
CANADA / JUDGMENT

M.Y.T.C. v. L.H.N.

2020 BCSC 414

COURT

Supreme Court of British Columbia

DECIDED

19 March 2020

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2020 BCSC 414 M.Y.T.C. v. L.H.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.Y.T.C. v. L.H.N.,

2020 BCSC 414

Date: 20200319

Docket: E172700

Registry: Vancouver

Between:

M.Y.T.C.

Claimant

And

L.H.N.

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Claimant:

P. Paul

Counsel for the Respondent:

R. Khunkhun (February 4-7, 11-14, 2019)

P. Mann (February 4, 14, 2019)

S. Brar, Articled Student (February 6-7, 11-14, 2019)

The Respondent, appearing in person:

L.H.N. (June 17-21, July 2-5, September 9, 2019, January 6-10, and 13-17, 2020)

Place and Dates of Trial:

Vancouver, B.C.

February 4-7, 11-14, June 17-21, July 2-5, September 9, 2019, January 6-10, and 13-17, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 19, 2020

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I. Introduction

- [1] The claimant, M.Y.T.C., was married to the respondent, L.H.N., for over 19 years. They have one son, R.N., now almost 17. The parties separated in the late summer of 2017 and have been embroiled in a highly acrimonious matrimonial dispute since then.
- [2] Both parties accuse the other of malicious and deceitful behaviour of various kinds. They both believe that they have been abused and victimized by the other, both during and after the marriage, to the point that their physical and mental health have suffered. Neither of them has been able to carry on working as before.
- [3] M.Y.T.C., now in her late forties, had, until recently, been teaching science part-time at a community college, but is currently away on a temporary leave of absence. She continues to teach piano part-time, but on a reduced schedule. L.H.N., now in his early fifties, was, until recently, a successful dentist but has since sold his practice and is no longer working at all. Each urges the Court to reject the other's assertion of disability and to impute additional income to the other.
- [4] To make matters worse, M.Y.T.C. has had no contact with her only son, R.N., since the parties separated. She blames L.H.N. for having alienated R.N. from her. To remedy the situation, M.Y.T.C. seeks an order to compel L.H.N. to cause R.N. to see her again and to participate in counselling aimed at restoring their severed relationship. L.H.N. responds that R.N., of his own accord, ran away from M.Y.T.C. and cut off all ties with her when he became aware of her "pathological control tactics." L.H.N. argues that R.N., who is now almost an adult, has good reason to remain estranged from M.Y.T.C. and cannot be forced to renew contact with her against his will.

- [5] M.Y.T.C. also alleges that when the parties separated, L.H.N. took and hid over half a million dollars of family funds and has since refused to comply with a series of court orders requiring him to return those funds or disclose where they are. She seeks an equal division of the family assets and debts, subject to certain exclusions in her favour, and an award of spousal support. That award must be credited to her as a lump sum through the division of the family assets because, she says, L.H.N. cannot be trusted to abide by court orders, as evidenced by his having been found in contempt of court several times already in this proceeding.
- [6] L.H.N. alleges that the parties kept their finances separate during the marriage and that M.Y.T.C. never shared her hidden personal wealth with him. Instead, he says, she regularly taunted him for not earning enough as a dentist, while forcing him to drain the profits from his dentistry business in order to pay for unnecessary luxuries. Among those, he says, was the opulent home in Vancouver where the family resided for the last seven years of the marriage. L.H.N. says that M.Y.T.C. insisted on purchasing the home because it had room for a private studio for her piano tutoring business, but then left him to carry the cost of the larger mortgage alone. In addition, he says that M.Y.T.C. insisted, for her own selfish reasons, on keeping R.N. enrolled in a prestigious private school, despite the fact that R.N. was unhappy there, while leaving him to pay the tuition fees alone.
- [7] L.H.N. alleges further that when the parties separated, M.Y.T.C. improperly locked R.N. and him out of the family home and then denied them access to their personal belongings, while she, unbeknownst to them or the Court, resided elsewhere and rented out the home to strangers for her own profit. He also alleges that M.Y.T.C. and her counsel improperly obtained a series of orders from this Court that kept R.N. and him out of their home until it was sold, froze his bank accounts and other assets leaving him unable to support himself or comply with court orders, and needlessly forced a sale of the family home at a low point in the market.
- [8] On those grounds, L.H.N. seeks child support, spousal support and an unequal division of the net family assets in his favour. He also says that M.Y.T.C. and her counsel have abused the process of the Court and seeks, among other things, to have her claims struck on that basis.
- [9] The parties agree that they should be ordered divorced. In addition, M.Y.T.C. acknowledges her obligation to pay child support, both prospectively and retroactively from the separation date. They disagree on just about everything else, however.

II. The Background Facts

A. The Early Years

- [10] L.H.N. grew up in Burnaby and later in Vancouver. He has two brothers. His mother still lives in Vancouver.

- [11] After completing high school in Vancouver, L.H.N. studied dentistry at the University of British Columbia. He acquired his license to practise in 1993.
- [12] That same year, he purchased his first dental practice at 2150 West Broadway in Vancouver. His memory of the details of the purchase is hazy. He produced no contemporaneous documents pertaining to it. He recalled that the practice came with an office space of approximately 1200-1300 square feet and 800-900 patients. He also remembers borrowing money both from his parents and a bank to make the purchase, although he was unsure of the precise amount of either loan. He testified at trial that he paid between \$300,000 and \$350,000 for the practice but on his examination for discovery, he testified that the purchase price was between \$350,000 and \$400,000.
- [13] In 1995, L.H.N. purchased a second practice at 750 West Broadway and decided to amalgamate both practices at the new location. He recalls that the second practice came with a smaller office but more patients than the first one. He could not say how much he paid for this second practice, except that he thought it was less than the first one. He was unable to explain how he paid for it, except that he thought that he financed the purchase with more loans from his parents and a bank. When asked at trial about the number of patients he acquired in 1995, he could not remember. On the eve of trial, however, he told a professional valuator whom he had retained to provide an historical valuation opinion, that there were approximately 1200 patients in the combined practice as of the date of marriage in August 1998. One month after that, in a subsequent email to the same valuator, he increased his estimate of the number of patients he had in August 1998 to 1500-1700.
- [14] Later, in 2005, L.H.N. purchased a third practice, this one at 805 West Broadway, but this time with few or no new patients added. He moved into that location and continued to carry on his practice from there until he sold the shares of his professional corporation in 2019, while the trial of this action was underway.
- [15] M.Y.T.C. was born in Taiwan and moved with her family to California when she was 11. When she was 15, the family moved from there to Vancouver. Her parents lived partly in Vancouver and partly in Taiwan after that. Her father passed away while the trial was underway. Her mother owns two houses in Vancouver, one of which is rented out, the other only partly so. M.Y.T.C. has a sister who lives with her own family in Wilsonville, Oregon.
- [16] After arriving in Vancouver, M.Y.T.C. went to Sir Winston Churchill Secondary School and then to the University of British Columbia, where she obtained a bachelor's degree in chemistry (in 1993) and then a master's degree in chemical engineering (in 1998). While she was writing her master's thesis, she also worked part time at an engineering firm. She was planning to return to Taiwan for work, but she opted not to go at the last minute because, she says, in 1996, she had met L.H.N. and he did not want her to travel. They were engaged the following year.

B. The Married Years

- [17] The parties were married on August 15, 1998.
- [18] After the wedding, M.Y.T.C. moved from her parents' home into L.H.N.'s condominium on Hamilton Street in Vancouver. L.H.N. had, he says, placed a deposit on the condominium two years earlier but only moved in when the building was completed just weeks before the wedding. He had financed the purchase with a mortgage advanced on May 29, 1998 in the amount of \$103,000.
- [19] M.Y.T.C. says that early on in their relationship, L.H.N. encouraged her to quit her engineering job and find other work that would allow her to remain at home and raise children, which she did. She had earned a diploma that qualified her to teach piano, so she shifted her career in that direction and has been tutoring piano ever since. She also began working at Vancouver Community College ("VCC") as a part-time science teacher in 1999. In 2007, she was able to secure a regular half-time teaching position at VCC and remained in that position until she took a temporary leave of absence in the wake of the parties' separation.
- [20] It is not disputed that the parties maintained separate finances during the marriage. They appear, moreover, to have preferred to keep one another in the dark about what they were doing with their own funds. M.Y.T.C. testified that the parties had an agreement that L.H.N. would pay the family's day-to-day expenses while she saved and invested her own funds (derived from her teaching salary, investments and gifts from her parents) for the benefit of the family. L.H.N. has a different memory of their agreement. He believed that the parties had agreed to share regular expenses rateably, but that M.Y.T.C. never complied with it. The evidence does not support the existence of any clear agreement between them as to their respective financial responsibilities during the marriage, beyond keeping their finances separate.
- [21] On April 26, 2001, the parties purchased their first home together on Tisdall Street in Vancouver for \$515,000. They financed the purchase with a mortgage of \$325,000. M.Y.T.C.'s father contributed \$100,000 toward the purchase price - her sister had received a similar gift toward the purchase of her first home in Oregon. L.H.N. contributed the remainder of the balance of \$74,924.50 owing after adjustments. On August 27, 2001, four months later, he sold the Hamilton Street condominium for \$149,000, which would have freed up enough equity to cover the better part of his contribution to the Tisdall purchase, but it is unclear whether those funds were in fact applied in that way. L.H.N. testified that they probably were but M.Y.T.C. testified that she did not think so, given the sequence of events.
- [22] R.N. was born in April 2003. He appears to have done well in his early years at school and skipped a grade. When he entered Grade 2, the parties enrolled him at St. George's School, a prestigious private school in the area. M.Y.T.C. testified that this was a mutual decision. L.H.N. says that he was persuaded to agree to send R.N. there against his better judgment and under false pretenses. He later came to believe that M.Y.T.C. had insisted on keeping R.N. at that school only because it gave her access to a wealthy social circle with an

abundant source of potential piano students, and not because it was in R.N.'s best interests. He says that M.Y.T.C. promised to contribute eventually to the cost of tuition, and even to repay him for his earlier outlays, but then never did. In any event, it fell to L.H.N. exclusively to pay the tuition (approximately \$25,000 per year by the time the parties separated) and he became increasingly resentful about having to bear that financial burden alone.

