

CANADA / JUDGMENT

Luo v. Lun

2022 BCSC 1150

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Supreme Court of British Columbia

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2022 BCSC 1150 Luo v. Lun

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Luo v. Lun,

2022 BCSC 1150

Date: 20220708

Docket: E55835

Registry: New Westminster

Between:

Pengfei Luo

Claimant

And

Fengjie Lun

Respondent

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for the Claimant:

L.X. Zhao

The Respondent appearing on own behalf:

F. Lun

Place and Date of Hearing:

New Westminster, B.C.

April 11-14, 19, 2022

April 20 and 21, 2022

Place and Date of Judgment:

New Westminster, B.C.

July 8, 2022

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Introduction

- [1] In this family law action, the main issues I must decide are the division of family property, the division of family debt, and the actual date of separation.
- [2] The only family assets of any significant value are a two-bedroom townhouse located at 9294 University Crescent, Burnaby, B.C. (the "Family Home") and a one-bedroom apartment located at 210-799 Jing Cheng Street, Lu Yuan District, Changchun City, Jilin Province, China (the "One-Bedroom Apartment").
- [3] Mr. Luo seeks an unequal division in his favour based on Ms. Lun's failure to contribute to family expenses (before and after separation) and her failure to disclose financial documents. Ms. Lun seeks an unequal division in her favour because Mr. Luo's family has used the One-bedroom Apartment for many years without paying rent.
- [4] Ms. Lun currently resides in the Family Home. Mr. Luo seeks an order that the Family Home be sold.
- [5] The credibility of the parties is key to some of the issues I must decide. Both parties speak Mandarin as a first language and apparently understand and speak only limited English. The entire trial was conducted with the assistance of a Mandarin-speaking interpreter. The assessment of credibility was complicated by the use of an interpreter and the absence of some key documentation.
- [6] Ms. Lun represented herself at trial. Following one of the six trial management conferences that were conducted in this matter, the presiding judge provided a memo to the parties that outlined trial procedure and the onus of proof. Apparently, Ms. Lun did not review this memo prior to trial. Another copy of the memo was provided to Ms. Lun at the outset of the trial.

Credibility

- [7] The challenges of assessing credibility when evidence is given through an interpreter were aptly described by Justice Sharma at para. 101 of *Kim v. Khaw*, 2014 BCSC 2221:

There is no doubt that hearing evidence through the filter of an interpreter can be challenging: *Wang v. Hu*, 2003 BCSC 552 at para. 24; *R. v. A.F.*, 2010 ONSC 5824 at para. 87. The court must be alive to the fact that the impact or nuance of interpreted testimony may be "lost in translation", especially during cross-examination. For example, inconsistencies in explanations or expressions may be the inevitable result of there being no exact translation, or perhaps many translations, for an English word, phrase or concept in the foreign language.

- [8] For the most part, Mr. Luo testified in a straightforward manner. That said, there are some anomalies in his financial disclosure that were not explained in direct examination or fully explored on cross-examination. For example, although Mr. Luo was employed and received a paycheque that he deposited to his bank account, there were other significant sums of

money that passed through his bank account that were not explained. Some of the funds deposited apparently included rent from the tenant(s) who lived in the second bedroom in the Family Home and cash that Ms. Lun gave to Mr. Luo from her earnings before she started e-transferring funds to him. However, there remain a number of unexplained deposits. Further, as I will explain, there was an alleged \$60,000 loan from a third party that was not documented, and Mr. Luo did not identify the proceeds of such a loan in the account statements in evidence.

- [9] I accept that Mr. Luo disclosed statements from all of the financial institutions where he held assets at the time of separation through to the trial date. The same cannot be said for Ms. Lun. She did not produce current statements for her primary bank account, and she did not disclose statements for investments she had or has with TD Bank. Ms. Lun claimed that she did not know how to obtain such statements. However, TD Bank provided banking services to Ms. Lun in Mandarin, and I am satisfied that she could have obtained statements for her accounts had she wanted to do so. Instead, I find that Ms. Lun deliberately failed to disclose such statements in order to hide what she owns or owned from Mr. Luo and the court.
- [10] Overall, I find that Ms. Lun was not a credible or reliable witness. Credibility refers to the truthfulness of the witness; reliability relates to the accuracy of the testimony: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 1995 CanLII 3498 (ONCA) at 526.
- [11] In terms of assessing Ms. Lun's credibility, I have relied in particular on the following factors identified as relevant by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 (aff'd: 2012 BCCA 296; leave to appeal ref'd: [2012] S.C.C.A. No. 392):

whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally"

- [12] On a number of points, Ms. Lun's oral evidence conflicted with bank statements or other reliable documents. She was motivated to misstate what actually happened with the purchase and sale of a pre-sale condominium in an effort to avoid financial responsibility for the loss that the parties incurred on the sale of that unit. Further, it is clear that she wishes to avoid and delay the harsh reality that she cannot afford to stay in the Family Home where she has lived for the past 12 years. Through much of the trial, whether giving evidence or making submissions, Ms. Lun's demeanour was often agitated and exaggerated. Ms. Lun was confrontational on cross-examination, and she often resisted answering questions. Her manner when giving evidence strongly suggested that she said what she thought would advance her position rather than her version of what actually happened.
- [13] In short, Ms. Lun was generally not a credible or reliable witness, and I have approached her evidence with caution where it is not corroborated by reliable documents. For the most part, I accept the evidence of Mr. Luo where his testimony and Ms. Lun's conflict.

