

CANADA / JUDGMENT

Lu v. Yao

2020 BCSC 24

COURT

Supreme Court of British Columbia

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2020 BCSC 24 Lu v. Yao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lu v. Yao,

2020 BCSC 24

Date: 20200113

Docket: E060413

Registry: Vancouver

Between:

BAIJIAN LU aka BENSON BAIJIAN LU

Claimant

And

JI YAO

Respondent

Before: The Honourable Justice Winteringham

Reasons for Judgment (Chambers)

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The Claimant, appearing in person (Feb. 8 and Apr. 12, 2019)

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Place and Date of Hearing:

Vancouver, B.C.

June 25-29 and October 22-23 2018,

February 8, April 12 and September 20, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 13, 2020

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I. INTRODUCTION

[1] The claimant, Baijian Lu, and the respondent, Ji Yao, married on July 19, 1989, separated in 2002[1] and divorced on June 1, 2006. They have two adult children, Michelle Lu and Kevin Lu ("Children"). The parties entered into an agreement dated January 5, 2006 ("Agreement"). The Agreement included terms addressing the division of assets, spousal support and child support. The Agreement had the parties divide property worth well over \$5 million and had Mr. Lu paying monthly child and spousal support of \$10,000.

[2] From 2006-2016, Mr. Lu did not live in Canada. He returned to Vancouver with his second family in 2016. Shortly after his return, Ms. Yao notified the Family Maintenance Enforcement Program ("FMEP") that Mr. Lu was in arrears of child and spousal support. Based on financial information received from Ms. Yao, FMEP notified Mr. Lu that he was in arrears in an amount exceeding \$800,000. Mr. Lu filed this notice of application shortly thereafter.

[3] Pursuant to Rule 2-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009, and the B.C. Court of Appeal decision of *Halliday v. Halliday*, 2015 BCCA 82, the claimant commenced this proceeding by filing a requisition attaching the Agreement. Both parties took the position that the court's jurisdiction to determine the issues as presented rests in the filing of the Agreement and notice of application.

[4] On April 26, 2019, I delivered to the parties the Court's determination that Michelle and Kevin were "children of the marriage" and maintained that status until December 31, 2018 (the "April Reasons[2]"). The reasons herein should be read in conjunction with the April Reasons.

[5] These reasons deal with the balance of the orders sought in the notice of application.

II. NOTICE OF APPLICATION and HISTORY OF THE PROCEEDINGS

[6] In the notice of application filed August 30, 2017, the claimant seeks the following orders:

- a) That arrears of child support and arrears of spousal support accrued pursuant to the Agreement be reduced or cancelled;
- b) That any and all interest accrued on the arrears be cancelled;
- c) An accounting for the sale proceeds of three real properties; and
- d) Special costs against the respondent.

[7] The claimant filed a second notice of application on January 8, 2018. The second notice of application simply duplicates the first application with some added material to be relied on. On December 13, 2018, when he was not represented by counsel, the claimant filed a third notice of application. That application repeats much of what he sought in the first and second notices of application and adds a claim seeking the return of \$870,000 worth of furniture.

[8] I will set out the history of this proceeding more fully below. However, I say at the outset that I am adjourning the claimant's application for return of the furniture. The furniture issue was raised late in the day and without proper notice or evidentiary record.

[9] The following is a summary of the proceedings to date:

- a) On August 30, 2017, Mr. Lu filed a notice of application and his Affidavit #1;
- b) On December 1, 2017, Mr. Lu filed his Affidavit #2 and his Form F8 Financial Statement;
- c) On January 8, 2018, Mr. Lu filed a Requisition in Form 17.1 attaching the Agreement;
- d) On January 8, 2018, Mr. Lu filed a second notice of application;
- e) On January 10, 2018, Ms. Yao filed an application response, her Form F8 Financial Statement and her Affidavit #2, comprised of three binders of materials;
- f) On February 27, 2018, Mr. Lu filed his Affidavit #4.
- g) On April 3, 2018, Master Scarth made several orders, including orders allowing cross-examination on the parties' Affidavits;
- h) On April 9, 2018, Chief Justice Hinkson adjourned the notice of application to June 26, 2018, and directed that on consent of the parties they would not file further affidavits prior to the hearing;
- i) The hearing of the notice of application commenced on June 26, 2018;
- j) On June 26, 2018, I granted leave to Mr. Lu to file his Affidavit #5 on certain conditions, including the fact that Ms. Yao be permitted to file an Affidavit in response;

- k) The notice of application was heard over seven days (June 26-30 and October 22-23, 2018) with judgment being reserved;
 - l) During the hearing in June 2018 and pursuant to Master Scarth's order, the claimant was cross-examined on his affidavits and Financial Statement; the claimant chose not to cross-examine Ms. Yao on her affidavits;
 - m) By memo to counsel dated December 11, 2018, I asked counsel to provide further submissions on the legal issue of the children's status as "children of the marriage";
 - n) Michelle Lu and Kevin Lu filed affidavit evidence on January 16, 2019 on the issue of "children of the marriage" and, in particular, providing evidence about their enrollment in post-secondary education;
 - o) In response to the Children's affidavits, Mr. Lu was granted leave to file a further affidavit; and
 - p) On April 26, 2019, I released reasons determining that Michelle and Kevin were children of the marriage and that they maintained that status until December 31, 2018.
- [10] On September 20, 2019, the parties presented submissions on the issues remaining. Following the claimant's reply, I granted leave to the respondent to deliver a written surreply with leave to reappear before me for further submissions. Any such request to appear was required by October 31, 2019. I did not receive any further submissions and as such am now in a position to deliver these reasons.

III. POSITION OF THE PARTIES

- [11] The claimant takes the position that he has fulfilled all of his financial obligations imposed by the Agreement and the respondent is actually indebted to him. Alternatively, if the Court determines that child and/or spousal support is owing then the claimant seeks cancellation of the arrears and/or a determination that any arrears be offset by his overpayment. This latter determination requires an accounting of monies paid over the years. The claimant seeks these orders on the following basis:
- a) he has overpaid child and spousal support over the years;
 - b) the respondent disposed of three properties without accounting for the sale proceeds as is required by the Agreement;
 - c) he is now financially responsible for a second family; and
 - d) the respondent is very wealthy and is not in need of support.

- [12] The respondent takes the position that pursuant to the Agreement, the claimant owes her almost \$3 million. She submits the outstanding balance is comprised of child and spousal support arrears and other financial obligations found in the Agreement, including costs of maintaining the family residence since 2006.
- [13] During the hearing, the parties presented vastly different calculations of financial obligations and accounts of payments made and received. To resolve the issues as fulsomely as possible on a chaotic evidentiary record, I have divided these reasons into five parts.
- [14] First, I will set out the factual background including my analysis and interpretation of the Agreement and the scope of the financial obligations relevant to a determination of this application. Second, I will set out the legal principles governing an application to cancel arrears of child and spousal support. Third, I will examine the evidence presented, including the viva voce testimony of the claimant, and provide my credibility findings. Fourth, I will set out my analysis regarding the claimant's application to cancel child and spousal support arrears if owing. Finally, I will set out my determination, of the amount, if any, owing between the parties.

IV. BACKGROUND AND AGREEMENT

A. Background

- [15] I have relied on the recitals of the Agreement for some of the background facts including the following:
- a) The parties married on July 19, 1989 at Guang Zhou, People's Republic of China;
 - b) The parties immigrated to Canada in December 1997;
 - c) Ms. Yao's ordinary residence is in British Columbia;
 - d) Mr. Lu's ordinary residence is in Dong Guan, People's Republic of China.
 - e) The parties have been living separate and apart since September 2002;
 - f) Ms. Yao is a homemaker. She has not worked outside the home in any significant manner;
 - g) Mr. Lu is a businessman whose income is approximately \$200,000 per year; and
 - h) The parties have two dependent children, namely Michelle Lu, born July 1, 1994 and Kevin Lu, born October 17, 1996.
- [16] Ms. Yao was born in China and is currently 51 years old. After residing in China and subsequently in the Czech Republic for approximately 3 or 4 years, she came to Canada in 1997 with Mr. Lu (currently 58 years old) and their two children. Ms. Yao was not employed while in Canada but assisted Mr. Lu in his various business pursuits. She was the parent primarily responsible for the Children and taking care of the home. During their marriage, Mr. Lu spent considerable time in China and was often away from the family home.

