

CANADA / JUDGMENT

Li v. Xu

2024 BCSC 77

COURT

Supreme Court of British Columbia

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2024 BCSC 77 Li v. Xu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Xu,

2024 BCSC 77

Date: 20240116

Docket: E203183

Registry: Vancouver

Between:

Bing Li

Claimant

And

Jing Xu

Respondent

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Claimant:

C. Collver

Counsel for Respondent:

J. Cao

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 23-27, 30 and

November 27 - December 1, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 16, 2024

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Introduction

- [1] This family case is brought by the claimant, Bing Li against the respondent Jing Xu. Ms. Li seeks orders including a divorce; an order requiring the return of the parties' daughter, M.X., from China to British Columbia; child support (if M.X. is returned to British Columbia); retroactive spousal support; and equal division of family property including the proceeds from the sale of an apartment in Burnaby (the "Arcola Apartment") and a residence in Richmond (the "Peterson Drive Residence"). Finally, Ms. Li seeks a penalty, payable by Mr. Xu to her, for failing to disclose financial records.
- [2] Mr. Xu filed a counterclaim. He also seeks an order for divorce, but is opposed to M.X. being returned from China and any order of spousal support. Although he sought child support in his counterclaim, he abandoned this claim at trial. Mr. Xu takes the position that aside from the increase in value of the Arcola Apartment during the parties' marriage, the sale proceeds are excluded property and not subject to division. He argues that the funds to purchase and pay mortgage and other maintenance expenses were gifted to him by his mother.
- [3] Mr. Xu alleges that his parents provided all of the funds to purchase the Peterson Drive Residence property on their behalf. He takes the position that this property, although registered in his name, is beneficially owned by his parents and therefore not family property.

Background

- [4] Ms. Li is currently 32 years old and Mr. Xu is 39. Both were born in China.
- [5] In 2008, Mr. Xu moved to British Columbia to complete graduate studies. He obtained a masters degree in software engineering from Simon Fraser University ("SFU") in 2012. Ms. Li moved from China to Alberta in 2010. After returning to China for a year, she moved to Vancouver in 2013. She took language and other classes at Fraser International College at SFU and later completed a diploma in marketing at Kwantlen Polytechnic University in August 2020.
- [6] Ms. Li and Mr. Xu met in 2013, began living together in a marriage like relationship in January 2014, and were married in Burnaby on May 29, 2014. When their relationship began in January 2014, Mr. Xu moved from Victoria into Ms. Li's rented one-bedroom apartment in Burnaby. In November 2014, a couple of months after Ms. Li became pregnant, the couple purchased the Arcola Apartment. The property was registered in Mr. Xu's name only.
- [7] M.X. was born in British Columbia in August 2015. In 2016, Ms. Li's mother came to Canada from China for approximately six months and Mr. Xu's mother came later, for approximately two months, to help care for M.X.

- [8] In April 2016, Mr. Xu purchased the Peterson Drive Residence. He contends that he purchased the property for his parents using money provided by them for that purpose. The couple then moved into this property and rented the Arcola Apartment.
- [9] In July 2016, when M.X. was 11 months old, Ms. Li and Mr. Xu took M.X. to China to live with Mr. Xu's parents in Beijing. This decision was made because of Mr. Xu's busy work schedule and Ms. Li's desire to continue her studies. Neither party wanted to place M.X. in daycare.
- [10] In January 2018, when she was approximately two and a half years old, M.X. returned to British Columbia from China with Mr. Xu and his parents. Mr. Xu's mother stayed in Canada and helped care for M.X. for approximately seven months until she returned to China. Afterwards, for approximately five months, M.X. attended daycare.
- [11] In late December 2018, when M.X. was approximately three and a half years old, Ms. Li and Mr. Xu took her back to live with her paternal grandparents in China, in Beijing. Ms. Li and Mr. Xu decided, for a second time, that they needed help caring for M.X. while Ms. Li finished her studies and because of Mr. Xu's work schedule. M.X. has since resided with Mr. Xu's parents in Beijing and has not returned to Canada. In total, M.X. has spent approximately 22% of her life in Canada and 78% of her life in China.
- [12] In January 2019, Ms. Li and Mr. Xu separated and Ms. Li moved out of the Peterson Drive Residence. In 2020, Mr. Xu returned to China and has remained there continuously since then. Ms. Li has remained in Canada but has travelled to China to spend time with M.X., including for six months in 2020. She was most recently in China in September and October 2023.
- [13] Sometime in August 2020, after she graduated from Kwantlen Polytechnic, Ms. Li attempted to discuss M.X.'s return from China with Mr. Xu. He refused, taking the position that he wanted M.X. to remain in China with his parents.
- [14] In December 2020, Ms. Li filed her notice of family claim in which she sought--relying on both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Law Act, S.B.C. 2011, c. 25--an order that M.X. be returned to Canada from China to live primarily with her.
- [15] In or about June 2021, Ms. Li had further discussions with Mr. Xu concerning M.X.'s return from China to British Columbia and made an unsuccessful attempt to register her in school in Richmond. Mr. Xu maintained his earlier position that it was better that M.X. remain in China with his parents.
- [16] In July 2021, Ms. Li brought an application before Master Bilawich seeking an order that M.X. be returned to Canada. In reasons released on July 21, 2021 and indexed as 2021 BCSC 2724, Master Bilawich found that M.X. was not habitually resident in British Columbia at the time of Ms. Li's application (the "Bilawich Order"). On this basis, he decided that this Court did not have jurisdiction to order that M.X. be returned to Canada.

Issues

[17] The issues to be decided in this case include the following:

- a) Whether this Court is bound by the Bilawich Order application of the principles of res judicata and issue estoppel.
- b) If this Court is not bound by the Bilawich Order, whether this Court has jurisdiction to make any parenting orders with respect to M.X. and, in particular, an order that she be returned to Canada.
- c) Whether any of the proceeds from the sale of the Arcola Apartment, which are currently being held in trust, are an excluded asset and therefore not subject to division between the parties. This requires a determination of whether Mr. Xu has proven that he used funds provided to him by his mother as a gift to purchase the Arcola Apartment.
- d) Whether the Peterson Drive Residence is family property and therefore subject to division between the parties.
- e) Whether Ms. Li is entitled to retroactive spousal support and in what amount. This requires a determination of the parties' incomes for support purposes.
- f) Finally, whether Mr. Xu should be required to pay a penalty for failure to disclose relevant documents with respect to his earnings and assets.

Res Judicata

[18] Before deciding whether this Court has jurisdiction to make a parenting order concerning M.X., it is first necessary to consider whether, as a result of the Bilawich Order, Ms. Li is prohibited from rearguing this question.

[19] Master Bilawich found that M.X. was not habitually resident in British Columbia at the relevant time. On that basis, he decided that this Court did not have jurisdiction to order that she be returned to British Columbia. He also determined, in the alternative, that he did not have sufficient evidence to make a decision whether it was in M.X.'s best interest to be returned to British Columbia.

[20] Mr. Xu contends that the principle of res judicata applies in respect of the Bilawich Order.

[21] As was discussed in a recent decision of the Court of Appeal for British Columbia, *Sood v. Hans*, 2023 BCCA 138, issue estoppel is a branch of res judicata that prohibits re-litigation of issues already decided in another court proceeding. In order for either res judicata or issue estoppel to apply, the issue must be the same as the one decided in a prior decision by a court of competent jurisdiction, the prior decision must have been final and the parties must be same: *Sood* at paras. 48-49.

