

CANADA / JUDGMENT

M.H. v. T.H.

2025 BCSC 2056

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2056 M.H. v. T.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.H. v. T.H.,

2025 BCSC 2056

Date: 20251021

Docket: E242752

Registry: Vancouver

Between:

M.H. also known as M.K.

Claimant

And

T.H. also known as T.K.

Respondent

Before: The Honourable Justice S. Ramsay

Reasons for Judgment

Counsel for Claimant:

R. Pryer

Y. Tao

Counsel for Respondent:

M. Morinaga

Place and Date of Trial:

Vancouver, B.C.

July 21-25, 2025

Place and Date of Judgment:

Vancouver, B.C.

October 21, 2025

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Introduction

- [1] The parties to this family law action were married in 2010 and separated on September 26, 2024. They have two children: a son who is 14 and a daughter who will soon be 11. The primary issues between the parties relate to housing, parenting arrangements, and the division of family property.

- [2] Before separation, the family resided in a rental apartment. After separation, the Claimant and children remained in the family apartment. The Claimant wants to remain living in the family apartment with the children; the Respondent says he is the one who should be able to live there. They each seek an order for exclusive occupation of the apartment pursuant to s. 90 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [3] The parties agree they will both remain guardians of the children. They do not agree on parenting arrangements, with each seeking the majority of parenting time and the sole ability to exercise some (the Claimant) or all (the Respondent) parental responsibilities. The parties agree on their current respective incomes, making determination of future child support a straightforward calculation under the Federal Child Support Guidelines, SOR/97-175, that will depend on parenting time. I do not need to decide past child support and s. 7 expenses as the parties resolved that issue during the trial.
- [4] The parties provided a Scott schedule, which itemizes the assets the parties say are at issue in this case, to the Court late in the trial. In closing submissions, the parties indicated that they agree to equally divide certain savings accounts and the insurance proceeds received by the Claimant after her vehicle was involved in an accident. They also agreed that the Respondent will be solely responsible for all payments relating to his leased vehicle. The remaining assets in the Scott schedule are funds held in various bank accounts. The parties agree on the value of those accounts but disagree about whether and to what extent they are family property.
- [5] The Claimant says that approximately \$73,000 held in her various accounts is excluded property that ought not be divided as family property. The Respondent says the Claimant has not established her excluded property claim. He seeks unequal division of family property in his favour because he says the Claimant depleted certain accounts post-separation.
- [6] Finally, the parties each seek an order for divorce.
- [7] The above gives rise to the following issues:
- a) Has either party established a right to exclusive occupation of the family's rented apartment?
 - b) What parenting arrangements are in the best interests of the children?
 - c) What, if anything, is excluded from family property pursuant to s. 85 of the FLA?
 - d) Would it be significantly unfair to divide family property equally, and, if so, what is the appropriate order for unequal division pursuant to s. 95 of the FLA?
 - e) Have the parties established the prerequisites to an order for divorce?
- [8] I address each of these issues below. For ease of reference, I include a summary of my orders at the end of these reasons.

- a) Has either party established a right to exclusive occupation of the family's rented apartment?
- [9] Prior to separation, the parties lived in a rented apartment. They are each named tenants under a standard residential tenancy agreement. The tenancy created by that agreement was for a fixed term ending March 31, 2023, after which the tenancy continued on a month-to-month basis.
- [10] The parties both continued to live in the apartment for some time after separation. That arrangement ultimately became unworkable and the Respondent moved out. He initially slept in his car in the apartment parking lot and continued to use the apartment during the day. Eventually, the Respondent moved into a rented room in shared housing. The Claimant remained living in the apartment, together with the children.
- [11] It is apparent from the Respondent's submissions that he sees entitlement to exclusive occupation of the apartment as necessarily following from whatever order I make regarding parenting arrangements. Specifically, he seems to assume that the children will remain living in the apartment and that whichever parent has "primary residence" of them will therefore also have the right to live in the apartment. That assumption wrongly conflates two distinct legal concepts: rights relating to a family residence and parenting arrangements.
- [12] There is no requirement or presumption that children remain in the family residence with one of their parents after separation. Indeed, financial or other reasons frequently make it impossible for either parent to retain the family residence after a marriage breaks down. That very may well be the case for the parties, given their respective financial circumstances.
- [13] The FLA contemplates that spouses--not children--have rights in relation to the family residence. My jurisdiction to make an order for exclusive occupation of the apartment is found in s. 90, which provides that the court may grant a temporary order for exclusive occupation of a family residence "for a specified period of time": FLA, s. 90(2)(a).
- [14] An order under s. 90 is discretionary. The applicant spouse must establish that shared use of the family residence is a practical impossibility, in that it is objectively intolerable or unacceptable, and that they are the preferred occupant on a balance of convenience: *P. v. H.*, 2024 BCSC 1135 at paras. 45-47. The balance of convenience is assessed objectively and requires weighing factors that include any acquiescence or delay, the parties' conduct, the parties' economic position, alternate living accommodations available to the parties, and any other relevant circumstances, such as health: *P. v. H.* at para. 47, citing *Sun v. Cook*, 2007 BCSC 2045 at para. 16.
- [15] The Claimant cites the parties' separation as establishing the first part of the s. 90 test. She also alleges verbal abuse as a relevant consideration. I do not agree that the evidence establishes any verbal abuse between the parties. That said, I have no difficulty finding that

the first part of the s. 90 test is met. There is no dispute that shared use of the family residence is a practical impossibility. The parties have separated and do not wish to live together. This is not a scenario where the parties can each stay in the residence but maintain separate living spaces, something that is sometimes possible in a larger home. The Respondent's attempt to share the family residence after separation required that he sleep in his car and only use the apartment during the day when the Claimant was at work. That arrangement is clearly intolerable and unacceptable.

