

CANADA / JUDGMENT

Ma v. Liu

2023 BCSC 283

COURT

Supreme Court of British Columbia

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2023 BCSC 283 Ma v. Liu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ma v. Liu,

2023 BCSC 283

Date: 20230228

Docket: E183355

Registry: Vancouver

Between:

Xiao Ma

Claimant

And

Qi Liu and Weiwei Liu

Respondents

Before: The Honourable Justice Lamb

Reasons for Judgment

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Weiwei Liu

Place and Dates of Trial:

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August 2-5; 8-12, 2022

August 15-18, 2022

August 31, September 1, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2023

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Introduction

- [1] The main dispute in this family law case is over ownership of a family home. The claimant and her parents say that the home was purchased by respondent Qi Liu's parents as a gift for the claimant and Qi Liu after the claimant became pregnant with his child. Qi Liu and his family deny that the home was gifted to the young couple and say instead that Qi Liu's father is the beneficial owner of the home.
- [2] By way of overview, in the spring of 2015, Xiao Ma and Qi Liu conceived a child together. On June 1, 2015, Qi Liu's father, Weiwei Liu, purchased a residential property located at [address redacted], British Columbia (the "Coquitlam Property"). Title to the Coquitlam Property was registered with Qi Liu as 99% owner and Weiwei Liu as 1% owner. There is no dispute that Weiwei Liu paid and continues to pay all of the costs associated with the Coquitlam Property, including the down payment and all mortgage payments. Weiwei Liu claims beneficial ownership of the Coquitlam Property, a claim that is supported by Qi Liu. Xiao Ma says that Weiwei Liu gifted the Coquitlam Property to her and Qi Liu, which is why title was registered with Qi Liu as 99% owner.
- [3] Xiao Ma and Qi Liu married on August 5, 2015 and had a child in December 2015. They eventually separated in September 2018. On September 11, 2018, Xiao Ma and Qi Liu signed a separation agreement in which Qi Liu agreed to transfer his interest in the Coquitlam Property, a BMW X5, and corporate shares in a restaurant business to Xiao Ma (the "Separation Agreement"). Xiao Ma seeks to enforce the Separation Agreement. Qi Liu says that the Separation Agreement is not enforceable because she failed to disclose significant property, he signed it at a time when he was vulnerable and without legal advice, and it is significantly unfair. Further, Weiwei Liu claims beneficial ownership of the shares and the BMW. Qi Liu acknowledged that the BMW was family property, but he supports his father's claim to a beneficial interest in the shares (which currently have no value).

- [4] Xiao Ma and Qi Liu have agreed to parenting orders. The parties have agreed that the Coquitlam Property will be sold if I find that Weiwei Liu gifted a 99% interest to Xiao Ma and Qi Liu. If I find that the Separation Agreement is unenforceable, then the parties have agreed that further submissions regarding division of assets, child support, and spousal support will proceed if necessary based on the evidence at trial.
- [5] Weiwei Liu represented himself at trial. Shortly before trial, he applied unsuccessfully to adjourn the trial after his previous counsel terminated his retainer. Weiwei Liu had a Mandarin interpreter present for most of the trial. He was able to understand all of the oral testimony, as each of the witnesses testified in Mandarin.
- [6] Throughout these reasons, as the parties did at trial, I have used the full names of parties and witnesses to avoid confusion.

Issues

- [7] Ownership of the Coquitlam Property is the key question to be decided: did Qi Liu's father intend to gift the Coquitlam Property to Qi Liu and Xiao Ma or does Qi Liu hold his interest in trust for his father? Because of their limited value, ownership of the shares and BMW is a secondary issue; however, ownership of these other assets provides context for the dispute over ownership of the Coquitlam Property.
- [8] In chronological order, the issues I must decide are as follows:
- a) Did Weiwei Liu gift the BMW to Qi Liu in March 2015?
 - b) Did Weiwei Liu gift a 99% interest in the Coquitlam Property to Qi Liu and Xiao Ma in May 2015?
 - c) Did Weiwei Liu gift the shares in the restaurant business to Qi Liu in October 2017?
 - d) Is the Separation Agreement signed in September 2018 enforceable?
- [9] Before turning to these issues, I will review the agreed facts and comment on credibility.