- [17] The parties divorced in June 2006 and shortly thereafter Mr. Lu married Li Dai. Ms. Dai (born in 1985) and Mr. Lu have two children: a daughter born March 2, 2007, and a son born June 11, 2008. Mr. Lu suggests that Ms. Dai is the breadwinner in their marriage and that he has not been employed for some time.
- [18] Ms. Yao began living with her current partner, Richard Sanders, in 2012. Mr. Sanders is 76 years old, retired, and earns about \$45,000 annually. Those earnings consist of rental and RRSP income.

B. The Agreement

- [19] Mr. Lu and Ms. Yao signed the Agreement in January 2006. The Agreement provided that the parties would share joint guardianship and consult one another regarding significant decisions, and where the parties could not agree, Ms. Yao would have final decision-making control, subject to Mr. Lu's right of review under the Family Relations Act. The Children's primary residence was with Ms. Yao and Mr. Lu was to have access as agreed.
- [20] The following terms of the Agreement are relevant to this application:

CHILD SUPPORT

7. Lu will pay to Yao the amount of \$4,000 per month, per child, for the support of the Children, commencing February 1, 2006 and payable on the 1st day of each and every month thereafter (the "Child Support").
8. The Child Support
 - (a) being far greater than the Federal Child Support Guideline table amount for Lu's income level (and for so long as it is greater than the Federal Child Support Guideline table amount for Lu's income level): and
 - (b) in consideration of the division of assets under this Agreement;is (and shall be) inclusive of any and all special costs or expenses pursuant to Section 7 of the Guidelines.
9. The obligation of Lu to pay the Child Support ceases in respect of a Child who:
 - (a) marries,
 - (b) becomes self-supporting, or
 - (c) becomes 19 years old, unless the Child remains a "child of the marriage" within the meaning of the Divorce Act because of inability to become self-supporting due to illness, disability, the pursuit of education, or other cause.

SPOUSAL SUPPORT

10. Lu will pay spousal support to Yao in the sum of \$2,000 per month, payable on the first day of each and every month, commencing on February 1, 2006, until further order of the court or written agreement.

FAMILY RESIDENCE

11. (1) On or before February 1, 2006, Lu shall transfer to Yao his one-half interest in the Family Residence, upon which it shall belong to Yao absolutely without further claim by Lu.
- (2) Even after Lu has transferred to Yao his one-half interest in the Family Residence, Lu shall continue to pay the following expenses related to the Family Residence until both of the Children are no longer considered "children of the marriage" as defined in the Divorce Act (Canada):
- (a) all payments due under the mortgage, whether periodic or lump sum; and
 - (b) property taxes, water rates, sewer rates, insurance, repairs and maintenance related to the Family Residence

[Emphasis added.]

- [21] The Agreement also dealt with the division of property. At the time of signing the Agreement, the parties agreed that their joint Canadian assets, including the family residence and three properties owned by Fiesta Enterprises Ltd. ("Fiesta") were valued at over \$6 million subject to a first mortgage held by the Bank of Montreal. In addition, the Agreement identified real properties located in Hong Kong and China with an agreed upon value of almost \$900,000 Cdn as joint assets.

C. Circumstances Post-Separation

- [22] The Children lived with Ms. Yao in the family residence from the time of separation until they began their post-secondary studies. They had limited contact with their father in the years following the divorce. In the early years post-separation, Mr. Lu traveled to Canada once or twice a year and stayed in the family residence. The Children also visited him in China and travelled with him to Australia. However, the Children have had virtually no contact with their father since a trip they took to visit him in Tennessee in 2009. At that time, Mr. Lu was residing in Nashville with his new family and the Children travelled to spend a week or so with him. Both Children described limited phone, email or other contact with their father since that trip.

- [23] Relevant to the notice of application are the three real properties held by Fiesta. There is a dispute about the sale price of the properties and the distribution of the sale proceeds. Mr. Lu and Ms. Yao agree that Mr. Lu directed Ms. Yao to use some of the sale proceeds to satisfy his support obligations. However, there remains a significant dispute about the amount of money Ms. Yao received with respect to the sale proceeds and the amount that was used to satisfy support obligations.
- [24] Ms. Yao states that Mr. Lu's last support payment was received in October 2014, and that she has not received any support thereafter. This is disputed by Mr. Lu.
- [25] In 2017, Ms. Yao turned to FMEP. After receiving a copy of the Agreement, FMEP delivered a document to Mr. Lu stating that as of May 9, 2017 he was in total arrears of \$831,000. The FMEP Record of Payments stated that Mr. Lu owed child and spousal support totalling \$1,360,000 from February 1, 2006 - May 1, 2017. The FMEP Record of Payments stated that Mr. Lu had paid child and spousal support of \$529,000 from February 1, 2006 - May 1, 2017, and thus, the balance due and owing was \$831,000. These figures were based on the information provided by Ms. Yao to FMEP.
- [26] Mr. Lu responded to FMEP's demand by informing them that Ms. Yao had sold three properties and failed to account for the sale proceeds of those properties. Shortly after FMEP's demand for payment, Mr. Lu filed this notice of application.

D. Residential and Section 7 Expenses

- [27] I wish to address Mr. Lu's obligations according to para. 11(2) of the Agreement ("Residential Expenses") and special and extraordinary expenses for the Children.
- [28] Ms. Yao takes the position that:
- the provisions of the Agreement must be read as a whole. The obligations are dependent on each other. For example, the obligation of the Respondent to pay all post-secondary expenses of the Children is dependent on the Claimant having met his child support obligations under the Agreement". In other words, Ms. Yao agrees that Mr. Lu was not required to pay post-secondary expenses so long as Mr. Lu "holds up to his side of the bargain."
- [29] The parties agree that Mr. Lu has paid money over the years for the Residential Expenses including the mortgage, property taxes and maintenance. There is considerable disagreement about whether Mr. Lu was responsible for construction costs as claimed by Ms. Yao. The issue is further complicated by it being unclear whether Mr. Lu's payments (received sporadically over the past decade and often in large sums, paid in different forms and to various accounts) was to be allocated to child or spousal support or Residential Expenses. In other words, when Mr. Lu was making payments under the Agreement, it is very unclear whether the payment related to his child or spousal support obligations or Residential Expenses obligations. As the case was presented, it became clear that the parties had not communicated with one another about their financial record keeping and when

payments were made, whether the money was to be attributed to child or spousal support or Residential Expenses.

- [30] In her written submissions, Ms. Yao provided a detailed analysis of monies due and owing under Residential Expenses. I agree with Mr. Lu that Ms. Yao's claim for Residential Expenses is not properly before me on this application. As such, I will not make a determination regarding the financial obligations under para. 11(2) of the Agreement. To the extent it was argued, I have considered the payment and receipt of Residential Expenses as they relate to the application to cancel or reduce arrears.
- [31] I have also considered Ms. Yao's submissions regarding s. 7 expenses. Ms. Yao's position is that I should consider s. 7 expenses if I conclude Mr. Lu has breached the Agreement. For the reasons set out below, I have determined that I should not engage in this analysis. Should Ms. Yao decide to pursue enforcement of the Agreement regarding the Residential Expenses or s. 7 expenses, she remains at liberty to do so.