- [16] Turning to the balance of convenience, the Respondent's submission that he was "ousted" from the family residence does not reflect the evidence. The evidence establishes that the Claimant asked the Respondent to leave and he did so. In any event, the Respondent waited for trial to seek an order for exclusive occupation, something that is, in the usual course, interim, pre-trial relief. These circumstances constitute acquiescence and delay on the part of the Respondent.
- [17] While the evidence is not clear, there is some suggestion that the apartment is rented at below market rates. While neither party is in a good economic position, the Claimant is worse off than the Respondent--her annual income is \$37,200, and his is \$44,614. The Respondent has since secured alternate living accommodation, albeit not something that is suitable for the long term for reasons discussed below. Neither party brought any other potentially relevant factor to my attention.
- [18] Based on the above factors, I find that the balance of convenience favours the Claimant as the preferred occupant of the family residence. However, this finding is of limited utility for the parties, because an order under s. 90 is temporary.
- [19] A temporary order for exclusive occupation does not resolve what I view as the more significant issue between the parties, which is that each of them remains a tenant with joint and several obligations under the tenancy agreement. That situation cannot continue and is not resolved by a s. 90 order for exclusive occupation.
- [20] Neither party identified this issue or addressed how it might be resolved. Neither party sought any orders regarding the tenancy agreement itself. In the circumstances, I do not consider it appropriate for the Court to make any orders regarding the tenancy agreement. Clearly, something must be done. However, it is up to the parties to decide what that is. Regardless of what the parties decide to do, steps must be taken to resolve the tenancy agreement issue without delay. I therefore order that the Claimant shall have exclusive occupation of the apartment for three months following the date of this decision. This will give the parties time to seek legal advice, consider their positions, decide how to proceed, and take steps in that regard.

- [21] I shall be seized of any application in respect of the tenancy agreement, should one become necessary. If the landlord may be affected by the orders being sought, they must be served with the application. That said, I am hopeful that having the benefit of the Court's orders regarding parenting arrangements and division of family property will assist the parties in reaching a cooperative decision about the apartment and that an application will not be necessary.
- b) What parenting arrangements are in the best interests of the children?
- [22] The parties' submissions addressed the issue of parenting arrangements with reference to the FLA. I will therefore do the same.
- [23] As stated above, the parties agree that they shall each be guardians of the children under s. 39(1) of the FLA.
- [24] Turning to parenting arrangements, it is uncontroversial that the sole consideration is the best interests of the children, taking into account all of their needs and circumstances, including the factors prescribed by s. 37 of the FLA.
- [25] There are two elements to parenting arrangements: parenting time and parental responsibilities.
- [26] The parties framed their submissions on parenting time with reference to the children's "primary residence", a phrase not defined in the FLA but frequently used to describe an arrangement in which children live primarily with one parent who has the majority of parenting time. The Respondent seeks an order that the children should reside primarily with him. The Claimant argues that the children should reside primarily with her, at least until the Respondent has suitable housing. Thereafter, she is agreeable to shared parenting time.
- [27] I understand that the Respondent also seeks all parental responsibilities, although he did not address the basis for that proposed order in his submissions. The Claimant proposes that the parties share most parental responsibilities but wants the sole ability to exercise parental responsibilities relating to travel documents and decisions. She also seeks the right to make final decisions in the event of disagreement between the parties.
- [28] I preface my discussion of parenting time and parental responsibilities with a comment about the parties' firmly held views on the superiority of their respective parenting choices, particularly in the areas of discipline, nutrition, and use of electronic devices. In this case, while the parties' parenting styles are very different in some respects, I find that they each fall within the wide range of acceptable parenting styles. Neither is right or wrong.
- [29] I strongly urge the parties to reflect on the following comments of Justice Goepel in *K.D.P. v. A.R.K. aka R.K.*, 2011 BCSC 1085:

- [1] No parents are perfect. All have flaws of one kind or another. If families stay together, except in those rare circumstances in which a child is found to be in need of protection, the state and the courts allow imperfect parents to raise their children as best they can. The children, in most cases, are no worse for wear for the experience.
- [2] If families separate, however, and issues of custody and access arise, in the guise of determining the best interests of the child, a parent's flaws of character and conduct are put under a microscope. In such circumstances, care must be taken not to lose sight of the strengths that a party brings to the challenge of raising a child.
- [30] Fortunately, this is not one of "those rare circumstances in which a child is found to be in need of protection": K.D.P. at para. 1. Unfortunately, each party appears to have lost sight of the strengths of the other. I am hopeful that will change once this litigation is behind them.
- [31] After considering the best interests of the children and all of the evidence, including but not limited to the evidence discussed below, I find that it is in the best interests of the children that the parties equally share parenting time and parental responsibilities.

I. Parenting time

- [32] The Claimant suggests that the Respondent is seeking parenting time simply to avoid paying child support. She says a settlement offer the Respondent made relatively soon after separation shows that he is financially motivated as he was willing to give up his parental rights in exchange for money.
- [33] I find that the offer was based on the parties' understanding of Japanese family law principles, which they describe as quite different from Canadian law. I am therefore not persuaded it is in any way a reliable reflection of the Respondent's views. I cannot reconcile the Claimant's position that the Respondent is motivated only by money with the uncontroverted evidence that the Respondent has been a very involved parent throughout the children's lives--including since separation, to the extent possible given his living situation--and that he has a close, loving relationship with them. I find that his desire to exercise parenting time with the children is more likely motivated by those considerations than by financial reasons.
- [34] Turning to the best interests of the child analysis, the Respondent emphasises that he was the primary caregiver of the children after the family moved to Canada in 2016. When the Respondent returned to paid work outside the home in 2024, he secured employment with flexible hours so that he could continue to care for the children after school. Since separation, he has remained available to the children, despite not living with them and not having a residence that can accommodate them staying with him overnight. He has been and remains an interactive and engaged father. He says that he and the children remain very close. I accept all of this as true. However, I do not agree with the Respondent's submission that these factors mean it is in the children's best interests that he have the majority of parenting time.