Background

- [14] Mr. Luo and Ms. Lin were both 66 years old as of the trial date. Their marriage was registered on April 13, 1982. The parties have one son, Justin Luo, who is now 38 years old and no longer a child of the marriage for purposes of the Family Law Act, S.B.C. 2011, c. 25.
- [15] Neither party is currently employed. Mr. Luo used to work in a restaurant kitchen, and Ms. Lun worked as a dishwasher in a cafeteria. Both earned modest incomes before their retirement. There was no clear evidence as to when either party retired.
- [16] In or around July 1999, the parties acquired rights to a two-bedroom apartment in China. The evidence is not clear as to when the parties acquired rights to the One-Bedroom Apartment. Both apartments in China were registered in Ms. Lun's name.
- [17] Throughout their marriage, Mr. Luo was primarily responsible for the parties' joint family finances. In 2007, Ms. Lun opened her own bank account, and her employment income was directly deposited to her personal bank account from then onward. I accept that Ms. Lun gave Mr. Luo sums of cash and later made e-transfers in order to contribute to family expenses. However, Ms. Lun also used money in her personal bank account to make investments in her own name and to gift funds to their son without consulting or telling Mr. Luo.
- [18] In 2010, the parties sold the former family home where they lived in Ottawa. From the net proceeds from the sale of the Ottawa property, \$100,000 was transferred into Ms. Lun's account and \$97,500 was transferred into Mr. Luo's account.
- [19] The parties then purchased the Family Home in 2010 for \$400,000. The purchase price was paid through a down payment of \$100,000 advanced from Ms. Lun's account, \$80,000 advanced from Mr. Luo's account, and a joint mortgage of \$220,000. The parties lived together in the Family Home until Mr. Luo moved out in July 2018. The Family Home is the most valuable family asset to be divided.
- [20] In October 2010, without Mr. Luo's knowledge, Ms. Lun agreed to sell the two-bedroom apartment in China to an acquaintance in exchange for approximately \$40,000. Mr. Luo learned of the sale more than a year later. This two-bedroom apartment continues to be registered in Ms. Lun's name because the property apparently cannot be legally transferred without Mr. Luo's signature. However, I am satisfied the apartment was "sold" and that Ms. Lun received the sale proceeds in October 2010. The two-bedroom apartment is no longer a family asset.
- [21] In or around August 2017, Ms. Lun agreed to purchase a pre-sale condo unit in a building being developed close to the Family Home. The purchase and sale agreement was eventually assigned to a third party in December 2020. There was much evidence at trial regarding the purchase of this unit and argument regarding the sharing of the loss incurred.

- [22] On August 8, 2018, Mr. Luo filed a notice of family claim seeking an order for divorce and an unequal division of family assets and debts in his favour. He asserted that the parties separated on January 8, 2017. To divide the parties' real estate holdings, Mr. Luo sought an order that he be granted sole ownership of the Family Home and the One-Bedroom Apartment in China and that Ms. Lun be granted sole ownership of the pre-sale condo unit and the two-bedroom apartment in China. As noted, I find that the two-bedroom apartment in China is no longer a family asset.
- [23] On September 10, 2018, Ms. Lun filed a response to family claim in which she said the parties had not yet separated.
- [24] On April 18, 2019, Ms. Lun filed a counterclaim in which she alleged that the parties separated on August 25, 2018. She sought an order for spousal support. Ms. Lun also sought an order for unequal division of family property and debt in her favour. She sought an order to sell the Family Home, with the proceeds to be used to pay out the mortgage and a \$86,300 loan to the parties from their son. She sought an order selling the pre-sale condo unit. Ms. Lun also sought an order that the One-Bedroom Apartment in China be sold and that she be paid back rent in the amount of \$30,000 on the basis that Mr. Luo's mother and sister have lived in the apartment since 1990 without paying rent.
- [25] At trial and in her trial brief, Ms. Lun said that the parties separated on January 10, 2018, she waived her claim for spousal support, and she was opposed to selling the Family Home.

Issues

- [26] All of the statutory requirements for a divorce have been met, and both parties consent to the order for divorce. The divorce will take effect on the thirty-first day following the date of this judgment.
- [27] The first issue to be decided is the date of separation. The remaining issues relate to the division of family property and debt.
- [28] From Mr. Luo's perspective, the main financial issues in dispute are as follows:
- 1) whether a loss related to the pre-sale condo should be shared equally;
 - 2) whether Mr. Luo should receive credit for paying down the mortgage on the Family Home after the date of separation; and
 - 3) whether the parties should share equally in a repayment, made after separation, towards a \$60,000 undocumented debt to a third party.
- [29] In closing submissions, Mr. Luo waived his claim for the difference between what he paid after separation for Family Home-related expenses other than mortgage payments (including strata fees, property taxes and insurance) and what he received in rent from the tenant who lived in the second bedroom in the Family Home.

- [30] As a factor in favour of unequal division of assets, Ms. Lun asked the court to consider the fact that Mr. Luo's family lived in the One-Bedroom Apartment in China for more than a decade without paying rent and then kept rent paid by a tenant starting in 2005.
- [31] I will deal first with the separation date before turning to the division of family assets and debts. As required by the caselaw, I will consider what each party would receive if the division was equal before considering whether the division of assets should be unequal. I will then set out the orders required to divide family assets and debts.