V. LEGAL PRINCIPLES--CANCELLATION/REDUCTION OF ARREARS

- [32] Before turning to my credibility assessment and findings, I set out the legal principles governing an application to cancel or reduce child and spousal support.
- [33] In the legal basis of the notice of application, Mr. Lu relies on s. 174 of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). In his written submission, Mr. Lu relies on s. 174 of the FLA, s. 17 of the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.) and the following cases: MacCarthy v. MacCarthy, 2015 BCCA 496; Ritchie v. Ritchie, [1988] B.C.J. No. 1765 at paras. 23-27; Marquez v. Zapiola, 2013 BCCA 433 at para. 30; Earle v. Earle, [1999] B.C.J. No. 383; and Ward v. Ward, 2001 BCSC 847.
- [34] As stated previously, Ms. Yao raised preliminary concerns about the jurisdiction grounding Mr. Lu's application but withdrew her objection in that regard. In her written submission, Ms. Yao sets out the issue of which statute to apply as follows:
37. [Mr. Lu] relies on s. 174 of the Family Law Act to cancel arrears. However, the support arrangements in the Agreement were made under the Divorce Act and no reference is made to the Family Relations Act, in force in 2006, with respect to the support arrangements.
38. The application was brought in the divorce proceeding and no corollary relief was sought in the proceeding.
39. As the action was for divorce only, the Agreement was by agreement filed under s. 214 of the Family Law Act.
40. [Mr. Lu] applies under s. 174 of the Family Law Act to cancel arrears and seeks no other relief, other than an accounting. [He] provides that the court must be satisfied that it would be "grossly unfair" not to cancel arrears and the court may consider

- a) The efforts of the person responsible for paying support to comply with the agreement or order respecting support;
 - b) The reasons why the person responsible for paying support cannot pay the arrears owing, and
 - c) Any circumstances that the court considers relevant.
41. Under s. 174(1), the court can reduce or cancel arrears under a support order if it is satisfied that it would be grossly unfair not to do so. The onus is on the payor to bring evidence that satisfied this test: *Dubreuil v. Poloway*, 2010 BCCA 297.
42. Under the Divorce Act, arrears can be cancelled as follows:
- a) By bringing an application for an original support order to be made under s. 15.2 or;
 - b) If an order is in place, by variation under s. 17.
43. Absent an application for an original order to determine spousal or child support obligations, there can on an application to cancel arrears of support accruing under a Separation Agreement be no standalone order to vary ongoing support terms in the Agreement.

[]

44. Section 17 of the Divorce Act allows for the cancellation of arrears accumulated under a support order; or on a variation application of a pre-existing spousal support order where there has been a spousal support agreement prior to the s. 15.2 order.
17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- (a) a support order or any provision thereof on application by either or both former spouses;
 - (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
45. The approach to be taken to an application for cancellation of arrears under the Divorce Act is the same as that under the Family Relations Act. That approach was summarized in *Earle v. Earle*, 1999 Canlii 6914 (BCSC) at paragraph 46.

[Emphasis in original].

- [35] In summary, Ms. Yao's position is that the test for cancellation or reduction of arrears, on the application presented here, is the same regardless of the statutory framework and to that end, relies on *Earle* at paras. 22-23:

Because cancellation or reduction of arrears is a form of variation, there is a substantial onus (a heavy duty) on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances.

The courts are generally reluctant to reduce or to cancel arrears. Under the Family Relations Act arrears will not be reduced or cancelled unless it is grossly unfair not to do so. This principle is similar to the one applied to the Divorce Act, which requires a material and long lasting change.

- [36] Although reference is made to both the Divorce Act and the Family Relations Act, the Agreement is silent about which statute was relied on to determine the amount of support. The Agreement refers to the Divorce Act to determine the status of the children of the marriage once they reach the age of majority. On the other hand, the Agreement refers to the Family Relations Act to determine parenting decisions.
- [37] I have considered the express wording of the Agreement and the parties' agreement regarding the applicable statutory framework. In addition, I am guided by the words of Justice Fleming in *Khangura v. Rogalski*, 2017 BCSC 1753:
- [26] Although the test for variation of a final order is materially the same under both statutes, the question remains: which provision applies to the respondent's application to vary the terms of the 2013 Order regarding his parenting time, communication, and family dispute resolution? The meaning of a court order, including its statutory foundation, is determined by the objective indicia found in the pleadings, the wording of the order, and the circumstances in which it was made. In the absence of objective indicia, the doctrine of paramountcy will apply and the order will be "founded" in the federal legislation: *Yu v. Jordan*, 2012 BCCA 367, at para. 1.
- [38] See also Justice Smith's opening paragraph in *Yu v. Jordan*, 2012 BCCA 367 which provides:
- [1] This appeal demonstrates the potential unintended consequences of failing to specify in a court order which legislation governs corollary relief provisions for the custody and support of a child of the marriage, in a divorce proceeding where both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] are pleaded. It also illustrates how the meaning of a court order is determined: it is not determined by the parties' stated intention as to its meaning after the order is made, but by objective indicia that may be found in the pleadings of the action, the wording of the order and in the circumstances in which the order was made. In the absence of such objective indicia, the doctrine of paramountcy will apply such that the order will be founded in the federal legislation.

[39] Taking into account the Agreement, the statutes and jurisprudence governing the test to be applied, the parties' positions regarding the appropriate framework, and paramountcy, I have determined that the Divorce Act should apply to the application to cancel arrears. However, I note the similarity between the frameworks and, for the reasons set out below, I would dismiss Mr. Lu's application to cancel or reduce child/spousal support arrears regardless of which statute governs.

[40] I turn now to the case law.

[41] In Earle, Justice Martinson summarized the principles to be considered in this way:

[46] These basic principles can be summarized this way:

1. Maintenance Generally

- a. Parents have a joint and ongoing legal obligation to support their children.
- b. It is the child, not the other parent, who has the right to maintenance.
- c. The payment of maintenance is based on not just what a parent does earn but what a parent can earn.

2. Variation

- a. There has to be a material change of circumstances, a change that is significant and long lasting.
- b. A change to the Guideline amount is not automatic.

3. Arrears

Basic Principles

- a. There is a heavy duty on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so.
- b. If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away.

Examples

- a. Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future.
- b. A reduction or a cancellation requires detailed and full financial disclosure, under oath (usually in the form of an affidavit) that at the time the payments were to be made:
 - i. the change was significant and long lasting and
 - ii. the change was real and not one of choice and

iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.

- c. Responsibility for a second family cannot relieve the parent of his or her legal obligation to support the first family.
- d. Delay in enforcement is generally not a legal basis to cancel or reduce child support arrears.
- e. Judges will not cancel arrears because the other party gets a lot of money at once. Otherwise, people would be encouraged to not pay maintenance and rewarded for not paying maintenance.
- f. Judges will not cancel arrears because the children were looked after in spite of the non payment.
- g. Nor will judges cancel arrears because the children no longer need the money. The children should be compensated for what they missed.
- h. An agreement between parents that the maintenance for the children does not have to be paid will not be considered.
- i. Lack of access between a parent and child is not a legal reason to reduce or cancel arrears.
- j. Judges will not reduce or cancel arrears because other money has been spent to buy things for the children.
- k. The fact that a person did not have legal advice when the order was made or during the time when the arrears added up, is not, by itself, a reason to reduce or cancel arrears.

[42] More recently, in *P.L. v. J.D.L.*, 2013 BCSC 1492, Fleming J. reviewed some of the principles to be applied on an application for the reduction or cancellation of child support arrears:

[21] The legal principles applicable to any application regarding child support and cancellation or reduction of child support arrears were discussed by Madam Justice Martinson in *Earle v. Earle*, 1999 BCSC 283 ("Earle"). With respect to child support generally, those principles are: parents have a joint and ongoing legal obligation to support their children; it is the child, not the parent, who has the right to support; and the payment of child support is based on the ability of the parent to pay, not only what the parent earns. The result of this last principle is that parents have a legal obligation to earn as much as they are reasonably capable of earning to meet their obligation to support their children (*Earle and G.(S.) v. W.(G.)*, 2006 BCSC 991).