[22] I find that the Master Bilawich Order with respect to whether he had jurisdiction was not and could not have been final. I note Practice Direction on Masters' Jurisdiction (PD-50), which provides, inter alia, guidance concerning a master's jurisdiction to make interim orders in family cases. It states that a master is able "to make orders for interim corollary relief under the Divorce Act": at para. 6(b).

[23] In conclusion, I do not consider that the principle of res judicata applies in this case and that I must decide the issue of jurisdiction anew.

Jurisdiction to Make Parenting Orders

[24] Ms. Li relies on both the Divorce Act and Family Law Act in support of an order that M.X. be returned to British Columbia.

Law Relevant to Jurisdiction

[25] With respect to a Canadian court's jurisdiction to make parenting orders, s. 6.2(1) of the Divorce Act provides as follows:

Removal or retention of child of marriage

6.2 (1) If a child of the marriage is removed from or retained in a province contrary to sections 16.9 to 16.96 or provincial law, a court in the province in which the child was habitually resident that would have had jurisdiction under sections 3 to 5 immediately before the removal or retention has jurisdiction to hear and determine an application for a parenting order, unless the court is satisfied

- (a) that all persons who are entitled to object to the removal or retention have ultimately consented or acquiesced to the removal or retention;
- (b) that there has been undue delay in contesting the removal or retention by those persons; or
- (c) that a court in the province in which the child is present is better placed to hear and determine the application.

[26] A similar provision exists under the Family Law Act, which provides as follows:

74 (2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:

- (a) the child is habitually resident in British Columbia when the application is filed[1];

[27] Both the Divorce Act and Family Law Act include exceptions under which jurisdiction may be found even where the child's place of habitual residence was not, at the relevant time, respectively, in Canada or British Columbia.

[28] Section 6.3(1) of the Divorce Act prescribes that when a child is not habitually resident in Canada, jurisdiction may only be found in exceptional circumstances. This provision reads as follows:

Child habitually resident outside Canada

6.3 (1) If a child of the marriage is not habitually resident in Canada, a court in the province that would otherwise have jurisdiction under sections 3 to 5 to make a parenting order or contact order, or a variation order in respect of such an order has jurisdiction to do so only in exceptional circumstances and if the child is present in the province.

[Emphasis added]

[29] Section 74(2)(b) of the Family Law Act prescribes that a British Columbia court may take jurisdiction even where the child is not habitually resident in British Columbia, if all of the following conditions are met:

- (i) the child is physically present in British Columbia when the application is filed,
- (ii) substantial evidence concerning the best interests of the child is available in British Columbia,
- (iii) no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident,
- (iv) no extraprovincial order has been recognized by a court in British Columbia,
- (v) the child has a real and substantial connection with British Columbia, and
- (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;

In addition, s. 74(2)(c) of the Family Law Act prescribes that a British Columbia court may take jurisdiction over a child who is not habitually resident in British Columbia under the following circumstances:

- (c) the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to
 - (i) remain with, or be returned to, the child's guardian, or
 - (ii) be removed from British Columbia.

[Emphasis added]

[30] The exceptions, set out in s. 6.3(1) of the Divorce Act and ss. 74(2)(b) and (c) of the Family Law Act, do not apply as M.X. was not present in British Columbia at the time Ms. Li commenced this family case or afterwards.

- [31] There is no dispute that M.X. was not wrongfully removed from British Columbia as both parents agreed in December 2018, that she should travel to China to live with her paternal grandparents. However, Ms. Li alleges that M.X. was wrongfully retained in China, although she has not specified when the wrongful detention occurred.
- [32] The relevant question is whether M.X. was "habitually resident" in British Columbia either immediately before the alleged time of wrongful retention (Divorce Act, s. 6.2(1)) or at the time Ms. Li commenced this family law case (Family Law Act, s. 74(2)(a)). In my view, it is not necessary to determine which date should be applied as, for the reasons set out below, I do not find that M.X. was habitually resident in British Columbia shortly after she was sent to live with her paternal grandparents in China in December 2018. The earliest it can be said that she was "wrongfully retained" in China is December 2020.

Analysis: Where was M.X. Habitually Resident?

- [33] The term habitually resident is not defined in the Divorce Act. Section 72(2) of the Family Law Act defines habitually resident as follows:

72 (2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided

- (a) with the child's parents,
 - (b) if the parents are living separate and apart, with one parent
 - (i) under an agreement,
 - (ii) with the implied consent of the other parent, or
 - (iii) under an order of a court or tribunal, or
 - (c) with a person other than a parent on a permanent basis for a significant period of time.
- [34] In *Aslanimehr v. Hashemi*, 2022 BCCA 248, the Court of Appeal considered the meaning of the word "resided" in s. 72(2) of the Family Law Act, stating that in its ordinary sense, "reside" includes "a notation of permanence or, at least, of a non-transient situation": para. 36. The evidence establishes that M.X. lived with her grandparents in Beijing for a significant period of time from December 2018 to December 2020, was enrolled in school, and participated in a number of extracurricular activities. This was more than a transient arrangement. As a result, I conclude that ss. 72(2)(a) and (b) do not apply as M.X. did not reside with either parent after December 2018.
- [35] Subsection 72(2)(c) is applicable if this Court concludes that, at the relevant time, M.X. had resided with her paternal grandparents on a permanent basis for a significant time.

- [36] Counsel did not direct this Court to, nor is the Court aware of any authority from British Columbia in which s. 72(2)(c) has been interpreted. There is a line of authority from the Ontario courts that has been applied in the Northwest Territories, which includes an analysis of a provision identical to s. 72(2)(c). In *D(F) & S(K) v. O(L) et al*, 2020 NWTSC 33 the Court relied on *Dorya v. Dorya*, 2015 ONCJ 24 and the related cases, summarizing them as follows:
- [25] This Court has not previously opined specifically on the meaning of s. 25(2)(c) of the Children's Law Act; however, an identical provision has been considered and interpreted in a number of cases by courts in Ontario, including *Vega v. Vega*, [1994] O.J. No. 1794 (Ont. Prov. Div.), *Sui v. Tang* [1997 CarswellOnt 5616 (Ont. Prov. Div.)], 1997 CanLII 14935, *Hsu v. Liu*, [1999] O.J. No. 3172 (Ont. S.C.J.) and *Dorya v. Dorya*, 2015 ONCJ 24 (Ont. C.J.). They offer a useful analytical framework, set out below, which I adopt.
- [26] There are two aspects to consider in determining whether a "significant period of time" has passed. The first is the actual amount of time the child has spent in the jurisdiction with the third party. The second is the period of time the child has spent in the jurisdiction relative to the lifetime and age of the child. *Vega v. Vega*, at para 10.
- [27] With respect to whether the child has resided in the jurisdiction with the third party on a "permanent basis", the Court must consider the following:
- a. the intention of the parent or parents in placing the child in the care of the third party, bearing in mind that intention is not necessarily determinative of the issue;
 - b. the amount of time that has passed, and
 - c. other factors, or lack thereof, pointing towards permanence, including:
 - i. establishing relationships with other relatives;
 - ii. attending school;
 - iii. obtaining medical treatment;
 - iv. developing relationships with other children; and
 - v. knowing no other place than the current residence as home.
- [28] Finally, the terms "permanent basis" and "significant period of time" complement each other and must be read conjunctively. The longer the period of time, the more likely the situation may be considered permanent. *Sui v. Tang*, at para 53; *Dorya v. Dorya*, at para 38.
- [37] I adopt the reasoning from these authorities with respect to the interpretation of the phrase "permanent basis for a significant period of time" in s. 72(2)(c) and apply the same factors in determining permanence to the case at issue.