Date of separation

- [32] Mr. Luo says the parties separated on January 8, 2017. He testified, however, that the parties had been emotionally separated since 2007. In early 2017, Mr. Luo and Ms. Lun were in Montreal to visit their new granddaughter when the parties had a significant argument, according to Mr. Luo. He announced that he wanted a divorce. After January 8, 2017, Mr. Luo and Ms. Lun continued living in the Family Home, though he says they stopped socializing together and stopped celebrating birthdays and other occasions. The parties took care of their own expenses.
- [33] Ms. Lun does not dispute this description of their relationship after January 2017; however, she denies that the events on January 8, 2017 occurred as described by Mr. Luo.
- [34] Despite what she said in her counterclaim (which was not put to her on cross-examination), Ms. Lun testified that the parties separated on January 10, 2018, when Mr. Luo asked for a divorce. Mr. Luo acknowledges that he asked for a divorce that day, based on his understanding that a divorce was available one year after separation under Canadian law. Mr. Luo filed the notice of family claim on August 8, 2018 when Ms. Lun refused to discuss divorce or a separation agreement.
- [35] As I will detail below, the parties agreed to purchase a pre-sale condo unit in August 2017, which might suggest that they were not separated as of that date. However, I am satisfied that Mr. Luo participated in the purchase of the pre-sale condo because Ms. Lun promised that she would pay her share of family expenses and the cost of the condo and because, like Ms. Lun, he anticipated that they could make a profit by investing in the condo. I do not believe Ms. Lun's evidence that they agreed to buy the pre-sale condo as a place to live together in retirement. At best, such a plan was wishful thinking on Ms. Lun's part.
- [36] Spouses may live "separate and apart" while continuing to reside in the same home: *Lauzon v. Lauzon* (1982), [1982] B.C.J. No. 1636, 1982 CanLII 311 (BCSC) at paras. 2-3. I am satisfied that the parties separated as of January 8, 2017, when Mr. Luo recognized and announced that the marriage was at an end.

Statutory framework regarding division of family and debt

- [37] Section 81 of the Family Law Act provides that each spouse has a right to an undivided half interest in all family property as a tenant in common, subject to an agreement or order that provides otherwise. Generally, the value of the family property must be based on its fair market value: Family Law Act, s. 87(a).
- [38] Section 86 defines family debt as all financial obligations incurred by a spouse during the period when the relationship between the parties begins and ending when the spouses separate. Family debt also includes debt incurred after the date of separation for the purpose of maintaining family property.
- [39] Where there is no agreement to divide family property and debt, section 87(b) provides that the value of family property and family debt must be determined as of the trial date. Family assets and debt are identified as of the date of separation and valued as of the date of trial.
- [40] Neither party argued that any of the assets the parties owned were excluded property, which means that s. 85 of the Family Law Act is not relevant to my decision.
- [41] Section 95 of the Family Law Act allows the court to order an unequal division of family property only if equal division would be significantly unfair for one of the reasons set out in s. 95(2), including:
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- [42] Section 97 gives the court authority to make orders to effect division of family property.

Family Assets

- [43] I will first identify the family assets and determine their value, to the extent that is possible on the evidence. For the reasons that follow, I find that there are no family debts as defined by s. 86 of the Family Law Act. However, the division of assets must take into account the sharing of the loss on the pre-sale condo unit. Finally, I will consider whether fairness requires an unequal division of family property in favour of either party.

The Family Home

- [44] The Family Home is a family asset to be divided. It is currently unencumbered by a mortgage. It is unclear whether the parties' joint line of credit is secured by the Family Home.
- [45] Neither party testified about the value of the Family Home, and there was no appraisal filed. Mr. Luo attached a copy of the 2021 BC Assessment to his financial statement made on June 2, 2021, which valued the property at \$489,000 as of July 1, 2020.
- [46] Ms. Lun would strongly prefer to stay in the Family Home because she is concerned that she will not be able to find affordable rental accommodation. Unfortunately, she lacks the financial resources to buy out Mr. Luo's share of the property.
- [47] I am satisfied that the Family Home must be sold and the funds distributed to allow the sharing of family assets and debts.

The One-Bedroom Apartment in China

- [48] The One-Bedroom Apartment is registered in Ms. Lun's name and is a family asset. Mr. Luo seeks an order that the One-Bedroom Apartment be sold and the proceeds shared equally between the parties.
- [49] Neither party filed an appraisal or any other independent evidence to establish the value of the One-Bedroom Apartment. On his F8 financial statement, Mr. Luo said that the One-Bedroom Apartment was worth \$60,000. On her F8 financial statement, Ms. Lun said that the One-Bedroom Apartment was worth \$40,000. In her closing submissions, when she thought it was in her interest to assign a higher value to the One-Bedroom Apartment, Ms. Lun acknowledged that the One-Bedroom Apartment's assessed value is \$60,000. Ms. Lun failed to disclose an appraisal or other documents that might establish the assessed value of the One-Bedroom Apartment.
- [50] Ownership of the One-Bedroom Apartment is registered to Ms. Lun. In order to divide this asset while limiting the parties' transactions costs, Ms. Lun will retain ownership of the One-Bedroom Apartment, and Mr. Luo will ensure that possession and control of the One-Bedroom Apartment is transferred to Ms. Lun.
- [51] Based on Ms. Lun's admission and her failure to disclose an appraisal that might have confirmed the actual value, I find that the One-Bedroom Apartment in China has a value of \$60,000 for purposes of dividing family assets.

Other assets

- [52] As noted above, Ms. Lun failed to disclose statements for her bank accounts and investments. This gives rise to the possibility that Ms. Lun has undisclosed assets.