- [35] The Respondent says he gave detailed evidence about the many ways he engages with the children, as compared to what he says is a lack of detail from the Claimant in her evidence about what she does with the children. That is not a reasonable or fair critique of the Claimant's evidence, which was quite detailed about those aspects of parenting that she prioritizes. It is clear on the evidence that each party brings different strengths to parenting. It is not surprising that the Respondent was more detailed in describing his perceived strengths and the Claimant was more detailed in describing hers. The Respondent's position ignores the many factors that demonstrate it is in the children's best interests for the Claimant to have parenting time and parental responsibilities.
- [36] The evidence establishes that the Claimant is also an interactive and engaged parent who is close with the children despite historically working long hours outside the home to ensure the family's financial security. Since moving to Canada, the Claimant has always been the primary parent for interactions with the children's teachers and medical care providers because she speaks fluent English and the Respondent does not. The Respondent acknowledged in his testimony that one of the Claimant's strengths is her focus on the children's health and safety. For example, she places more emphasis than the Respondent does on the nutritional value of the children's meals and food choices.
- [37] The Claimant is very critical of the types of food the Respondent provides to the children. I do not consider the Claimant's and the Respondent's respective choices regarding the children's diet to be a relevant consideration in this case. There is no evidence to suggest that the Respondent is feeding the children in a way that has caused them to become malnourished or to otherwise suffer adverse health impacts. There is simply no basis in the evidence for me to conclude that either party's approach to feeding the children is something that should bear on my assessment of the children's best interests. Based on the evidence before me, this is a situation where the parties' choices simply fall at opposite ends of the wide spectrum of what is considered acceptable in parenting.
- [38] I make that same finding regarding the parties' different approaches to the children's use of their electronic devices. The Respondent is more lenient than the Claimant thinks is appropriate, especially since their daughter's cellphone use at school has apparently become problematic. However, there is no evidence on which I can base a finding that the Respondent's approach is detrimental to the children such that it is in their best interests that his parenting time or responsibilities be restricted. Without any objective evidence of harm to the children, this is another example of the parties' respective parenting philosophies simply falling at opposite ends of the spectrum of acceptable parenting choices.

- [39] There is no merit to the Claimant's assertion that there has been parental alienation in this case. Much of the Claimant's submissions regarding alienation are speculative and are not supported by the type of evidence that should be tendered in support of such a serious allegation. Overall, the evidence in this case falls far short of what is required to establish allegations of parental alienation.
- [40] The only evidence before me regarding the children's views is from the Respondent, who says the children have expressed to him their preference to live with him. I do not consider that to be reliable evidence of the children's views. Children often say they want to live with a parent when questioned by that parent about living arrangements. It is manifestly unfair to the children to put them in the position of choosing between their parents. That said, I find the questioning in this case was limited to isolated instances and was not a recurring pattern and that the Respondent now understands it is not a topic not appropriately raised with the children. I therefore do not consider it to be a significant consideration in assessing the children's best interests.
- [41] The parties each described one occasion when their son left home and was missing for several hours after an argument with the Claimant. There is no evidence that this was anything more than an isolated incident. I do not consider it to be evidence relevant to the Claimant's allegation of alienation or to otherwise be relevant to determining the children's best interests.
- [42] There is no evidence to suggest that the children have any needs or issues that would make shared parenting problematic. Apart from the Respondent's current housing situation, which I discuss below, there is no reason to think the parties will have any difficulty exercising parenting time. The Respondent says his job is more flexible and better allows for after-school care for the children; however, there is no evidence that this has been an issue for the Claimant since separation. In any event, the children are old enough that after-school care is or will soon be an irrelevant consideration.
- [43] I am quite troubled by the Claimant's suggestion that the Respondent's poor ability to speak English is a relevant consideration in determining the children's best interests in the circumstances of this case. There is simply no merit to that submission. If the Respondent needs to communicate in English with third parties during his parenting time, any challenges can easily be overcome with the use of readily accessible translation applications. Further, the children are fluently bilingual and are old enough to assist the Respondent in communicating with others while they are with him, should that be necessary.
- [44] Family violence is not an issue in this case. As already stated, to the extent Claimant suggests there has been verbal abuse, I find that allegation is not supported by the evidence. There is no reason to think the parties will not be able to communicate respectfully and cooperatively with each other on parenting matters.

- [45] The Claimant observes that the Respondent does not have suitable housing that can accommodate the children. She emphasises that, since separation, the children have spent relatively little time with the Respondent and have never stayed overnight with him, despite there being a second bedroom where the Respondent lives. I accept the Respondent's evidence that his current residence is in a shared accommodation and that he only rents one bedroom, which he shares with his girlfriend. Given this arrangement, the second bedroom is not available for the children's use. While I accept that the Respondent has not had the children overnight, I find that is due only to his present housing situation. I find that the Respondent has spent as much time with the children as possible in the circumstances, which include the Claimant restricting the Respondent's access to the children.
- [46] The Respondent's evidence is that he can cancel his shared accommodation any time after the six-month rental term, which commenced in March 2025. There is no reason to think the Respondent will be unable to find a new place to live that can accommodate the children overnight. Until then, the children are still able to spend time with him at his shared accommodation, such as after school or during the day on weekends, even though they cannot spend the night.
- [47] Having considered the relevant factors, I find that but for the Respondent's current housing situation, there is nothing in the evidence about the children's needs and circumstances that suggests their interests are best served by anything other than maximizing the time spent with each of their parents. Indeed, the Claimant says that shared parenting time is acceptable if the Respondent has suitable housing. I find it will be in the children's best interests for the parties to equally share parenting time as soon as the Respondent is living somewhere that the children can stay overnight.
- [48] In the current circumstances, I order that the parties share parenting time on a schedule that maximizes each of their parenting time to the extent possible given the Respondent's current housing situation. If the parties cannot agree on a reasonable schedule that achieves that aim, I order that the parenting time schedule will be as follows:
- a) Every second weekend, the Respondent shall have parenting time from 9:00am to 8:00pm on Saturday and from 9:00am to 8:00pm on Sunday.
 - b) Every second week, the Respondent shall have parenting time every weekday from after school to 8:00pm, or from 9:00am to 8:00pm if the children are not attending school on a given day during the Respondent's week.
- [49] Parenting time shall change to a shared 50-50 schedule as soon as the Respondent moves into housing that can accommodate the children overnight. For clarity, I am not imposing any specific requirements on the Respondent's housing other than that it must have space for the children to sleep overnight. The parties should bear in mind that there is a spectrum of acceptable housing arrangements for families and, depending on the circumstances, "acceptable" does not necessarily mean a separate bedroom for each person. If the parties cannot agree on a 50-50 schedule, parenting time shall be on a week-on week-off schedule,

with parenting exchanges to occur on Sundays at 8:00pm.