- [23] The issue became even more contentious in the wake of an incident that occurred in Grade 8, when R.N. was involved in an altercation with other boys at the school. L.H.N. believed that R.N. had been bullied and that the school had not handled the situation properly. M.Y.T.C. believed that L.H.N. overreacted. According to her, L.H.N. later used the incident as an excuse to remove R.N. from St. George's School and enrol him in Churchill Secondary, in order to avoid the higher tuition fees and reduce her level of influence over R.N. It is apparent that by the time of the parties' separation, both parents were attempting to convince R.N. to side with them in their escalating tug of war over his schooling and many other issues.
- [24] Another source of tension between the parties arose from their 2010 move from their first house on Tisdall Street, which they sold that year for \$1,328,000, to a larger house on Lime Street, for which they paid just over \$2 million. Once again, the parties disagree about whose decision it was. The house on Tisdall Street had an open plan. M.Y.T.C. often had piano students in the home during the evening hours and this led L.H.N. and R.N. to go elsewhere to have dinner, leaving M.Y.T.C. to have dinner alone. She wanted to find a new home with a better floor plan so that she could teach her students privately, without discouraging the rest of the family from eating dinner at home. She testified that she had preferred a different house that was listed at \$300,000 less than the Lime Street property, but L.H.N. convinced her that they could afford the more expensive one.
- [25] After the purchase, M.Y.T.C. became concerned about the higher mortgage debt and so, she says, she later applied her earnings and gifts from her parents to make lump sum payments against the principal amount owing. M.Y.T.C. is able to trace \$250,000 of those payments. Of that amount, she says \$200,000 was a gift to her from her parents and, as such, excluded property. She also took on the obligation to pay the property tax and other miscellaneous household expenses, such as the cost of R.N.'s summer camp and occasional maintenance projects (including painting, power-washing and housekeeping). In addition, she says, in 2008 her parents gave her \$10,000 towards a family membership at the Arbutus club and she paid the monthly membership dues thereafter.
- [26] L.H.N. testified that it was M.Y.T.C. alone who wanted to purchase the larger house on Lime Street for her piano business. According to him, she convinced him to agree to the move by promising to help with the higher mortgage payments, but then never did so. Although he acknowledges that M.Y.T.C. made occasional lump sum payments against the principal, he disputes that they had the effect of reducing his monthly mortgage payments. Instead, he attributes their reduction from around \$4,000, when they first acquired the Lime Street property, to \$2,166 at the time of the separation, to a drop in interest rates. Given the relative

stability of interest rates during that period, however, the reduction must have been attributable primarily to M.Y.T.C.'s lump sum payments.

- [27] Yet another source of tension arose as a result of a series of investment transactions that M.Y.T.C. carried out in the fall of 2015. In September 2015, apparently without consulting with L.H.N., M.Y.T.C. acquired an investment property in Wilsonville, Oregon, near another property owned by her sister. The purchase price was US \$389,900. She was surprised to learn after committing to the purchase that she could not qualify for an American mortgage and that she therefore had to finance the purchase by herself. To do so, she withdrew approximately half of the amount needed from her own investment accounts and borrowed the other half from her sister and brother-in-law. She also received more gifts from her parents for that purpose. In order to generate tax deductible interest payments to set off against the anticipated rental income, she sought and obtained L.H.N.'s permission to withdraw \$300,000 from the line of credit charging the Lime Street property and used those funds to repay herself and her sister's family. In return, she assured L.H.N. that the line of credit would be repaid within two years and that, in the meantime, she would assume responsibility for the debt herself. She also told him that he too was free to borrow on the line of credit as needed and that she would pay off the \$300,000 immediately if he ever needed that money for himself.
- [28] M.Y.T.C. did not pay off the debt within two years as she had promised. Instead, in January 2017, the parties agreed to convert the \$300,000 debt into a new second mortgage, so as to lock into a lower interest rate. Initially, M.Y.T.C. continued to assume responsibility for the second mortgage herself. Later that year, however, both parties began using the line of credit to pay household expenses, including both mortgages, rather than draw on their own separate funds for that purpose.

C. The Separation

- [29] As their relationship deteriorated, the prospect of a divorce appears to have begun coming up regularly in their arguments.
- [30] By the summer of 2017, L.H.N. was feeling "burnt out" and increasingly angry about the various sources of tension in the marriage. He had already begun reducing his work hours by hiring additional staff, including another dentist. By early August, L.H.N. was asking M.Y.T.C. to agree to sell the Lime Street property. She refused, at least initially.
- [31] The parties' arguments grew increasingly heated as the marriage unravelled. M.Y.T.C. recorded snippets of some of these with her cell phone. She adduced recordings made on June 19, 2011, February 22, 2015 and September 5 and 6, 2017. They appear to have been selected partly for the admissions they contain, but primarily to demonstrate L.H.N.'s fits of rage when he lost his temper, in each case with R.N. present. At trial, L.H.N. argued that the recordings distort more than they reveal, insofar as they depict a snapshot in time after he was provoked, ambushed and recorded. I agree that their evidentiary value is limited because of their selectiveness. In fact, they do not portray either party in a particularly

flattering light. In each episode, R.N. is clearly caught in the middle as they compete with each other for his sympathy and support.

[32] A more revealing piece of evidence is a private document that L.H.N. typed for himself in the late spring or early summer of 2017, in which he considers the implications of an anticipated separation and divorce. The document is divided into two parts. It begins with a list of what are described as the "problems I face," but the enumerated items read more like a litany of complaints about M.Y.T.C. and the marriage. They can be summarised as follows:

- (a) M.Y.T.C. had "tricked" or "forced" him into purchasing a luxury house and paying exorbitant private-school tuition fees with the false promise that the payments would be temporary because she would soon replace those funds herself;
- (b) he has been unable to grow his dental business because "virtually all my income stream" is committed to the mortgage payments and tuition fees;
- (c) M.Y.T.C. regularly insults him by complaining to R.N., their friends and his colleagues that "dentists don't make that much" and that L.H.N. is a "scoundrel" who lives off her and her parents;
- (d) as a result of her behaviour, he has been "left in financial ruin" and in poor health; and
- (e) M.Y.T.C. improperly used the line of credit to fund the purchase of the Wilsonville property, without his authorization.

[33] The second part of the document poses the following questions (quoted here verbatim and in their entirety):

- (a) Should I use the home LOC to take back my tuition \$ for the last 10 years that I am owed?
- (b) Should I use the home LOC to take back my disproportionate payment for mortgage for the last 7 years that I am owed?
- (c) If I have funds which I withdrew from my company to make RRSP contributions to reduce the yearly taxes as a result of having to make those luxury expenditures (tuition, mortgage), should I take them out of the RRSP and repatriate the funds back to my company? Put another way, I expected her to give my tuition and mortgage payments back to me but in the meantime since I had to pull the tuition and mortgage payments out of my company, some years I had to use my company funds to also purchase RRSP's to reduce my taxes (further draining my company funds); I had no intention of using those RRSP's as retirement amounts but funds that are rightfully owed to my company (for expansion/growth needs) that I tool out 'temporarily' to reduce the taxes on the tuition/mortgage payments that she promised where [sic] temporary. (don't know the amts and times I did this but will have to check)
- (d) What is the likelihood RRSP's in [c] are considered a family asset?

- (e) What is likelihood my dental business is considered a family asset? (purchased prior to marriage, excluded ppty?)
 - (f) What is the likelihood there would be spousal support in this case (we had completely separate finances)? What if I didn't/couldn't work now bec of my health (stress et.)? what if I sold bec of health?
 - (g) What is the likelihood there would be child support in this case?
 - (h) Would custody be 50/50 given the details above? Does morals of one parent that deviates from Canadian societal norms and which negatively impacts a child play a role in disentitling/reducing custody rights? Has this issue been decided by the courts, if not is this a perfect test case bec our morals are polar opposites (hard/good work ethics vs. money-centric world view)?
 - (i) I want to sell the house now while the market is still hot so we can split it and still be in an advantageous position for both of us. Is there a way to quickly compel the sale now?
 - (j) Is there steps [sic] to take to stop her from using the LOC to charge more things? (Of course I don't want to stop my potential use of the LOC for questions [a] and [b]).
 - (k) If I found a good condo, is it advisable to just buy it with the LOC now?
- [34] Over the following weeks, L.H.N. appears to have satisfied himself that the correct answer to questions (a), (b), (c) and (j) was "yes", because he took several of those steps or others like them. In June 2017, he stopped paying the household expenses, including the first mortgage, even though he had access to well over \$100,000 in retained earnings in his professional corporation at the time. On June 12, 2017, he sent an email to Al Heaps & Associates ("AHA"), a consulting firm specializing in the purchase and sale of dental practices, to find out if they had "any listings in the West Broadway Corridor" - this presumably to get a sense of what his practice might be worth if he were to try and sell it. In July 2017, he reduced his work hours further to three hours per day. On July 25, 2017, he withdrew the first \$20,000 tranche from his RRSP.
- [35] That process was accelerated when, in early August 2017, M.Y.T.C., animated by her own unfounded suspicions about an extra-marital affair, was looking through L.H.N.'s briefcase where she found, read and photographed the document described above. She confronted him on August 5, 2017 and the parties had another heated argument.
- [36] M.Y.T.C. evidently considered her worst suspicions confirmed by the document. She shared her beliefs in that regard (and the document itself) with friends, M.Y.T.C.'s dental office staff and even R.N.

- [37] On August 8, 2017, M.Y.T.C. transferred \$10,000 from the line of credit into her personal account in order to pay the household expenses that L.H.N. had stopped paying. She transferred another \$4,500 on August 30, 2017 for the same purpose. She effected those transfers while holding the following amounts in her various savings and investment accounts:
- (a) \$180,012.74 (HSBC);
 - (b) \$33,330.82 (TD);
 - (c) US \$91,394.58 (Bank of America); and
 - (d) \$54,698.94 (Scotia).
- [38] On August 10, 2017, L.H.N. retained a divorce lawyer. That same day, he cashed out a GIC held by his dental corporation in the amount of \$111,445 and took almost all of the proceeds in cash bills. Between September 8 and 11, 2017, he withdrew the balance of \$279,656 remaining in his RRSP. On September 17, 2017, he engaged a notary to sever the parties' joint tenancy on the Lime Street property. On the following day, September 18, 2017, he withdrew \$500,000 in cash from the line of credit. He wire-transferred \$449,800 of that amount to his mother and bought a bank draft for \$50,000 which he deposited into his bank account. He said he intentionally left the remaining \$46,000 on the line to cover transition expenses pertaining to the anticipated sale of the house. On September 20, 2017, M.Y.T.C., in response, withdrew the entire remaining balance leaving it fully drawn. That same day, L.H.N. instructed AHA to sell his dental practice.
- [39] M.Y.T.C. says that after their argument on August 5, 2017, the parties ceased sharing a bedroom and that L.H.N. resided primarily at his mother's house. She says that he spent only one night in August 2017 at the Lime Street property (August 15), when he retrieved his passport so that he could leave with R.N. on a ten-day trip, from August 19-30, to visit his relatives in the United States. M.Y.T.C. had previously agreed that R.N. could accompany L.H.N. on that trip, although she initially denied this in her testimony at trial. According to M.Y.T.C., he spent four nights in September (5, 6, 7 and 17) at the Lime Street house, but in a separate bedroom. Her account was supported to some extent by two other witnesses, Ms. Hsu (a family friend) and Ms. Montalbo (the housekeeper), who recalled that the parties did not appear to be living together in August 2017.
- [40] L.H.N. has a different memory of his whereabouts during those weeks. He claims that, apart from when he was out of the country, the parties continued to share their bedroom during August and September 2017. According to him, he spent only one night at his mother's house during this period.
- [41] I generally prefer M.Y.T.C.'s version of these events. In the document L.H.N. drafted that eventually triggered the separation, he was already contemplating purchasing a condominium for himself with the money that he was planning to withdraw from the line of credit. During the partially recorded argument on September 5, 2017, L.H.N. complained

about his having had to reside away from the house for the previous three weeks in order to "escape" from M.Y.T.C. He insisted that it was her turn either to move into the basement or to another home altogether so that he could reside at Lime Street with R.N. In an email that L.H.N. later sent to M.Y.T.C. and Ms. Paul on September 24, 2017, he described his whereabouts during that period as follows:

it is perfectly reasonable for you to be downstairs and me to be upstairs during this transition (or you to be at your mom's as I was 'forced' to be at my mom's) and not have you constructively kick me out with theatrics and recordings and then narrate that you are welcoming to me (with bubble tea etc.) but I am willingly leaving but then actively be hostile to me when I am there. Please just sleep downstairs and let me have safe passage back into my own house so I'm not homeless like this. [Emphasis added.]