- [38] A significant period of time has passed since M.X. began residing with her paternal grandparents in China; she resided with them from December 2018 to December 2020, when Ms. Li commenced this family case. During that time, M.X. was between three and a half and five and a half years old. This factor supports a finding that during the relevant time, M.X. lived in China with her paternal grandparents on a permanent basis.
- [39] As to parental intention, the evidence establishes that the decision to send M.X. to live with her grandparents in December 2018 arose because both Ms. Li and Mr. Xu were busy with school and work. Counsel for Ms. Li submits that there was an implied agreement that M.X. would return to Canada when Ms. Li finished her studies, however, she was unable to point to any evidence which would allow this Court to infer that there was a specified date for M.X.'s return to Canada. I am not satisfied that a specific date had been agreed upon.
- [40] Ms. Li testified that in December 2018, she thought that M.X. would live temporarily with her paternal grandparents until she had finished her studies. Mr. Xu and his mother deny that M.X. came to China in December 2018 on only a temporary basis.
- [41] Ms. Li testified that after she separated from Mr. Xu in January 2019--and moved out of the Peterson Drive Residence--that they decided to discuss M.X.'s future. I infer their discussion included deciding where M.X. would live after Ms. Li graduated. I find that at this time the parties no longer had an intention with respect to when and if M.X. would be returned to British Columbia. They chose to allow her to remain in China for the time being.
- [42] My conclusion that the parents' intention changed in 2019 is supported by the exchange of text messages between Ms. Li and Shu Zhen Li in August and November 2019. Shu Zhen Li is M.X.'s paternal grandmother. Some examples of exchanges in August are as follows:

Shu Zhen Li wrote:

If your trouble escalates, the child will bear the brunt of the harm, considering in particular the circumstances of our family, that [M.X.] will return to Canada for school sooner or later while I won't be able to accompany her on a long-term basis given her grandpa's health condition.

In response to a text from Shu Zhen Li urging Ms. Li to focus on her studies Ms. Li wrote:

I'll spend more time with her when I go back. I also feel very sorry for [M.X.]. She has grown bigger now. She is no longer that baby girl. It feels like she knows everything.

[43] In November 2019, Shu Zhen Li wrote:

Take [M.X.], although she's Canada-born, she has roots here, and is unwilling to return.

If you get rid of him, you would actually leave all of us behind. Take [M.X.] for example. Although she was born in Canada, she took root here. She is already not willing to go back there, and she would definitely want to live here if she knew you two had messed up the family like this.

Originally, we were looking forward to your completion of school so we could relax for a while. If things did not happen unexpectedly I would respect the choice of the kids. I don't want [M.X.] to be hurt. I have no way to let her enjoy the happiness of being with her parents or the ability to bring her up to be an outstanding talent, but I could keep her by my side forever if worse comes to worst.

- [44] I was not referred to Ms. Li's response, if any, to the November 2019 text sent by Shu Zhen Li. According to Ms. Li, the next time she and Mr. Xu discussed M.X. returning to Canada was after Ms. Li graduated from Kwantlen Polytechnic in August 2020. At that time, Mr. Xu expressed his desire that M.X. remain in China.
- [45] In December 2020, Ms. Li exchanged text messages with Shu Zhen Li discussing what would be in M.X.'s interests. Ms. Li did not insist that M.X. be returned to Canada at this time, stating that "as soon as it's over, I'll be thinking about my own affairs. I will take responsibility for [M.X.]".
- [46] I find that M.X. was sent to live in China with her paternal grandparents in December 2018 for an indefinite period of time. Although I find it likely that Ms. Li and Mr. Xu initially intended for M.X. to return to Canada after Ms. Li completed her studies, their intention changed, and the timing of her return became uncertain after they separated in January 2019. As a result, parental intention is a neutral factor with respect to whether M.X. remained in China on a permanent basis prior to December 2020.
- [47] Other factors favour a finding that M.X.'s residency with her paternal grandparents took on a level of permanency prior to December 2020.
- [48] The testimony at trial from Ms. Li, Mr. Xu and Shu Zhen Li establishes that since December 2018, M.X. has been cared for by and has a close relationship with her paternal grandparents. Ms. Li had no concerns regarding the care M.X. received from them. After Mr. Xu returned to Beijing in October 2020, he spent his days looking for company start-up opportunities and would spend evenings and weekends with M.X. M.X. spent time with Ms. Li and Ms. Li's parents during Ms. Li's visits to China between December 2018 and December 2020. I am satisfied that during the relevant time M.X. had significant ties to her family in China and none in Canada, except for her mother.
- [49] M.X. attended kindergarten in Beijing starting in approximately April 2019 and grade school thereafter. In addition, starting in 2019 or in subsequent years, M.X. attended various extra-curricular activities in Beijing including dance, painting, Tai Kwon Do, ping-pong and English classes. Mr. Xu's parents paid for the cost of M.X.'s care, including her school fees and extra-curricular activities.

- [50] During the trial, Mr. Xu presented a number of photographs taken of M.X. participating in various activities with Mr. Xu or his parents, including of a trip to the beach, learning to rollerblade and skateboard, at a birthday party with friends, and in the pool. Although the photographs show only snippets of M.X.'s life in China, they provide some evidence with respect to her typical activities there.
- [51] Given that M.X. was three and a half years old when she began living in China and in consideration of the extent of her family engagement, participation in school and extra-curricular activities, it is likely that in December 2020 she considered the residence she shared with her paternal grandparents as home.
- [52] The only evidence concerning M.X.'s views comes from Shu Zhen Li's text exchanges with Ms. Li. They suggest that M.X. wishes to remain in China.

Conclusion on Jurisdiction

- [53] I find that as of December 2020, just prior to the date that this family claim was commenced, M.X. was not habitually resident in Canada but had been residing with her paternal grandparents in China on a permanent basis, for a significant period of time. As a result, I conclude, pursuant to s. 6.2(1) of the Divorce Act and s. 74(2) of the Family Law Act, that this Court does not have jurisdiction to make any parenting orders with respect to M.X. and in particular, an order that she be returned to Canada.

Division of Family Property

Is the Arcola Apartment an Excluded Asset?

- [54] In his counterclaim, Mr. Xu originally sought an unequal division of family property pursuant to s. 95 of the Family Law Act. At trial, he amended his pleadings to claim that the proceeds from the sale of Arcola Apartment are excluded property within the meaning of s. 96 of the Family Law Act. This mid-trial pleadings amendment was not opposed by Ms. Li.
- [55] Mr. Xu contends that all of the funds used to purchase the Arcola Apartment and to pay mortgage costs, taxes and other expenses were provided by his mother to him as a gift. Accordingly, he claims that the sale proceeds --not including the increase in value of the property, which he concedes is family property--are an excluded asset pursuant to ss. 85(1) (b.1) and (g) of the Family Law Act. With respect to how to divide the increase in value of the Arcola Apartment, Mr. Xu submits that this amount should be divided unequally in his favour because his parents paid the mortgage and other costs.
- [56] Ms. Li contends that Mr. Xu has not proven, as is his burden, that the source of funds used to purchase and maintain the Arcola Apartment was a gift from his mother. As a result, she says that the Arcola Apartment was a family property and the proceeds from the sale of this property are subject to equal division pursuant to s. 81(b) of the Family Law Act. She contends that even if this Court finds that the funds used to purchase and maintain the Arcola Apartment are excluded assets, she is entitled to, at a minimum, 50% of the increase

in value of this property from the time of its purchase to the time of its sale, pursuant to s. 84(2) of the Family Law Act.