[22] With respect to variation applications, the applicant must establish a material change of circumstances since the original order was made. The change must be significant and long lasting. A change to the Guidelines amount is not automatic: *Earle*.

[23] The cancellation or reduction of arrears is a form of variation. Madam Justice Martinson in *Earle* found the test under the Family Relations Act, R.S.B.C. 1996, c. 128, which required that arrears not be reduced or cancelled unless it would be grossly unfair not to do so, is similar to the one to be applied under the Divorce Act. The "grossly unfair test" has been found appropriate for consideration on a variation application under the Divorce Act: *S.A.R. v. L.G.R.*, 2011 BCSC 712, at para. 45; and *Lewis v. Lewis*, [1999] B.C.J. 2537 (S.C.), at para. 16.

[43] See also Justice Wilcock's statement in *MacCarthy*, where he states at para. 54:

The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

[44] The onus of establishing that it would be grossly unfair not to reduce or cancel the arrears is on Mr. Lu. The cases in which arrears have been cancelled are rare and generally speaking, the court has held the bar of "gross unfairness" at a high level: see *Longstaff v. Longstaff* (B.C.C.A.), [1993] B.C.J. No. 1911.

VI. EVIDENCE AND CREDIBILITY

[45] Mr. Lu was cross-examined on his affidavit. Ms. Yao was not. The cross-examination occurred over a year ago and new material was filed thereafter. Having reviewed Mr. Lu's testimony and having considered the evidentiary record generally, I am able to make some determinations relating to the issues raised on the application.

[46] In this portion of my reasons, I set out some well-known principles regarding credibility assessments. I then address the unusual circumstances of one party having been cross-examined on their affidavit evidence while the other was not, and its effect on my assessment of Ms. Yao's evidence. Finally, I apply the principles regarding credibility findings to Mr. Lu's testimony and will identify some aspects of his evidence that cause me to assess his evidence with caution.

[47] When assessing the truthfulness of the testimony of any interested witness, I am guided by the words articulated many years ago in *Faryna v. Chorny*, [1951] B.C.J. No. 152 at para. 11:

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.

[48] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as follows:

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. 152 (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 para. 356).

[49] There were features of Mr. Lu's testimony about his financial circumstances that cause concern. During cross-examination, it was clear that Mr. Lu has stated different things at different times about his financial circumstances. Notably, his evidence changed when Ms. Yao produced information that was contrary to his prior statements. He very often needed to explain the basis for these inconsistencies. This was most evident when Mr. Lu addressed two topics in particular. First, he testified that he has had virtually no income since separation. Rather, Ms. Dai is the primary earner in the family. Second, his description of his financial circumstances is inconsistent with the body of evidence presented on this application. I address each later in these reasons.

A. Law and Credibility

[50] I turn briefly to Ms. Yao's evidence and make a few general comments. Ms. Yao's repeated complaint during the hearing was Mr. Lu's delay in bringing this application. She submitted that the delay caused her prejudice because she was unable to locate the documents required. She says she did her best to locate what she could but she was unable to find many of the documents needed to refute his claims. She says she spent a huge amount of time trying to put together the information and she was required to attend at her banks and request dated records.

[51] Based on the extent of the material she presented on this application, I accept her characterization of the effort required. That said, Ms. Yao asserts Mr. Lu owes her \$3 million. It seems to me, considering the amount of money at stake and the submissions now advanced, proper record-keeping would have been a priority for both parties.

[52] In circumstances where there is poor record-keeping and a deficient evidentiary record, the parties cannot expect the court to try and piece together what may have transpired: see Justice MacLeod's comments in *Makdissi v. Masson*, 2017 ONSC 6498 at para. 46:

Providing only partially complete numbers and then expecting the court to make detailed financial rulings is not appropriate. A court should not be called upon to produce its own calculations or to run its own reports. In our court system, the court does not conduct its own investigations or calculations or create evidence to fill in gaps in the record. Rather the role of the court is to adjudicate based on the evidence and the submissions of the parties assisted by experts if necessary.

[53] Before I released my April Reasons, I invited the parties to tender accounting evidence to assist with their various claims. Neither did so. Rather, both provided a myriad of calculations relating to their disputed claims. I have attempted to sort out these disputes where the evidence allows. However, I have found the material quite chaotic and difficult to assess, as the calculations provided to me are often based on assumptions that are inconsistent with the findings I have made.

B. The Respondent's "Unchallenged" Evidence

[54] I wish to note briefly Ms. Yao's submission about the impact of Mr. Lu's decision to abandon his cross-examination of Ms. Yao. I found aspects of Ms. Yao's evidence problematic even though she was not challenged in cross-examination.

[55] Ms. Yao contends that because Mr. Lu abandoned any cross-examination of her, her evidence stands unchallenged. While it is correct that Ms. Yao was not cross-examined, I have nonetheless considered her evidence with some caution. She is also an interested party and on some key points, I was unable to accept her evidence. For example, despite the passage of time, her evidence as to her lack of memory about the disposition of a cheque in her name for over \$300,000 did not seem to be in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.": Faryna at para. 11. Below, I address the impact of her evidence about the lost cheque.

[56] I now turn to my review and analysis of the evidence.

C. Claimant's Post-Divorce Financial Circumstances

[57] I address first the evidence regarding Mr. Lu's post-divorce earnings. Relevant to this review is Mr. Lu's second spouse to whom he attributes significant skill with stock trading and real estate investments.

[58] Ms. Dai did not file an affidavit or otherwise present any evidence on this application.

[59] Mr. Lu testified that he married Ms. Dai in 2006. She was a student when they met and would have been about 21 years old when they married. They have two children together. Mr. Lu agreed that one month after Ms. Dai had given birth to their daughter in 2007, the two set up a home in the United States. Mr. Lu agreed that Ms. Dai never worked in the U.S. and, in particular, was not employed in the U.S. after they moved to Hawaii in 2010. Mr. Lu testified that was because she needed to look after their children.

[60] The details regarding Mr. Lu's financial background are not so clear. To make sense of the evidence, I will start with a summary of the affidavit evidence he tendered on this application.

1. Mr. Lu's First Affidavit

[61] In his first affidavit sworn August 28, 2017, Mr. Lu briefly described his financial circumstances at the time of marital breakdown, his post-divorce earnings and his new family. This affidavit is devoid of detail and attaches only five pages of Mr. Lu's U.S. income tax filings spanning seven years. He does not attach any bank statements, employment information, complete tax filings, or particulars of Ms. Dai's income.

[62] Mr. Lu deposed that he and Ms. Yao co-owned Fiesta and the Agreement required Ms. Yao to transfer her shares in Fiesta "when required in writing by [Mr. Lu]" and in any event within two years from the date the last party signed the Agreement (January 24, 2006). Fiesta's assets included three properties:

- a) 140-4471 No. 6 Road, Richmond, B.C. ("No. 6 Rd. Property");
- b) 904-6081 No. 3 Road, Richmond ("No. 3 Rd. Property"); and
- c) 1197 Howe Street, Vancouver ("Howe St. Property").

[63] After he discovered that Ms. Yao was seeking FMEP arrears, Mr. Lu deposed that he looked into the status of the Fiesta's assets and discovered:

- a) Without his knowledge or consent, Ms. Yao had sold the No. 6 Rd. Property for \$355,000 in about June 2006; and
- b) Without his knowledge or consent, Ms. Yao had sold the Howe St. Property for \$783,000 in about November 2007.

[64] Mr. Lu deposed:

- 13. I had no knowledge of the sale of these properties which were [part] of [Fiesta] until I was notified by FMEP of the arrears and I started to look into the status of the Holding Company's properties.
- 14. In the process, I also found out that [Ms. Yao] eventually sold [Fiesta's] last property [No. 3 Rd. Property] for \$125,000 in about December 2009].