Joint statement of agreed facts

- [10] The claimant and respondent Qi Liu executed a Joint Statement of Agreed Facts, pursuant to which they were deemed to have admitted the facts included in the attached schedule. The Joint Statement of Agreed Facts was filed as an exhibit at trial. Although Weiwei Liu was not a signatory, I find the following facts were proven by the Joint Statement of Facts and the absence of credible evidence to contradict the admissions:
- a. As of the trial date, Xiao Ma was 31 years old. Xiao Ma is also known as "Tali".
 - b. Xiao Ma was born in the City of Chengdu, in the Province of Sichuan, China. Her mother is Hui Xiao, and her father is Ming Ma. Her parents are divorced. Hui Xiao resides in the United States, and Ming Ma resides in China. Xiao Ma is an only child.

- c. As of the trial date, Qi Liu was 29 years old. He turned 30 years old during the trial. Qi Liu is also known as "Leo". His mother is Yazhen Gao, and his father is Weiwei Liu. He has one younger sister.
- d. Qi Liu was born in the City of Anping, in the Province of Hebei, China.
- e. Xiao Ma and Qi Liu did not know each other in China. They both graduated from high school in China.
- f. In or about October or November 2010, Xiao Ma and Qi Liu moved to Vernon, British Columbia to attend high school. Although they both graduated from high school in China, they were advised by agents that it would be easier to be admitted to a Canadian post-secondary school if they attended a Canadian high school.
- g. Xiao Ma and Qi Liu met each other at the Vernon high school, namely, Clarence Fulton Secondary School, where they were classmates. They began a romantic relationship in or around the end of 2010. They resided with separate home stay families while they lived in Vernon.
- h. After completing the school year in Vernon, Xiao Ma and Qi Liu jointly decided to move to Vancouver and move in with each other. In or about the summer of 2011, Xiao Ma and Qi Liu moved to the Greater Vancouver area, and they lived in several rental units together continuously from the summer of 2011 until approximately the summer of 2014. During this time period,
- i. Xiao Ma and Qi Liu each attended post-secondary at BCIT and Coquitlam College. Their respective parents paid for their respective tuition;
- j. Xiao Ma and Qi Liu did not work; and
- k. Xiao Ma and Qi Liu shared living expenses. They both relied on their parents for money.
- l. In or about the summer of 2014 during a trip to China, Xiao Ma and Qi Liu broke up. Xiao Ma initially stayed in China, and then she resided in San Diego with her mother.
- m. In or about September 2014, Qi Liu returned from China to the Greater Vancouver area and resided with a roommate.
- n. In or about the fall of 2014, Qi Liu and Xiao Ma resumed contact through a messaging platform and by video calls. During March 2015, Xiao Ma visited Qi Liu in the Greater Vancouver area. Qi Liu asked Xiao Ma if they could have a baby. Xiao Ma eventually agreed to try to conceive a baby, and they engaged in sexual relations with the intention of conceiving a baby. Xiao Ma became pregnant.
- o. In or about March 2015, Weiwei Liu purchased the BMW, which was registered in the name of Qi Liu.

- p. Xiao Ma told Qi Liu that her parents did not approve of the pregnancy. Xiao Ma told Qi Liu that her father requested that Xiao Ma have an abortion.
- q. In or about April 2015, Xiao Ma quit her schooling in San Diego and moved back to the Greater Vancouver area. She resided with Qi Liu and his roommate in a rental unit and then a rental house rented by Qi Liu where Qi Liu, Xiao Ma and Qi Liu's parents stayed during Qi Liu's parents second visit to Canada in May 2015.
- r. On or about May 10, 2015, the contract of purchase and sale was executed to purchase the Coquitlam Property for the sum of \$1,855,000. Qi Liu was named as the purchaser on the contract of purchase and sale.
- s. On or about May 21, 2015, by addendum to the contract of purchase and sale, Weiwei Liu was added as a purchaser of the Coquitlam Property.
- t. On or about June 1, 2015, the purchase of the Coquitlam Property completed.
- u. Immediately following the purchase of the Coquitlam Property, Xiao Ma and Qi Liu moved into the Coquitlam Property.
- v. In or about August or September 2015, Qi Liu's parents and his younger sister moved into the Coquitlam Property and resided with Xiao Ma and Qi Liu until in or about April 2016, when they all moved to Irvine, California.
- w. On August 5, 2015, Xiao Ma and Qi Liu were married in Seattle, Washington.
- x. In or about August or September 2015, Qi Liu's parents travelled to Chongqing, China to visit Xiao Ma's father and her stepmother.
- y. On or about December 7, 2015, Xiao Ma gave birth to her and Qi Liu's son, Ethan.
- z. In or about the end of April 2016, Xiao Ma, Qi Liu, Qi Liu's parents and his younger sister, and Ethan moved to Irvine, California together. They all resided at a home purchased by Weiwei Liu and Yazhen Gao and registered in the names of Weiwei Liu and Yazhen Gao.
- aa. In or about April 2016, the Coquitlam Property was listed for sale. It was never sold. Qi Liu continues to hold a 99% registered interest and Weiwei Liu continues to hold a 1% registered interest in the Coquitlam Property.
- bb. In or about January or February 2017, Xiao Ma, Qi Liu and Ethan moved back into the Coquitlam Property. Weiwei Liu, Yazhen Gao and Qi Liu's younger sister stayed in California.
- cc. On or about October 26, 2017, 1139135 B.C. Ltd. (the "Company") was incorporated to open a Chinese restaurant in Burnaby, British Columbia called "Hi Chicken Pot". On the incorporation documents, Qi Liu was listed as one of the three directors of the Company and one of the three shareholders of the Company.

