claimant's claim for spousal support when considering reapportionment: see *Parton v. Parton*, 2016 BCSC 1528 at para. 18, varied in part 2018 BCCA 273.

Excluded Property

- [157] Section 85 of the FLA excludes certain property from the definition of family property. The relevant portions of s. 85 read as follows:

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

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

- [158] The claimant does not dispute that certain of the property of the respondent is excluded by virtue of the application of this section. What is in issue is the extent of the exclusion and the valuation of the admittedly excluded property.

- [159] Property that is excluded from family property includes property acquired before the relationship began, inheritances, gifts from third parties, and property derived from excluded property: FLA, s. 85(1) The accretion in value of excluded property during the marriage is considered family property: FLA, s. 84(2)(g).
- [160] The onus rests upon the spouse asserting an exclusion to establish, on a balance of probabilities, the basis for and extent of the exclusion, based on "clear and cogent evidence": *Shih v. Shih*, 2017 BCCA 37 at paras. 42-43.
- [161] Importantly, as will be seen here, the trier of fact is permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties: *Shih* at para. 44. This statement has particular relevance to the liquid assets still controlled by the respondent, both as to their characterization as excluded property and the value of a particular asset.
- [162] Here, some property is admittedly excluded: the value of the Seabird Apartment as at marriage; the purchase price of Heffley Crescent; and the value of the Shanghai House at the date of purchase. The parties differ as to the excluded portion of the Seabird Apartment.
- [163] While both agree on the purchase price of the Shanghai House is excluded; neither allowed for the impact of the improvements of 650,000 RMB (approximately CA\$130,000) done immediately following the purchase with what, for reasons I will explain, I find were excluded funds.
- [164] The claimant acknowledges the 2005 value of Kennedy Town would be excluded property and only the accretion to its value post-marriage would be family property (to the extent of the respondent's interest in the estate) divisible by way of a compensation order if Kennedy Town is determined to be family property within the meaning of s. 84(1)(b).
- [165] Where as here, one spouse has excluded property that is real property, the other spouse has a monetary claim and entitlement to an undivided half interest in the increased value of the property and not an undivided half interest in a real estate asset itself: *Johnson v. Korol*, 2019 BCSC 111 at para. 45.
- [166] Excluded property is not to be divided unless family property located outside BC cannot practically be divided or, having regard to the duration of the spouses' relationship and a spouse's direct contribution to the preservation, maintenance, improvement, operation, or management of excluded property, it would be "significantly unfair" not to divide the excluded property: FLA, s. 96.
- [167] The threshold of unfairness required to warrant a division of excluded property is higher than the level of unfairness necessary to support dividing family property unequally and the factors that can be considered are limited to those set out in s. 96: *Parton* at paras. 36-37.

- [168] The parties have agreed that the excluded value of Heffley Crescent, is CA\$348,000 (its purchase price); both noted the value of the Shanghai House as 2,170,000 RMB as at December 2007, its acquisition date; neither allowed for the impact of the respondent's singular contribution to its enhancement after purchase but before they took occupation. The parties agree the exclusion for the Seabird Apartment is 5,344,000 HKD.
- [169] The parties submitted a common appraisal giving the value of Kennedy Town as at January 2005. The exclusion, if Kennedy Town is family property as suggested by the claimant, is 2,620,000 HKD.
- [170] With respect to the 'other assets' of the respondent, her liquid holdings in various bank accounts referenced both in her Form 8 and the documents reflecting same exhibited in the trial, the claimant asserts that save for the proceeds of the Seabird Apartment, which ought not to be counted twice, the remainder of the deposits are family property divisible equally because the respondent has failed to establish their value as of the date of cohabitation, save for accounts at the Bank of China Shanghai, a government savings plan, and an account at the Industrial Commerce Bank of China. The total agreed to exclusions are approximately 70,000 RMB for the assets in China and \$12,422.87 for the assets in Hong Kong.
- [171] The respondent testified that she had the equivalent of CA\$2,000,000 in liquid savings when she retired in 2002. No historic accounts were provided but there is a wealth of information in the account histories demonstrating the transfer of significant funds from China and/or Hong Kong to Canada which, in part, funded the purchase of Heffley Crescent, purchased the two automobiles to which I have referred, provided sufficient funds such that the respondent could advance to the claimant for investment purposes, all of which he says were lost or returned, CA\$100,000 and US\$270,000.
- [172] Neither of the parties earned a meaningful income subsequent to meeting. By meaningful I mean sufficient to meet what appears to be an affluent lifestyle of enjoying international travel, dinners out, expensive cars, massages and major dental work in Shanghai for the claimant.
- [173] The other missing piece of the puzzle in terms of the liquid assets is the deposit of funds received from the sale of the Seabird Apartment and the various of the accounts.
- [174] The claimant accepted in the revised Scott Schedule presented at the trial's conclusion, the exclusion of the Seabird Apartment proceeds so as not to double count them.
- [175] In the result, the claimant argues that approximately CA\$300,000 (being the liquid assets in excess of the Seabird Apartment sale proceeds and several other small accounts the claimant concedes are traceable to funds brought into the relationship by the respondent) is family property because the respondent failed to produce historical documents evidencing the tracing of those accounts to accounts existing at the time the parties commenced cohabitation. He seeks a compensation order of CA\$149,015 in respect of those

deposits.