- [42] On the evening of September 5, 2017, although the parties were sleeping in the same house, L.H.N. barricaded the bedroom door with a chair to prevent M.Y.T.C. from entering. M.Y.T.C. appears to have moved temporarily into the basement on September 6, 2017.
- [43] While he was back at the Lime Street house temporarily in early September, L.H.N. enrolled R.N. in Churchill Secondary School. M.Y.T.C. did not agree to the change of schools. She repeatedly tried thereafter to convince R.N. to return to St. George's. She conscripted friends and former school mates in her effort to bring R.N. back. At her request, St. George's agreed to keep a spot open for him, thereby preventing the parties from reclaiming their deposit, although it was eventually returned on January 22, 2018. During this period, she sent a stream of text messages to R.N. in which she also openly discussed the various financial and other controversies between the parties and asked him to keep her requests confidential as between them.
- [44] On the morning of September 27, 2017, M.Y.T.C. turned up at Churchill Secondary to meet with the school's principal and guidance counselor. She called to R.N. by name in the hallway, which appears to have been embarrassing for him. On that same day, M.Y.T.C.'s counsel sent L.H.N. a letter confirming the parties' separation. The letter notified him that because L.H.N. is now residing at his mother's house, M.Y.T.C. would be changing the locks and the alarm code at the Lime Street property.
- [45] That evening, L.H.N. returned to Lime Street to collect R.N. and bring him back with him to his mother's house. While there, he demanded the new alarm code from M.Y.T.C. M.Y.T.C. left it to R.N. to decide whether to give it to him. R.N. left with L.H.N. at that time and M.Y.T.C. has not seen R.N. since.

- [46] Distraught over the departure of R.N., M.Y.T.C. instructed her counsel to send another letter to L.H.N. on October 2, 2017, this time to advise that she had reconsidered her position and now wished to reconcile. The letter asked that he return to the house and advised him that she had reset the alarm code as it was before. She also sent a series of conciliatory and even apologetic texts to him on that date confirming the change to the alarm code and seeking to induce him to return, presumably with R.N.
- [47] L.H.N. did return to the house on Sunday, October 15, 2017, but only to collect some of his personal effects. M.Y.T.C. was teaching piano at the time. She confronted him when he removed a modem from the wall. They had a physical altercation in front of the piano students, which L.H.N. thought was staged, after which L.H.N. left the home for good.

D. Litigation History

- [48] M.Y.T.C. commenced this action on the following day, Monday, October 16, 2017.
- [49] On October 20, 2017, the following Friday, M.Y.T.C.'s counsel, Ms. Paul, applied without notice, or alternatively on short notice, for various relief, including a preservation and freezing order, an order for exclusive occupation of the Lime Street property, equal parenting time (including reconciliation counselling), interim child support and spousal support. The preservation and freezing order was granted without notice that same day. It prohibited L.H.N. from dealing with or disposing of family property "without the consent in writing of [M.Y.T.C.] or further court order." The remainder of the relief sought was adjourned generally.
- [50] Ms. Paul did not serve L.H.N. with the order until the following week, on October 25, 2017. She did serve at least some of the relevant banks on the day she obtained the order, however. Over the following weekend, L.H.N. discovered that his credit cards were no longer working. In an apparent rush to secure the remaining liquid family assets for himself, he took out another \$64,000 from his corporate account at TD bank on October 23, 2017 (that money was subsequently returned). He also went to four different branches of CIBC that day to withdraw as much cash from the ATMs as he could, yielding another \$24,000.
- [51] The parties were next in court for a judicial case conference on November 3, 2017, following which they were released from the programme.
- [52] On November 29, 2017, M.Y.T.C. filed an application seeking the following orders, among other things:
- (a) granting her parenting time with R.N.;
 - (b) directing R.N. to participate in reconciliation counselling with her;
 - (c) compelling R.N. to return to St. George's as of January 2, 2018;
 - (d) compelling L.H.N. to return the \$500,000 that he withdrew from the line of credit; and

- (e) compelling L.H.N. to produce a financial statement, bank records and an accounting for the \$500,000.
- [53] This time, L.H.N. received notice and responded to the application.
- [54] The matter was heard by Master Taylor on December 12, 2017. He adjourned the parenting issues. He dismissed the application to compel R.N. to return to St. George's but made the following orders:
- (a) L.H.N. was to produce banking records and a sworn financial statement by January 24, 2018;
 - (b) L.H.N. was to return the \$500,000 to the line of credit, except for \$30,000 which was to be set aside to fund a reconciliation counselor;
 - (c) M.Y.T.C. was to return \$46,000 to the line of credit, except for \$10,000, which was to be set aside to fund a reconciliation counselor and to pay household expenses;
 - (d) a view of child report was to be prepared (the parties later agreed to engage a child psychologist, Dr. Laura Mills, for that purpose); and
 - (e) the parties were not to be in contact with one another other than by text or email.
- [55] L.H.N. did not produce the banking records or financial statement as ordered by Master Taylor. He did not return the \$500,000. On February 5, 2018, M.Y.T.C. applied to have him found in contempt of court and for an order to obtain production of the banking records directly from the banks.
- [56] Three days later, on February 8, 2018, L.H.N.'s counsel at the time, Mr. Hamilton, wrote to Ms. Paul to ask that M.Y.T.C. return two piano trophies to the "Trophy Centre" on Kingsway because they were needed for a piano festival the following week. He also requested that L.H.N. be given temporary access to the Lime Street home for the purpose of retrieving his and R.N.'s belongings and that M.Y.T.C. remain out of the house while he did so. Ms. Paul responded that M.Y.T.C. would consider the request once L.H.N. had complied with the December 12, 2017 order but, in the meantime, M.Y.T.C. would be taking the trophies to L.H.N.'s dental office herself. Mr. Hamilton wrote back to ask that M.Y.T.C. bring the trophies to his law firm office rather than to L.H.N.'s dental office.
- [57] Mr. Hamilton had been on the record as L.H.N.'s counsel since November 30, 2017. By February 20, 2018, however, L.H.N. was no longer represented by Mr. Hamilton, but by new counsel, Mr. Chui. Perhaps for that reason, M.Y.T.C. ignored Mr. Hamilton's request and took the trophies to L.H.N.'s dental office anyway. Apart from returning the trophies, M.Y.T.C. also wanted to serve L.H.N. personally with the materials for her pending applications. She and a friend attended at the dental office on two occasions but were told each time that L.H.N. was not present. In the end, they left the trophies with the receptionist without having effected service.

- [58] Having refused Mr. Hamilton's request to allow L.H.N. into the house to retrieve his effects, M.Y.T.C. took it upon herself to resolve the issue by packing his papers and other belongings into boxes and placing them in the garage. In an email dated March 3, 2018, Ms. Paul advised Mr. Chui that "[a]ll of [L.H.N.]'s personal belongings and old papers" were now in boxes in the garage and available to be collected there. On March 12, 2018, Mr. Chui responded by letter complaining that the papers and belongings will be damaged if left in the garage and demanding that they be taken back into the house. The matter remained unresolved.
- [59] In the meantime, M.Y.T.C.'s then pending applications were heard by N. Smith J. on March 5, 2018. He made the following orders:
- (a) L.H.N. was found in contempt of court and fined \$5,000 for failing to produce the bank records and financial statement as ordered;
 - (b) the banks were ordered to produce L.H.N.'s bank records directly to M.Y.T.C., upon M.Y.T.C. paying their reasonable copying costs;
 - (c) L.H.N. was given the opportunity to purge his contempt by filing his financial statement within seven days and paying M.Y.T.C.'s costs in procuring the bank records directly from the banks;
 - (d) L.H.N. was ordered to adduce an affidavit explaining what became of the \$500,000 that he withdrew from the line of credit;
 - (e) L.H.N. was to ensure that he and R.N. met with Laura Mills to allow her to complete a view of the child report; and
 - (f) M.Y.T.C. was awarded special costs in any event of the cause, payable forthwith.
- [60] On April 13, 2018, M.Y.T.C. renewed her earlier applications insofar as they had not yet been addressed. She also sought the following addition relief, among other things:
- (a) to have L.H.N. found in contempt of court for various breaches of the orders of N. Smith J. and Master Taylor;
 - (b) to have the Lime Street property sold;
 - (c) to require L.H.N. to pay the mortgage, the interest on the line of credit and the property tax;
 - (d) to have a joint expert appointed at L.H.N.'s expense to value his dental practice; and
 - (e) to require L.H.N. to produce documents for the valuation expert.

- [61] A few weeks before that, on March 23, 2018, Mr. Chui was replaced by new counsel, Ms. Lewis. Ms. Lewis withdrew less than a month later on April 17, 2018, to be replaced in late April or early May 2018 by yet another lawyer, Ms. Guy. At a hearing on May 4, 2018, L.H.N. applied to adjourn the hearing of M.Y.T.C.'s applications in light of the recent upheavals in his legal representation. That application was largely unsuccessful. The bulk of M.Y.T.C.'s application was heard by Forth J. on May 11, 2018.
- [62] In her reserved decision released on July 13, 2018 (indexed as M.Y.T.C. v. L.H.N., 2018 BCSC 1174), she made the following orders:
- (a) M.Y.T.C.'s application to compel R.N. to participate in reconciliation counselling was dismissed;
 - (b) L.H.N. was to pay M.Y.T.C. interim spousal support of \$2,300 per month, retroactively from November 1, 2017;
 - (c) M.Y.T.C. was given exclusive occupancy of the Lime Street property until it was sold;
 - (d) the Lime Street property was to be listed for sale with the parties having joint conduct of sale and the listing agent to be agreed or, failing agreement, with each party appointing their own realtor;
 - (e) the proceeds of sale were to be held by Ms. Paul in trust pending the outcome of the trial; and
 - (f) L.H.N. was again found in contempt of court, this time for failing to pay the \$5,000 penalty that N. Smith J. had imposed, for which a further penalty of \$2,000 was imposed, to be paid from the cash that L.H.N. had withdrawn from his RRSP account.
- [63] On August 10, 2018, L.H.N., again represented by new counsel, Ms. Nasser, sought leave to appeal from the decision of Forth J. In oral reasons pronounced October 18, 2018, Harris J.A. stayed the application due to L.H.N.'s ongoing failure to purge his contempt. He explained his conclusion in that regard as follows:

I am not persuaded that L.H.N. is indeed incapable of complying with the terms of the orders, whether by earning income or using other financial resources to which it appears he has access. He says that he cannot access certain resources because they are subject to a freezing order procured by his spouse. If that were the case, I expect that arrangements could be made whether by consent or, if necessary, by court order varying the terms of the freezing order to permit him to fulfil his obligations. I would not expect consent to be refused to lifting or varying the freezing order. His explanation of the use he made of \$500,000 taken by him, at the time roughly of the marriage breakdown, was that he used it to pay off a debt that he owed to his parents. In my view, having reviewed that portion of the affidavit filed earlier, the timing and circumstances of that payment raise more questions than answers. His explanation of his ability or inability to earn income rests on little more than bare assertion and refers concretely only to one month of income. The court is entitled, in my view, to a more compelling explanation, especially since his

year end for financial statements was the end of May. Having reviewed the evidence, I do not accept that L.H.N. has provided a satisfactory explanation of why he is in breach of the orders he seeks to appeal. In those circumstances he is asking this Court to indulge his appeal at the same time as he is flouting the orders he seeks to appeal. This is not a circumstance this Court will tolerate

[64] The sale of the Lime Street property did not proceed as ordered by Forth J., primarily because L.H.N. continued to insist on being allowed into the house alone with his realtor before signing the listing agreement. In an effort to move matters along, M.Y.T.C. filed another application on September 13, 2018, this time seeking sole conduct of sale. L.H.N. responded on September 21, 2018 with an application of his own, initially without notice, seeking to restrain M.Y.T.C. from throwing out his belongings in advance of the sale, as she was threatening to do. Those applications were heard by Ball J. on October 1, 2018. He too refused to consider L.H.N.'s application in view of his ongoing failure to purge his contempt. With respect to M.Y.T.C.'s application, he made the following orders:

- (a) M.Y.T.C. was given sole conduct of sale;
- (b) L.H.N. was to have access to the garage between 10 am and 2 pm on October 14, 2018 in order to collect the boxes containing his papers and belongings, after which M.Y.T.C. was permitted to dispose of whatever remained uncollected at that time;
- (c) L.H.N. was to provide M.Y.T.C. with a list of the items that he wanted from the house; and
- (d) Costs were awarded to M.Y.T.C. in any event of the cause.