II. Child support

- [50] As stated above, the parties agree that the Claimant's Guidelines income is \$37,200 and the Respondent's Guidelines income is \$44,614. The parties also agree they will each be responsible for s. 7 expenses proportionate to their respective incomes. Finally, they agree that the Respondent owes retroactive child support and s. 7 expenses in the amount of \$5,251.81. The only remaining issue regarding child support is the amount payable going forward, which is a straightforward calculation under the Guidelines based on the parties' income and parenting time.
- [51] Until the Respondent obtains new housing, the Claimant will presumably have the majority of parenting time (i.e., more than 60%) as it will be impracticable for the Respondent to have parenting time at least 40% of the time if the children never stay with him overnight. As such, the Respondent will be responsible to pay Guidelines child support for the children every month, which is \$704.28 under the updated 2025 Federal Child Support Tables: Guidelines Amending the Federal Child Support Guidelines, SOR/2025-166.
- [52] As soon as the parenting time schedule changes to equal division of parenting time, the Claimant shall pay to the Respondent \$562.60 in child support each month and the Respondent shall pay to the Claimant \$704.28 in child support each month. This will result in a net payment by the Respondent to the Claimant of \$141.68 in monthly child support.
- [53] The parties each seek security for child support. Neither party has persuaded me that such an order is appropriate in this case. The evidence does not establish any concern regarding either party's willingness to comply with orders regarding payment of child support.
- [54] While I accept the Respondent has not voluntarily paid child support on a consistent basis since separation, there is no basis to conclude that he will not comply with a court order in that regard. The Claimant suggests security is appropriate because the Respondent might return to live in Japan, given that his "ties to Canada are minimal" and that "his close family members all reside in Japan". This ignores the fact that the Respondent's children live in Canada. There is no evidence that the Respondent has any plan to move, nor is there any reason to think he would do so while his children are in Canada.

III. Parental responsibilities

- [55] In assessing the parties' positions regarding parental responsibilities, I have considered the evidence reviewed above regarding the best interests of the children.

- [56] The Claimant asks for the sole ability to apply for travel documents and travel with the children without obtaining the Respondent's consent. She does not explain why such an order would be in the best interests of the children. In my view, it is in the children's best interests for each party to be responsible for day-to-day decision-making during their respective parenting time and for the parties to jointly share all other parental responsibilities, including those responsibilities relating to travel.
- [57] I therefore order that, pursuant to s. 42(2) and s. 41(a) of the FLA, each party may exercise the parental responsibility of making day-to-day decisions affecting the children and having day-to-day care, control, and supervision of the children during their parenting time. The parties shall equally share all other parental responsibilities enumerated in s. 41 of the FLA, which must be exercised together or with the consent of the other parent. There is no reason to think that the parties will be unable to reasonably cooperate on such matters. However, I make the following orders to assist in that regard:
- a. Each party must advise the other of any matters of a significant nature affecting the children.
 - b. While each party shall have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party care givers, each party must discuss with the other any significant decisions that have to be made concerning the children, including significant decisions about health (except emergency decisions), education, religious institutions, and general welfare.
 - c. The parties must discuss significant decisions with each other and must try to reach agreement on those decisions.
 - d. The parties must use their best efforts to resolve parenting disagreements.
- [58] While I do not agree with the Claimant's allegation of parental alienation, there is some suggestion in the evidence that the children prefer the Respondent's parenting style. I am concerned that giving the Respondent final decision-making authority will inadvertently reinforce that preference, likely with negative consequences for the parties' co-parenting relationship. For that reason, to the extent the parties cannot resolve disagreements regarding parental responsibilities they are jointly responsible to make, I consider it to be in the children's best interests to give the Claimant final decision-making authority, with leave to the Respondent to apply to court for review of the decision if he considers it appropriate and necessary to do so.
- [59] It bears repeating that the parties must use their best efforts to reach agreement. It is only where they cannot reasonably come to an agreement that the Claimant may make the final decision. I encourage the parties to remain respectful of each other's different approaches to parenting in discussing decision-making for the children. To that end, I order that the parties must at all times:

- a. put the best interests of the children before their own interests;
- b. encourage the children to have a good relationship with the other parent and speak to the children about the other parent in a positive and respectful manner; and
- c. make a real effort to maintain polite, respectful communication with each other, refraining from any negative or hostile criticism, communication, or argument in front of the children.

[60] Also to assist in respectful co-parenting, I order that the parties must not:

- a. question the children about the other parent or time spent with the other parent, beyond simple conversational questions;
 - b. discuss with the children any inappropriate adult, court, or legal matters; or
 - c. blame, criticize, or disparage the other parent to the children.
- c) What, if anything, is excluded from family property pursuant to s. 85 of the FLA?

[61] The Claimant says that she received 10,000,000 Japanese Yen as a cash gift from her father and a further 1,000,000 Yen as a cash gift from her grandfather during a trip she made to Japan in 2022. She did not tell the Respondent about the gifts. She says she brought the Yen home with her to Canada and converted it to Canadian currency. She says she initially stored the money at the apartment before depositing it, over time, to a bank account she opened in her name for that purpose: TD account ending 443 ("TD 443"). The Claimant kept this account secret from the Respondent. Eventually, the Claimant transferred the funds out of TD 443 and into other accounts also held in her name. She claims those funds, to the extent they still exist, as excluded property.

[62] As a preliminary issue, the Respondent observes that the Claimant's excluded property claim is not pleaded and that her disclosure of relevant financial information has been inadequate. He says that there should therefore be an adverse inference drawn against the Claimant and her excluded property claim should be denied. In any event, he says the Claimant has not proved the claim.