- [53] In *Bandpey v. Talebpourazad*, 2021 BCSC 763 [Bandpey], Justice Basran succinctly summarized the law in such circumstances:
- [57] Nondisclosure of assets is the cancer of matrimonial property litigation: *Cunha v. Cunha* (1994), 1994 CanLII 3195 (BC SC), 99 B.C.L.R. (2d) 93 (B.C.S.C.) at para. 9, cited with approval by the Supreme Court of Canada in *Michel v. Graydon*, 2020 SCC 24 at para. 33.
- [58] It is insufficient to respond to financial nondisclosure with an award of costs or by dealing only with what is known. Doing so would reward the non-disclosing litigant: *Cunha* at para. 10.
- [59] Unless disclosure is made by the conclusion of the trial, a court may conclude that there are undisclosed assets that should be considered for the purpose of property division: *Cunha* at para. 11. If the court is satisfied full disclosure has been made then an award of costs might be an appropriate penalty: *Cunha* at para. 13.
- [60] An inference that there are further undisclosed assets should be invoked cautiously, exceptionally, and only when the conclusions drawn are more than a guess: *Wu v. Sun*, 2011 BCCA 239 at para. 41, and *Devathasan v. Devathasan*, 2019 BCSC 661 at para. 206. There must be a strong evidentiary basis showing one of the parties has hidden assets: *Laxton v. Coglon*, 2008 BCSC 42 at para. 31.
- [54] I am satisfied based on the limited account statements she disclosed and her evidence on cross-examination that Ms. Lun held a mutual fund and a separate TFSA as of the date of separation. She regularly deposited funds from her bank account to the mutual fund, and she often withdrew funds from the mutual fund to transfer to her son. Based on the amounts deposited to and withdrawn from the mutual funds, Ms. Lun had deposited a net amount of at least \$24,000 into her mutual fund as of the date of separation. In her financial statement made May 17, 2021, she disclosed an RRSP with a value of \$20,266 as of February 23, 2018, without providing an updated value. In the same financial statement, she disclosed that she had disposed of an RRSP worth \$30,000 on April 12, 2021. There is no information regarding the value of her TFSA.
- [55] It is likely that Ms. Lun had family assets as of the date of separation, including a mutual fund and a TFSA, for which she failed to provide any or adequate disclosure. That said, I am cautious about assuming the value of undisclosed family assets. One option would be to attribute a value of \$20,266 to Ms. Lun's RRSP for purposes of dividing family assets. However, there is a real possibility that Ms. Lun has already disposed of her RRSP based on her financial statement that reported disposal of an RRSP worth \$30,000. In the circumstances, I will account for Ms. Lun's failure to disclose financial information, and in particular the value of her RRSP, when I consider unequal division of family assets.
- [56] There is no evidence upon which to value Ms. Lun's TFSA. Again, I will account for this when I consider unequal division of family assets.

- [57] Mr. Luo submitted that the parties should retain the balances as of the trial date for accounts in their own names. In submissions, Ms. Lun said that she agreed, but she also wanted to divide the balances in their accounts as of the date of separation.
- [58] As of the date of trial, Mr. Luo had a savings account balance of approximately \$3000, accumulated from government benefits paid to him.
- [59] As noted above, Ms. Lun did not provide any current financial disclosure. Her account balances as of the date of trial are unknown. As of January 8, 2017, the date of separation, she had \$3817 in her bank account. In her financial statement made May 17, 2021, Ms. Lun disclosed that her bank balances as of that date were approximately \$4500.
- [60] Without condoning Ms. Lun's failure to disclose financial documentation, I am satisfied that it is reasonable to order that both parties retain the current balances in the bank accounts in their respective names. Fairness does not require division of the bank account balances based on their values on a date other than the trial date.

Family Debt

Loan from Justin Luo

- [61] Both parties acknowledge that their son loaned them approximately \$86,000 by e-transferring monthly or bi-monthly installments over a number of years, ending in early 2018. Ms. Lun sought recognition of this loan on behalf of her son. Mr. Luo says the parties have repaid the loan or that at least he has repaid his share.
- [62] For the reasons that follow, based on the evidence at trial, I am unable to determine how much, if anything, the parties owed Justin Luo as of the date of separation. As a result, Ms. Lun has not established a family debt as defined by s. 86 of the Family Law Act as a result of funds transferred from Justin Luo to the parties.
- [63] The loan from Justin Luo to his parents was not formally documented. Ms. Lun produced a document created by Justin Luo that shows 193 payments totalling \$86,300. Mr. Luo produced the parties' joint account statements showing monthly or bi-monthly deposits, each of a few hundred dollars, that he described as loan advances from his son to help pay the mortgage on the Family Home. The transfers listed on the document produced by Ms. Lun are similar but do not match the deposits made to the parties' joint account.
- [64] Bank statements confirm that, despite their own modest incomes, both parties transferred large sums of money to their son. For example, in 2009, Mr. Luo gifted \$3500 to Justin Luo from the proceeds of the sale of the Ottawa residence. In October 2010, Ms. Lun transferred \$40,000 to Justin Luo after she received the proceeds from the sale of the two-bedroom apartment in China, to be used by Justin Luo as a down payment to buy a home. In June 2015, Justin Luo got married. From 2013 to 2015, Ms. Lun transferred close to \$50,000 to Justin Luo, and Mr. Luo transferred \$30,000 to Justin Luo. Ms. Lun described all of these funds as gifts, some of which related to the wedding and preparations for it. Mr. Luo says the

\$30,000 that he transferred was a partial loan repayment.