dd. In or about September 2018, Hi Chicken Pot restaurant opened. In or about September 2021, Hi Chicken Pot restaurant closed. The shares held by Qi Liu in the Company have no value. Accordingly, the parties did not obtain a business valuation in respect of the Company shares.

ee. In or about June 2018, Weiwei Liu, Yazhen Gao and Qi Liu's younger sister moved back to Canada from Irvine, California. They went back to China in or about August 2018 and when they returned to Canada in September 2018, they resided at the Coquitlam Property until they moved into a condominium in Richmond that same month.

ff. In or about 2018, Xiao Ma and Ethan visited China for a few months. During their trip, Xiao Ma learned from Qi Liu that he began an affair with another woman which resulted in Qi Liu's and Xiao Ma's separating.

gg. On or about September 11, 2018, Xiao Ma and Qi Liu executed the Separation Agreement.

hh. After the execution of the Separation Agreement, Qi Liu transferred the ownership of the BMW to Xiao Ma. Xiao Ma remains in possession of the BMW.

ii. In or about November 2018, Xiao Ma and Ethan moved to California where they continue to reside today.

jj. As of the trial date, Weiwei Liu and Yazhen Gao resided in the Coquitlam Property.

kk. On or about December 17, 2018, Xiao Ma filed this action.

ll. On or about June 18, 2020, Justice Ross granted the parties a divorce order.

mm. Qi Liu is remarried and has a child with his new wife.

nn. In Xiao Ma's trial brief, filed June 21, 2022, she listed Roy Luo as a witness (the lawyer who drafted the Separation Agreement). Despite using her counsel's best efforts, they have been unable to locate Roy Luo to testify as a witness at trial. They believe he may have moved back to China. The parties agree that no adverse inference should be drawn as a result of Xiao Ma's inability to call Roy Luo as a witness.

oo. In Qi Liu's trial brief, filed June 22, 2022, he listed Wu Yue He as a witness (Wu Yue He was a director and shareholder of Hi Chicken Pot restaurant). Despite using his best efforts, he has been unable to locate Wu Yue He to testify as a witness at trial. He believes he may have moved back to China. The parties agree that no adverse inference should be drawn as a result of Qi Liu's inability to call Wu Yue He as a witness.

[11] Although not addressed in the Joint Statement of Agreed Facts, I find that Weiwei Liu provided the funds to purchase the BMW, the Coquitlam Property, and the shares in the Company. Weiwei Liu's only source of funds identified at trial was Yazhen Gao's business. Yazhen Gao owned a successful jewelry store business in China that had a number of retail outlets. Yazhen Gao is not a party to this litigation. I find that Weiwei Liu and Yazhen Gao had a common intention with respect to the assets in issue.

- [12] Before deciding the issues, I will make some general comments regarding the credibility of the witnesses and the reliability of their testimony.