15. Altogether the respondent sold [Fiesta's] three properties for a total of \$1,263,000, all without my knowledge or consent.

...

20. [Ms. Yao] had sold two of the three properties without my knowledge or consent, and had not provided me with an accounting for the sale proceeds whatsoever.

21. [Ms. Yao] failed to advise FMEP about her receipt of the sale proceeds which were to be applied to offset the child and spousal supports payable by me.

[65] In the same affidavit, Mr. Lu deposed that in 2008 he had instructed Ms. Yao to sell the properties and to use the sale proceeds to offset child and spousal support. This statement stands in stark contrast to Mr. Lu's assertion that the properties were sold without his knowledge or consent. In fact, the two statements, sworn to in the same affidavit, are irreconcilable.

[66] Mr. Lu deposed that in that same year, Ms. Yao told him she had sold the Howe St. Property for \$420,000 and that she had used \$20,000 to ship the merchandise from the property to him. He deposed that it was only later that he learned she had received much more money for the sale of the Howe St. Property.

[67] Mr. Lu briefly described his residency post-divorce stating that in 2006, he resided primarily in China. After his marriage to Ms. Dai, he immigrated to the United States and lived in Tennessee from 2008-2010. In 2010, he and his new family moved to Hawaii and then in 2013 to Seattle where he lived until September 2016. At that time, he returned to Vancouver. He attached select pages from his U.S. income tax filings indicating earnings as follows:

Year

Earnings (USD)

2010

-\$8,355.00

2012/2013

-\$667.00

2014

\$6,600.00

2015

\$6,565.00

2016

\$33,414.00

[68] However, these pages do not appear to be a complete record of his U.S. tax filings from that period. As such, I approach these documents with some caution.

[69] Within his own affidavit and in his later testimony, Mr. Lu contradicted his own evidence as to his financial state of affairs, particularly with respect to his knowledge about the sale of the Fiesta properties.

2. Mr. Lu's Second Affidavit

[70] Mr. Lu filed a second affidavit on December 1, 2017 and described his financial circumstances post-divorce in more detail. He deposed that between 2006-2008, he lived off the sale proceeds of his properties in Hong Kong and China, and earned approximately \$50,000 from his manufacturing business. After 2008, he lived off monetary gifts received from his mother. Because the gifts were under \$100,000, he was not required to report this on his U.S. tax returns. He deposed that his mother gave him \$150,000 so he could purchase the property in Tennessee. He deposed that he also used the sale proceeds from the Hong Kong and China properties to purchase the residence in Tennessee.

[71] With respect to employment, Mr. Lu stated that he tried to find work in Tennessee, but was unsuccessful.

[72] In 2010, Mr. Lu and his family moved to Hawaii where he purchased a condominium with Ms. Dai for \$600,000.

[73] Mr. Lu was not employed while living in Hawaii. From 2010-2014, his mother gave him approximately \$40,000 U.S. per year.

[74] In 2013, Mr. Lu moved to Seattle. He deposed that they sold the Tennessee property in 2014, at a loss, for \$680,000 USD.

[75] Mr. Lu deposed that his income in 2013 was about \$8,000 per year and his mother was not providing the allowance any longer because she had depleted her savings.

[76] In 2016, Mr. Lu and his family moved to Vancouver and they purchased a condominium at 307-4759 Valley Drive for \$1,150,000 ("Vancouver Property"). He deposed that he purchased the Vancouver Property using \$350,000 in cash from the sale proceeds of the Tennessee property. He obtained a mortgage for the balance at \$2,967.67 per month.

[77] He concluded this part of his affidavit making the following statements:

37. I have around CAD \$21,000 in my bank account in RBC

38. My mortgage of the Vancouver Property is eating more than half of my income.

39. I have many necessary household expenses as my young children are attending school.

40. My income level significantly decreased since 2006.

41. Due to my health problems and old age, I am unable to secure any high paying employment.

42. My children from my first marriage are grown up, therefore, they are not in a dire need of my money as much as my children from second marriage who are very young.
43. I pay monthly tuition fee of \$1500 for my children from the second marriage. They are studying piano and violin.
- [78] Mr. Lu then spent the balance of his affidavit commenting on Ms. Yao's financial gains realized since the separation. In particular, he notes that Ms. Yao had listed the former matrimonial home for sale for over \$10 million.
- [79] Of significance, Mr. Lu does not attach any documents, financial or otherwise, supporting any of the assertions he makes about his financial circumstances post-divorce. In my view, Mr. Lu, seeking to cancel significant arrears of child and spousal support, cannot expect to rely on deficient records such as those presented here.
- [80] This is particularly so in circumstances where the party bearing the burden of proof chooses to proceed in the absence of a fulsome evidentiary record.
3. Mr. Lu's Form F8 Financial Statement
- [81] Mr. Lu filed his Financial Statement on the same day as his second affidavit, December 1, 2017. In his Financial Statement, he made the following declarations:
- a) his total income to be used for child and spousal support is \$8,000;
 - b) the total annual expenses are \$119,708.04;
 - c) the value of the Vancouver Property is \$1,150,000;
 - d) the value of his vehicles is \$15,000;
 - e) the value of his savings is \$21,331.74; and
 - f) the amount outstanding on the Vancouver Property mortgage is \$759,993.04.
- [82] Mr. Lu did not disclose any information relating to the sale of properties in the two years preceding the filing of his Financial Statement. He did not disclose any financial information from China or the U.S (except for the seven pages of U.S. tax documents referenced above).
4. Mr. Lu's Third Affidavit, Fiesta and the Disposition of the Three Properties
- [83] Mr. Lu filed a third Affidavit on February 27, 2018. This affidavit was filed in response to an affidavit filed by Ms. Yao on January 10, 2018. Ms. Yao's affidavit comprised three binders of materials. Each vociferously disputes the account of the other.
- [84] As stated previously, Mr. Lu deposed that Ms. Yao disposed of the three Fiesta properties without his knowledge or consent.

[85] Ms. Yao disagrees. She deposed that the properties were sold at Mr. Lu's direction. She deposed that the No. 6 Rd. Property was sold by Mr. Lu and that he directed her to sell the No. 3 Rd. and Howe St. Property.

[86] Mr. Lu denied any involvement in the sale of these properties and repeated his assertion that Ms. Yao "sold all the properties and assets without my direction and without any notice to me and [Ms. Yao] usurped all proceeds illegally."

[87] Regarding the No. 6 Road Property, Ms. Yao provided documents demonstrating the following:

- a) The net proceeds of sale were \$337,181.73;
- b) In June 2006, \$330,000 was transferred into Ms. Yao's bank account;
- c) By wire transfer dated August 1, 2006, \$200,000 [approximately \$175,000 U.S.] was transferred to Mr. Lu in Nashville;
- d) On June 21, 2006, \$71,534 was applied to the outstanding mortgage on the No 6 Road Property;
- e) On July 4, 2006, \$3,000 was applied to pay expenses of Fiesta;
- f) On July 4, 2006, \$15,444.43 was used to pay property taxes of the family residence; and
- g) From April 2007 through May 2009, \$19,000 was used primarily for various Fiesta expenses.

[88] Ms. Yao summarized the disposition of the sale proceeds of the No. 6 Road Property in this way:

The foregoing expenses, the wire transfer and the [wire] transfer fee totalled \$294,200.09. I believe the Claimant told me to retain the balance of the funds and offset them against his obligations under the Agreement. I did so and I transferred \$30,000 to a GIC with RBC. I subsequently liquidated the GIC and, over time, [used] these funds to meet living expenses of the children and me.

[89] Mr. Lu disputes Ms. Yao's accounting of the sale proceeds of the No. 6 Rd. Property. He put it this way in his third affidavit:

41. In the year 2006, I sent in total \$675,680.00 to [Ms. Yao] which was in excess of the agreed amount so [Ms. Yao] returned to me USD 175,669.74 from that overpaid money.