[65] L.H.N. subsequently arranged for his boxes to be collected and placed in storage. He testified at trial that he has not reviewed their contents since retrieving them.

[66] By order made October 18, 2018, AHA was appointed as a joint expert to value L.H.N.'s dental practice. L.H.N. did not disclose to M.Y.T.C. or Ms. Paul that he had earlier retained AHA to sell the practice. On the contrary, L.H.N. had instructed AHA not to share that fact with M.Y.T.C. or her counsel. They learned of it only later in the trial, when I ordered AHA's complete file disclosed to Ms. Paul.

[67] On December 7, 2018, L.H.N. applied to adjourn the trial. The application was unsuccessful. The trial began before me on February 4, 2019. Once again, L.H.N. had just retained new counsel in late December. On the eve of trial, L.H.N. finally purged his contempt, at least in part, by paying the outstanding fines. He has never paid the interim spousal support ordered. He testified at trial that he had had to borrow money from his brother to pay the fines.

[68] The trial was originally scheduled for ten days. Those first two weeks (in fact, only eight days were available) proved to be insufficient to complete even just the claimant's case, let alone the entire trial. Nine additional trial days were later scheduled in June and July but that additional time also proved insufficient.

- [69] During the ensuing interval pending completion of the trial, the Lime Street property sold, subject to court approval. I heard M.Y.T.C.'s application to approve the sale in chambers on May 6, 2019. L.H.N. opposed the sale at that time, arguing that the price was too low, even though he had previously approved a putative sale at a similar price that had fallen through at the last minute when the purchaser refused to waive the subjects. He also advanced a new complaint. It had since come to his attention that M.Y.T.C. had been renting out the house on Airbnb without disclosing that fact. I granted an order approving the sale over L.H.N.'s objections, essentially on the terms sought.
- [70] One of those terms was that M.Y.T.C. be permitted to proceed with certain repair work in the basement of the Lime Street property that had become necessary as a result of a recent flood. Completion of that work was a condition of the closing of the sale. L.H.N. opposed that relief too because he wanted to investigate the flood and its cause for himself. My order stated that M.Y.T.C. could carry out the repairs herself and that L.H.N. must endorse the insurance cheque to her if it was issued to both of them, without prejudice to his right to claim a corresponding adjustment at trial. The insurance cheque was later issued to both of them, but L.H.N. refused to endorse it to M.Y.T.C. as I had ordered. On July 3, 2019, I ordered the insurer to cancel that cheque and issue a replacement, this time to Ms. Paul in trust, to be held pending the outcome of the trial.
- [71] On May 13, 2019, the parties appeared before me again to address an application by L.H.N., now representing himself (as he would be for the rest of the trial), to "stay" or "cancel" my order of May 6, 2019. I refused the application and granted M.Y.T.C. her costs in any event of the cause.
- [72] The parties were before me yet again on May 21, 2019 with competing applications. On May 16, 2019, L.H.N. filed his first application to have M.Y.T.C.'s claims stayed as an abuse of process. I ordered that application to be heard with the trial.
- [73] L.H.N. filed an amended application seeking similar relief on May 24, 2019. That application came before Russel J. on June 4, 2019. She too ordered it adjourned to the trial. At the same time, M.Y.T.C. sought production of documents in relation to the pending sale of L.H.N.'s dental practice. Justice Russel ordered L.H.N. to deliver the name of the prospective purchaser to me in a sealed envelope, which he subsequently did.
- [74] When the trial resumed on June 17-21 and July 2-5, 2019, Ms. Paul concluded M.Y.T.C.'s case on July 17 and 18. L.H.N. began his case by giving his own testimony in chief over the remaining seven days. The trial was scheduled to conclude over two weeks in August and September, but those dates were lost at the last minute because M.Y.T.C. had to travel to Taiwan due to her father's terminal illness and death.
- [75] L.H.N.'s dental practice sold on August 16, 2019 but he did not disclose the details of the sale to Ms. Paul. In September and October 2019, the parties appeared before me in chambers with competing applications in relation to that and other matters. On September 9, 2019, I ordered L.H.N. to disclose the sale price and associated contract documents to Ms. Paul. On

October 28, 2019, I ordered L.H.N. to instruct the solicitor handling the sale of his dental practice to confirm to Ms. Paul that he held the sale proceeds in trust and to deliver to her the schedules from the Share Purchase Agreement, which had not yet been produced. I also scheduled ten more trial days in January 2020, over the objection of L.H.N. Finally, I ordered that, in the meantime, the parties were to bring no further interlocutory applications without first obtaining leave.

[76] When the trial resumed on January 3, 2020, L.H.N. again applied to have it adjourned and his abuse of process applications heard immediately instead. When I dismissed the adjournment application, he initially refused to continue with the trial and submit to cross-examination. I eventually ordered him taken into custody for his ongoing refusal to comply with my direction. Later that day, after consulting with duty counsel, he reluctantly agreed to complete his testimony.

[77] The trial itself was finally completed over the next two weeks.

III. Abuse of Process

[78] L.H.N. believes that this action has been litigated in a manner that has been fundamentally unfair to him. He says that both M.Y.T.C. and her counsel, Ms. Paul, have knowingly advanced rank falsehoods and used them repeatedly to obtain serial orders against him, to his and R.N.'s prejudice. That behaviour should, he argues, have precluded them from being heard further at all. To that end, his abuse of process applications seek the following relief, among other things:

- (a) an order setting aside the previous orders of this Court made October 20, 2017 and July 13, 2018;
- (b) an order striking out M.Y.T.C.'s pleadings, interlocutory application materials and trial testimony;
- (c) an order that the affidavits that he adduced for the interlocutory applications be accepted as evidence in the trial;
- (d) an order that the funds held by M.Y.T.C.'s counsel in trust be paid out forthwith to him exclusively;
- (e) an award of damages to compensate him for the alleged abuse of process;
- (f) a declaration that both M.Y.T.C. and Ms. Paul are vexatious litigants;
- (g) an order adding Ms. Paul (in her personal capacity) as a party to this action and declaring her jointly and severally liable with M.Y.T.C. on his counterclaim, but prohibiting her from adducing evidence, making submissions, making claims or filing any documents;

- (h) an order prohibiting M.Y.T.C. from adducing evidence, making submissions or filing documents, and, with respect to those already adduced, made or filed, from using them in this or any future proceeding; and
 - (i) a declaration that the Legal Profession Act, S.B.C. 1998, c. 9 is "constitutionally invalid," due to the failure of the Law Society to discipline Ms. Paul as he would have wished.
- [79] The misconduct that is said to justify that relief originated with M.Y.T.C.'s successful application for the asset preservation and freezing order made October 20, 2017, from which all else has flowed. The four principal falsehoods that he says were used to obtain that and all subsequent interlocutory orders in this action were the following:
- (a) that L.H.N. had wrongfully drawn \$500,000 from the line of credit without any apparent warning or justification, when in fact M.Y.T.C. knew all along what he was doing and why, and even accepted his rationale at the time;
 - (b) that M.Y.T.C. was ill and incapable of earning income at her full capacity, when in fact she earns more and holds more in assets than she has disclosed;
 - (c) that L.H.N. moved out of the family home voluntarily and M.Y.T.C. had nowhere else to go, when in fact she locked him out and then secretly rented out the family home on Airbnb while residing at her parents' house; and
 - (d) that L.H.N. has alienated R.N. from M.Y.T.C., when in fact their estrangement was really the product of M.Y.T.C.'s mistreatment of R.N.
- [80] Leaving aside the many procedural and other technical defects in L.H.N.'s applications, I find the substance of his main allegations to be without merit.
- [81] With respect to the first alleged falsehood, the evidence adduced at trial did not cast serious doubt on the truthfulness of the assertion in M.Y.T.C.'s affidavit #1 that it was a "mystery" to her as to why L.H.N. had taken the \$500,000 from the line of credit. In arguing otherwise, L.H.N. relies on conversations they had prior to and around the time of their separation. I accept his evidence that:
- (a) he had previously conveyed to her that he felt that he could no longer continue working and that he wanted someone else to support him for a change;
 - (b) he had previously conveyed to her that he believed that he was owed that much and more for having been made to bear the cost of the Lime Street mortgage and R.N.'s tuition fees alone during the marriage; and
 - (c) she had previously told him, in order to get him to agree to let her use the line of credit to finance the Wilsonville purchase, that he too could use the line of credit if he needed it.

[82] But none of that really explains L.H.N.'s behaviour in borrowing that much money, in cash, all at once, as and when he did. In any event, it certainly does not demonstrate that M.Y.T.C. knew all along why he did what he did, as L.H.N. alleges.

[83] M.Y.T.C.'s bewilderment at his conduct is evident in an email that she sent to L.H.N. just three days after the withdrawal, on September 21, 2017:

You have requested me not to use the LOC, I have obliged. Can you please explain to me why you move ½ million to your personal account?

I am so sad that things have gotten worse during the first 2 weeks of September. I was willing to sell and do as you said in the spring time and move in the summertime, as winter is a slow month for real estate. I was hoping to do it amicably as I know how damaging it is for [R.N.]. I have done a couple of stupid things out of hurt and jealousy. I do not want to do anything stupid anymore.

Can you please explain to me why you have moved money without telling me? It is LOC, you have to pay interest on the ½ mil.

[84] L.H.N. also relies on the conciliatory text messages that M.Y.T.C. sent to him on October 2, 2017 (that is, after L.H.N. withdrew the \$500,000 but before she commenced this action). There, she appears to accept that he must have needed the money and even invites him to take more if that will help to avoid having to sell the house. Her message states, in relevant part, as follows:

Is 500k enough for you to cover your bill? Is there any way we can keep the family home? How much are you short?

[85] A subsequent message sent that same day assures him that he does not need, at least for the present, to explain to her why he did what he did (again suggesting that she still did not understand it). She goes on to offer the following olive branch:

As for the extra money that you have taken from the LOC how about this? Please use that to buy [R.N.] something? You have taken 500 K, I have taken 300 K, the difference? How about let it be for [R.N.]. We can think of ways to make sure that he gets the money? Let it be amicable. I really do not want to continue on this path.