- [176] In my view, despite the lack of documents dating back 20 years to when the parties met, the respondent has satisfactorily demonstrated that the CA\$300,000 residue claimed to be family property is properly excluded based on the inference I draw from the entirety of the evidence.
- [177] Whatever liquid assets brought into the relationship by the respondent, they have been significantly depleted; not augmented. Some of the money transferred to Canada by the respondent went to the purchase price of Heffley Crescent, hence assuming a different character but still subject to exclusion. Other sums were invested by the claimant and "lost" with the residue, according to his evidence returned to the respondent and, if accepted, retaining their exclusion.
- [178] Other funds were used to enhance the Shanghai House. In the main, I conclude the CA\$300,000 in dispute is logically derived from capital brought into the marriage by the respondent because (1) the parties never intermingled their finances such that any could be said to have been contributed by the claimant and (2) the respondent has not worked since the commencement of the relationship or earned income other than a minimal return of interest on her capital. Any accretion through investment gains has, logically, gone to offset living expenses.
- [179] I unhesitatingly conclude that the respondent's capital position has been significantly eroded if one looks only to her liquid holdings, acknowledging some of the cash she entered the relationship with remains excluded from division, albeit in a separate form, via the purchase of Heffley Crescent or, as will be seen, enhancement of the Shanghai House with otherwise excluded funds.
- [180] I note, if not apparent from the above, that the cost of the Shanghai House was funded by the sale of the Shanghai apartment and, as such, the purchase price is admittedly excluded.
- [181] In *Shih*, the Court of Appeal stated that inferences could be reasonably drawn where the evidence is not certain or precise in order to affect justice between the parties.
- [182] I need not conclude that the respondent accurately detailed her liquid assets at CA\$2,000,000 when she met the claimant, but only that the reasonable inference to be drawn from the totality of the evidence is that CA\$300,000 deposits in excess of the Seabird Apartment proceeds is traceable to the much larger fund she brought into the relationship. There is no other reasonable explanation as to its existence given the failed investment history of each, the lifestyle they lived, and the lack of incoming funds from employment.
- [183] Accordingly, I am satisfied that all the accounts in the name of the respondent are excluded. The proceeds from the sale of the Seabird Apartment, which form the bulk of the remaining liquid wealth, will be dealt with separately below.

- [184] As to the excluded portion of the three properties for which the accretion is admittedly family property, the parties agree on the exclusion for Heffley Crescent (CA\$348,000) and the Seabird Apartment (5,344,000 HKD). Both suggest the purchase price for the Shanghai House, 2,170,000 RMB but immediately after purchase, the parties remodelled the property to meet their occupational needs at a cost of 650,000 RMB.
- [185] In *Chapman v. Chapman*, 2020 BCSC 1029, Justice Jackson noted:
- [141] To establish an exclusion a party must prove the value of the exclusion and, if property is derived from that exclusion, that the exclusion can be traced into property that existed at the date of separation: FLA, s. 85(1)(g). Where a spouse seeks to have any increase in the value of the excluded property included in family property, however, they have the onus of establishing the value of the increase: *J.S.F. v. W.W.F.*, 2015 BCSC 2375 at para. 161; *Kumagai v. Campbell Estate*, 2016 BCSC 450 at para. 70, rev'd on other grounds 2018 BCCA 24. The approach involves first determining the net fair market value of the property at the time the spouses' relationship began or the time it was otherwise acquired, followed by a determination of its fair market value at the date of trial, and subtracting the former from the latter: *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 272 at paras. 69-71.
- [186] I find the 650,000 RMB properly formed part of its original purchase price given the timing of the remodelling. The funds to remodel were part of the excluded property brought into the relationship by the respondent and thus the total exclusion is the purchase price plus the cost of renovating: 2,820,000 RMB.
- [187] In summary, I find that the claimant has not proven any entitlement to a share of the respondent's cash or cash-like assets. They are all excluded under the provisions of s. 85 of the FLA.
- [188] Likewise, the excluded real property is the value of Heffley Crescent and the Seabird Apartment as agreed, and the combined purchase price and remodelling cost of the Shanghai House.
- [189] Kennedy Town, if the accretion in value is family property as submitted by the claimant, has an agreed exclusion of 2,620,000 HKD or CA\$434,400 (rounded).

Family Property

Is the Accretion to Kennedy Town Family Property?