Law Concerning Gifts as Excluded Property

- [57] In *Zhao v. Fang*, 2022 BCCA 227, the Court of Appeal for British Columbia recently affirmed the principles that guide the analysis in determining what constitutes a gift under s. 85(1) (b.1) of the Family Law Act :
- [25] Excluded property, defined in s. 85(1), includes "gifts to a spouse from a third party". Under s. 85(2) the spouse making this claim has the burden of demonstrating that property is excluded property. The standard of proof is on a balance of probabilities (as in any civil case), but the evidence must be clear and cogent. If documentary evidence is not available, a party's testimony on this issue is to be scrutinized for credibility. However, the judge is permitted to draw reasonable inferences from evidence that is less certain or precise in order to do justice between the parties: *Shih v. Shih*, 2017 BCCA 37 at paras. 43-44; see also *Pisarski v. Piesik*, 2019 BCCA 129 at para. 24.
- [58] The Court of Appeal defined a gift as follows:
- [26] A gift is "a gratuitous transfer made without consideration". For a gift to be legally binding, the donor must have intended to make a gift and must have made the transfer to the donee: see *McKendry v. McKendry*, 2017 BCCA 48 at para. 31.

Analysis: Are the Proceeds from the Sale of the Arcola Apartment an Excluded Asset?

- [59] As set out in the above excerpts from *Zhao*, the burden is on Mr. Xu to prove on a balance of probabilities, by clear and cogent evidence, that he received money from his mother as a gift—that is, the money was given to him gratuitously and without consideration. In addition, he must show that he used this money to purchase and maintain the Arcola Apartment. In other words, Mr. Xu must trace the funds used to purchase this property to a gift from Shu Zhen Li .
- [60] The Arcola Apartment was purchased in November 2014, shortly after Ms. Li became pregnant with M.X. The property was registered solely in Mr. Xu's name. I am satisfied that the reason Mr. Xu purchased the Arcola Apartment was because Ms. Li and Mr. Xu decided that, in anticipation of the birth of their first child, they needed a larger home than the one-bedroom apartment they were living in.
- [61] During his testimony in both direct and cross-examination, Mr. Xu insisted that the funds he used to purchase the apartment and to pay on-going costs were a gift from Shu Zhen Li to him only. There are no documents or independent evidence from third parties that corroborate Mr. Xu's testimony on this point. Mr. Xu relies on his and his mother's testimonies and on banking and wire transfer records which show that his mother sent him money.

- [62] With respect to the \$190,000 down payment, Mr. Xu testified that he used funds which Shu Zhen Li previously gifted him. As evidence, he provided copies of his TD Canada Trust "Application for Personal Credit" dated September 15, 2014, which show that he held financial assets valued at just over \$500,000 in various accounts. He did not provide any financial records at trial showing corresponding deposits totalling \$500,000 and did not explain what efforts he made to obtain any such records.
- [63] Shu Zhen Li's evidence concerning why she provided \$500,000 to Mr. Xu was inconsistent. At one point during the trial, she testified that she and her husband gave this money to Mr. Xu in exchange for him supporting them when they got older. If this was the case, this transfer is inconsistent with a gratuitous transfer made without consideration. The consideration would be Mr. Xu's future support for his parents.
- [64] Shu Zhen Li also provided transaction records--which were not disclosed until part way through the trial--that show wire transfers from her account in China to Mr. Xu between 2011 and 2013. The transfers total approximately \$148,000. Shu Zhen Li testified that the funds were provided for Mr. Xu to purchase property at some point in the future. The transaction records state that the transfers were for "education".
- [65] At another point in her testimony, Shu Zhen Li indicated that she provided money to Mr. Xu as part of the Chinese tradition whereby parents help their children buy a first home once they are married. I note that Mr. Xu and Ms. Li did not marry until May 2014. There is no evidence that any transfer of money was made after this time and before they purchased the Arcola Apartment in November 2014. This suggests that the transfers in 2011 and 2013 were not, as Shu Zhen Li testified, as a gift to be used to purchase property in accordance with the tradition.
- [66] Given the conflicts in Shu Zhen Li's testimony with respect to why she sent \$148,000 to Mr. Xu between 2011 and 2013, together with the documentary evidence, I find her evidence to be suspect and give it little weight.
- [67] Ms. Li testified that neither Mr. Xu nor Shu Zhen Li advised her that the funds used to purchase the Arcola Apartment were a gift that had been provided to Mr. Xu alone. She testified that at the time she and Mr. Xu were contemplating purchasing the property, Mr. Xu showed her his investment and savings account balances and indicated that funds from these accounts were to be used towards it. Mr. Xu did not challenge her testimony at trial. I find Ms. Li's evidence to be credible.
- [68] Mr. Xu's documents include a screen shot from what appears to be an online mortgage application form for the Arcola Apartment. Under the heading "Source of Down Payment" on the application form, the box "Proceeds of Sale of Investments" is selected. The box "Gift" is not checked, despite being an alternative option.

- [69] At trial, Mr. Xu testified that the online mortgage application form was not in respect of the Arcola Apartment but was, in my understanding, part of a more general discussion about potential financing. I do not find Mr. Xu's explanation to be believable. I note that the form shows a purchase price of \$518,000, which is within \$2,000 of the actual \$516,000 purchase price of the Arcola Apartment and a down payment of \$181,300, which is within \$9,000 of the \$190,000 deposit ultimately paid for the property.
- [70] Further, the documents evidencing transfers amounting to \$148,000 from Shu Zhen Li to Mr. Xu between 2011 and 2013 state that they were for educational purposes. In 2012, Mr. Xu was still completing his masters' degree. It is therefore possible that the funds were advanced for educational purposes.
- [71] Mr. Xu has not provided any financial records or other documents showing that the remaining approximately \$352,000 in his various accounts (that is, the \$500,000 in his various accounts in September 2014, minus the \$148,000 sent by his mother between 2011 and 2013) was provided to him as a gift from Shu Zhen Li.
- [72] Even if Mr. Xu was able to prove that the source of some of the \$500,000 in his accounts were a gift from Shu Zhen Li, in my view, he has not shown the link between these funds and the \$190,000 down payment he made on the Arcola Apartment. For example, he could not recall which account he used to pay this amount and did not provide relevant bank records. It is unclear whether Mr. Xu simply pooled money sent by his mother into his accounts along with his own funds. Ultimately, I am not satisfied that Mr. Xu used the funds he says were provided to him by his mother to make the \$190,000 down payment for the Arcola Apartment. There is no clear and cogent evidence in front of the Court in support of the same.
- [73] In addition to funds used for the down payment on the Arcola Apartment in 2014, Mr. Xu testified that Shu Zhen Li also provided on-going gifts of funds that were used to pay the monthly mortgage, property tax, strata fees and maintenance costs for the Arcola Apartment. He also seeks to exclude these funds from family property.
- [74] Mr. Xu did not provide any evidence showing transfers from his mother to him between 2013 and 2016. Mr. Xu and Shu Zhen Li's banking records together show that, beginning in March 2016, Mr. Xu received approximately \$500,000 from his mother's account in China. Mr. Xu purchased the Peterson Drive Residence in June 2016, making a \$1.29 million down payment. This suggests that money transferred after March 2016 was to assist in purchasing the Peterson Drive Residence and not to pay for on-going costs for the Arcola Apartment.
- [75] Ms. Li submits that Mr. Xu has not proven that he used money provided to him by his mother to pay for the mortgage (approximately \$1,300 per month) and other costs for the Arcola Apartment after he purchased the property in 2014. She submits that Mr. Xu earned enough salary to cover these costs. The evidence at trial was that Mr. Xu earned approximately \$76,000 in 2015 and \$86,751 in 2016. In addition, Ms. Li submits that after 2016, and when the Peterson Drive Residence was purchased, the parties rented the Arcola

Apartment. She says the monthly rental income was more than the monthly mortgage and other costs for this property.