- [65] In 2016, the parties transferred at least \$50,000 to Justin Luo. Ms. Lun described some of these funds as gifts; Mr. Luo said some of these funds were loan repayments.
- [66] Mr. Luo claims that he made loan repayments to Justin Luo totalling \$84,000. Mr. Luo initially sought a declaration as part of this action that he had repaid his share of the loan, a position he abandoned in closing submissions. In any event, I am satisfied that payments to Justin Luo prior to separation (to the extent they were loan repayments rather than gifts) came from family assets, and such repayments would reduce the parties' joint debt obligation to Justin Luo. Further, the two payments Mr. Luo made to Justin Luo in May 2017 totalling \$20,000 came primarily from funds withdrawn from Mr. Luo's investment account, i.e., funds that would be considered family assets. None of the payments for which Mr. Luo seeks recognition should be credited exclusively to him. In other words, Mr. Luo did not make any payments to their son that would justify an unequal division of any debt owed to Justin Luo pursuant to s. 95(2)(f) of the Family Law Act or otherwise.
- [67] Justin Luo was not a party to this action, and he did not give evidence. It is clear that large sums of money were transferred by the parties to their son at different times, and I accept that Justin Luo regularly transferred smaller sums of money to his parents over a number of years. However, without a loan agreement and without evidence from Justin Luo, it is not possible to determine whether the funds the parties sent to him were loan repayments or gifts, which means it is not possible to determine what, if anything, was owing as of the date of separation.
- [68] A family debt to Justin Luo has not been proven on a balance of probabilities. Further, I am not prepared to make any order pursuant to s. 97(2)(h) of the Family Law Act that one party or the other is responsible for repayment of any remaining balance on the loan from their son.

The \$60,000 loan

- [69] Mr. Luo says that between 2015 and 2016 or 2017, he borrowed \$60,000 from an elderly lady named Liu Hung to pay the first mortgage on the Family Home. He says that Liu Hung asked for repayment of the loan when she learned of the parties' pending divorce. Mr. Luo says that he withdrew \$60,000 from the parties' joint line of credit in March 2019 to repay Liu Hung.
- [70] I am not satisfied that Mr. Luo has proven a loan of \$60,000 as a family debt. There are no documents to substantiate a loan of \$60,000 from Liu Hung to Mr. Luo. Mr. Luo did not testify as to the principal amount of the loan or the interest rate or the repayment terms. There is no lump sum deposit of \$60,000 or comparable amount into the parties' or Mr. Luo's account during the period when the loan was allegedly made. Mr. Luo did not testify that the loan was advanced in smaller amounts over a period of time. He did not identify any of the deposits to the parties' or his personal bank account as advances related to the Liu loan. He

was unsure as to the time frame over which he allegedly borrowed funds.

- [71] That said, as noted, there were numerous unexplained deposits in the parties' bank account that do not match Mr. Luo's employment or rental income.
- [72] Between March 28 and April 2, 2019, the statement for the joint line of credit shows that Mr. Luo withdrew \$60,000 in cash advances in \$5000 increments. These are the funds that Mr. Luo says he paid to Liu Hung to retire the loan. There is no receipt or other document to establish to whom the cash was paid.
- [73] I note that Mr. Luo admitted in direct examination that he withdrew \$38,000 (six withdrawals of \$5000 each and one withdrawal of \$8000) on February 8 and 9, 2019, and gave that money to his then girlfriend. Mr. Luo acknowledges that he is solely responsible for repayment of those funds. These significant withdrawals a month before the \$60,000 was withdrawn casts further doubt on who received the \$60,000 withdrawn in March 2019.
- [74] The party alleging a debt bears the burden of establishing its existence and that it was incurred during the parties' relationship: *Chatha v. Uppal*, 2018 BCSC 6 at para. 309. Although I found Mr. Luo to be generally credible, in the absence of any corroboration by way of loan documents or testimony from Hung Liu, Mr. Luo has failed to prove that it is more likely than not that the \$60,000 withdrawn between March 28 and April 2, 2019 was used to satisfy a pre-separation family debt. Mr. Luo failed to meet the burden on him as a result of the lack of specificity regarding the terms of the alleged loan, the absence of evidence that the loan funds were advanced to him, and the lack of corroboration that the cash advances were paid to Hung Liu in respect of a loan that was incurred prior to separation.

The pre-sale condo and the parties' line of credit

- [75] Mr. Luo seeks an order dividing the loss on the pre-sale condo and a reallocation in his favour of 50% of the loss. Ms. Lun says that her obligation is limited to half of the deposits paid, i.e., \$62,290. Rather than "dividing the loss", in my view, it is appropriate to consider whether some of the outstanding balance owing on the parties' line of credit that relates to the pre-sale condo ought to be allocated equally between the parties.
- [76] As noted above, in or around August 2017, Ms. Lun became aware of an opportunity to buy a pre-sale condo unit in a building to be constructed close to the Family Home. Ms. Lun says that the parties agreed to buy the unit as a retirement home. It may be that Ms. Lun was hoping that Mr. Luo might change his mind about separation and divorce. However, I accept that Ms. Lun convinced Mr. Luo to invest equally with her in the pre-sale condo unit on the expectation the investment would be profitable and based on Ms. Lun's promise that she would pay 50% of the cost of the condo unit as well as her promise to again start contributing to family expenses, including the first mortgage on the Family Home.