[190] Family property is defined in s. 84 of the FLA. The relevant portions read as follows:

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

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

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

(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.

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

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

(i) the relationship between the spouses began, or

(ii) the excluded property was acquired.

[191] The claimant argues the accretion in value to Kennedy Town is family property, noting the claimant is both co-executrix and a joint beneficiary of her mother's will. Ms. Shu died in 2002 and the title to Kennedy Town remains in her name.

[192] Kennedy Town was purchased in 1997 by Ms. Shu, the respondent's mother, for 4,280,000 HKD. Its excluded value is 2,620,000 HKD as opined in the joint appraisal. In October of 2022, its value was opined as 8,240,000 HKD.

[193] The claimant seeks a compensation order for the 'family property' of the difference in value from January 2005 until October 2022 of the respondent's share of Kennedy Town.

[194] There is no dispute over the jurisdiction of this Court to consider foreign immovable property: *Chen v. Chen*, 2021 BCSC 2502; see also FLA, s. 109.

[195] Neither party argued the Court was without jurisdiction to decide the issue here. The respondent originally argued Hong Kong law, the *lex situs* of the apartment, governed the result and, according to the opinion of the expert, Mr. Look, the respondent's interest was but a chose in action and not property held in trust for her benefit. As such, the respondent says the accretion is not family property but "something else": an incomplete gift.

[196] The respondent's pleading do not assert the application of foreign law to either of the two immovables outside of BC. Despite an invitation to amend during the January 2023 hearing, the respondent never sought to amend the pleadings.

[197] Absent a pleading that foreign law applies to one or more of the extra-provincial properties, presumptively the law of BC applies: *Li v. Liang*, 2021 BCSC 862 at para. 126; *D.D.R. v. K.T.R.*, 2019 BCSC 2218 at para. 8.

[198] Sections 106 to 109 of the FLA dictate the choice of law rules. The relevant portions read:

106 (1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

- (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
- (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
 - (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
 - (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
 - (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.

109 (1) If the Supreme Court has authority under this Division to make an order respecting extraprovincial property, the Supreme Court may make an order respecting the ownership and division of the extraprovincial property.

- (2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:
- (a) instead of dividing the extraprovincial property,
 - (i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or
 - (ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;

[199] The evidence discloses the parties travelled routinely between Canada and China. Both filed Canadian income tax returns habitually throughout the marriage and both were habitually resident in B.C. when the action was commenced. The respondent filed a counterclaim in response to this action. Accordingly, it is reasonable to conclude their domicile was and is Canada. Given my conclusion Heffley Crescent was the first common habitual residence of the parties and the parties domicile, following marriage, was and is Canada, the law of BC applies absent an agreement to the contrary. Further, both parties submitted to the Court's jurisdiction during the proceeding. As such, I am satisfied pursuant to s. 106 that this Court has the authority to make an order respecting the foreign immovable property.

[200] I now turn to whether Kennedy Town is extraprovincial property of the respondent within the meaning of s. 109 of the FLA.

- [201] The claimant argued the conclusion in Li should inform the result here as to whether the Kennedy Road apartment is in trust for the respondent as to a one-half interest per Ms. Shu's will.
- [202] In Li, as here, there were credibility issues. Justice Horsman, as she then was, concluded that the respondent's evidence as to the creation of an express trust over the subject property in favor of a third party was less than credible. The onus was on him to prove he held the property for the benefit of another. He did not.
- [203] Li, in my view, has no application here. It is fact driven and the facts found are markedly different than those before me. In Li, the Court found that a bare trust was a strategy devised by the respondents and found the respondents liable to the claimant in respect of the assets concerned.
- [204] Ms. Gleason, the claimant's counsel, argues the same result should accrue here. She submits the respondent, as co-executrix, has standing to initiate steps to probate the will and complete the bequest. She notes Ms. Shu died in 2002; approximately the same date the parties, in the claimant's view, commenced their "international marriage".
- [205] The inference I am asked to draw is that Ms. Wang did not proceed to probate the will so as to defeat any future claim of the claimant.
- [206] In my view, there are two flaws in this reasoning.
- [207] Firstly, the death of Ms. Hsu significantly preceded what I would have determined to be the date of cohabitation between the parties; the purchase of Heffley Crescent with a mutual intention to live together while in Canada. At best, they began to cohabit in Heffley Crescent in 2004. Prior to that, the relationship does not in my view satisfy the requirements of a common-law relationship. They were sexually intimate but none of the other indicia of a marriage-like relationship existed, or at least was proven on the evidence adduced, until they moved into Heffley Crescent in August 2004.
- [208] Secondly, and more importantly, Ms. Gleason's submission presumes, by implication, that the other co-executrix and beneficiary, Emma was party to the agreement to defeat Mr. Lang's interest. Such in my view, hardly accords with common sense. Ms. Lau as co-beneficiary has a decided interest in realizing her one-half share in Kennedy Town.
- [209] The more logical inference, and the one I draw, from all of the circumstances, is that the respondent correctly described the instructions from her mother regarding Emily to both her and Emma and that the status quo has been maintained for over 20 years with Emily occupying Kennedy Town to the exclusion of the two beneficiaries.
- [210] As noted earlier, given the failure of the respondent to plead foreign law, I declined to consider the opinion evidence of either foreign expert. The respondent argues it is unnecessary as Canadian law provides the same result.