- [76] In summary, Ms. Li submits that the evidence with respect to Mr. Xu's financial circumstances does not support his testimony that he needed to and did use money provided to him as a gift by Shu Zhen Li to pay ongoing costs for the Arcola Apartment after it was purchased in 2014. I agree with her submission.
- [77] At trial, Mr. Xu testified that in China when a couple gets married, they receive money from their family to purchase a property. I note, once again, that there is no documentary evidence that Shu Zhen Li provided money to Mr. Xu between the time of his marriage to Ms. Li and when the Arcola Apartment was purchased.
- [78] Even if I was satisfied that Mr. Xu used money gifted to him by his mother to purchase and maintain the Arcola Apartment--which I do not find Mr. Xu has proved in this case--the question remains of whether by using this money for this purpose, Mr. Xu gifted it to the marriage.
- [79] A summary of the relevant law on when excluded property may lose its excluded status is set out by Justice MacNaughton in *K.S.P. v. J.T.P.*, 2023 BCSC 1188:
- [479] Excluded property can become family property where one spouse gifts excluded property to the other party or applies it to a joint asset, thereby gifting it to the marriage: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 75.
- [480] In assessing whether an exclusion is "lost" through a gift to a spouse or to the marriage, the court looks at the intention of the spouse: *Venables v. Venables*, 2019 BCCA 281 at para. 95. Where there is insufficient evidence of the actual intention of the transferor, then the common law presumption of advancement applies: *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 40; *V.J.F.* at para. 77.
- [481] In *Pisarski v. Piesik*, 2019 BCCA 129, the Court reiterated that the onus of proving an exclusion is on the party asserting it, on a balance of probabilities: para. 24. In that case, the Court found that despite differing contributions of pre-marital assets, the evidence did not support a finding, on a balance of probabilities, that the parties' intended to preserve their exclusions. The appellant took no steps to keep the funds separate or to document that his contribution was to be treated as separate: paras. 27, 29.
- [80] In *World v. World*, 2021 BCSC 1177, the respondent had contributed funds received from his inheritance for a down payment to purchase the family home. The couple thereafter shared family expenses, but after the couple had their first child, the claimant became a stay-at-home mother and the respondent earned all the income. At issue was whether the down payment should be excluded, and the answer depended on whether the parties intended to own the family home in combination. After considering *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 40 and *Venables v. Venables*, 2019 BCCA 281 at paras. 85 and 95, Justice G.P. Weatherill determined that the evidence showed that the parties jointly purchased the

family home as the eldest child was about to be born, pooling their resources: paras. 17-24. There was no evidence that the respondent took steps to keep his inheritance separate or to document that the down payment was to be treated as a separate asset: para. 21.

- [81] Justice Chan recently applied *World in Kibret v. Petrick*, 2023 BCSC 1598. There, each of the parties had contributed to the down payment and mortgage payments for a property purchased in both of their names. The respondent had paid more towards the down payment using funds from his RRSP and savings. Justice Chan found there was no evidence that the respondent intended to keep his portion of the down payment separate or otherwise keep track of it separately: para. 48. Instead, the evidence showed that the parties pooled their resources, with each contributing what they could: para. 48.
- [82] Similarly, there is no compelling evidence that Mr. Xu paid the down payment for the Arcola Apartment or made subsequent payments towards the mortgage and maintenance costs without an intention to gift these contributions to the parties' marriage. That is, Mr. Xu took no steps to document that the \$190,000 down payment for the Arcola Apartment and subsequent mortgage and related payments were to be kept or treated as a separate asset.
- [83] Ms. Li testified that after she and Mr. Xu were married in 2014, her father contributed \$25,000 and Mr. Xu contributed \$15,000 towards the purchase of a BMW which was driven by Mr. Xu exclusively until 2017. At that time, Ms. Li got her driver's licence and Mr. Xu purchased a Porsche SUV for \$100,000 using money from his bank account. This provides some evidence that each of the parties contributed towards the acquisition of family property, as they could.
- [84] Despite the fact that he had \$500,000 in his accounts prior to his marriage to Ms. Li, Mr. Xu did not take steps to purchase a property until after they were married. It appears that Mr. Xu purchased the Arcola Apartment for the family because of the impending birth of M.X., likely with expectation of Ms. Li contributing to the marriage as a caregiver to M.X. and then financially after she had finished school.
- [85] In conclusion, I do not find that Mr. Xu has proven that his mother gifted him the funds used to purchase the Arcola Apartment and to thereafter pay the mortgage and other costs. If I am wrong on this point, I would still find that Mr. Xu in turn gifted the money he received from his mother to the marriage. For these reasons, I do not find that the sale proceeds of the Arcola Apartment are an excluded asset pursuant to s. 85(1)(b.1) of the Family Law Act. There is no basis for an unequal division of these sale proceeds and they are therefore to be divided equally between the parties.

Is the Peterson Drive Residence a Family Asset?

- [86] In his pleadings, Mr. Xu did not take the position that the Peterson Drive Residence is an excluded asset pursuant to s. 85(1)(b.1) of the Family Law Act. He amended his pleadings at trial to contend that all of the funds used to purchase this property and to pay the on-going mortgage and other costs were provided by his parents. Therefore, Mr. Xu says his parents are the beneficial owners of this property pursuant to a resulting trust. For this reason, he says that the property is not subject to division as family property.
- [87] I note that Mr. Xu's parents, Shu Zhen Li and Xiao Ming Xu, who Mr. Xu suggests own the Peterson Drive Residence, are not defendants in this proceeding. In May 2021, they filed a separate notice of civil claim, naming Mr. Xu and Ms. Li as defendants and asserting that Mr. Xu purchased the Peterson Drive Residence to hold for their benefit in trust. Pursuant to a consent order made in September 2021, the civil action commenced by Mr. Xu's parents had been set to be heard together with this family case. However, the action was struck from the trial list by Master Harper in May 2023 as a result of the plaintiffs' failure to attend at a trial management conference or file a trial brief. In June 2023, Justice Murray denied an application brought by Shu Zhen Li seeking an order that the trials of the family and civil matters proceed at the same time.

Analysis: Who Owns the Peterson Drive Residence?