- [77] There was no written or oral contract between the parties regarding the purchase of the condo. I am satisfied the parties agreed that they would pay the costs equally and that they would share equally in any profits that they expected to earn. By extension, I find that it was an implied term of the agreement between the parties that they would share equally in any loss.
- [78] On August 13, 2017, Ms. Lun signed the purchase and sale contract pursuant to which she agreed to buy the pre-sale condo unit for \$622,900 plus GST, payable through four deposits totalling 20% of the purchase price, with the balance due upon completion of the unit. Mr. Luo was not a party to the original purchase contract. Ms. Lun paid the initial \$10,000 deposit from her own account, funds which were a family asset.
- [79] On August 19, 2017, the second deposit in the amount of \$52,290 was paid from the parties' joint line of credit. Shortly thereafter, the parties secured a second mortgage against the Family Home to pay off the joint line of credit.
- [80] The third deposit for the pre-sale condo unit in the amount of \$31,145 was due May 16, 2018. In May 2018, Mr. Luo withdrew \$50,811.81 from his investment account and his TFSA account, both of which were family assets, to pay the third deposit. He used the balance of the withdrawn funds to pay off the remaining balance of the mortgage on the Family Home. The developer allowed Mr. Luo to pay the third deposit as a third party to the purchase contract.
- [81] On February 9, 2019, the fourth and final deposit for the pre-sale condo unit in the amount of \$31,145 was paid by taking a cash advance from the parties' joint line of credit. In February 2019, after repeated requests from Mr. Luo, Ms. Lun signed an additional buyer addendum which caused Mr. Luo to be added as an additional buyer of the pre-sale condo unit. Mr. Luo wanted to ensure that there was no doubt that he owned the unit equally with Ms. Lun. As of February 2019, the parties had paid the developer \$124,580 from family assets or from joint debt facilities.
- [82] In or around December 2020, when the unit was ready for occupancy, the parties did not have the necessary funds (approximately \$530,000) required to complete the purchase, and they could not find a buyer willing to cover their investment. To avoid a potential claim by the developer for breach of contract, the parties agreed to assign the contract of purchase and sale to a third party for \$34,080. After paying fees related to the assignment, the remaining balance of \$20,239 was divided equally between the parties.
- [83] Although they had hoped to make a profit on the pre-sale condo unit, the parties lost approximately \$104,580 without accounting for interest paid on the second mortgage and joint line of credit. Mr. Luo feels that the parties should share this loss 50/50. Mr. Luo seeks an order that Ms. Lun pay him approximately \$52,000, which he believes will result in a sharing of the loss.

- [84] Mr. Luo's submission fails to recognize that the funds used to pay the first and third deposits on the pre-sale condo unit were family assets, which otherwise would have been divided equally if they had been preserved to trial. To the extent that family assets were spent, the parties have effectively shared equally in the loss of those funds.
- [85] The remaining deposits were paid using funds borrowed through a second mortgage and the parties' joint line of credit.
- [86] Neither the second mortgage nor the balance on the joint line of credit falls within the definition of family debt under the Family Law Act, as both were incurred after the date of separation and not to preserve family assets. However, I am satisfied that the parties agreed to invest jointly in the pre-sale condo unit, and they must share equally in the loss. Otherwise, Ms. Lun would be unjustly enriched if Mr. Luo is left solely responsible for debt arising from the failed investment.
- [87] As a result, to the extent Mr. Luo paid the second mortgage from his own resources, not family assets, his payments on the second mortgage will result in a reallocation of family assets in his favour. The amount owing on the joint line of credit for payments related to the pre-sale condo unit will be divided equally.

First and second mortgage

- [88] Mr. Luo seeks credit for payments he made on the first and second mortgage after separation. In reviewing the post-separation mortgage payments Mr. Luo made, I have tried to discern the source of the payments to ensure that Mr. Luo is only credited for payments made from his post-separation earnings rather than from family assets in his name. Because the second mortgage was used in part to pay out the first mortgage, I have tried to ensure that credit for debt payments are not double counted.
- [89] As of the date of separation, there was \$60,669.96 owing on the first mortgage on the Family Home. Mr. Luo made all of the payments on that mortgage until it was paid off on May 16, 2018.
- [90] In 2017, Mr. Luo made regular payments on the first mortgage of \$18,251 and additional principal payments of \$16,000. The 2017 payments were funded in part by \$10,000 from the second mortgage and by \$14,000 Ms. Lun paid to Mr. Luo in 2017 after he agreed to buy the pre-sale condo. As a result, I find that Mr. Luo paid \$10,251 toward the first mortgage in 2017 from his own resources.
- [91] In 2018, Mr. Luo made regular payments on the first mortgage of \$8098 and a final payment of \$20,751.13 on May 16, 2018. The final payment was funded by a withdrawal from Mr. Luo's investment accounts, which were a family asset. There is no evidence that Ms. Lun paid anything toward the mortgage in 2018, thus I find that Mr. Luo paid \$8098 toward the first mortgage in 2018 from his own resources.

- [92] The second mortgage on the Family Home in the amount of \$60,000 was taken out in August 2017 to finance the second deposit on the pre-sale condo unit. Mr. Luo made all the payments on the second mortgage until he took an advance from the parties' joint line of credit to pay the final balance of \$7206.91 on August 10, 2020.
- [93] For the second mortgage, in 2017, Mr. Luo made regular payments of \$5332 and additional principal payments of \$9000. Mr. Luo used funds originally advanced pursuant to the second mortgage to make the additional payments of \$9000. I find that Mr. Luo paid \$5332 toward the second mortgage in 2017 from his own resources.
- [94] In 2018, Mr. Luo made regular payments on the second mortgage of \$15,142. In 2019, Mr. Luo made regular payments on the second mortgage of \$15,398. In 2020, Mr. Luo made regular payments on the second mortgage of \$9805. There is no evidence that Ms. Lun paid anything toward the second mortgage between 2018 and 2020, thus I find that Mr. Luo paid \$40,345 toward the second mortgage between 2018 and 2020 from his own resources.
- [95] I will account for the payments Mr. Luo made on the first and second mortgages from his own resources when I consider the unequal division of family assets.
- [96] Mr. Luo made a final payment of \$7206.91 on August 10, 2020 to pay out the balance owing on the second mortgage. The final payment was paid using funds advanced from the parties' joint line of credit and will be addressed in the next section.