[90] In support of his assertion about the overpayment, Mr. Lu attached to his affidavit an undated spreadsheet that he prepared purporting to show the amount of money he paid to Ms. Yao from 2009-2014. The spreadsheet must have been prepared after he filed the Notice of Application because it specifically references Ms. Yao's affidavits and documents. Important to my findings set out below, Mr. Lu did not present any financial records demonstrating the payments he says to prove his assertions regarding the \$175,669 USD.

- [91] Without providing any documents to contradict Ms. Yao's evidence regarding the No. 6 Rd. Property, Mr. Lu nonetheless states that Ms. Yao's statements are "false and fabricated."
- [92] Ms. Yao deposed that Mr. Lu instructed her to list the Howe St. Property and that it had been listed unsuccessfully on three separate occasions in 2006. At Mr. Lu's direction, it was relisted in 2007 and ultimately sold in November 2007 for \$754,094.52. Ms. Yao described the distribution of the sale proceeds as follows:

The sale proceeds were divided into two cheques. I do not know the reason for this and I recall only that I received one cheque in the amount of \$430,233.92. [Mr. Lu] informed me . . . that he intended to gift this money to the Children. I deposited the \$430,233.92 cheque into my RBC bank account [account number omitted]. I then invested this money in two investments for \$215,000 for each of Kevin and Michelle. Over time, I returned the funds to the children's and my accounts and then used the monies to pay for living expenses of the Children and I also created an RESP for the Children. I have exhausted the RESP funds to meet the Children's post-secondary educational costs.

The second cheque is for \$323,860. I do not recall receiving these funds or know what happened to them. I have searched all of my records and the funds were not deposited into any account of mine at the time and I believe I would recall receiving these funds and know what happened to them if I retained them. I believe that [Mr. Lu] must have received these funds and it is possible that I endorsed the cheque to him in 2008 when he came to Canada, as he had said to me when he asked for the property to be sold that he wanted the money.

- [93] Ms. Yao attached the two cheques to her affidavit. Both cheques are dated November 16, 2007 and are made out to Ms. Yao.
- [94] In response, Mr. Lu denies that he instructed Ms. Yao to sell the Howe St. Property. He also says that Ms. Yao lied to him about the amount of the sale. He states Ms. Yao told him it sold for only \$420,000. He also denies receiving any of the sale proceeds. Specifically, he denies receiving a cheque for \$323,860 from Ms. Yao.

VII. ANALYSIS

- [95] There are two issues relating to Fiesta which I address at the outset. First, I address Mr. Lu's allegation that Ms. Yao failed to transfer her shareholdings of the company despite his demand and the Agreement. Second, I provide my findings regarding the disposition of the three properties.

A. Allegation of Ms. Yao's failure to transfer shares

- [96] Mr. Lu was cross-examined about Fiesta's corporate structure. In particular, he was presented with Fiesta's Certificate of Incorporation, which seemed to show that he was its sole shareholder. In addition, the corporate records appear to show Ms. Yao was appointed an officer and director in 2002.

- [97] The corporate records are relevant to Mr. Lu's allegation that Ms. Yao had refused to transfer her shares in Fiesta despite the Agreement and his multiple requests. At first, Mr. Lu explained that the corporate records had not been translated for him and thus he did not know that he was the sole shareholder and Ms. Yao only became an officer in 2002. During his testimony, he eventually conceded that he gave her permission to manage certain aspects of the business because he trusted her. However, he maintained his denial that he instructed Ms. Yao to sell the three properties.
- [98] I have little difficulty finding that the shareholdings are as reflected in the corporate records. Considering Mr. Lu's testimony on this point, I am satisfied that Ms. Yao did not improperly withhold her consent to transfer any shareholdings to Mr. Lu. That is because she did not possess any shares to transfer. Mr. Lu is simply incorrect on this point.

B. Allegations regarding Ms. Yao's disposition of the Fiesta properties

- [99] With respect to the sale of the Fiesta properties, I reject Mr. Lu's testimony that he did not know about the transactions and that Ms. Yao undertook the disposition of the properties without his knowledge. His evidence on this point was inconsistent; he made different statements about his knowledge on different occasions as well as within his first affidavit. His evidence is also inconsistent with the records presented, regardless of Ms. Yao's affidavit evidence on each point. Mr. Lu's evidence here was particularly problematic because of the inconsistencies within his first affidavit. I simply do not accept his evidence about the sale of these properties. While under cross-examination, he attempted to explain away documentary evidence that was inconsistent with his version of events. His explanations were unconvincing and did little to repair his credibility.
- [100] During cross-examination, he eventually conceded that he learned about the sale of two of the properties in 2008 but maintained he did not know the price. He was asked why he did not take any steps after 2008 to make inquiries about the sale price and that he only took steps in 2017 when FMEP tried to collect the arrears. He testified as follows:

I did pursue after the properties she had sold - I had always pursued - she kept ignoring me - she hung up the phone on me or just didn't talk to me so that's why I couldn't trace back the prices for which they were sold. Of the one property she sold prior to that I had no idea that she had sold it - I thought she was looking after that to collect rent for me because when I asked her she never responded - one time I was pursuing so fiercely - that was in 2011 when I asked her - I asked her how much she sold it for...

So all along I thought she was looking after that for me until I came back in 2016. . . .

She had never informed me and I didn't know what was going on.

[101] After Mr. Lu filed his notice of application, Ms. Yao attempted to secure records about the sale transactions for the three properties. To that end, she was able to locate additional financial records and some of the documents evidencing the transactions. I accept that she has tried to piece together some of the details relating to the sale of these properties.

[102] I have relied on these records in my assessment of the evidence.

1. No. 3 Rd. Property

[103] I start with the sale of the No. 3 Rd. Property. Ms. Yao deposed that the No. 3 Rd. Property sold in December 2009 and the net proceeds were \$115,950.26. She does not have any recollection of the amount of the proceeds or how the proceeds were distributed. However, she was able to locate an account at TD Canada Trust ("TD") where the net proceeds were deposited. Ms. Yao produced a deposit slip seeming to indicate that \$115,950.26 was deposited into an account in the name of J. Yao. She also produced a TD bank statement showing the distribution of the proceeds in a number of cheques that cleared the account shortly after the funds were deposited.

[104] Despite Ms. Yao's request, the bank was unable to locate copies of the cheques to determine where the funds from this transaction had gone. Ms. Yao deposed that she was able to locate one deposit for \$35,000 into her RBC account that seemed to match the timing of the transaction. She was unable to determine the distribution of the balance of the funds.

2. No. 6 Rd. Property

[105] I turn to the sale of the No. 6 Rd. Property and Ms. Yao's evidence that she transferred \$200,000 to Mr. Lu in Nashville. Mr. Lu testified that he had remitted "huge amounts of money to her to the tune of \$800,000." To that end, he testified as follows:

First, I did not just remit money in those 2 months - I started those remittances back in February.

You can see that she had incomes of 670,000 as shown in bank statements that she provided in 2006.

Second thing is I had remitted to her eldest sister's bank account \$10,000 Cdn every month.

Third, she had used the credit card which was a supplementary card holder - she said she had to incur expenses with the credit card. That's why in year 2006 I remitted to her. And it is documented - except for the remittances to her elder sister's account because it has been such a long time.

[106] Mr. Lu was asked three times whether he had produced any documents to support his evidence that he paid about \$800,000 to Ms. Yao in 2006. He did not answer the question posed - even when the same question was asked by the Court. He finally agreed that he had a very good recollection of the transactions although he did not have any "documents offhand". He repeated his assertion that the \$200,000 flowing from Ms. Yao's account to him in Nashville was Ms. Yao returning an overpayment to him and had nothing to do with the

sale proceeds.