[63] A finding of excluded property requires "clear and cogent evidence" and, in the absence of documentary evidence, a party's testimony in support of an excluded property claim must "be scrutinized for credibility": *Shih v. Shih*, 2017 BCCA 37 at para. 43. The standard of proof is on the balance of probabilities; precision and mathematical certainty are not required: *Shih* at para. 40. The court may "draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties": *Shih* at para. 44.

[64] For the reasons set out below, I find that all funds held by the parties in their various individual and joint bank accounts are family property.

I. Alleged cash gift from Claimant's grandfather

- [65] The Respondent first learned of the alleged gift from the Claimant's grandfather at trial. It is not included in the pleadings or mentioned in the Claimant's financial disclosure. The Claimant's explanation for not disclosing the gift before trial is that she did not want her grandfather to give evidence because he is elderly and she was concerned about the impact that giving evidence might have on his health. That choice deprived the Respondent of any opportunity to prepare for and respond to an excluded property claim in respect of the alleged gift. It would be unfair to permit the Claimant to advance that claim in these circumstances.
- [66] In any event, the Claimant has the burden of proving her excluded property claim on a balance of probabilities. The Claimant has not met her burden of proving that her grandfather did in fact make the alleged gift.
- [67] Unlike the gift from the Claimant's father, discussed below, there is no documentary evidence to support the allegation that the grandfather made the gift. He did not testify. Neither the Claimant nor her father testified as to what prompted the alleged gift from the grandfather. Their evidence about that gift was cursory: they simply asserted that the gift was made and provided no further details whatsoever. That alone is not enough to meet the burden of proof. Even taking the liberal approach to this issue described by the Court in *Shih*, there is insufficient evidence for me to draw any reasonable inferences regarding the alleged gift from the Claimant's grandfather.
- [68] For the above reasons, I find the Claimant's excluded property claim is not made out in respect of the alleged gift from her grandfather.

II. Alleged cash gift from Claimant's father

- [69] Turning to the alleged cash gift from the Claimant's father, while it is not pleaded in the Notice of Family Claim, it is included in her Financial Statement. As such, the Respondent had notice of that part of the Claimant's excluded property claim prior to trial. The trial proceeded as though it was a pleaded issue. On balance, fairness in determining property division weighs in favour of deciding whether the alleged gift from the Claimant's father was made and, if so, whether it is excluded property.
- [70] I have no difficulty finding that the Claimant has established, on a balance of probabilities, that she received a significant cash gift from her father in 2022. I accept the evidence of the Claimant and her father that the total gift was 10,000,000 Yen and that it was intended only for the Claimant. Their evidence was much more detailed about the circumstances of and reason for this gift as compared to the alleged gift from the Claimant's grandfather. The Claimant's father explained that approximately 8,000,000 Yen came from an account he had opened in the Claimant's name when she was a child for the purpose of saving money for her. The bank record showing this withdrawal is in evidence before me.

- [71] The Claimant's father testified that he wanted to give the Claimant a "clean number" as a gift, so he added funds from his own account to make the cash gift total 10,000,000 Yen. I accept the Claimant's father's explanation as credible and reliable. While his bank records are not before me, there is photographic evidence that shows the Claimant with 10,000,000 Yen.
- [72] However, proving the original gift of 10,000,000 Yen only gets the Claimant partway to proving her excluded property claim. She must also prove that the gift from her father is the source of the funds she claims as excluded property.
- [73] I accept the Claimant's evidence that she brought the Yen that her father gave her to Canada, converted it to Canadian Dollars at a currency exchange, and initially kept the cash in her apartment. Her testimony in that regard was not challenged by the Respondent. I find the Claimant had a practice of keeping relatively large amounts of cash on hand at home--something that was known to the Respondent, given his evidence about finding the Claimant's cash tip income hidden at home--and not immediately depositing the cash gift into a bank account is consistent with that practice.
- [74] I also accept that the Claimant eventually opened TD 443 in April 2023 for the purpose of depositing at least some of the large amount of cash she was storing at home. Her explanation that she did so after learning from a bank employee that she could open an account without the Respondent knowing about it is reasonable and makes sense in the context of the parties' deteriorating relationship. There is no dispute that starting in April 2023, the Claimant made numerous deposits to TD 443 over the span of 16 months. Over that same time frame, she transferred large amounts of money out of TD 443 into various other accounts also held in her name. The Claimant says that a total of \$73,458.32 in those various other accounts can be traced back to TD 443. She therefore claims that amount as excluded property.
- [75] For the Claimant's excluded property claim to succeed, she must prove that the funds originally deposited to TD 443 came from the cash gift she received from her father. The difficulty for the Claimant is that there are two potential sources of the deposits to TD 443: the cash gift from her father and cash tips she earned as income from her job at a small restaurant where she worked until March 2024.
- [76] The Claimant's position is that all deposits to TD 443 came from her father's cash gift. She makes many assertions in support of that position that have no basis in the evidence, either directly or by inference. The evidence before me clearly establishes that some portion of the deposits to TD 443 must have come from the Claimant's cash tips.
- [77] The Claimant does not dispute that she kept cash tip income hidden from the Respondent at home--she explained that she did not want him to spend her tips. The Claimant's first deposit to TD 443 was in April 2023, nine months after receiving the cash gift from her father. In the intervening period, the only inference available on the evidence is that the Claimant kept both the cash gift and her tip income hidden at home in the apartment. There is no evidence that she made any effort to keep the two categories of hidden cash separate. I

consider it unlikely that the Claimant would have distinguished between the two sources of cash when making deposits to TD 443 in these circumstances. There is no reason to think the Claimant would only deposit cash from the gift when she also wanted to keep her cash tips hidden from the Respondent.