- [88] The Peterson Drive Residence purchase completed on June 23, 2016, and Mr. Xu is shown as the registered owner on the title for this property.
- [89] Section 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 provides that indefeasible title is conclusive evidence that the person named in the title as registered owner is indefeasibly entitled to an estate in land as fee simple. In this case, Mr. Xu is the registered owner of the Peterson Drive Residence and has the burden to rebut that statutory presumption that the property is his: *Lin v. Wang*, 2019 BCSC 1169 at paras. 74 and 75.
- [90] Mr. Xu has provided evidence showing deposits into his account totalling approximately \$1.62 million starting in 2016. This includes approximately \$1.25 million transferred from accounts in Shun Zhen Li's name between March and May 2016, and approximately \$372,000 transferred to Mr. Xu for which there are no corresponding transfer records. The latter amount (\$372,000) is comprised of five transfers sent between 2016 and 2020, which Mr. Xu says came from his mother (approximately \$50,000 each) and one transfer of US\$100,000, which he says came from a cousin as repayment of a loan from his parents. Ms. Li does not challenge that Mr. Xu received these funds, but disputes that this alone establishes a resulting trust in favour of Mr. Xu's parents.
- [91] As noted in *Suen v. Suen*, 2013 BCCA 313, the presumption of indefeasible title can be rebutted by the operation of a resulting trust. In *Suen* at para. 34, the Court of Appeal set out three considerations for determining whether a resulting trust has been established:
- (i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;

(ii) the operation of an agreement between the parties that is contrary to the registered legal title;
or

(iii) taking into account the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).

[92] Shu Zhen Li testified that she sent money to Mr. Xu and authorized him to purchase the Peterson Drive Residence on their behalf in 2016, because she and Xiao Ming Xu intended to immigrate to Canada. Neither Mr. Xu nor Shu Zhen Li provided any documentary or independent evidence concerning an agreement for Mr. Xu to purchase the Peterson Drive Residence for his parents.

[93] In their notice of civil claim, Mr. Xu's parents pleaded that on February 1, 2016, with their authorization, Mr. Xu bought the Peterson Drive Residence. Shu Zhen Li testified to this effect during her direct examination at trial. During her cross-examination, when confronted by evidence from Ms. Li that the Peterson Drive residence was not listed for sale in February 2016 and was first viewed by the parties in April 2016, Shu Zhen Li admitted that she was mistaken regarding when the purported authorization was made. This change raises an issue of Shu Zhen Li's credibility regarding her testimony about the purported agreement between herself, Xiao Ming Xu and Mr. Xu.

[94] Shu Zhen Li testified that the Peterson Drive Residence was registered in Mr. Xu's name because she did not know English, did not know how to register the property in her and her husband's names, and was not living in Canada at the time of purchase. There is no documentary evidence concerning any discussions between Mr. Xu and his parents regarding registration of the property. I find Shu Zhen Li's testimony that she did not know how to purchase a property in Canada and register it in her and her husband's name to be difficult to believe.

[95] First, there is no evidence before the Court that there was an impediment to registering the Peterson Drive Residence in the name of Mr. Xu's parents. Although neither Mr. Xu nor Shu Zhen Li raised the suggestion that avoiding tax was an explanation for their purported arrangement, in any case, the foreign buyers' property tax did not come into force until after the property was purchased.

[96] Further, Shu Zhen Li sent Mr. Xu a significant amount of money starting in March 2016. If this money was sent for Mr. Xu to purchase a property for his parents in Canada, logic suggests that some record confirming their agreement would exist in the absence of title being registered in her and Xiao Ming Xu's names.

[97] The financial records also do not support Mr. Xu and Shu Zhen Li's assertions that the Peterson Drive Residence was beneficially owned by Shu Zhen Li and Xiao Ming Xu. None of the documents indicate that the money transfers from Shu Zhen Li were to purchase property for her and her husband's benefit pursuant to an agreement with Mr. Xu. Mr. Xu was the only borrower on the mortgage obtained to purchase the Peterson Drive Residence.

On the Land Title Act Form B Mortgage signed by Mr. Xu, he indicated that the nature of his interest in the property is "freehold" despite the fact that "other" is also an option.

- [98] The wire transfer receipts for transfers from Shu Zhen Li's Chinese bank account to Mr. Xu each show "Family Support" as the reason Shu Zhen Li sent funds to Mr. Xu. Although available as another option, Shu Zhen Li did not select the box entitled "Personal Investment". As well, the receipts include an attestation from the receiver of funds--in this case Mr. Xu--that the money received "will be used for daily life expenses and savings " This document does not therefore suggest that Shu Zhen Li sent funds for the purpose of enabling Mr. Xu to purchase a property for her and her husband.
- [99] The other evidence tendered also does not support Mr. Xu's contention that he used money from his parents to purchase the Peterson Drive Residence for their benefit.
- [100] On February 17, 2021, Mr. Xu swore an affidavit, related to this case, in support of an application to unfreeze one of his bank accounts. Therein, he confirmed that he instructed his counsel to advise Ms. Li's counsel that he paid monthly expenses totalling approximately \$12,000 using money he borrowed from his parents. His monthly expenses included the mortgage costs for the Peterson Drive Residence. At the time, Mr. Xu did not say that the money provided by his parents was a gift (in respect of the Arcola Apartment) or was sent for purchase of property (in respect of the Peterson Drive Residence) on their behalf.
- [101] In addition, in approximately September of 2021, Mr. Xu began to rent the Peterson Drive Residence through a property rental agency in Richmond. The evidence indicates that the \$5,200 in monthly rent was paid to Mr. Xu and not to his parents.
- [102] Ms. Li testified that the parties decided to purchase the Peterson Drive Residence in April 2016, after first looking at some other properties. She testified that Mr. Xu never told her that Shu Zhen Li asked him to look for property on her and her husband's behalf. As well, Ms. Li testified that Shu Zhen Li never said that she and her husband wished to immigrate to Canada, but rather that they only applied for a tourist visa in 2018. Mr. Xu did not challenge this testimony at trial.
- [103] Mr. Xu testified that his parents decided to purchase the Peterson Drive Residence because they planned to immigrate to Canada. He referred to an email exchange with an immigration consultant concerning his parent's efforts to come to Canada. On December 24, 2017, the consultant advised that temporary resident or visitors' visa applications were still being processed and inquired if Mr. Xu was interested in sponsoring his parents for immigration through a parental immigration lottery. On December 26, 2017, Mr. Xu responded confirming that he would like to sponsor his parents for the lottery. In January 2018, Mr. Xu and the immigration consultant exchanged further emails concerning Mr. Xu's income requirements to sponsor his parents. These email exchanges do not suggest that Mr. Xu's parents formed an intention to immigrate to Canada or took steps to do so prior to December 2017. The Peterson Drive Residence was purchased in 2016.