- [211] With respect, I agree.
- [212] The respondent referred me to a number of Commonwealth cases which define the rights of an intended beneficiary to an un-probated or un-administered estate.
- [213] The authorities to which I was referred, notably *Commissioner of Stamp Duties (Queensland) v. Livingston*, [1965] A.C. 694, [1964] 3 All E.R. 692 (Privy Council) and *Re Leigh's Will Trusts* [1970] 1 Ch. 277, make clear that no beneficial interest arises in the intended beneficiary of an un-administered estate, but rather the intended heir has a chose in action to sue the named executor to compel probate of the estate or, alternatively appoint an administrator to effect probate and distribute the estate to the named beneficiaries.
- [214] The respondent argues this long-standing principle remains unchanged by either the FLA or Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA].
- [215] Neither counsel referred me to the decision of Justice Butler in *Parton*. Justice Butler considered the status of the beneficiary's entitlement under a deceased's estate:
- [50] The claimant says that her inheritance from her mother's estate is excluded pursuant to s. 85(1)(b). The respondent accepts that the inheritance is excluded property, but says the claimant has failed to prove the value of the inheritance as of the date of her mother's death and that some portion of the funds she received in 2015 represents the increase in value of that inheritance. Further, in his written argument, the respondent relies on s. 95(2)(g) for the proposition that the claimant was not acting in good faith. While this argument was not pursued in any detail, he presumably says the estate was not wound up promptly or that the claimant, acting as executor, did not act prudently in the administration of the estate. This argument is without merit. Section 95(2)(g) is a consideration which applies only to whether family property should be divided unequally. It does not apply to consideration of excluded property. Further, no evidence was presented to support this assertion.
- [51] More importantly, the inheritance exclusion applies as of the date a spouse receives his or her inheritance. A plain reading of s. 85(1)(b) leads to that conclusion. Before an inheritance can be excluded property, it must be received by the beneficiary. If that were not the case, the court would have to explore the administration of the estate to value the assets and liabilities as of the date of death and consider the likely estate expenses. This would prolong and complicate property division claims and would produce an illusory value for the exclusion. The claimant is entitled to an exclusion of \$139,000 for the inheritance that she received in February 2015.
- [Emphasis added.]
- [216] *Parton* was successfully appealed, in part, but on other grounds.
- [217] In *Chapman*, Justice Jackson referred favourably to the aforementioned passage in *Parton*, where she noted:

- [253] In Parton at para. 51, Justice Butler held that excluded inheritances are to be valued as of the date a spouse receives the inheritance. That specific issue was not commented on by the Court of Appeal. Under the doctrine of judicial comity, I am to follow the decisions of other judges of this Court unless subsequent decisions have affected their validity, it is demonstrated that some binding authority was not considered by the court in passing judgment, or the judgment was unconsidered, in that an immediate judgment was required to be given without opportunity to fully consult authority: *Re Hansard Spruce Mills Limited*, [1954] 4 D.L.R. 590 at 592 (B.C.S.C.).
- [254] The claimant urges me to reconsider Butler J.'s judgment arguing it was unconsidered and did not take into account circumstances such as those in this case. The claimant submits that upon Hubert's death the respondent acquired a beneficial interest in one third of the assets of the estate. She argues this beneficial interest should be treated the same as a vested interest of a beneficiary of a trust, where the increase in value of the trust assets would be divisible between the spouses at separation.
- [255] The respondent advocates for the analysis of Butler J. He refers also to the decision of Justice Brundrett in *M.F.W. v. M.A.H.*, 2019 BCSC 588, which left the rule articulated by Butler J. undisturbed.
- [256] The claimant's position overlooks that upon his death, the real property in Hubert's estate vested in his personal representatives, not the beneficiaries: *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 77(1). While the respondent acquired certain rights vis-à-vis the trustees upon Hubert's death, the respondent did not acquire an interest in the estate's assets until they were distributed, which for the most part was in 1996.
- [257] I am alive to the claimant's argument that such an interpretation may permit an unscrupulous spouse who is both a beneficiary and an executor under a will to delay receipt of their distribution in an effort to frustrate their spouse's right to benefit in the increased value of the estate. I make two comments in response. First, there is no evidence those were the circumstances in this case. Second, no argument was made with respect to whether an executor owes fiduciary duties to the spouse of a beneficiary. Where trustees of an estate act in a manner intended to defeat a spouse's claim to family property in the form of an increase in an inherited asset, it may be that equity will provide that spouse with a remedy. That is a matter for another day.
- [218] While leaving open the question as to whether there is a remedy where an unscrupulous spouse intentionally defers the distribution of an estate to defeat a "potential" interest in the assets undistributed as family property, I do not find that to be the case here for reasons previously stated.
- [219] Here, there is supporting evidence that Ms. Wang's evidence as to mutually conscious decision by her and her half-sister to defer probate, not for mala fides on their part, but based on a genuine intention to look after their disabled sister, Emily.