- [78] The Claimant acknowledged in her own evidence that she did not know whether some of the deposits to TD 443 came from the cash gift. Further, I do not consider her testimony that the bulk of deposits came from the cash gift to be credible or reliable. The Claimant did not explain how she could be certain those deposits were only from the cash gift. Her certainty about those specific transactions is at odds with the overall imprecise and general nature of her testimony about most other financial matters. I consider it implausible that the Claimant has a clear and certain memory of certain deposits being from the gifted money but no memory of the source of the other deposits.
- [79] While there is no documentary evidence from the currency exchange to establish the exact amount the Claimant received after converting the Yen from her father to Canadian Dollars, the parties appear to accept the exchange value would have been in the range of \$94,000. The Claimant testified that she spent \$15,000 of the cash gift on household purchases, meaning that it would not have been available to deposit to TD 443. I do not consider her estimate to be reliable, given the lack of documentary evidence (such as receipts) and the absence of any detailed evidence from the Claimant in her testimony. That said, I accept that the Claimant would have spent some of the gift on household expenses.
- [80] Using the Claimant's estimate, \$79,000 of the cash gift from her father would have been available to the Claimant to deposit in TD 443 (\$94,000 minus \$15,000). That figure is a best-case scenario for the Claimant, given the unreliability of her evidence regarding finances. Even the best-case scenario is over \$21,000 less than the total deposits to TD 443. It is therefore impossible that all deposits came from the father's cash gift.
- [81] I find that the only reasonable inference on the evidence is that the deposits to TD 443 consisted of both the father's cash gift (which is excluded property) and the Claimant's tip income (which is family property). I consider this finding consistent with the evidence discussed above and with the pattern of deposits over time.
- [82] Leaving aside any potential complications created by the comingling of the cash gift and the Claimant's tip income, the difficulty for the Claimant's excluded property claim is that it is impossible, for two reasons, to determine the extent to which each source made up the deposits to TD 443 on the evidence before me. First, as I have said, the Claimant's estimate of how much of the cash gift she spent versus how much she deposited to TD 443 is not reliable. Second, there is no reliable evidence before me regarding the amount of tip income earned by the Claimant. In the absence of that information, it is impossible to make any reasonable inference about the extent to which the cash gift and tip income make up the TD 443 deposits.

- [83] The Respondent provided a spreadsheet that he says shows the Claimant's tip income. However, the document is double hearsay (the Respondent received it from the Claimant's former employer's wife) and is not reliable in the absence of evidence about the source of the information. The Respondent's evidence about the amount of alleged tip income he discovered hidden in the apartment is also unhelpful, despite the corroborating photographic evidence, absent any reliable evidence about (1) the time frame over which the discovered cash was compiled and (2) whether the discovered cash represents the entirety of all tip income earned by the Claimant, something I consider unlikely.
- [84] I would have expected the Claimant to be able to give precise evidence about her tip income. However, she testified that she had not made any attempt to calculate her tip income. She explained that she understood from her former employer that she did not need to report the tips as income for tax purposes. She said she did not count the cash tips she kept at home. Overall, I find the Claimant was not forthright in her testimony about her tip income. Her evidence lacked any meaningful detail and the little evidence she did give was not supported by any documentary or third-party evidence. The Claimant's submission that "tipping is not customary" in the restaurant setting she worked in has no basis in the evidence and is directly contradicted by her own evidence. When pressed, she estimated her average daily tip income to be \$20. Absent any corroborating proof, I do not consider that estimate to be reliable.
- [85] Absent any reliable evidence about the Claimant's tip income, it is impossible for me to determine the extent to which the deposits to TD 443 consisted of excluded property (the father's cash gift) and family property (the Claimant's tip income). The state of the evidence does not permit even a rough approximation of those figures. Any determination I make would simply be a guess and, while I accept that "rough justice" is sometimes the best that can be achieved between parties in family law litigation, even rough justice requires something more than a mere guess.
- [86] As I have said, the Claimant has the burden of proving her excluded property claim. I conclude she has failed to do so in respect of funds that can be traced to TD 443. I will further address the implications of my findings regarding the fact and amount of the cash gift from the Claimant's father in my discussion of division of family property below.

III. Other excluded property claims

- [87] The Claimant advances two additional excluded property claims.
- [88] First, she claims an account that she opened before the parties' marriage, TD savings account ending 603 ("TD 603"), as excluded property. The mere fact that an account was opened prior to marriage does not mean the funds in that account are not family property. To prove the funds are excluded property requires evidence about how the account was used during the marriage and the nature of the funds in the account at the time of and after separation, among other things. There is no such evidence in this case. The Claimant has not established that TD 603 is excluded property.

[89] Second, the Claimant says that two Registered Education Savings Plan accounts are excluded from family property because they are solely for the benefit of the children. The Claimant does not cite any authority for that proposition. RESPs are generally treated as family property (Freitas v. Freitas, 2025 BCSC 254 at paras. 13-14) and I can see no reason to depart from that principle in this case. The RESP accounts are family property and shall be divided in the manner set out below.

d) Would it be significantly unfair to divide family property equally, and, if so, what is the appropriate order for unequal division pursuant to s. 95 of the FLA?

[90] Given my findings regarding the Claimant's excluded property claims, the family property subject to division consists of funds presently held in the following accounts:[1]

Balance at separation (\$)

Balance at trial (\$)

Held in Claimant's name

TD account ending 901

n/a

6,881.25

TD savings account ending 603

10.77

12.77

TD savings account ending 443

4,252.15

21.12

TD TFSA ending 208

9,042.78

2,502.04

TD TSFA ending 014

16,440.43

16,475.48

TD TFSA ending 358

20,062.47

19,826.30

TD TSFA term deposit ending 004

6,739.80

6,752.73

TD TSFA term deposit ending 005

2,923.49

2,932.29

TD TFSA ending 903

20,376.05

20,905.75

TD TFSA ending 904

20,278.54

20,669.00

TD Mutual Fund TTSP ending 457

9,725.59

9,931.88

TD TFSA ending 722

28,041.38

0 (account closed)

TD account ending 528

17,676.09

0 (account closed)

Held in Respondent's name

TD account ending 434

Undisclosed

2,709.02

BMO account ending 214

773.40

354.08

TD TFSA ending 477

Undisclosed

.39

TD TFSA ending 870

7,409.58

.01

Fidelity TFSA ending 083

10,681.22

2,419.33

Held jointly

RESP account ending 403

24,590.54

25,020.74

RESP account ending 719

13,468.06

14,687.68

TOTAL

212,492.34

152,101.86

[91] The above figures are taken from the parties' Scott schedule, with one exception. On the date of separation, there is a withdrawal of \$3,800 in cash from TD 443 (that same amount was deposited to TD 443 two weeks later). The Scott schedule uses the post-withdrawal balance for this account's separation date value. In my view, the pre-withdrawal account balance should be used when assessing the value of family property as of the date of separation, that is, the value of the account at the start of the day. I have adjusted the balance for that account in the above table accordingly.