Joint lines of credit

- [97] The remaining joint line of credit (account ending in 090) had a balance of nil as of the date of separation and \$143,488.07 as of the date of trial. Mr. Luo continues to service this debt without contribution from Ms. Lun. Ms. Lun argues that this joint line of credit has nothing to do with her and that the parties had no large family expenses in early 2019 that would require the large cash withdrawals that Mr. Luo took from the line of credit.
- [98] Counsel for Mr. Luo cited *Bandpey* to argue the court should consider whether a debt "was incurred for use within the family unit" when allocating debt. *Bandpey* was decided with reference to the Family Relations Act, R.S.B.C. 1996, c. 128, which did not define family debt. The Family Law Act has replaced the Family Relations Act and applies to the case at bar, including its definition for family debt. As a result, *Bandpey* is not helpful in deciding how to allocate the balance owing on the parties' line of credit.
- [99] The balance on the joint line of credit was nil as of the date of separation. As a result, only debt incurred for the purpose of maintaining family property or any balance that replaced debt that was incurred prior to the date of separation would be family debt: s. 86 of the Family Law Act.

- [100] I am satisfied that the balance on the line of credit is not a family debt. However, given my conclusion that the parties must share in the pre-sale condo loss equally, any balance used to make deposits for the pre-sale condo unit are subject to equal division.
- [101] As a result, the \$31,145 withdrawn on February 9, 2019 to pay the fourth and final deposit on the pre-sale condo will be allocated equally between the parties.
- [102] The cash advance from the joint line of credit on August 8, 2020 in the amount of \$7206.91 that was used to retire the second mortgage on the Family Home will be divided equally between the parties as it arises from paying the second deposit on the pre-sale condo.
- [103] Mr. Luo has paid all of the interest on the joint line of credit. The interest on the amounts to be divided is approximately \$3000 and should be allocated equally between the parties.
- [104] The remaining balance on the joint line of credit was incurred solely by Mr. Luo. Mr. Luo will be required to pay off this joint line of credit with his share of the proceeds from the sale of the Family Home, with recognition that debt of \$41,351.91 must be divided equally.

Unequal division

- [105] Both parties claim an unequal division of family assets.
- [106] A two-stage analysis is used to determine whether an unequal division of family property would be significantly unfair: *Polard v. Polard*, 2017 BCSC 1963 at para. 19. At the first stage, the court must determine the extent of family property in accordance with ss. 84-86 of the Family Law Act and undertake the notional exercise of dividing property equally. The second stage requires the court to determine whether the equal division would be significantly unfair, taking into account the factors in s. 95(2) of the Family Law Act.
- [107] Turning to the first stage, the only family assets to be divided in this case are the Family Home and the One-Bedroom Apartment in China; the latter has a value of \$60,000. There is no family debt as that term is defined in the Family Law Act, as the first mortgage on the Family Home (the only pre-separation debt) was paid off as of the trial date. Leaving aside the sharing of the debt arising from the pre-sale condo, if family property was to be divided equally, Ms. Lun would be required to pay Mr. Luo \$30,000 from her share of the net proceeds from the sale of the Family Home to compensate him for his share of the One-Bedroom Apartment.
- [108] Mr. Luo claims a greater share of the family assets based on his assertion that, throughout their marriage and in particular since 2007, he paid the vast majority of the parties' joint expenses and in particular the mortgage on the Family Home. Mr. Luo says that Ms. Lun used her employment income to purchase investments in her own name or to send funds to their son without consulting him instead of contributing equally to family expenses.
- [109] In exceptional cases, relative contribution to the acquisition, preservation, maintenance and improvement of family property during the relationship may be a factor that justifies an unequal division of family assets: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras.

43-44; *Khan v. Gilbert*, 2019 BCCA 80 at paras. 25-36. In this case, Ms. Lun contributed some but not all of her income to family expenses. I find that it is not appropriate in this case to do a dollar for dollar comparison between her contribution and Mr. Luo's contribution toward maintaining the Family Home as a basis for an unequal division pursuant to s. 95(2)(i).