[220] Hence, in my view, the accretion in value to Kennedy Town, which remains in the name of the respondent's mother, is not family property such that the claimant is entitled to a compensation order.

The Family Property

[221] What remains as family property is the accretion in value to: Heffley Crescent; the Seabird Apartment; and the Shanghai House.

[222] The respondent says the valuation date for each of those assets ought to be the date of separation. Separate values were provided for each of the three properties as of October 2014.

[223] Section 87 of the FLA provides:

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

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

[224] Here there is no agreement as to the valuation date so, by default, the valuation date is at trial unless such would cause unfairness defined in the FLA.

[225] Selecting a date other than the hearing date is a reapportionment of the asset or assets so valued. As noted in *Kumagai v. Campbell Estate*, 2018 BCCA 24:

[76] A departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA. Section 95 expressly provides for the reapportionment of net family property if an equal division would be "significantly unfair." Under the former FRA, a change in the valuation date from the date of hearing was determined to be an effective reapportionment of the family assets. See *Martelli v. Martelli* (1981), 33 B.C.L.R. 145 at para. 28 (C.A.); *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1 at para. 55 (C.A.); *McPhee v. McPhee* (1996), 22 R.F.L. (4th) 302 at paras. 10-13 (B.C.C.A.); and *Fisher v. Fisher*, 2009 BCCA 567 at para. 61. The same reasoning, in my opinion, should be applied to the comparable provisions of the FLA. Any departure from the presumptive equal division of net family property under s. 81 of the FLA must therefore be made pursuant to s. 95(1) of the FLA, which imposes a threshold finding that an equal division of the net family property would be "significantly unfair" before any reapportionment of the net family property can be ordered.

- [226] In *Banh v. Chrysler*, 2022 BCCA 74, leave to appeal to SCC ref'd, 40156 (12 January 2023), the Court of Appeal overturned the trial judge's determination that a valuation of the family property as of the date of separation was warranted, concluding the trial judge relied on factors "outside the scope" of the FLA regime save one; the length of the parties' marriage.
- [227] In *Banh*, the husband brought three properties into the relationship; the wife, one. The trial judge found unfairness and departed from the usual valuation date based on six separate factors:
1. the short duration of the marriage;
 2. the fact that Ms. Chrysler was not the owner of any of Mr. Banh's rental properties;
 3. Mr. Banh's essentially exclusive efforts to develop, manage and maintain the rental properties;
 4. the considerable growth in the value of the rental properties that occurred primarily after the parties separated;
 5. financial advances made by Mr. Banh to Ms. Chrysler prior to and during their marriage; and
 6. Ms. Chrysler's "unilateral" setting of a trial date three and a half years after the parties separated.
- [228] In allowing the appeal and determining the property values at trial, Justice Marchand noted:
- [7] In my view, with the exception of the short duration of the parties' marriage, the judge relied on factors outside the scope of the legislation. On its own, the short duration of the parties' marriage cannot sustain the outcome. I would, therefore, allow the appeal and order an equal division of the family property at the date of trial.
- [229] The respondent points to many of the same factors as rejected in *Banh* as warranting departure from the default position of valuation of family property at trial. Accordingly, I reject the respondent's suggested valuation date and value the family property at trial. To be clear, the choice of valuation date does not end the enquiry into whether an unequal division might be unfair.
- [230] Accordingly, in the first instance, prior to a consideration of whether the *prima facie* equal division of family property required by the FLA, I look to the values as at trial.
- [231] Based on the evidence, the agreed accretions to family property are as follows: Heffley Crescent is CA\$605,000 (CA\$953,000-CA\$348,000).