[86] Nothing in those messages suggests that M.Y.T.C. really understood why L.H.N. had taken the \$500,000 in the first place. On the contrary, they tend to demonstrate her continuing confusion on that score. She appears to have been trying to get L.H.N. (or more likely, R.N.) to return to the house. She did not want it sold. In that context, she asked if the \$500,000 was "enough for you to cover your bill" and if not, how much more would be needed. But L.H.N. has never suggested that he withdrew the money to pay a bill, let alone one that had to be paid in order to allow them to keep the house, as M.Y.T.C. appears to have assumed. Moreover, he himself was not consistent at trial in his efforts to explain his reasons for withdrawing the \$500,000. On the one hand, he claimed that he needed the money to support himself and felt justified in taking it because he believed she owed it to him. On the

other hand, he also claimed that he used it to repay a decades-old debt to his parents. In the circumstances, M.Y.T.C. can hardly be faulted for having later professed to be at a loss in that regard.

- [87] With respect to the second alleged falsehood, I am not persuaded that M.Y.T.C.'s present inability to work at full capacity is feigned. I accept, rather, that the effect of the separation and its consequences have been traumatic for her, just as they have been for him. Indeed, the separation has had a much greater emotional impact on M.Y.T.C. because it has led to her total estrangement from R.N. The anguish that has caused her is obviously real. L.H.N. argues that M.Y.T.C. should not be believed in this regard because she appears to have gone on vacation to Whistler and to parties. Even if that is true, such behaviour is not necessarily inconsistent with a diminished capacity for work.
- [88] Nor am I persuaded that M.Y.T.C. has seriously understated her income from piano tutoring. L.H.N.'s argument to the contrary is founded primarily on his calculation multiplying the total number of students he says she taught over the years and an unrealistic hourly rate that he says she must be charging them.
- [89] Although it is true that M.Y.T.C.'s affidavit #1, which was used to obtain the October 20, 2017 order, contained only an incomplete description of her assets, the resulting order was not made relying on her evidence as to the relative size of her asset base. Rather, it was made in order to preserve family assets in the face of L.H.N.'s obvious threat to them, as manifested by his recent behaviour. Unlike L.H.N., M.Y.T.C. was more forthcoming about her assets in her financial statement filed days later, on November 2, 2017 - long before her support applications were first heard on notice to L.H.N. I am not persuaded, in summary, that she has hidden family assets.
- [90] With respect to the third alleged falsehood, I have already found that L.H.N. left the family home on or about August 5, 2017 to reside with his mother, as M.Y.T.C. alleges. There can be no doubt but that the parties were incapable of living together in the same house by then, if not before. What was left to be resolved thereafter was which of them should have possession of the Lime Street property pending its sale. That issue was addressed in a subsequent application that was brought and heard on notice to L.H.N.
- [91] I am also not persuaded that M.Y.T.C. misled the Court thereafter by failing to disclose that she had other accommodation available to her and that she was renting out the Lime Street property on Airbnb. Both parties had alternative accommodation available to them at their parents' houses if and when they needed it. In M.Y.T.C.'s case, her parents' houses were at least partly (if not always entirely) rented out. The Airbnb rental was relatively brief and covered only part of the house. I accept her explanation that she needed the extra income it generated (approximately \$4,500) to help cover the household expenses that he left her to bear alone. There were, I find, good reasons for her wanting to avoid having L.H.N. back in the house, and these had nothing to do with her wanting to hide the fact of the Airbnb rentals from him.

- [92] I appreciate that M.Y.T.C. was not always consistent in describing what papers and personal effects L.H.N. had taken with him when he left the Lime Street property. For example, she asserted initially that he had taken all of his papers. Later, she asserted that she found some of his papers, such as older bank statements, in the house. Such contradictions may be attributable at least partly to her having looked through his office area more thoroughly when she packed his belongings into boxes. More generally, I attribute that and other similar inconsistencies to her confusion about what he had in his possession at any given time (something she could not know with certainty), rather than a deliberate attempt to mislead the Court. Since October 2018, L.H.N. has had possession of the boxes containing his personal effects from the Lime Street property. It was open to him to demonstrate what they contained but he did not seek to do so.
- [93] Finally, I am not persuaded that M.Y.T.C. deliberately misled the Court in asserting that L.H.N. has alienated R.N. from her. She obviously believes that is so, and I accept, having now heard the evidence of both parties in full, that there probably is at least some truth to the allegation. On the other hand, I also accept that M.Y.T.C. appears to be unable or unwilling to appreciate the extent to which her own conduct has contributed to the present state of affairs between her and R.N. Any lack of insight on her part in that regard is not, however, a fraud on the Court.
- [94] Although I have rejected the central allegations supporting L.H.N.'s abuse of process applications, it does not follow that I have accepted all of M.Y.T.C.'s testimony at face value or that I consider the manner in which this action has been advanced to be beyond reproach in all respects. In that regard I note, by way of example, that Forth J. was critical of M.Y.T.C. and her counsel for having withheld important evidence on one of their prior applications to have L.H.N. found in contempt of court. I am not persuaded, however, that such misconduct justifies any of the drastic relief that L.H.N. seeks.
- [95] The applications are therefore dismissed.

IV. Parenting Issues

- [96] M.Y.T.C. seeks an order granting her parenting time with R.N. for three hours on at least one evening per week (and at other times as R.N. may agree to), and to compel L.H.N. to cause R.N. to attend reconciliation counselling with her for at least six sessions. L.H.N. opposes any such order.
- [97] M.Y.T.C. also sought similar relief on an interlocutory basis within days of commencing this action. This is therefore not the first time that this issue has been addressed in this Court. When the application finally came on for hearing before Forth J. on May 11, 2018, she concluded that forcing R.N. to renew his relationship with M.Y.T.C. and to attend counselling would not be in his best interests. She arrived at that conclusion after reviewing much of the same evidence and hearing essentially the same submissions that have been made to me. She summarised that evidence as follows, at paras. 34-47:

[34] In this case it is appropriate that the child's views be considered. To date, the views of the child are contained in the following documents:

- a. Letter of Claire Sutton dated November 6, 2017;
- b. Affidavit of the child sworn December 5, 2017; and
- c. Views of the Child Report by Dr. Laura Mills dated March 17, 2018 (the "Views of the Child Report").

[35] I will deal with each of these documents.

Letter of Claire Sutton dated November 6, 2017

[36] The claimant arranged to take the child to Ms. Sutton, a registered clinical counsellor, on September 22, 2017. She did not advise the respondent that she was taking the child to see a psychologist. Ms. Sutton saw the child for 25 minutes on his own and 15 minutes with the claimant present.

[37] Ms. Sutton prepared a letter dated November 6, 2017 addressed to the claimant's lawyer in which she stated:

[The child] wanted the following:

- 1) A schedule that clearly outlined when Dad picked him up and when Mom picked him up including the nights he spent with which parent;
- 2) Parents would attend alternate music performances;
- 3) That Mom accept the fact that [the child] is attending [the new school];
- 4) That Mom & Dad stop arguing in front of him;
- 5) That [the child] engage in physical activity such as basketball which he likes to do at the [club] which he is a member;
- 6) That when with [his mother] - they relax while watching a movie together with popcorn.

[38] Ms. Sutton recommended the following:

In my professional opinion, my recommendations are as follows:

- 1) That [the child] sees a counsellor on a weekly basis. This counsellor should be skilled in dealing with adolescents as well as separation and divorce.
- 2) That a parenting schedule is set up immediately including the schedule for the Christmas holiday break.
- 3) That [the father] be assigned a Divorce Coach.

- 4) In the best interests of [the child], that both [the father] and [the mother] work with the same family therapist (individually at first) that will help them parent responsibly given the separate households.
- 5) And, if [the father] refuses to engage in the recommendations outlined above, I would recommend that he be psychologically assessed (section 211) to determine if he is a fit parent with the best interests of his son at the top of his priority.

Affidavit of the child sworn December 12, 2017

- [39] The respondent deposed that one week prior to the hearing scheduled for December 12, 2017, the child told him that he wanted to give a statement to the court. The respondent arranged to take the child to a notary public to swear an affidavit. The respondent decided not to rely on this affidavit for the December 12, 2017 hearing but attached it to his affidavit #2 as an exhibit.
- [40] In this affidavit the child states as follow:
- [1] I want to stay with my dad. I want my living arrangement to stay the same as it is now staying with my dad. I am comfortable, relaxed, and not stressed when I am living with my dad.
 - [2] I do not want to see or be with my mom. My mom lies, forces and pressures me to do things that I do not want to do and things that benefits herself .
 - [12] In the early part of August when I was doing math, my mom started crying in front of me and told me that my dad was having an affair. She also told me there may be other children and he will not love me anymore or have time for me
 - [17] She coerced me to go see psychologist Claire Sutton and she told me it would help me. She said every boy needs a mom and dad and to tell her that I want to see my mom equal to my dad. I did not want to go and I wanted to run away from Claire's office, but my mom would say it would help me if I did this.
 - [19] Now that I am away from my mom I am relieved, not stressed and happy now.
 - [41] The claimant admits that she told her son that his father was having an affair and she admits that the respondent was not having an affair and her suspicions were unfounded.

Views of the Child Report dated March 17, 2018

- [42] Dr. Laura Mills is a registered child psychologist, who has expertise in the assessment and treatment of children and their families. She has prepared in excess of 100 reports regarding children's mental health. The Views of the Child Report was based on interviews with each parent and the child. Dr. Mills notes that the child presented as "bright, thoughtful and articulate in expressing his thoughts, feelings and experiences."

[43] Of significance is:

[The child] noted he didn't want to come to see me because he knew his mother had already spoken to me and he felt she likes to give a false impression. He added that his dad has tried to keep him away from his problems but he felt his mother has tried to use him to make herself look better and his dad look bad.

[The child] claimed that his mother pretended that his dad hurt her and she recorded this. Then she would cry. [The child] recalled that he would see his mother recording saying "stop hurting me" but his dad was not doing this or near her.

[The child] noted she [the mother] told him that his father had an affair and had other children. [The child] claimed he has determined that this was not true.

When asked about the future, [the child] noted that right now he did not want any contact with his mother until after the divorce is done. He felt this way because he felt she kept trying to put him in the middle. He noted he was concerned she would put him in the middle of the situation where she would say bad things about his dad. [The child] noted he didn't want to hear anything about the separation. He noted his mother sent [the child] an e mail to say she was sorry but [the child] noted he just didn't want to be part of it. He added that until it is over, he wants to be out of the process.

[The child] noted that now he doesn't want to see his mother but it will depend on how it ends. He added he was worried that he may have to see her but he didn't want to if it was "50-50". He claimed he just wouldn't go. He didn't want to live with her but maybe once in a while he would see her but he was not sure if he wanted to.

[The child] wrote: "Please tell the judge for me:

1. I don't want to see my mom and I don't want her or her friends that she lied to contact me.
2. I don't want my mom or people she told lies to harass me at school or at my activities - Please tell the judge to make her stop.
3. I want my mom to fix the lies she told others because that has hurt my relationships with my friends-Please tell the judge to fix her lies (like write a correction letter to those she lied to).

[The child] was asked to express his concerns directly in a letter to his mother. He was reluctant but then agreed. He wrote the following letter in our session:

"Dear Mom, I am writing this to tell you how I really feel. I have tried to tell you countless times but you just ignore me. I do not want to see you or have contact with you or your friends that you have lied to. I do not want you or your friends to come to my school or my other activities and harass me. I want you to fix the relationships that you have hurt by writing a letter to the people you lied to. Even though I am handwriting this, I have zero faith that you will do any of this. And if you do, I still will not want to see or contact you."