- [92] Overall, there has been a notable decrease in the value of family property since separation. The presumptive valuation date for family property is the date of trial: FLA, s. 87. Neither party argued for a departure from this presumption. The Respondent instead addresses the decrease in value of family property in his argument on unequal division, discussed below. I will therefore use the presumptive valuation date for the purpose of assessing division of property.
- [93] The parties agree that several of the Claimant's accounts should be divided equally: TD TSFA ending 014 ("TD 014"), TD TSFA term deposit ending 004 ("TD 004"), and TD TFSA term deposit ending 005 ("TD 005"). They also agree to equally divide \$10,160.21 in car insurance proceeds received by the Claimant. There is no evidence about those proceeds, but I consider it reasonable to conclude they were deposited into one of the Claimant's accounts.
- [94] Other than the above items, the Respondent says that I should depart from the presumption of equal division of family property because it results in significant unfairness in this case: FLA, s. 95(1). To determine if it would be significantly unfair to divide family property equally, I must notionally divide family property in accordance with the FLA and then determine whether equal division is significantly unfair: *Remmem v. Remmem*, 2014 BCSC 1552 at para. 47. An equal division of the value of family property in this case results in each party effectively receiving \$76,050.93 (\$152,101.86 divided by two). The question, therefore, is whether it is significantly unfair for each party to receive \$76,050.93.
- [95] The Respondent cites the post-separation decrease in two of the Claimant's accounts, TD TFSA ending 722 ("TD 722") and TD account ending 528 ("TD 528"), which together held \$45,717.47 at the date of separation and are now closed, in support of his position that equal division is significantly unfair. Section 95(2) of the FLA provides that the court may consider a significant decrease in the value of family property which is beyond market trends (s. 95(2)(f)) or caused by a spouse not acting in good faith (s. 95(2)(g)) in assessing a claim for unequal division of family property. The Respondent emphasises these considerations and says there is no evidence that could establish that the decrease in value of family property is due to market trends or the Claimant acting in good faith, such as needing the funds for a family purpose. He asks that I adjust property division so that he is not prejudiced by the Claimant's unilateral depletion of these accounts prior to trial.
- [96] I agree there is no evidence to establish that the decrease in TD 722 and TD 528 was for a family purpose. There is no evidence about what happened to the funds withdrawn from those accounts. There is also no basis to conclude the decrease is due to market trends. That said, the depletion of those two accounts is not something that should be considered in isolation. It is appropriate to weigh all relevant s. 95(2) considerations in assessing whether the Court should exercise its discretion under s. 95(1), including "any other factor that may lead to significant unfairness": FLA, s. 95(2)(i).

- [97] One difficulty with the Respondent's position is that there is also a notable unexplained post-separation decrease in two of his accounts (TD TFSA ending 870 and Fidelity TFSA ending 083), totalling \$15,671.46. As with the Claimant's accounts, there is no basis to conclude this decrease is due to market trends or was for a family purpose. I also observe that there is no evidence of the value of two of the Respondent's accounts at separation (TD account ending 434 and TD TFSA ending 477), which makes it impossible to determine whether there has been any post-separation decrease in the value of those accounts. These circumstances weigh against the Respondent's argument that equal division is significantly unfair because of post-separation decreases in the Claimant's accounts.
- [98] The Claimant says the financial burden of caring for the children since separation is a factor relevant to the analysis. I acknowledge that the Claimant's sworn F8 statement itemizes her monthly expenses, which exceed her income. However, I have some doubt as to the reliability of the Claimant's evidence about finances, for reasons as already stated. In any event, while there is no dispute that Claimant has been the primary parent responsible for caring for the children since separation and there is obviously cost associated with that, those costs are notionally addressed through the Claimant's retroactive child support claim, which the parties resolved at trial. I also observe that the Respondent did pay some child support indirectly before trial, by way of money the Claimant withdrew from the parties' joint account after separation.
- [99] I am not persuaded that the above considerations would make equal division of family property significantly unfair, which is the standard required under s.95(1). However, I do consider the gift from the Claimant's father to be a relevant and significant consideration to the s.95(1) analysis.
- [100] The Respondent does not seriously contest, and I find there is no question, that the gift from the Claimant's father was the source of at least some of the funds in the Claimant's accounts. In my view, this factor supports a finding that equal division of family property would be significantly unfair to the Claimant, even after taking into consideration amounts withdrawn by the Claimant after separation--withdrawals that are, in any event, offset to some degree by the Respondent's post-separation withdrawals from his own accounts.
- [101] The difficulty is determining how to divide family property in a way that will address this significant unfairness. The exercise necessarily involves a rough justice approach, given the state of the evidence.
- [102] In my view, the fairest remedy the significant unfairness to the Claimant is a 65/35 division of family property in favour of the Claimant, but only after first accounting for an equal division of funds agreed-to by the parties plus the RESP accounts.

[103] The value of family property that the parties agree to divide equally is \$36,320.71[2]. The value of the remaining family property after subtracting both that amount and the value of the RESP accounts[3] is \$76,072.73[4]. Of this, the Claimant shall receive \$49,447.27 (65% of \$76,072.73) and the Respondent shall receive \$26,625.46 (35% of 76,072.73). I consider this to be a reasonable division that remedies the significant unfairness to the Claimant that would arise from equal division of family property.

[104] In the result, the parties shall divide family property as follows:

- a) The two RESP accounts shall be divided equally between the parties, with each half to be separately managed by the parties for the benefit of the children.
- b) By consent, the parties shall divide \$36,320.71 of the family property equally.
- c) Of the family property that remains after subtracting the amounts specified under subparagraphs (a) and (b), the Claimant shall receive 65% and the Respondent shall receive 35%.
- e) Have the parties established the prerequisites to an order for divorce?

[105] Each party seeks a divorce.