- [104] There are no documents after January 2018 evidencing efforts by Mr. Xu's parents to immigrate to Canada. As well, there is no indication in the text exchanges between Shu Zhen Li and Ms. Li in 2019 and 2020, noted previously, that Mr. Xu's parents intended to do so.
- [105] I do not find that Mr. Xu or Shu Zhen Li's testimony that Shu Zhen Li and Xiao Ming Xu made the decision to purchase the Peterson Drive Residence because they wished to immigrate to Canada to be credible.
- [106] The circumstances in Lin are similar to those of the case before me. In Lin the parties first lived together in an apartment in Vancouver then moved to another apartment in the city. The respondent's parents provided all the funds for the purchase and mortgage payments for both apartments, but they were both registered in the respondent's name and he was the sole mortgager. Justice Sharma found that the respondent's assumption of the mortgage risk for the purchase of the properties constituted sufficient consideration to create his interest in the properties: paras. 79-80. She held:
- [75] The Properties have never been in his parents', or anyone else's name. Mr. Wang was the sole purchaser identified on the contracts for purchase and sale, and he was the sole mortgagor on both Properties. It is clear that s. 23(2) of the Land Title Act applies and there is a presumption that he is the legal and equitable owner of the Properties.
- Ultimately, Sharma J. concluded that the respondent failed to rebut the presumption of legal and equitable ownership.
- [107] In this case, I do not find that Mr. Xu--or Shu Zhen Li for that matter--has proved a resulting trust. In particular, applying the factors set out in Suen, I do not find that Mr. Xu has established that he purchased the Peterson Drive Residence for his parents pursuant to an agreement between them. I find that because Mr. Xu took on the mortgage risk when the property was purchased, he gave consideration for his legal interest in the property. Finally, I do not find that the underlying equitable interests between the parties assist in rebutting the presumption of indefeasible title in Mr. Xu's favour. The Peterson Drive Residence was purchased as family property for Mr. Xu and Ms. Li after the birth of M.X. Although the property was large enough to be used by Mr. Xu's parents when they visited, Mr. Xu has not established that it was purchased solely for their benefit.
- [108] In summary, I conclude that Mr. Xu has failed to rebut the presumption of indefeasible title in his favour for the Peterson Drive Residence by demonstrating the existence of a resulting trust. As a result, I find that this property is family property subject to division between the parties.

How Should Funds in the Parties' Bank Accounts be Divided?

- [109] In his closing, Mr. Xu submitted that the money in his bank accounts at the time of separation was provided by his parents for mortgage payments for the Peterson Drive Residence and is excluded property. The submission that these funds are "excluded property" must mean that they were a "gift" to Mr. Xu. In my view, this submission is inconsistent with Mr. Xu and Shu Zhen Li's contention that Shu Zhen Li provided money to Mr. Xu to purchase and maintain the Peterson Drive Residence for her and her husband.
- [110] I am not able to determine what, if any, portion of the funds held Mr. Xu's bank account at the time of separation are excluded assets. These funds seem to be comprised of employment earnings and investments of uncertain ownership. As a result, I find that the funds held in Mr. Xu and Ms. Li's individual accounts at the time of separation are family property.
- [111] Ms. Li has provided a Scott Schedule that sets out the amounts in the parties' bank accounts at the time of separation. At the time of separation, Mr. Xu had a total of \$345,834.41 in his accounts and Ms. Li had a total of \$44,386.50 in her accounts. Mr. Xu does not challenge Ms. Li's calculation of these balances.
- [112] The total amount subject to division between the parties is \$390,220.91. Dividing this amount equally between the parties would result in Ms. Li receiving an equalization payment of \$150,723.96. For the reasons set out below, I do not consider that an equal division of the funds in the parties' bank accounts at the time of separation is warranted.

Should Any Family Property be Divided Unequally?

- [113] As I noted earlier in these reasons, at trial, Mr. Xu modified his original pleading--in which he sought an unequal division of family property--to instead seek a ruling that the proceeds from the sale of the Arcola Apartment are excluded property and that the Peterson Drive Residence is not family property at all.
- [114] Mr. Xu did not make any submissions at trial with respect to whether, should I find that those properties are family property, these assets should be unequally divided. That is, he apparently abandoned any arguments with respect to an unequal division of family property.
- [115] Nonetheless, I find an unequal division of family property is not warranted with respect to the Arcola Apartment and the Peterson Drive Residence.
- [116] Section 95 of the Family Law Act sets out factors which may be considered in deciding whether an unequal division may be warranted. Relevant factors to the case at issue include the duration of the relationship between the parties and any other factors that may lead to significant unfairness.
- [117] Ms. Li and Mr. Xu separated after approximately five years of marriage. I do not consider this to be an inordinately short marriage.

- [118] Under the "other factors" category, I assume that Mr. Xu contends that Ms. Li made little contribution towards the purchase and maintenance costs for the properties. This is true, but is not sufficient to rebut the starting point in the Family Law Act that on the dissolution of a marriage family property is to be divided equally.
- [119] In *Khan v. Gilbert*, 2019 BCCA 80 at para. 32, Justice Fenlon set out, in summary, that an unequal division may be warranted in circumstances of marked, prolonged, and intentional or unexplained disparities between parties' contributions towards family burdens. In this case, Ms. Li was a student when the parties' married and later, when M.X. was born, a new mother. This provides an explanation as to why she was unable to contribute to the costs of purchasing and maintaining the properties.
- [120] I do not find that a basis for an unequal division of the proceeds from the sale of the Arcola Apartment or the value of Peterson Drive Residence has been made out. The parties do not dispute that the proceeds from the sale of the Arcola Apartment, which are currently held in trust, are \$533,647.34. The value of the Peterson Drive Residence is \$2,880,000, according to a joint appraisal dated June 1, 2023. The mortgage balance for this property as of September 30, 2023 is \$1,004,340.24, amounting to net equity of \$1,875,659.76. I find that Ms. Li is entitled to an equalization payment, reflecting an equal division of these properties, of \$1,204,653.55.
- [121] The amounts held in the parties' bank accounts at the time of separation should not be subject to equal division. I say this because, since the parties' separated in January 2019, Mr. Xu has continued to make the mortgage payments on the Arcola Apartment and the Peterson Drive Residence, from money held in his accounts. Some of these costs have been offset by rental income from those properties over the relevant time. It would be unfair if Mr. Xu was required to bear all of the costs of maintaining the properties since the parties separated.
- [122] I find that the value of the parties' bank accounts at the time of separation should be divided equally, with Mr. Xu receiving a credit for the cost of servicing the mortgages and paying taxes and maintenance expenses for the properties, net of the rental income for the properties since that time. I leave it to the parties to make this calculation. If they are unable to agree they are at liberty to appear before me at a convenient date.

Conclusions on Division of Property

- [123] In summary, with respect to division of family property, I find as follows:
- a) The proceeds from the sale of the Arcola Apartment and the net equity in the Peterson Drive Residence is family property subject to equal division between the parties. In this respect, Ms. Li is entitled to an equalization payment of \$1,204,653.55 for these properties.

- b) I find that the value of the parties' bank accounts at the time of separation should be divided equally, with Mr. Xu receiving a credit for the cost of servicing the mortgages and paying taxes and maintenance costs for the properties, less rental income earned for these properties. The credit will be calculated from the time that the parties separated to date.

Spousal Support

- [124] Ms. Li seeks spousal support on a non-compensatory basis, primarily as a result of the parties' different needs and means after separation, from the date she served her notice of family claim, December 24, 2020. She seeks spousal support in accordance with the Spousal Support Advisory Guidelines based on Mr. Xu's imputed income of \$105,000 (\$100,000 in employment income and \$5,000 in investment income) and an income of \$27,053 to be applied for her. Ms. Li seeks "lump sum" spousal support and has provided a "without child" DivorceMate Calculation of \$11,185. This figure assumes a two year and five month period of support. There are no previous orders with respect to payment of spousal support.
- [125] Mr. Xu does not dispute that if spousal support is awarded, that the period of "retroactivity" extends back to December 24, 2020. However, Mr. Xu claims that if income is to be imputed to him for support purposes, his 2018 employment income of \$41,666.70 should be utilized.
- [126] Section 15.2(2) of the Divorce Act provides this Court with the jurisdiction to make a lump sum spousal support award. In my view, the characterization of the award Ms. Li seeks as "lump sum" support is in error. Lump sum awards are generally made for prospective support, not retroactive support. I understand that Ms. Li does not seek spousal support going forward, but only for a reasonable time after December 24, 2020.
- [127] Section 15.2(4) provides that, in making a final spousal support order, 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.
- [128] Section 15.2(6)--which sets out the objectives for support orders and speaks to non-compensatory spousal support factors (Bracklow v. Bracklow, [1999] 1 S.C.R. 420 at para. 41, 1999 CanLII 715)--provides that a spousal support order 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. In my view, subsections (a), (c) and (d) are the relevant objectives in this case.