[44] The child reported that his mother had told people about his father. He further reported an incident when his mother attended a youth orchestra rehearsal with a friend. His mother was at one entrance and the friend at the other. The friend attempted to grab him when he tried to run away.

[45] In the Youth Self Report questionnaire the child provided the following significant answers:

I would be really happy if "my mother would leave me alone";

I sure wish my dad would "understand me better" (teenage things);

I sure wish my mother would "leave me alone";

If I could have three wishes come true, I'd like "to be successful in the future, my mother to go away, to be happy".

[46] Dr. Mills opined that:

[The child] has expressed the view that he does not want to have contact with his mother at this time. His reasons appear to be related to his experiences where he felt his mother has done things that placed him in the middle of the marital conflict. He has indicated he has felt his mother has said and done things that left him feeling he was used as part of the conflict between his parents. He has indicated he does not want to be part of the conflict between his parents

[The child] has expressed the view that he could not begin to consider contact with his mother until he felt confident that his parents have settled their marital separation issues. Otherwise, he appeared to feel he was worried he could be drawn into the conflict.

[47] Dr. Mills concludes with:

However, it is hoped that over time, if [the child] can see that his parents can work together for the benefit of his development and normal adolescent needs, then he may be encouraged to initiate contact with his mother and resume some relationship. Until that time, it is likely, based on [the child's] claims about his feelings and experience, that if [the mother] was to initiate the contact with [the child], he would only retreat into the hurt, angry and distrustful feelings that he expressed in the current report.

[98] As Forth J. noted (at para. 28 of her reasons), disputes between parents about how to allocate parenting time and parenting responsibilities are to be resolved pursuant to s. 37 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which states as follows:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

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- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [99] Of central importance in the circumstances of this case, given his age, is the undisputed fact that R.N. does not currently want to be in contact with M.Y.T.C. M.Y.T.C. argues that R.N.'s wishes should not carry the day here because his will has effectively been overborne by L.H.N., who has alienated him from her.
- [100] The leading case in British Columbia on parental alienation is *Williamson v. Williamson*, 2016 BCCA 87. After quoting extensively from that decision and others on the topic, Forth J. concluded that "[t]he actions of both parents leave much to be desired and show a lack of understanding of how their conduct since separating has been to the detriment of their child's best interest" (at para. 71). She added that "[t]he evidence supports that the respondent is not supportive of the claimant's relationship with her son and is likely
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encouraging the estrangement" (at para. 72).

- [101] Unlike Forth J., I have had the benefit of hearing extensively from both parties and their witnesses on this subject by way of oral testimony - testimony that has now been thoroughly tested by cross-examination. I have seen even more of the parties' contemporaneous texts and emails than Forth J. did. That more copious body of evidence has added little, however. It merely served to validate the following conclusions, at paras. 79 - 81 of Forth J.'s reasons, with which I agree:
- [79] I see no benefit in forcing the child, if one can force a 15 year old, to attend counselling. The child's views are clear that any attempt to force him to enter counselling will be met with significant resistance. I believe this could even further damage the future relationship between him and his mother. The child may well use this as a further example of how he has been drawn into this marital "battle" by his mother.
- [80] The evidence supports that the child is "a bright competent adolescent boy capable of communicating his feelings and experiences", who shows "competence in his activities, social relationships and school achievement.": see Views of the Child Report at p. 10. In consideration of all the factors, his views must be given a significant weight. I adopt the reasoning of Mr. Justice Affleck in *K.L.S. v. K.M.S.*, 2017 BCSC 1315 at para. 16:
- [16] The only consideration I must have in regard to J.S. is her best interests. I am persuaded that an order of this Court requiring J.S. to undergo counselling with the aim of establishing a relationship with her mother, no matter how skilfully that counselling is handled, and no matter how delicately the re-establishment of a relationship is approached, would be seen by J.S. as coercion. It would not enhance the prospect of developing a useful relationship with her mother. In my view the more promising approach to achieving a satisfactory relationship between J.S. and her mother is to allow the passage of time, if possible, to overcome the wounds of the past, as perceived by J.S. This perception by J.S., whether or not it is acknowledged by others, must be respected. The striving of the respondent, through this Court, to create a relationship with J.S. is counterproductive.
- [81] If the child does wish to have counselling, then both parties should support and encourage this. However, the overall circumstances in this case do not support that the court should order the child to attend the REACH program or an equivalent. The record does not support that the child is ready or would be willing to engage in such counselling. As a result, this Court is not in the position to force meaningful counselling at this time: see e.g. *K.L.K. v. E.J.G.K.*, 2013 BCSC 2030 at paras. 72-74; *Willis v. Willis*, 1987 CarswellBC 2697 at para. 15 (S.C.).

[102] Since Forth J. rendered her decision on July 13, 2018, R.N. has grown 18 months older. He is soon to begin university. He is even less likely now than in 2018 to be beholden to the dictates of one parent or the other. With the imminent conclusion of this action, one can only hope that R.N. will be more amenable to renewing contact with M.Y.T.C. If that is to happen, however, it must be on his terms.

[103] I am making no parenting orders.

V. Financial Issues

A. Division of Assets and Debts

i. Governing Legislation

[104] The parties both seek a division of assets and debts under the FLA.

[105] Pursuant to s. 81 of the FLA, spouses are generally entitled on separation to a half interest in family property, and equally responsible for family debt, regardless of their respective use and contribution.

[106] The term "family property" is defined in s. 84 of the FLA to mean property that either spouse owns at the time of their separation or was acquired after their separation but derived from such property, unless it is excluded. Property may be excluded pursuant to s. 85, which states in relevant part as follows:

Excluded property

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

- (a) property acquired by a spouse before the relationship between the spouses began;
 - (b.1) gifts to a spouse from a third party;
 - (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
 - (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.
- [107] The family debts subject to division are defined in s. 86 to include all financial obligations incurred by either spouse during the relationship, or after the relationship if incurred for the purpose of maintaining family property.

[108] Despite s. 81, the Court may order an unequal division of family property or family debt pursuant to s. 95, which states as follows:

Unequal division by order

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

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (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;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

[109] Unless otherwise addressed below, I have accepted the list of family assets and debts, and their values, as enumerated in the Scott schedule that Ms. Paul presented in argument.

ii. The Assets and Debts Subject to Division

Net Proceeds of Sale of the Lime Street Property

[110] The Lime Street property was sold during the trial for \$3.1 million. Of that amount, Ms. Paul currently holds \$1,632,743.22 in trust, being the net proceeds remaining after paying the balance owing on the two mortgages, the line of credit and various closing and other costs. It is not disputed that those funds are a family asset subject to division, subject to M.Y.T.C.'s exclusion claims which are addressed below.

The Oregon Properties

[111] M.Y.T.C. owns two properties in Oregon - the first is the investment property in Wilsonville, discussed earlier (valued at US \$449,000) and the second a half interest in a bare lot in Welches (valued at US \$65,250). M.Y.T.C. seeks to have US \$71,000 from the Wilsonville property and her entire half interest in the Welches property treated as excluded property.

The Dental Business

[112] During the trial, L.H.N. sold the shares in his professional corporation for \$700,000, less commission of \$48,800, for a net total of \$651,200. The net proceeds are being held in trust by the firm that acted for L.H.N. on the sale, Affinity Law. Excluded from the sale were the business' net cash and receivables, which were valued on the financial statements closest in time to the separation at \$264,572. L.H.N. therefore retains the sum of those two amounts, or \$914,772, as a family asset subject to division.

[113] L.H.N. seeks to have the entire amount excluded on the basis that the practice had the same or greater value when he acquired it prior to the marriage.

Cash, Bank and Investment Accounts

[114] M.Y.T.C. claims that L.H.N. continues to hold \$500,000 in cash that he withdrew from the line of credit on September 18, 2017. L.H.N. claims that the \$300,000 loan that he took from his parents to purchase his first dental practice in 1993 (adjusted upward for inflation to \$449,800) was still outstanding at the time and that he used most of the \$500,000 to repay it. The evidence does not support the existence of any such debt, however. L.H.N. first mentioned it when this Court ordered him to explain what he did with the money that he withdrew from the line of credit. He adduced no written loan documentation. During the marriage, he never mentioned it and made no effort to repay it in whole or in part. His suggestions to the contrary (for example, that he occasionally took his parents on trips or for meals in partial repayment of that alleged debt) were not convincing. In summary, I am satisfied that L.H.N. continues to hold the entire \$500,000, along with the other cash that he

says is stored in a safe at his mother's house, for himself. I agree with M.Y.T.C. that those monies are family assets subject to division.

[115] According to the Scott schedule, L.H.N. also held the following bank accounts as of the separation date:

- (a) \$1,399 (TD Canada Trust); and
- (b) \$1,776 (BMO).

[116] M.Y.T.C. held bank accounts containing the following amounts:

- (a) \$16,350 (HSBC chequing account);
- (b) \$152,854 (HSBC savings account);
- (c) US \$8,559 - converted into Canadian dollars: \$10,808 (HSBC US dollar savings account);
- (d) \$8,368 (TD Canada Trust all-inclusive account);
- (e) \$33,301 (TD Canada Trust saving account);
- (f) US \$7,960 - converted in Canadian dollars: \$10,387 (TD Canada Trust US dollar saving account);
- (g) \$9,898 (Scotiabank savings account);
- (h) \$6,113 (BMO chequing account);
- (i) \$3,762 (BMO savings account);
- (j) US \$91,394 - converted into Canadian dollars: \$119,268.26 (Bank of America USD savings);
- (k) US \$8,247.59 - converted into Canadian dollars: \$10,763 (Bank of America USD chequing); and
- (l) \$10,000 (the amount remaining from the \$46,000 withdrawn by M.Y.T.C. from the line of credit after paying joint family debts, discussed below).

[117] She also held investment accounts as follows:

- (a) \$28,717 (HSBC TFSA);
- (b) \$197,240 (HSBC investment); and
- (c) US \$30,723.55 - converted into Canadian dollars: \$40,094 (HSBC USD direct investment account).

[118] M.Y.T.C. seeks to have some of these funds treated as excluded property on the basis that they were gifts or loans from her parents.

RRSPs

[119] As of the separation date, M.Y.T.C. held the following RRSP accounts:

- (a) \$5,890 (HSBC #1); and
- (b) \$84,451 (HSBC #2).

[120] L.H.N. held the following RRSP accounts:

- (a) \$279,656.67 (withdrawn at separation in an effort to retain the cash for himself);
- (b) \$851 (TD Canada Trust);
- (c) \$20,586 (BMO); and
- (d) \$4,238 (HSBC).

Other Assets

[121] L.H.N. held two burial plots valued at \$28,875 and \$23,625, respectively.

[122] The parties share a membership at the Arbutus Club, which is to be split between them.

[123] The parties have Canada Pension Plan credits that must be divided between them. M.Y.T.C. has paid \$47,884 toward a pension with VCC that must also be divided between the parties.

Debts

[124] I agree with Ms. Paul that L.H.N. must account to M.Y.T.C. for the interest she had to pay after separation on the \$500,000 that L.H.N. withdrew from the line of credit in September 2017 and still retains in cash. M.Y.T.C. paid \$30,435.65 in interest charges on the entire balance owing on the line of credit. Most of that was attributable to the \$500,000 that L.H.N. withdrew, but not all of it. In order to account for the remaining portion that was withdrawn by M.Y.T.C., I am reducing the amount of interest that L.H.N. must refund to M.Y.T.C. by 10%, yielding a net adjustment in her favour of \$27,408.29.