- [110] As noted, Ms. Lun's financial disclosure was wholly inadequate and intentionally done to hide investments in her name. Lack of financial disclosure is a factor that may be considered when deciding whether unequal distribution is appropriate: *Bamford v. Mulyati*, 2017 BCSC 945 at para. 43 and *Ahmadi-Abbasabadi v. Ahmadian*, 2017 BCSC 648 at para. 171.
- [111] Further, Ms. Lun disclosed in her financial statement made May 17, 2021 that she had disposed of an RRSP worth \$30,000 on April 12, 2021; gifted \$5000 to her granddaughter on November 12, 2019; gifted \$9000 to her granddaughter on December 3, 2020; and gifted \$10,000 to her grandson on April 19, 2021. In other words, Ms. Lun acknowledged in her financial statement that she disposed of \$54,000 in family assets after the parties separated. Ms. Lun was not cross-examined on her financial statement. Neither party gave evidence that they had a grandson. When considering whether to divide assets unequally, the court may consider whether one spouse, not acting in good faith, has disposed of or transferred property that is or would have been family property and caused the other spouse's interest in the property or family property to be defeated or adversely affected: s. 95(2)(g)(ii) of the Family Law Act.
- [112] In this case, I find that it would be unfair to divide family assets equally between the parties. I accept that fairness requires a redistribution in Mr. Luo's favour because Ms. Lun's failure to disclose financial documents made it impossible for Mr. Luo to determine what investments and bank balances she had in her own account. Further, as noted, I find that Ms. Lun intentionally withheld financial disclosure to hide assets. I find that Ms. Lun unreasonably gifted family assets post-separation without Mr. Luo's consent, which justifies an unequal division of family assets in this case: s. 95(2)(f) of the Family Law Act. An adjustment in the amount of \$30,000 will be made in Mr. Luo's favour to reflect the family assets Ms. Lun dissipated, with a slight adjustment in Mr. Luo's favour on account of Ms. Lun's failure to disclose documents.
- [113] As detailed above, Mr. Luo continued to make payments totalling \$18,349 on the first mortgage from his own resources after the parties separated. Debt can be divided unequally where equal division of post-separation family debts leads to significant unfairness: s. 95(2)(f) of the Family Law Act; *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 272 at para. 55 to 57. I accept that there should be an unequal division of family assets in favour of Mr. Luo to reflect mortgage payments made from his earnings after the parties separated. An adjustment in the amount of \$9175 will be made in Mr. Luo's favour.

[114] Ms. Lun seeks an unequal division of family assets in her favour because, according to Ms. Lun, Mr. Luo's mother and sister resided in the One-Bedroom Apartment from 1991 until they moved to their own home. Ms. Lun says that Mr. Luo's mother and sister have rented out the One-Bedroom Apartment for the last 17 years and kept the rent money. Ms. Lun says that she should be compensated for her half of 17 years of rental income, which she submitted in closing argument should be based on the market rate of \$200/month. However, I have no evidence about how much rent, if any, was actually collected. Further, Ms. Lun did not provide any legal authority for the proposition that Mr. Luo should compensate her for a financial benefit that his relatives may have received, before or after separation. The Family Law Act does not appear to cover this circumstance. I am not satisfied that Ms. Lun has established that family assets should be divided unequally in her favour.

Conclusion

[115] Family assets will be divided equally subject to a reallocation in favour of Mr. Luo because Ms. Lun disposed of family assets post-separation, she failed to disclose financial documents, she must share in the debt incurred due to losses on the pre-sale condo unit, and Mr. Luo made payments on the first mortgage on the Family Home from his own resources.

[116] I will now set out my orders to effect this division of family assets.

[117] The Family Home, located at 9294 University Crescent, Burnaby B.C., is to be listed for sale. Mr. Luo will have sole conduct of sale and will list the property with a licensed realtor. Ms. Lun will cooperate with all showings of the Family Home. Ms. Lun will deliver vacant possession to Mr. Luo by August 31, 2022, unless otherwise agreed in writing as between the parties. Mr. Luo will inform Ms. Lun of all offers to purchase the Family Home.

[118] The proceeds of sale of the Family Home will be held in trust by counsel for Mr. Luo and distributed as follows:

- (a) The proceeds of the sale of the Family Home are to be used first to pay any real estate commission and the usual closing adjustments;
- (b) The net proceeds of the sale of the Family Home are to be distributed equally between Mr. Luo and Ms. Lun, subject to paragraphs (c) and (d) that follow;
- (c) From her share of the proceeds of the sale of the Family Home, Ms. Lun will pay Mr. Luo the following amounts:
 - i. \$30,000 in respect of his equal share of the One-Bedroom Apartment;
 - ii. \$9175 in respect of his payments on the first mortgage after the date of separation;

- iii. \$22,839 in respect of his payments on the second mortgage arising from the purchase of the pre-sale condo;
 - iv. \$20,676 in respect of funds owing on the joint line of credit arising from the purchase of the pre-sale condo;
 - v. \$30,000 in respect of family assets dissipated by Ms. Lun after the date of separation and her failure to disclose financial documents;
- (d) From his share of the proceeds of sale, Mr. Luo will pay the outstanding balance on the joint line of credit, account ending in 090.
- [119] Ms. Lun is the owner of the One-Bedroom Apartment, located at the following address: 210-799 Jing Cheng Street, Lu Yuan District, Changchun City, Jilin Province, China. Mr. Luo will provide to Ms. Lun the land title certificates or any other documents in his possession or control for this apartment and will sign any documents required to ensure that Ms. Lun is the sole owner of this apartment.
- [120] Mr. Luo will return to Ms. Lun any personal documents in his possession or control, including her Chinese identification documents. Mr. Luo will provide to Ms. Lun the land title certificates or any other documents in his possession or control for the two-bedroom apartment in China, which has the following residential address: #304-693 Dongfeng Street, Lu Yuan District, Changchun City, Jilin Province, China. Mr. Luo will sign any documents required to ensure that Ms. Lun is the sole owner of this apartment.
- [121] Each party shall retain all bank accounts in their name and all personal property in their possession.
- [122] The parties have leave to appear before me with respect to implementing this order and on the issue of costs. If the parties wish to address costs, they may arrange with court scheduling in the next 30 days to make submissions before me for this purpose.

"Lamb J."

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