- [232] The other two properties are problematic because no evidence was led as to the conversion rate for RMB or HKD. Both parties suggested conversion rates in their respective Scott Schedules but, given the sizeable discrepancies in the result, I leave to the parties to agree on the appropriate conversion rate or re-appear before me after receiving these reasons.
- [233] The parties agree on the value of the Shanghai House at 8,330,000 RMB (before the exclusion noted above) but each gives a different value in Canadian dollars: the claimant says just under CA\$1,600,000; the respondent CA\$1,416,100. Neither has excluded, as I have, the 650,000 RMB which I conclude is excluded as part of the purchase price given the parties did not occupy the premises until after the renovation was completed.
- [234] For the Seabird Apartment, I similarly disagree with the figures used by each of the parties' counsel in their respective Scott Schedules as expressed in HKD. The claimant neglected to deduct from the sale proceed the vendors' selling costs, commission, and legal fees. The respondent failed to credit the vendors with having received a 10% deposit in addition to the amount due vendors on the statement of adjustments.
- [235] The actual growth in value is 4,251,000 HKD. I arrive at that number using the actual selling price of 9,700,000 HKD less sales costs of 105,000 HKD (rounded) and subtracting the agreed excluded portion 5,344,000 HKD.
- [236] The claimant says the respondent's one-half share (given her former husband's interest) is CA\$361,000; the respondent says CA\$278,000.
- [237] The parties will either have to agree between themselves as to the conversion rate(s) or appear before me with admissible evidence as to the appropriate conversion rate at trial (and what date to use given the re-opening in November 2022).
- [238] Given the vagaries of exchange rates of the two overseas properties, I estimate the value of family property at CA\$2,300,000. This figure is subject to adjustment or agreement between the parties based on conversion rates.
- [239] An equal division, before consideration of adjustments for the misappropriation of funds (CA\$195,600) by the claimant post-separation and repayment of the advance (CA\$100,000) is approximately CA\$1,150,000.
- [240] Net of the above adjustments, the respondent would be required to make a compensation payment of CA\$854,400, before consideration of any other adjustments suggested by the respondent including reapportionment other than by altering the valuation date to separation.
- [241] Specifically, the respondent seeks a reapportionment of family property 75%/25% in her favour and repayment by the respondent of 75% of the funds lost in the 2005/2006 investments, appraisal costs, and interest from the date funds were lost/misappropriated.

[242] Such leads to a consideration of whether the equal division of the family property would result in significant unfairness to the respondent.

Reapportionment

[243] Having dismissed the idea of reapportioning family property in favour of the respondent by using a valuation date different from the date of trial, it remains open to determine whether an equal division of the family property would result in significant unfairness.

[244] Quite apart from seeking valuation of the family property at separation; not trial, the respondent seeks reapportionment of the family property 75%/25% in her favour, and then doing a dollar by dollar accounting for the funds admittedly misappropriated by the claimant as well as "repayment" of the money the respondent argues was advanced by her under duress in 2005/2006 (approximately CA\$400,000 using 2006 conversion rates for US dollars).

[245] The claimant opposes any reapportionment arguing the respondent has failed to show significant unfairness as per the requirements of s. 95 of the FLA, the relevant portions include:

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

- (a) equally divide family property or family debt, or both, or
- (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (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;
 - (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.
- [246] Here, given the comments in *Banh* noted above, I am hard pressed to find and of the factors enumerated in s. 95(2), with the exception of s. 95(2)(g) and (i), have application.
- [247] Given the claimant's concession he needs to repay from his share of the family property all of the funds obtained using the power of attorney and the money he says he withdrew to pay the strata, s. 95(2)(g) seems to have no application. It would be unfair to the claimant to consider those funds twice.
- [248] That said, s. 95(2)(i) must be given some meaning. I interpret it to mean some factor other than those enumerated which would lead an objective observer to conclude the prima facie equal division mandated under the FLA is significantly unfair.
- [249] Further in *Chapman*, at paras 136-137, Jackson J. remarked:
- [136] Despite the presumption of equal division, the court may order an unequal division of family property if it would be significantly unfair to divide family property equally: FLA, s. 95(1). Significant unfairness requires something objectively unjust, unreasonable, or unfair in some important or substantial sense having regard to the factors set out in s. 95(2) of the FLA: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 41 and 42.
- [137] A two-stage analysis is used to determine whether an equal division of family property would be significantly unfair: *Polard v. Polard*, 2017 BCSC 1963 at para. 19. First, the court must determine the extent of family property in accordance with ss. 84-86 of the FLA and undertake the notional exercise of dividing the property (and any family debt) equally. Second, the court must determine whether the equal division would be significantly unfair, taking into account the factors set out in s. 95(2) of the FLA.
- [250] The respondent argues the claimant used her "as an ATM machine" throughout the relationship and imposed his will on her to make advances for his credit card; pocket money despite having income, albeit modest, of his own; forcing her to advance the funds he says were lost in the economic downturn of 2008 and then returned to her minus the losses; and, finally, his admitted misappropriation of funds using the power of attorney when he knew she did not agree.
- [251] In support of her contention that the advances made in 2005 and 2006 were not voluntary, the respondent points to what I agree was aggressive behaviour by the claimant toward her in 2016.