[125] M.Y.T.C. also seeks to adjust for the property-related expenses that she had to bear alone between the time that the parties separated and the sale of the Lime Street property. These include expenses she incurred in order to prepare the house for sale (\$13,061.11), payments made on the first mortgage (\$30,324 + \$6,498), property tax (\$8,018.60) and miscellaneous repairs, such as the sump pump (\$3,278.50). I accept that the adjustments claimed in this category are justified.

[126] Finally, L.H.N. alleges that the parties continue to owe money to St. George's School because M.Y.T.C. insisted that a spot be kept open for R.N. in the 2017/2018 academic year. He says that the school continues to demand the tuition owing for that year. I am not persuaded that the debt, if it ever existed, remains exigible today. I am therefore making no provision for it in my division of the family assets and debts.

iii. Excluded Property

M.Y.T.C.'s Exclusion Claims

[127] M.Y.T.C. seeks to have the following assets, held in her name, treated as excluded property under s. 85 of the FLA, on the basis that they derive from gifts or loans to her from her parents:

- (a) \$200,000 from the proceeds of sale of the Lime Street property (comprised of a gift of \$100,000 from her parents that she originally applied to the purchase of the Tisdall Street property in 2001 and two \$50,000 lump sum payments that she made against the first mortgage on the Lime Street property, in December 2015 and January 2016, respectively, using funds that she claims were loaned to her from her parents);
- (b) \$92,654 (converted from US \$71,000) of the value of the Wilsonville property, which M.Y.T.C. claims was a loan from her parents to assist with the original purchase;
- (c) \$85,150, reflecting her half interest in the Welches lot, which she says was purchased for her and her sister with a gift from her parents (the property has been appraised at US \$130,500 - \$170,301 in Canadian funds - and did not appreciate in value during the marriage);
- (d) \$10,387.70 (converted from US \$7,960) from the TD Canada Trust (USD) account, which is the amount left from a larger gift of US \$17,000 that her mother gave her in July 2016;
- (e) \$79,341.40 (converted from US \$59,982) from the Bank of America (USD) account, reflecting a gift that her mother gave her on March 2, 2017; and
- (f) \$120,000 of the funds held in her HSBC investment account, reflecting a gift that her mother gave her in 2003 using the proceeds of sale of an investment property on West 15th Avenue that she had held jointly with her sister, in trust for her parents, until it was sold in 1998.

[128] In addition, M.Y.T.C. asserts that certain other property, although nominally held in her name, was actually held in trust for her parents. Those items include certain bank accounts belonging to her parents, for which she obtained a power of attorney so that she could manage their affairs in Canada, and the investment property on West 15th Avenue referred to in the previous paragraph. That property was originally purchased by M.Y.T.C.'s parents in 1993. In 1997, they transferred title to M.Y.T.C. and her sister, ostensibly for \$250,000, but in reality as a means of splitting their income. The house was sold in 2003 for \$675,000. The evidence supports M.Y.T.C.'s contention that these items are or were held by M.Y.T.C. in trust for her parents. She never received any part of the revenues generated from the property, nor did she pay the associated expenses. I therefore accept that she held no beneficial interest in those items on the separation date.

[129] The evidence supports M.Y.T.C.'s contention that the assets that she seeks to have treated as excluded property under s. 85 of the FLA derived entirely from gifts or loans from her parents. I am also prepared to infer, given the evidence I heard about their relationship with L.H.N., that her parents generally intended any gifts they made to her to be for her alone. On that basis, I have concluded that M.Y.T.C.'s exclusion claims are, with one

exception, well-founded. The exception is M.Y.T.C.'s claim to exclude \$200,000 from the proceeds of sale of the Lime Street property. I find that both M.Y.T.C. and her parents intended those advances as gifts to both parties. Even if M.Y.T.C.'s parents intended to direct them to M.Y.T.C. alone, I find that she, upon receipt of them, effectively gifted a half interest to L.H.N. when she applied them toward the purchase of the Tisdall Street property and to pay down the mortgage on the Lime Street property, both jointly held assets.

- [130] Recently, in *N.S. v. C.S.*, 2020 BCSC 48, I concluded that where a parent of one spouse contributed to the purchase of what was intended to be a joint family home, the parent may be taken to have intended the gift for both spouses. Chief Justice Hinkson reached a similar conclusion in *Cabezas v. Maxim*, 2014 BCSC 767 [*Cabezas*].
- [131] I appreciate that the mere fact that a gift from a parent was used to purchase a home for both spouses is not necessarily determinative of its status as excluded property. *Cabezas* was distinguished by Baker J. in *L.A.F. v. E.H.D.*, 2015 BCSC 1450 on the following grounds, at paras. 114-116:
- [114] Mr. D submitted that the court should conclude that the funds given to Ms. F in 2010 were intended to be a gift to both of the parties. He relies on the decision in [*Cabezas*]. In that case the respondent's parents had advanced money to pay off the mortgage on a home jointly owned by the parties. Based on the evidence before him, Chief Justice Hinkson concluded that the funds were given as a gift intended to benefit both the respondent and the claimant. In the alternative - and in my view this conclusion is obiter dicta - he stated that the presumption of advancement would have applied, absent evidence to rebut the presumption.
- [115] In my view, the facts in that case are quite different from the facts in this case. Here the funds advanced to Ms. F in 2010 were clearly intended to be in the nature of an inheritance. The funds were advanced to her alone. She chose to use some of the funds to pay construction costs and to make a lump sum payment on the mortgage. The evidence does not establish that Mrs. F Sr. intended Mr. D to receive any of the funds or to have any control over the use that Ms. F made of the funds. The funds advanced were not directed in any specific way. *Cabezas* does not assist the respondent.
- [116] Had I concluded that the funds advanced by Mrs. F Sr. to Ms. F in 2010 were not an inheritance or a gift from a third party, I would have concluded that it would be substantially unfair to award Ms. F only one-half of the equity in the family home. To do so would essentially rob her of her inheritance and ignore the significantly disproportionate contribution she made to the improvement of the property and the increase in equity resulting from a substantial reduction in the mortgage.
- [132] In *C.L.M. v. M.J.S.*, 2017 BCSC 799, Donegan J. upheld a claim to trace an exclusion in similar circumstances. In that case, however, the donor parent had written a letter to explain his intentions and had testified at trial to that effect.

- [133] I find this case to be more like Cabezas and N.S. than L.A.F. or C.L.M.
- [134] Regardless of M.Y.T.C.'s parents' intentions, however, M.Y.T.C. must also demonstrate that she intended to keep the funds entirely for herself, despite having applied them to a joint asset. In *Venables v. Venables*, 2019 BCCA 281, Griffin J.A., writing for the Court, summarised the question that arises in such circumstances as follows, at para. 95:
- [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property
- [135] In *K.A.L. v. K.J.L.*, 2017 BCSC 651, Young J. drew the following principle from the relevant authorities, at para. 266:
- [266] Where a party uses funds from excluded property to pay down a shared mortgage, the courts have considered this a gift to the other party.
- [136] Where a husband contributes excluded property toward a jointly held asset, the common law presumption of advancement may apply. Due to a quirk of history, the same presumption will not apply where, as here, a similar contribution is made by a wife in favour of a husband. In these circumstances, the outcome must turn on the wife's intentions. If the wife intended the contribution as a gift, the claim for an exclusion will fail: *Donnelly v. Weekley*, 2017 BCSC 529.
- [137] It is apparent that M.Y.T.C. intended to apply the funds in issue here as a gift to the family to assist in the purchase of the Tisdall Street property and to alleviate the burden of the increase in the mortgage attendant upon the purchase of the Lime Street property. For her to contend otherwise today is inconsistent with numerous representations that she made to L.H.N. during the marriage. Whenever L.H.N. complained to her, as he often did, about her lack of contributions to the family finances, she answered by referring to, among other things, the \$100,000 that she contributed to the purchase of the Tisdall Street property and to the lump sum payments that she made toward the Lime Street property mortgage. She cannot have it both ways.
- [138] Finally, I am not persuaded that the advances from M.Y.T.C.'s parents that were used for the purchase of the Tisdall Street property and to pay down the Lime Street mortgage were originally intended as loans rather than gifts, as M.Y.T.C. now contends. M.Y.T.C. testified that although she originally understood the advances to be gifts, her mother later asked her to write a cheque to them in the amount of \$100,000, which was never cashed, as a kind of promissory note that would guarantee repayment should they later demand it. M.Y.T.C. also explained that this was done because M.Y.T.C. had received more money in gifts from her parents than her sister had. She testified that the date written on the face of the cheque

(October 10, 2016) was not the date that she actually wrote it, but rather a meaningless date that she chose at random. Having considered that evidence, I have concluded that M.Y.T.C.'s purported promise to repay her parents came later and did not change the original character of their original advances to her as gifts.

L.H.N.'s Exclusion Claim

[139] L.H.N. contends that his dental business should be treated as excluded property, in whole or in part, because it originated from two earlier practices that he acquired and amalgamated prior to the marriage in 1998. M.Y.T.C. responds that no such exclusion has been established.

[140] There was scant evidence as to the value of L.H.N.'s dental practice in 1998. L.H.N. sought to adduce supplemental expert reports on that subject during the trial, but I ruled them inadmissible on various grounds. He produced no contemporaneous documents to substantiate the historical value of his practice. He could not remember precisely how many patients he had in the 1990s, or even what he had originally paid for the practices and how he had financed the purchases.

[141] One indication of the historical value of the practice can be gleaned from an application that L.H.N. appears to have completed in April 1996 to obtain disability insurance coverage. In that document, he reported monthly overhead expenses of \$9,765 (the equivalent of \$117,180 annually), including monthly interest costs of \$1,500, against a gross annual income of only \$24,000.

[142] I am satisfied that L.H.N. probably acquired a few of his patients and some office equipment prior to the marriage, which justifies a modest exclusion. In the absence of better evidence as to the specifics, however, I am prepared to recognise only a nominal amount, or \$20,000, as excluded property.

[143] I am therefore reducing the value of the dental business that is subject to division as family property by that amount.

iv. The Appropriate Division

[144] L.H.N.'s claim for an unequal division of family assets and debts is based primarily on his perception that M.Y.T.C. did not contribute her fair share to the family finances during the marriage. I have already found that she contributed more than half of the cost of purchasing their first home on Tisdall Street and that, among other things, she made occasional lump sum payments toward the first mortgage on the Lime Street property, contributions which had the effect of reducing the size of the monthly mortgage payments substantially. L.H.N. is also reaping the benefit of the value of M.Y.T.C.'s other investments, subject only to the relatively limited exclusions that I have recognised.