- [107] With respect to the No. 6 Rd. Property, I reject Mr. Lu's testimony. I do not accept his testimony that he paid approximately \$800,000 to Ms. Yao yet has not produced a single document to support that the money was paid. If he was making monthly payments of \$10,000 to Ms. Yao's sister over a three year period, then it would have been simple to obtain the banking records demonstrating such payments - records that would have been in his possession and control.
- [108] In circumstances when Ms. Yao produced financial records, Mr. Lu would attempt to provide an explanation for each transaction. For example, it is clear from Ms. Yao's banking records that she remitted \$200,000 to Mr. Lu following the sale of the No. 6 Rd. Property. I do not accept his explanation that the \$200,000 represented an overpayment on his part and Ms. Yao was paying him back. I accept Ms. Yao's evidence about this transaction. I find that Ms. Yao sold the No. 6 Rd. Property, at the direction of Mr. Lu, and that she transferred \$200,000 CAD to him in Nashville.

3. Howe St. Property

- [109] I address the sale of the Howe St. Property. I do not accept Mr. Lu's testimony that Ms. Yao sold this property without his knowledge or consent. I accept Ms. Yao's testimony, as confirmed in the real estate documents and associated bank records, that Ms. Yao listed the property for sale and that she did so with Mr. Lu's knowledge and consent. I have determined that the net sale proceeds were \$754,094.52 and that the proceeds were split into two cheques. The first cheque, for \$430,233.92 was received by Ms. Yao and distributed as she described in her affidavit.
- [110] The second cheque, for \$323,860, was also made out to Ms. Yao. I am troubled by the fact that this cheque has apparently gone missing. Ms. Yao deposed that she does not have any record of depositing this cheque in any of her accounts. As such, Ms. Yao believes that she must have endorsed the cheque and given it to Mr. Lu. Mr. Lu denies ever receiving this cheque. However, he says this without producing bank records that might have proven (or disproven) his assertion.
- [111] What is certain is that Ms. Yao received the cheque. It was made out in her name. Ms. Yao dealt fully with the first cheque. I am left with uncertainty about what she did with the second cheque. I am not satisfied with her evidence that "I believe that [Mr. Lu] must have received these funds and it is possible that I endorsed the cheque to him in 2008 when he came to Canada as he had said to me when he asked for the property to be sold that he wanted the money." I simply cannot be sure of Ms. Yao's guess that she must have given the cheque to Mr. Lu. I will deal with the consequence of this finding below.
- [112] For the reasons stated above, I have rejected much of Mr. Lu's testimony relating to the sale of the Fiesta properties. His evidence was problematic on other fronts as well and I touch briefly on those issues now.

C. Other issues raised in the evidence

- [113] I have rejected much of Mr. Lu's evidence for the reasons set out above. Other features of his evidence impacting his credibility are worthy of mention here.
- [114] First, he refused to make certain concessions in the face of the obvious. For example, during cross-examination, Mr. Lu was steadfast in his rejection of the suggestion that he had enjoyed considerable wealth. He testified that his Washington home was valued at about 10% of Ms. Yao's home (the former matrimonial home) apparently suggesting that he was living modestly. He agreed, however, that the Washington property was a 9000 square foot residence situated on a 40,000 square foot lot with a salt water pool and guest house. Ms. Yao tendered photographs of the Washington property that she had obtained from a real estate listing. Despite Mr. Lu's refusal to characterize it as such, I have little difficulty concluding that this is a luxurious property.
- [115] Mr. Lu was cross-examined about his U.S. income tax filings, one of the few documents that he actually produced in the application. In 2014, 2015 and 2016, he described himself in these records as a "real estate professional." When he was first cross-examined about this job title, Mr. Lu testified "How could I be a real estate professional - I don't understand - this is an error on the accountant's part. I will provide an affidavit from the accountant. I don't know why this was put that way."
- [116] Mr. Lu did not ever tender an affidavit from any accountant.
- [117] When he was asked about reviewing his U.S. tax records, Mr. Lu testified that he overlooked this job title and so did not correct it. He added that he trusted Ms. Dai to correct it. When challenged on this evidence, Mr. Lu avoided the question and simply testified, "I don't understand the implications of that anyway."
- [118] Mr. Lu testified that in 2007, Ms. Dai made approximately \$800,000 in the stock market in China. However, he was unable to produce any records demonstrating the stock trades because it has been too long. In addition, he attributed significant earnings to Ms. Dai as a result of her purchase and sale of four properties in Hawaii.
- [119] Mr. Lu initially denied that he had any ownership interest in the Hawaii properties and denied that he was in any involved in Ms. Dai's successful stock transactions. During cross-examination, he was presented with land title documents for the Hawaiian properties where he is listed as an owner with Ms. Dai. His explanation for any discrepancy was this:

Question: You agree that you both purchased the property as you have just testified.

Answer: That is correct. But the majority of the funds were from her. But I had to put my name there because according to the laws of the U.S. since the children were still very young and there would be issues regarding inheritance and estate matters if my name was not on it.

- [120] About Mr. Lu and Ms. Dai's assets generally, Mr. Lu said that the money was his wife's. He testified that "she made a killing from the stock market. Then she bought properties in mainland China and then we transferred the money to Hawaii." When he was cross-examined about his name being on title for some of the Hawaii properties, Mr. Lu explained "that's because [Ms. Dai] was looking after [our] children and I went out and viewed the properties. When I made the offer, my name was on the offer." He said that most of the money that he gave to Ms. Yao after 2008 belonged to Ms. Dai.
- [121] I do not accept that Ms. Dai was principally responsible for Mr. Lu's financial successes. It is clear from the evidence before me that Mr. Lu has enjoyed a lifestyle of wealth. I reject his testimony that Ms. Dai was the sole basis for this. He has produced virtually no documents to demonstrate stock trades, real estate transactions, bank accounts or otherwise. Ms. Dai has not sworn an affidavit or tendered any evidence. In addition, Mr. Lu has demonstrated throughout this litigation that he will attempt to explain away all of the financial records tendered by Ms. Yao whenever the documents are inconsistent with his story, but he would not provide credible documents of his own to counter her submissions.
- [122] When he has tendered documents, they are woefully incomplete. I provide but one example here. In his fourth affidavit, Mr. Lu deposed as follows:
63. In response to paragraph 89 of the Yao Affidavit #2, my wife Li Dai does not hold any significant assets or bank accounts. Attached hereto and marked as Exhibit "H" is a copy of her online banking records.
- [123] In fact, exhibit "H" is a single page document dated January 16, 2018 showing a balance of \$4,942.32 in a Central Pacific Bank account. Although of poor quality, the document seems to be in the name of Mr. Lu. In any event, it is an incomplete record which does not, in any way, support the assertion of facts set out above. When cross-examined about this bank account, Mr. Lu simply stated: "My memory deserts me, thank you for reminding me, it might have been my account".
- [124] Mr. Lu was cross-examined about M&K Fiesta Canada Ltd. and denied any ownership interest. He agreed that this was a company incorporated by Ms. Dai and that she owned M&K Fiesta Canada Ltd. During his testimony, Mr. Lu testified about various real estate transactions relating to the company although he distanced himself from involvement with these transactions or with any profits made.
- [125] I have reviewed Mr. Lu's testimony and the documents relating to the various transactions over the past decade. As stated previously, I reject Mr. Lu's evidence about his financial circumstances. I do not accept that Ms. Dai was solely responsible for their significant earnings over the past decade. I make these findings on the following basis:
- a) Mr. Lu initially produced nothing but patently incomplete U.S. income tax filings;
 - b) Ms. Dai presented no evidence on this application;

- c) Mr. Lu produced partial or incomplete documents and this was done only in response to some aspects of Ms. Yao's evidence; and
- d) Mr. Lu's evidence was inconsistent on significantly material points.

D. Cancellation of Support Arrears

[126] I have considered the substantial onus on Mr. Lu to show that there has been a significant and long lasting change in circumstances. Based on the evidence tendered on this application and considering my assessment of Mr. Lu's credibility, I am not satisfied that he has demonstrated that it would be grossly unfair not to cancel the arrears, nor has he demonstrated a material and long lasting change.