- [252] Such does not persuade me, given the intervening period from 2005 to the date of separation, that the claimant dominated the respondent in the fashion she suggests or that the transfer of funds, even if begrudgingly to achieve harmony between them, was under duress so as to engage s. 95(2)(g) beyond the post-separation activity.
- [253] Nonetheless, the significant losses incurred as a result of the claimant's investment strategy all fall at the feet of the respondent given the funds lost were hers and would have been excluded from division if not invested in equities.
- [254] The post-separation misappropriation by the claimant is suitably dealt with by way of an order requiring repayment. Such, in my view is not a reapportionment of family property given my conclusion the cash held by the respondent up to and after separation was and is excluded property.
- [255] As to the factors set out in s. 95(2), they are for the most part, inapplicable. The marriage was of significant duration (nine years); there was no agreement or understanding between the parties, despite the fact they never co-mingled their property, that would affect the otherwise prima facie equal division of family property; neither contributed the career of the other; there is no family debt let alone debt that exceeds the value of the family property; neither of them decreased the value of the family property post-separation (as opposed to depletion by the claimant of excluded property); and all three real properties increased in value.
- [256] The respondent points to the relative contributions of the parties and notes throughout the relationship the respondent paid, from the excluded property of her pre-relationship accumulated savings, all of the parties' expenses in respect of the real properties and their living expenses, including repayment of his credit card.
- [257] In *Yousefian v. Jafarmadar*, 2018 BCSC 855, Justice Choi noted:
- [24] As set out in s. 84(2)(g), the increase in the value of excluded property, regardless of the contributions made by each spouse, is family property. In general, the fact that one spouse contributed more to the acquisition or maintenance of family property throughout the relationship does not change its characterization. However, if the court determines that an equal division of family property or family debt, or both, is significantly unfair, it may order an unequal division of family property or family debt, or both, under s. 95(1). Before applying s. 95, the court will first notionally divide family property and family debt and then consider whether such a division would be significantly unfair, having regard to the factors listed under s. 95(2)-(3): see *Remmem v. Remmem*, 2014 BCSC 1552 at para. 43.
- [258] On a fact pattern not notably different than what I find here, Justice Choi went on to reapportion the family property in favour of the claimant wife.

- [259] She did so not on the basis of unequal contribution by the parties, but upon the post-separation contributions of the claimant (paydown of the mortgage) and the fraudulent post-separation actions of the respondent in transferring or disposing of both family and excluded property.
- [260] Here, the respondent carried the expenses of the three real properties that comprise the family property to which the claimant is entitled from what I have found to be excluded funds. Offset against that is the fact she had the use of the properties, save for Heffley Crescent, until she resumed living there in June 2016.
- [261] Nonetheless, the properties were preserved and grew substantially in value from 2014 to 2022 as a result of market forces.
- [262] The post-separation misuse by the claimant of excluded property is addressed, in part, by the order he repay the sums taken from what was otherwise excluded property. Repayment, absent an order for the addition of interest, leaves the respondent without the use of those funds since 2014.
- [263] The claimant had the free use of Heffley Crescent for approximately 18 months post-separation.
- [264] That leaves, in my mind, consideration of s.95(2)(i) "any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness".
- [265] I have found the claimant to be dishonest and capable of dishonest acts in three identifiable instances: the withdrawal of funds claiming to have used them for strata costs; the use of CA\$172,000 through the power of attorney knowing the respondent would not agree; and retaining CA\$20,000 from the deposit on the aborted sale of the Shanghai House while lying to the respondent about the money being stolen by hackers.
- [266] His description of the investments made with the money admittedly received from the respondent and, belatedly admitting from his former wife, coupled with the acts of dishonesty I have referenced, leave me with significant doubt that he repaid the respondent the remainder of the mutual funds and online investments.
- [267] Other than his word, there is no evidence of repayment or even details of how it was done. The sums involved are large.
- [268] There is evidence his former wife purchased real property sometime after the world economic downturn. The claimant denies any involvement in the purchase, but I am dubious.
- [269] Even with losses of 50% on the investments funded by the respondent; there should have been in excess of CA\$200,000 left of the respondent's contribution. The claimant, not the respondent, bears the onus of showing such was repaid. If repaid, for the reasons above I would have concluded the sum remaining were excluded from division.