Credibility and reliability

- [13] There were no independent or disinterested witnesses at trial. Xiao Ma and both her parents testified. Qi Liu and both his parents testified. Qi Liu's friend testified about what Qi Liu told him about the Coquitlam Property: this hearsay evidence was of no assistance.
- [14] The assessment of credibility was complicated by the fact that all witnesses testified with the assistance of a Mandarin interpreter. As noted by Justice Sharma, "[h]earing evidence through the filter of an interpreter can be challenging": *Kim v. Khaw*, 2014 BCSC 2221 at para. 101.
- [15] Credibility refers to the truthfulness of the witness; reliability relates to the accuracy of the testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104.
- [16] In terms of assessing credibility, I have relied in particular on the following factors identified as relevant by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013):

the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally...Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time...

- [17] At trial, both respondents testified about events and conversations that were not put to the claimant or her witnesses in cross-examination, contrary to the rule in *Browne v. Dunn* (1893), 6 R. 67, 1893 CanLII 65 (U.K.H.L.). I accept that Weiwei Liu failed to give the claimant and her witnesses an opportunity to respond to his anticipated evidence because he represented himself. I make no criticism of Qi Liu's counsel, as I expect that he was taken by surprise by some of the evidence offered by his client. Where evidence tendered by the respondents was not put to the claimant and her witnesses, I give such evidence (to the extent it is credible) less weight.
- [18] Qi Liu was not a credible or reliable witness. He claimed not to remember many key events and conversations, particularly those that might conflict with his or his father's interests. For example, he claimed not to recall when he told his parents that Xiao Ma was pregnant or their reaction, even though he was completely financially dependent on his parents at the time and he had no real prospect of supporting a child without their continued financial support. He claimed not to recall the discussion with the lawyer who handled the conveyance of the Coquitlam Property. On the other hand, he testified in minute detail about

events from many years ago that might cast a negative light on Xiao Ma's character, most of which were not put to her in cross-examination and most of which were not directly relevant to the issues I must decide.

- [19] Qi Liu was particularly forgetful at his examination for discovery, conducted December 30, 2020. On discovery, Qi Liu claimed not to remember meeting with Xiao Ma's mother to tell her about the pregnancy or events leading up to and related to the signing of the Separation Agreement in September 2018. Qi Liu claimed to have better recollection on these events at trial. He claimed that his memory was better at trial because, as of December 2020, he continued to be distraught over his break-up with Xiao Ma more than two years earlier. I reject this explanation as implausible: by August 2020, Qi Liu was married to his current spouse. I find that Qi Liu's lack of responsiveness and feigned failure to recall at his examination for discovery was an attempt to avoid giving any evidence that might be damaging to his and his father's position at trial.
- [20] At trial, Qi Liu admitted that some of his evidence on discovery was not true or not completely true. Giving evidence under affirmation that was not truthful undermines his credibility: *Youyi Group Holdings (Canada) Ltd v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at para. 92b) [Youyi].
- [21] Qi Liu's credibility was further undermined when he gave testimony that contradicted facts he admitted pursuant to the Joint Statement of Agreed Facts. Given his formal admission of facts, I am left to conclude that Qi Liu offered false testimony, believing somehow that it would assist his case. For example, Qi Liu acknowledged in the Joint Statement of Agreed Facts that Xiao Ma visited him in the Greater Vancouver area in March 2015 after they resumed contact in the fall of 2014. However, in cross-examination, Qi Liu claimed that he did not know she was coming to BC and that he found her in his apartment, yet he apparently did not remember asking her why she was there. I prefer Xiao Ma's evidence, confirmed by the Joint Statement of Agreed Facts, that Qi Liu invited her to visit him in the Greater Vancouver area in March 2015.
- [22] Further, Qi Liu's failure to disclose documents in accordance with the Supreme Court Family Rules further undermines his credibility: *Youyi* at para. 92e). On the seventh day of trial, during the second day of his examination in chief, Qi Liu sought to tender a number of documents that had not been previously produced in the litigation. I declined to admit these new documents, in large part because there was no explanation for their late production.
- [23] Finally, despite his denial of any involvement, I find that Qi Liu was aware that his father accessed Xiao Ma's personal email account and blocked her access to her own email account after she moved out of the Coquitlam Property. On his list of documents, Weiwei Liu listed two emails from November 2018 sent from Xiao Ma's email account to her legal counsel. Weiwei Liu said on discovery that his son had provided Xiao Ma's emails to him. At trial, Weiwei Liu said on cross-examination that, in November 2018, he asked a relative in China to help him to find and change the password for Xiao Ma's email account, which was open

on a desktop computer at the Coquitlam Property. Weiwei Liu then asked his relative to look for important emails. Weiwei Liu testified that the relative corresponded with him and Qi Liu in a family WeChat group about the emails. It is difficult to disentangle the conflicting and misleading testimony from Qi Liu and Weiwei Liu in order to determine who actually accessed and blocked Xiao Ma's email account, but I am satisfied that both respondents were aware of and involved in the process. These events are particularly troubling because they accessed Xiao Ma's privileged correspondence with her counsel, the respondents only produced emails that they perceived might help their position, and they prevented Xiao Ma from accessing emails that might have corroborated her evidence regarding communications with the lawyer who prepared the Separation Agreement.