- [129] Ms. Li and Mr. Xu were married for approximately five years. The evidence at trial establishes that after M.X. was born, and while she remained with the parties in Canada, Ms. Li performed most of the home and childcare duties when neither of the parties' grandparents were present.
- [130] When the parties separated in January 2019, Ms. Li moved into rented accommodation and Mr. Xu resided in the Peterson Drive Residence until he chose to move back to China in October 2020. Ms. Li continued in school until August 2020, and did not earn an income during this time. I find that she suffered an economic disadvantage as a result of the parties' separation. It is not in my view relevant that Ms. Li received support from her father and brother post-separation: *Kelsch v. Chaput*, 2012 BCCA 64 at para. 12.
- [131] I am satisfied that Ms. Li is entitled to spousal support, on a non-compensatory basis, from the date she served Mr. Xu with her notice of family claim, December 24, 2020. It is necessary to determine what income amounts should be applied in calculating support and what duration for support is appropriate in this case.
- [132] With respect to duration, I find that two and a half years is an appropriate period for spousal support. This duration for support recognizes the parties' relatively short marriage, covers the period of time when Ms. Li was completing her studies and is consistent with the objective of promoting economic self-sufficiency.
- [133] With respect to what income to apply for support purposes, Mr. Xu declared income of \$28,001 in 2020, \$25,353 in 2021 and \$22,359 in 2022 on his Canadian income tax returns. This was substantially less than his earnings in previous years when he was working full time, before he began to pursue business opportunities in Asia. For example, in 2017 he earned \$99,996, not including rental income.
- [134] Mr. Xu testified, in summary, that his income in 2019 and following dropped because he was pursuing his dream of becoming an entrepreneur in the technology sector. He testified that when he returned to China in 2021, he spent much of his time looking for start-up opportunities. He eventually became a founder in a start-up cryptocurrency company called Unite, and started working there in about June 2021. He testified that he did not earn any income from this company and relied on his parents to support his living expenses.
- [135] As part of this litigation, Ms. Li demanded that Mr. Xu provide his banking records for his worldwide bank accounts and worldwide income for the period 2014 forward. Mr. Xu consented to an order for production of the same made in March 2023. However, Mr. Xu has not provided the banking records. At trial, he testified that he was unable to obtain his bank statements from China online because the accounts had been closed. Ms. Li submits, and I find this submission has merit, that Mr. Xu did not explain why he did not attend at his banks in China to obtain copies of relevant statements.

- [136] In addition, Mr. Xu has not provided any corporate records from Unite confirming his ownership interest in the company or corporate financial statements setting out the company's assets and earnings. During cross-examination Mr. Xu testified that he was not able to provide this information because only his "supervisor" could do so. I find this assertion difficult to believe, given Mr. Xu's testimony that he is one of the founders of Unite.
- [137] The Federal Child Support Guidelines, SOR/97-175 (the "Guidelines") provide guidance with respect to determination of a spouse's income. Section 16 of the Guidelines sets out that the starting point for determining income is the income reported by the spouse to the Canada Revenue Agency for tax purposes. Section 17 sets out that if a court finds that applying the amount of income reported for tax purposes is not the fairest way to determine income, the court may have regard to the spouse's historical income over three years and determine an amount of income which is fair and reasonable. Section 19 sets out that a court may impute income as it considers appropriate where, under subsection 1(a), a spouse is intentionally underemployed or where, under subsection 1(f), the spouse has failed to provide income information.
- [138] In this case, I find it appropriate to impute income above that which Mr. Xu declared in his 2020, 2021 and 2022 income tax returns. First, I find that Mr. Xu was intentionally underemployed during this period. His decision to pursue his dreams in the cryptocurrency industry and forego employment income (which his education and earnings history demonstrate he had the capacity to earn) should not come at Ms. Li's expense. Second, I find that Mr. Xu failed to disclose relevant documents concerning his earnings and assets, including records from his Chinese bank accounts and those from Unite.
- [139] I find that employment income in the amount of \$105,000 per year should be imputed to Mr. Xu for 2020, 2021 and 2022 for the purposes of determining spousal support. Mr. Xu did not challenge Ms. Li's submission that her income should be set at \$27,053 and I apply this amount.
- [140] In this case I find that the midpoint of the "without child support" formula set out in the DivorceMate calculation for monthly spousal support provided by Ms. Li should be applied-- \$568 per month. Based on a duration of two and a half years commencing on December 24, 2020, I find that Mr. Xu is obliged to pay spousal support to Ms. Li in the amount of \$16,472.

Payment of a Fine for Non-Disclosure of Relevant Financial Records

- [141] Ms. Li submits that Mr. Xu should be required to pay her \$5,000 as a result of his failure to disclose relevant financial records, despite a requirement that he do so under the Family Law Act and pursuant to orders of this Court. I have summarized the deficiencies in Mr. Xu's financial disclosure above.

[142] Ms. Li relies upon s. 213(2)(d)(ii) of the Family Law Act, which provides this Court with the jurisdiction to make an order requiring a party who has failed to disclose relevant documents to pay an amount not exceeding \$5,000. Section 213(b) provides that the court may also impute income to a person in an amount which the court considers appropriate where that person has failed to disclose relevant financial records.

[143] I have already imputed income to Mr. Xu, in part as a result of his failure to provide an adequate explanation for his failure to provide relevant documents. In my view, it is not necessary to impose a \$5,000 penalty on Mr. Xu.

Conclusion

[144] I am satisfied that the prerequisites for a divorce are made out in this case and grant the parties' request for a divorce order.

[145] I do not find that this Court has the jurisdiction to make any parenting orders with respect to M.X., including an order that she be returned to Canada, parenting time orders, or orders for payment of child support.

[146] Ms. Li is entitled to an equal share of the proceeds of the sale of the Arcola Apartment and the equity in the Peterson Drive Residence. I order that Mr. Xu pay Ms. Li \$1,204,653.55, plus 50% of any interest which has accrued on the proceeds of sale of the Arcola Apartment since those proceeds were placed in trust.

[147] Ms. Li is not entitled to an equal division of the funds in the parties' bank accounts at the time of separation because Mr. Xu paid all of the costs of maintaining the family property since their separation. I order that Mr. Xu pay Ms. Li 50% of \$390,220.91, minus the amount of mortgage payments, property taxes and maintenance costs he paid for the Arcola Apartment and Peterson Drive Residence from the date of the parties' separation. Any amounts received by Mr. Xu as rent for the properties during this period will be deducted from the credit.

[148] I order that Mr. Xu pay Ms. Li spousal support, in full and final satisfaction of any obligation to pay such support, in the amount of \$16,472.

[149] I decline to order that Mr. Xu pay a fine for failing to disclose financial documents.

"Mayer J."

[1] At para. 80 of B.C. v. D.E., 2023 BCCA 251, Justice Abrioux confirmed that the meaning of the phrase "when the application is filed" in s. 74(2) is when a notice of family claim in which a parenting order is sought is filed.

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