- [270] Despite my conclusions about the respondent's credibility (or lack thereof), I prefer her denial of receiving anything back over his evidence of repayment of both hers and Ms. Feng's original investment.
- [271] Such, in my view, constitutes an 'other factor' making an equal division unfair.
- [272] I conclude the respondent, if ordered to pay the claimant 50% of the family property would leave the relationship with less than she entered because of the erosion of her excluded capital through a combination of failed investments and lavish spending. The claimant would depart with a windfall of over CA\$800,000.
- [273] In concluding an unequal division in favour of the respondent is warranted I also consider her claim for occupational rent of Heffley Crescent and the loss of opportunity of the use of funds misappropriated by the claimant in 2014. The combination of those factors make an equal division significantly unfair even in the face of the disparate financial circumstances each would be left with if an equal division were ordered.
- [274] Accordingly, I order the family property be divided 65%/35% in the respondent's favour.
- [275] I expect the parties can work out the compensation payment in Canadian dollars but if they cannot, I invite them to re-appear on this issue of the appropriate conversion rates so as to state the compensation payment in Canadian dollars.
- [276] From the claimant's 35% share of the family property, there shall be a deduction of the CA\$195,600 which I find he misappropriated post-separation, and the CA\$100,000 advance.
- [277] Given the reapportionment in favour of the respondent, I make no order for interest on the deductions set out above nor an allowance for the claimant's use and occupation of Heffley Crescent during the 18 months following separation.
- [278] The other orders sought by the respondent, notably repayment of investment losses and miscellaneous advances during the relationship whether for debt in his name alone or spending money, have no foundation under the FLA or common law.
- [279] I agree with the claimant that the FLA, just like its predecessor the Family Relations Act, R.S.B.C. 1996, c. 128, does not entitle the Court with a "roving commission to inquire into the spending habits of the spouses during the marriage": *Newson v. Newson*, (1986) 27 D.L.R. (4th) 738, 1996 CanLII 166 (B.C.C.A.).

Spousal Support

- [280] The claimant seeks spousal support both under the Divorce Act, R.S.C. 1985, c. 3, and the FLA. Section 15.2(1) of the Divorce Act provides:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

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

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[281] Similar provisions and wording exist in sections 160-162 of the FLA. The authorities establish similar considerations apply to both the issue of entitlement and quantum: *Zilic v. Zilic*, 2021 BCCA 107 at para. 21.

[282] Relying on *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC ref'd, the claimant argues that regardless of the assets received by way of distribution of family property, his lifestyle has been radically affected by the separation from the respondent by virtue of their disparate financial situation, particularly when the respondent was in possession of all of the assets and the claimant reliant upon government sources of income for his day-to-day expenses.

[283] The claimant acknowledges he is not entitled to compensatory support but rather on a needs-based model: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715.

[284] Undoubtably, the claimant has been living at a standard well below that which he enjoyed when living with the respondent. That lifestyle was provided by the respondent's capital; not income derived from employment.

- [285] The claimant has been reliant wholly on social benefits and lives in subsidized housing since vacating Heffley Crescent in 2016. The respondent continues to maintain a similar standard of living as was enjoyed by the parties during the marriage. She maintains the residence at the Heffley Crescent and the Shanghai House. Post-separation, she stayed at Kennedy Town.
- [286] Both properties in her name are mortgage free. One of which, the claimant suggests, could provide rental revenue to her.
- [287] Currently, before allowing for the compensation payment ordered, the respondent has something in the order of CA\$950,000 in investments. Her expenses claimed annually are modest.
- [288] As a result of the orders made above, the claimant is entitled to a substantial compensation payment. Noting that no application for interim support was ever made in the nine years following separation, the claimant's needs at 79 are less compelling than they may have been in 2014.
- [289] Although the claimant helped himself through freely using the respondent's money post-separation, the parties agree that that he needs to repay, from his share of family property, that which he has taken.
- [290] Nonetheless the net result is the claimant is left with a significant capital position. It is hard to fathom how he was disadvantaged by the marriage.
- [291] The payment of spousal support at this stage, given the respondent's age and lack of income other than from investments, is little more than a redistribution of capital already divided above; in effect a distribution of excluded property or a re-distribution of the property found to be the respondent's entitlement under the FLA.
- [292] After payment to the claimant of his entitlement to family property, the parties will have more or less similar 'cash positions'.
- [293] Assuming for a moment each of the parties could receive a safe return on their assets, and even allowing for the fact the respondent should be required to rent one of the two premises still under her ownership, any income generated by the respondent, after payment to the claimant of his portion of family property, would likely be little different than the income generated by the capital that the claimant will receive as a result of his entitlement under the terms of this judgment.
- [294] Accordingly, despite the fact the respondent will retain the value of excluded property, thus skewing the lifestyles of each of them, it would, at this late stage, nine years following separation, be a redistribution of property excluded from division to accede to the claimant's claim for spousal support.
- [295] Accordingly, the claim for spousal support is dismissed.

The Divorce

[296] Each party seeks a divorce from the other. They have been separated for a period in excess of a year such that it is appropriate to grant the order for divorce subject to s. 12 of the Divorce Act.

Costs

[297] There may be offers to settle which impact the question of costs. If the parties are unable to agree on costs, they may set the matter down for submissions before me.

[298] As well, the respondent's late disclosure of relevant documentation (the will) resulting in the application to re-open her case, adduce expert evidence and make further submissions, added to the costs of the litigation. The parties are at liberty to make submissions on this aspect of the trial regardless of any agreement they may reach of the on the proceeding conducted up to and including the last day of trial July 25, 2023.

"Harvey J."

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