[127] I wish to address each of the basis submitted by Mr. Lu in support of cancellation of the arrears.

[128] First, he believes he has overpaid child and spousal support over the years. Mr. Lu chose to advance this position without producing virtually any financial records. In my view, it is not possible, on the evidentiary record presented, to determine this proposition and I decline to do so. I have also considered Martinson J.'s comments in Earle:

[27] People making this argument have a heavy onus. It is not good enough just to say they could not pay because they earned less. They can only get a reduction or a cancellation of arrears if they present detailed and full financial disclosure, under oath (usually in the form of an affidavit) that

- i. the change was significant and long lasting and
- ii. the change was real and not one of choice and
- iii. every effort was made to earn money during the time in question and those efforts were not successful.

[Emphasis in original]

[129] Second, I have rejected Mr. Lu's allegations regarding the sale of the Fiesta properties. However, I agree that there needs to be an adjustment for the missing cheques relating to the No. 3 Rd. Property (\$115,950.26) and the Howe St. Property (\$323,860). I will deal with this adjustment below.

[130] Third, Mr. Lu's financial responsibility for his new family does not meet the test of grossly unfair or material and long-lasting change as required. As Martinson J. explained in Earle:

[32] This raises questions of priority. Which obligation comes first? It is often argued that the person required to pay has a second family. The law is clear that responsibility for a second family cannot relieve the parent of his or her legal obligation to support the first family.

- [131] In addition, clear evidence, under oath, is required to demonstrate the financial needs of the second family. Except for some scarce information his Financial Statement (without any corroborating documents), Mr. Lu has not satisfied his burden of demonstrating the needs of his second family.
- [132] I would also add that Mr. Lu's financial obligations, except for the arrears, to the Children and Ms. Yao ended almost a year ago.
- [133] Finally, Mr. Lu submits that Ms. Yao is very wealthy and is not in need of support. In my view, this ignores his own financial obligations to Ms. Yao, the Children and the nature of the Agreement itself. This position ignores the principle that both parents are jointly responsible for child support and, as per Martinson J. "this responsibility cannot be avoided by delay." Ms. Yao's financial status has little to do with the enforcement of a contractual term.
- [134] This is Mr. Lu's application and thus his burden to provide evidence in support of his claim. He has failed to meet it. I dismiss his application to cancel or reduce the arrears.
- [135] That determination does not end the matter however. There was inextricable overlap of monies paid by Mr. Lu over the years pursuant to his various obligations under the Agreement. I must therefore wrestle with the amount of the arrears outstanding, based on the evidence before me.

VIII. DETERMINATION OF ARREARS AND ORDERS

- [136] The parties agree that pursuant to the Agreement, the child support due and owing from February 1, 2006 through December 31, 2018 is \$1,240,000.
- [137] The parties agree that pursuant to the Agreement, the spousal support due and owing from February 1, 2006 through October 23, 2018 is \$305,484.
- [138] The total combined child and spousal support obligation is therefore \$1,545,484.
- [139] Mr. Lu submits that he made "various payments totalling \$1,079,855.52." In his written submission, Mr. Lu said these payments were proven through the following documents:
- Mr. Lu paid \$675,680 for the \$605,235 construction mortgage and interest and the surplus of \$70,445 should be allocated to support;
 - Between 2006-2007, he paid \$200,000 in support using a second credit card;
 - From February 1, 2006 through January 1, 2009, the Claimant paid \$360,000 to Ms. Yao's sister;
 - Mr. Lu overpaid for property taxes and utilities on the family residence and the overpayment of \$29,410.52 should be allocated to support;
 - From February 2010 to January 2013, Mr. Lu paid approximately \$300,000 for support;

- f) After February 2013, Mr. Lu paid \$92,000 for support.
- [140] Mr. Lu relies exclusively on Ms. Yao's financial records to substantiate the above payments. He asks the Court to draw certain inferences establishing that the money should be attributed to support rather than to his other obligations, contrary to Ms. Yao's calculations.
- [141] I do not accept Mr. Lu's allocation or attribution of funds because he has not satisfied his evidentiary burden.
- [142] I turn now to Ms. Yao's calculations. The difficulty here is that Ms. Yao agrees that Mr. Lu paid money for Residential Expenses and has characterized some of those funds as child support. Her calculations lump together support payments and Residential Expenses payments, thus dramatically increasing the calculation of child support owing. As stated earlier, I am not satisfied that the Agreement can be interpreted such that Residential Expenses constitute child support. Rather, the Residential Expenses provision was Mr. Lu's obligation so long as Michelle and Kevin were children of the marriage as defined by the Divorce Act. That provision, in my view, does not allow the Residential Expenses that may be due and owing to be subsumed into the child support arrears.
- [143] That does not mean that Ms. Yao is prevented from pursuing enforcement of the Agreement and compensation for Residential Expenses. However, the determination of Residential Expenses as I have previously stated, is not properly before me on this application. Rather, this is an application to cancel arrears of child and spousal support.
- [144] In light of this comingling of payments received, I have found that the most accurate accounting of the amount of money paid over the years for child and spousal support is \$529,000.[3] I base that finding on the FMEP documents attached to Mr. Lu's first affidavit, Ms. Yao's documents attached to her Affidavit and her evidence explaining the allocation of funds received over the past decade, including the sale proceeds of the Fiesta properties. I appreciate that this figure was based on Ms. Yao's information. I am satisfied that this is the best evidence of child and spousal support, exclusive of any other financial obligation that may have accrued over the years.
- [145] Ms. Yao admits that she received \$529,000 specifically for child and spousal support. This is the amount that she reported to FMEP in May 2017. The parties seem to agree that no funds were received or paid after May 2017. Any other funds she received, Ms. Yao submits were in partial satisfaction of the other financial obligations under the Agreement.
- [146] It is clear that Mr. Lu paid more than \$529,000 over the years. However, he has not demonstrated that those funds were with respect to child and spousal support. This is his burden and he has not satisfied it on the evidentiary record presented. He elected to proceed with this application with an extremely thin record. He did so at his peril.

- [147] The amount of arrears for child and spousal support is therefore \$1,016,484. I am offsetting this amount by the value of the two missing cheques of \$115,950.26 and \$323,860 totaling \$439,810.26. I am satisfied on the evidence before me that Ms. Yao received these funds, but I am left with uncertainty about what she did with those funds. Deducting this amount from the child and spousal support arrears leaves \$576,674.26 outstanding.
- [148] I fix the arrears due and owing for child and spousal support to be \$576,674.26. I reiterate that Ms. Yao is at liberty to pursue any claim she may have relating to any funds owing under the Agreement whether it be for Residential Expenses or otherwise.
- [149] I turn to the application for an accounting. During the hearing, Mr. Lu said little about the application for an order compelling Ms. Yao to account for the sale proceeds of the specified properties. I dismiss the application for an accounting. I do so on the basis that Mr. Lu did not properly advance it. More importantly, Ms. Yao produced documents that I found to be consistent with her version of the transactions. Except for the missing cheques, I accepted her evidence about the transactions and the distribution of the sale proceeds.
- [150] In summary, I fix the amount of arrears of child and spousal support arrears due and owing to be \$576,674.26 plus any interest. I make the following orders:
- a) The claimant's application to cancel arrears of child support and arrears of spousal support is dismissed;
 - b) The claimant's application for an accounting of the sale proceeds for the Fiesta Properties is dismissed; and
 - c) The respondent is awarded costs of this application.

"Winteringham J."

- [1] There is disagreement about the separation date. I have relied on the date referenced in the agreement signed by both parties.
- [2] 2019 BCSC 652.
- [3] I make this finding based on the evidence before me. It should be clear that if there are future applications, the evidentiary record may very well be different and the accounting would be analyzed accordingly.

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