- [145] L.H.N. also complains that M.Y.T.C. "forced" him to bear the cost of unnecessary luxuries, such as the Lime Street property and private school tuition. I am not persuaded that L.H.N. really was forced into those financial commitments, however. I find, rather, that they were the product of his own choices as much as hers. Moreover, he enjoyed the advantages of living in a larger home and having R.N. educated at a private school, as much as M.Y.T.C. did.
- [146] I appreciate that those choices may, to some extent, have prevented L.H.N. from growing his dental business at the pace he would have wished, but the financial statements in evidence show that the business was, contrary to his complaint, in sound financial condition at the time of the separation. I also appreciate that L.H.N. felt frustrated because M.Y.T.C. reserved for herself the right to elect when and how much to contribute to the family expenses (and by his reckoning, never did so rateably), whereas he had no such flexibility. Nevertheless, I am not satisfied that the parties' respective contributions to their shared obligations were so out of proportion to their individual means as to justify a reapportionment on that basis.
- [147] In summary, I am not persuaded that an equal division of the family assets would be significantly unfair to either party, subject only to the adjustments that follow.
- [148] The gross amount payable by M.Y.T.C. to L.H.N. to equalize their asset holdings will be \$538,942 (being the \$428,942 indicated to be payable to L.H.N. on M.Y.T.C.'s Scott schedule, with an additional \$100,000 payable to L.H.N. to account for M.Y.T.C.'s half-share of that part of her excluded property claim that I have refused, plus \$10,000 to account for her half-share of L.H.N.'s excluded property claim that I have allowed, neither of which were reflected on the Scott schedule).
- [149] From that amount, the following amounts are to be deducted to account for the adjustments I am ordering:
- (a) \$100,509 to equalize the RRSPs;
 - (b) \$30,590.11 to account for the Lime Street property expenses that M.Y.T.C. incurred after separation; and
 - (c) \$27,408.29 to account for interest that M.Y.T.C. paid on the line of credit.
- [150] The total payable by M.Y.T.C. to L.H.N. out of trust to effect the division of assets that I am ordering is therefore \$380,434.60.

B. The Parties' Incomes

i. M.Y.T.C.'s Income

- [151] M.Y.T.C. earns income from three sources: a half-time teaching position at VCC (from which she is currently absent on a renewal leave), piano tutoring and investment income (including rentals from the Wilsonville property). Her reported line 150 income over the past three years was as follows:
- 2016: \$124,968 (of which \$48,000 was from teaching/tutoring);
- 2017: \$48,461 (of which \$34,000 was from teaching/tutoring); and
- 2018: \$41,926 (of which \$19,000 was from teaching/tutoring).
- [152] In 2018 she also received disability benefits totalling \$11,692.
- [153] M.Y.T.C. says that she earned less in 2019 due to the stress and cost associated with this trial and the loss of her father.
- [154] Her plan for 2020 and beyond is to return to her former half-time position at VCC and to apply eventually for a full-time position there. Because she had been teaching at VCC on a casual basis for many years before she was able to secure the half-time position she currently has, it is likely to be several years, she thinks, before she can attain full-time status. The last year that she worked for an entire year at VCC, she earned \$38,390. On that basis, she calculates that a full-time position would pay twice that, or about \$76,780.
- [155] M.Y.T.C. says that her piano tutoring revenue has dwindled with the steady attrition of her students. Four of the ten that are left will be graduating this year and moving on. She can no longer look to the community at St. George's to replace them.
- [156] Most of M.Y.T.C.'s income has come from her investments. That source of income too has diminished because she has had to deplete her savings to fund this litigation. Half of the assets are to be divided in this action, except for the excluded property that I have recognised. She says that she intends to sell the Wilsonville property in order to acquire a new home for herself.
- [157] M.Y.T.C. submits that her income for future years should be fixed at \$60,000 (comprised of \$9,600 in gross piano tutoring income, a half-time salary from VCC of \$38,390 and rental revenue from the Wilsonville property of \$17,684, less associated expenses).
- [158] L.H.N. submits that the Court should impute an income of over \$100,000 to M.Y.T.C., on the basis that she has concealed her true earnings, particularly from piano tutoring. I have already rejected that allegation. He also submits that she is qualified to work as an engineer and could earn considerably more by returning to that profession. I find that to be an unrealistic proposition, given that she abandoned that career path decades ago for the sake of the marriage.
- [159] In awarding interim spousal support, Forth J. fixed M.Y.T.C.'s income at \$48,462. It is not disputed that she should be capable of earning considerably more than that now that this litigation is nearing its end. I accept that the earnings from her piano tutoring will continue

to dwindle. On the other hand, while her investment income will not be as high as it was before, she will retain assets capable of generating income. In addition, her salary at VCC can be expected to grow once she returns to a half-time, and perhaps eventually a full-time position.

[160] In light of those considerations, I am fixing M.Y.T.C.'s annual income at \$70,000.

ii. L.H.N.'s Income

[161] Since 1993, L.H.N. has earned his income as a dentist. He recently sold his practice and retired because, as he put it, his "human capital is depleted." Nevertheless, he is 51 years old, many years away from a typical retirement age.

[162] He has been working at reduced hours for several years and has now ceased working altogether. He testified that he has no intention of working again in any capacity, although he may, he says, return to piano teaching. Despite his stated intention not to return to dentistry, he negotiated a restrictive covenant in the Share Purchase Agreement that, in its final form, prohibits him from practising dentistry but only for the next three years and only within a five-kilometre radius of his former office.

[163] In calculating the amount of interim spousal support that L.H.N. should pay, Forth J. accepted that it was reasonable for him to have curtailed his practice by 20-25% due to the stress of the separation and ensuing litigation (this was before the sale of his practice, which occurred later, during the trial). On the other hand, she also stated that "it is not reasonable given [his] education, work history, and lack of evidence as to medical status that he be perpetually working below capacity." Having regard to those factors, Forth J. fixed his income using the average of the previous three years "income from operations" and "practitioner's wages" as reported on the corporate financial statements. That figure worked out to \$170,563. She refused to impute additional income for having overstated his business expenses, as M.Y.T.C. had urged, for want of evidence supporting that allegation.

[164] M.Y.T.C. submits that such evidence was adduced at the trial, however. She relies in this regard on AHA's analysis of the corporate financial statements, in which L.H.N.'s expenses are compared to those of the "most efficient professional average." The comparison shows that L.H.N. spent 3.06% on "advertising and promotion" compared to the "most efficient professionals," who spent an average of only 1.47% in that category. Similarly, she notes that L.H.N. spent 4.97% of his gross revenues on "office and miscellaneous" expenses, whereas the "most efficient professional" spends an average of only 1.79%. She notes that AHA added back the "discretionary" expenses in order to calculate the adjusted net earnings. This Court should, she argues, follow suit. She suggests that L.H.N. should be allowed only 2% of gross revenues as a reasonable allocation for "office and miscellaneous" expenses, with the balance added back into the discretionary expense category to yield a further adjusted net earnings figure. So calculated, L.H.N.'s three year average (for the years 2015-2017, before he slowed down) would be \$250,532.

[165] Alternatively, she suggests imputing an income calculated by adding the following amounts:

- (a) the net pre-tax income of the business;
- (b) L.H.N.'s reported wages; and
- (c) half of the impugned expenses (advertising/promotions and office/miscellaneous) "improperly" deducted.

[166] That calculation would yield a three-year-average income of \$192,787.

[167] The evidence does not support L.H.N.'s contention that he has been forced to retire early for health reasons, as he asserts. Like M.Y.T.C., he can be expected to return to work at full capacity following the conclusion of this litigation.

[168] It is not manifestly clear that the difference between L.H.N.'s reported expenses and those of the "most efficient professional" ought to be treated as income in his hands for support purposes, as M.Y.T.C. urges. Nevertheless, I accept that an adverse inference should be drawn against L.H.N. in this regard, by virtue of his failure to produce the associated records or to explain the details of those expenses, despite being asked.

[169] Having regard to those considerations, I am adopting M.Y.T.C.'s second alternative and imputing an annual income of \$192,787 to L.H.N.

C. Child Support

[170] M.Y.T.C. does not dispute her obligation to pay child support both prospectively and retrospectively. She has paid none to date because L.H.N. did not apply for it.

[171] For the period from November 2017 (when L.H.N.'s counterclaim seeking child support was filed) to the end of February 2020 (28 months), I award L.H.N. retroactive child support, calculated based on M.Y.T.C.'s income as Forth J. found it to be, at \$48,462. At that income, monthly child support accrued during the relevant period at the rate of \$455.44 per month. The total amount owing for the period is therefore 28 x \$455.44 or \$12,752.32.

[172] From and after March 1, 2020, M.Y.T.C. will owe R.N. child support of \$666 per month for as long as he continues to be a child of the marriage.

D. Spousal Support

[173] I accept that M.Y.T.C. has established her entitlement to spousal support, particularly on compensatory grounds. This was a relatively lengthy marriage, at 19 years. She gave up a career in engineering for the sake of the marriage. She performed housework while raising R.N. She devoted considerable time to R.N. and his schooling, particularly in his early years. She volunteered at his school.

- [174] On the other hand, there are other factors that weigh more heavily in favour of an award at the lower end of the range. The parties kept their finances entirely separate during the marriage. M.Y.T.C. has received many gifts from her parents, which she generally retained for herself (other than the contributions that she made to the family homes, which I have found to have been gifts to the family). As a result, she was able to accumulate a substantial investment portfolio during the marriage, a significant part of which I have found to be excluded property that will not, as such, be subject to division.
- [175] Justice Forth ordered L.H.N. to pay interim spousal support at \$2,300.00 per month, from November 1, 2017 through to trial. None has been paid to date. The amount of the arrears outstanding through to the end of February 2020 (28 months) is \$64,400.
- [176] Prospectively, M.Y.T.C. seeks lump sum spousal support on the basis that L.H.N. cannot be relied upon to comply with a court order stipulating monthly payments. I agree that a lump sum award of spousal support is necessary and appropriate in this case, for that reason and because it would be preferable to minimise the need for further dealings between these parties, given their volatile history.
- [177] Based on the parties' incomes as I have found them to be, the range of net present values indicated by the DivorceMate calculation lies between \$166,017 (low), \$191,785 (mid) and \$217,730 (high). In all the circumstances, I have concluded that a lump sum award of \$175,000 is appropriate.

VI. Summary and Disposition

[178] I am making the following orders:

- (a) the parties are ordered divorced, the divorce to take effect 31 days after the date of this judgment;
- (b) L.H.N.'s applications filed May 16, 2019 (as amended May 24, 2019) and January 3, 2020 are dismissed;
- (c) subject to any costs award I may make, M.Y.T.C. is to pay L.H.N. \$153,786.92 from the net proceeds of sale of the Lime Street property held by Ms. Paul in trust, being the sum of \$380,434.60 (the amount owing to L.H.N. to effect the division of family assets and debts) plus \$12,752.32 (child support arrears owing to L.H.N.), less \$64,400 (spousal support arrears owing to M.Y.T.C.) and \$175,000 (lump sum prospective spousal support owing to M.Y.T.C.);
- (d) subject to any costs award I may make, the remainder of the net proceeds of sale of the Lime Street property held by Ms. Paul in trust are to be paid to M.Y.T.C.;
- (e) subject to any costs award I may make, the net proceeds of sale of the shares in L.H.N.'s dental business, held in trust by Affinity Law, are to be paid to L.H.N.;
- (f) \$1,768.52 of the funds held by Ms. Paul in trust from Intact Insurance are to be paid to M.Y.T.C. and the remaining sum of \$2,921.39 is to be divided equally between the parties;

- (g) the parties' membership in the Arbutus Club is to be divided equally;
 - (h) the parties' pensions are to be divided equally pursuant to the FLA; and
 - (i) from and after March 1, 2020, M.Y.T.C. will pay L.H.N. child support of \$666 per month, on the first day of each month, for as long as R.N. remains a child of the marriage.
- [179] I am making no order as to costs at this stage. The parties have 30 days from the date of this judgment to deliver any written submissions they wish to make on costs by way of a letter to the registry.

"Milman J."

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Prepared on 24 October 2026 · Esheria