[106] As of the date of trial, the parties had not yet lived separate and apart for at least one year. As such, they cannot establish breakdown of the marriage under s. 8(2)(a) of the Divorce Act, R.S.C. 1985, c. 3. However, the Respondent, who commenced a counterclaim in this proceeding, seeks an order for divorce on the ground of adultery, pursuant to s. 8(2)(b)(i) of the Divorce Act. The Claimant confirmed in her evidence that she committed adultery since celebration of the parties' marriage. As such, I am satisfied that the evidence establishes a breakdown of their marriage within the meaning of s. 8(1) of the Divorce Act.

[107] The evidence establishes there is no possibility of reconciliation. I am satisfied that the prerequisites to granting a divorce as set out in s. 11(1) of the Divorce Act are met. I therefore order that the Claimant and the Respondent are divorced, the divorce to take effect on the 31st day after the date of this order.

Costs and summary of orders

[108] The parties each seek costs. I am not persuaded that this is an appropriate case to order costs to one party.

[109] The parties had divided success--each raised issues and took positions at trial that were not resolved in their favour. While the Respondent identified some concerns with the Claimant's financial disclosure, the same can be said of the Respondent's disclosure. This is not a scenario where the parties failed to comply with pre-trial disclosure requests or orders. Rather, it is apparent that the parties prioritized an early trial date over pursuing the various means of discovery available to them. In the circumstances, I consider it appropriate that each party bear their own costs.

[110] In summary, I make the following orders:

1. Pursuant to s. 90(2) of the FLA, the Claimant shall have exclusive occupation of the family residence for three months following the date of this decision.
2. I am seized of any application in respect of the tenancy agreement for the family residence, which must be served on the landlord if they may be affected by the orders sought.
3. By consent, the Claimant and the Respondent shall be the guardians of the children under s. 39(1) of the FLA.
4. On an interim basis until the Respondent secures suitable housing, the parties shall share parenting time on a mutually agreed-to schedule that maximizes each of their parenting time. If the parties cannot agree on a schedule, the parenting time schedule will be as follows:
 - a. Every second weekend, the Respondent shall have parenting time from 9:00am to 8:00pm on Saturday and from 9:00am to 8:00pm on Sunday.
 - b. Every second week, the Respondent shall have parenting time every weekday from after school to 8:00pm or from 9:00am to 8:00pm if the children are not attending school on a given day during the Respondent's week.
5. Parenting time shall change to a shared 50-50 schedule as soon as the Respondent moves into housing that can accommodate the children overnight. If the parties cannot agree on a schedule, parenting time shall be on a week-on week-off schedule, with parenting exchanges to occur on Sundays at 8:00pm.
6. By consent, the Claimant's Guidelines income is \$37,200 and the Respondent's Guidelines income is \$44,614.
7. By consent, the parties shall each pay s. 7 expenses proportionate to their respective incomes.
8. By consent, the Respondent shall pay to the Claimant \$5,251.81 as the total outstanding retroactive child support and s. 7 expenses.
9. Until the parties share parenting time equally, the Respondent shall pay monthly child support to the Claimant in the amount of \$704.28.
10. Upon the parties equally sharing parenting time, the Claimant shall pay to the Respondent \$562.60 in child support each month and the Respondent shall pay to the Claimant \$704.28 in child support each month. For clarity, this will result in a net payment by the Respondent to the Claimant of \$141.68 in monthly child support.

11. Pursuant to s. 42(2) and s. 41(a) of the FLA, each party may exercise the parental responsibility of making day-to-day decisions affecting the children and having day-to-day care, control, and supervision of the children during their respective parenting time. The parties shall equally share all other parental responsibilities enumerated in s. 41 of the FLA, which must be exercised together or with the consent of the other parent as follows:
 - a. Each party must advise the other of any matters of a significant nature affecting the children.
 - b. While each party shall have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party care givers, each party must discuss with the other any significant decisions that have to be made concerning the children, including significant decisions about health (except emergency decisions), education, religious institutions, and general welfare.
 - c. The parties must discuss significant decisions with each other and must try to reach agreement on those decisions.
 - d. The parties must use their best efforts to resolve parenting disagreements.
12. If the parties cannot resolve parenting disagreements, the Claimant shall have final decision-making authority, with leave to the Respondent to apply to the court for review of the decision if he considers it appropriate and necessary to do so.
13. The parties must at all times:
 - a. put the best interests of the children before their own interests;
 - b. encourage the children to have a good relationship with the other parent and speak to the children about the other parent in a positive and respectful manner; and
 - c. make a real effort to maintain polite, respectful communication with each other, refraining from any negative or hostile criticism, communication, or argument in front of the children.
14. The parties must not:
 - a. question the children about the other parent or time spent with the other parent, beyond simple conversational questions;
 - b. discuss with the children any inappropriate adult, court, or legal matters; or
 - c. blame, criticize, or disparage the other parent to the children.
15. All funds held by the parties in their various individual and joint bank accounts are family property.
16. The parties shall divide family property as follows:

- a. The two RESP accounts shall be divided equally between the parties, with each half to be separately managed by the parties for the benefit of the children.
 - b. By consent, the parties shall divide \$36,320.71 of the family property equally.
 - c. Of the family property that remains after subtracting the amounts specified under subparagraphs (a) and (b), the Claimant shall receive 65% and the Respondent shall receive 35%.
17. The Claimant and the Respondent are divorced, the divorce to take effect on the 31st day after the date of this order.
 18. The parties shall bear their own costs.
- [111] I am seized of any applications in this matter for two years from the date of these reasons. After the expiry of two years, the parties may request to appear before me, but I will no longer be seized.

"Ramsay J."

- [1] This list consists of all items listed in the parties' Scott schedule, with the exception of those items that are stated to have no value at the date of separation and the date of trial as there is nothing to divide (TD TFSA ending 367 and life insurance policies held in the name of each party).
- [2] Consisting of TD 014, TD 004, TD 005, and \$10,160.21 in car insurance proceeds.
- [3] Together, \$39,708.42.
- [4] \$152,101.86 minus \$76,029.13 (\$36,320.71 plus \$39,708.42).

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