- [24] As a result, except where he made admissions against his own or his father's interest or his evidence was corroborated by credible evidence, I have given Qi Liu's evidence little to no weight.
- [25] Weiwei Liu's and Yazhen Gao's credibility suffered because they struggled "to resist the influence of interest to modify [their] recollection": Bradshaw at para. 186. Understandably, they are both strongly motivated to try to obtain a court order recognizing them as the owners of the Coquitlam Property. However, I am cautious about accepting their assertions about their contemporaneous intentions regarding the assets in issue, especially where their evidence conflicts with other credible evidence.
- [26] Weiwei Liu's evidence at trial was at times inconsistent, and he too acknowledged that some of his evidence on discovery and evidence deposed in an affidavit filed in support of a trial adjournment application was untrue.
- [27] Weiwei Liu's credibility suffered as a result of his failure to meet his document disclosure obligations, and he too sought to tender previously undisclosed documents late in the trial. Some of these failures may be attributable to his unfamiliarity with his disclosure obligations (despite having counsel until shortly before trial); however, his active and intentional interference with Xiao Ma's email account is particularly troublesome.
- [28] That said, I am not prepared to reject all of Weiwei Liu's evidence. I accept that he was trying to be accurate about background matters that did not relate directly to his intentions concerning the assets in issue. Some of his evidence was corroborated by documents.
- [29] Yazhen Gao provided limited evidence. She was often evasive and unresponsive on cross-examination, which impacted her credibility: Youyi at para. 92g).
- [30] Xiao Ma presented her story in a very deliberate manner. Qi Liu argues that she is not credible because she failed to disclose financial account statements. As detailed below, the evidence does not establish that Xiao Ma failed to provide adequate financial disclosure. Xiao Ma's evidence was largely unshaken on cross-examination. I accept that some minor differences in her evidence are most likely attributable to translation difficulties.

- [31] Qi Liu argued that Hui Xiao was not credible because her will-say statement did not include some of the details included in her trial testimony. However, I find Hui Xiao was generally credible and reliable. For the most part, her evidence was not shaken on cross-examination. As for the will-say statement, it is "a procedural tool to ensure fairness, efficiency, and preparedness and to prevent ambush at trial": *Bartch v. Bartch*, 2017 BCSC 1625 at para. 7. Hui Xiao's will-say statement was adequate though not exemplary, and any deficiency is attributable to Xiao Ma's counsel rather than a problem with Hui Xiao's credibility. Hui Xiao did not have an opportunity to review her will-say statement before it was delivered to the respondents, and she would not have understood a document written in English in any event. That said, Hui Xiao claimed to have better than average memory by her own estimation. Her claim was not substantiated.
- [32] Ming Ma was a generally credible witness. He presented his evidence in a clear and straightforward fashion. His evidence was not shaken on cross-examination.

Issue 1: Did Weiwei Liu gift the BMW to Qi Liu?

- [33] There is no dispute that Weiwei Liu paid for the BMW, and he claims beneficial ownership in the vehicle. I am satisfied on the whole of the evidence that Weiwei Liu intended to gift the BMW to Qi Liu for the following reasons:
- a) Qi Liu was identified as the purchaser on the Motor Vehicle Purchase Agreement prepared March 28, 2015 by the dealership;
 - b) the dealership receipt indicates that the initial payment of \$5000 was received from Qi Liu;
 - c) Weiwei Liu admitted on discovery that he told Qi Liu that he would buy a vehicle for him;
 - d) Weiwei Liu testified that, in the days prior to the purchase of the BMW, his wife said Qi Liu's other car was "too shabby" and "too old" and that Qi Liu should drive a "good car";
 - e) Weiwei Liu and his wife purchased their own vehicles when they came to live in Canada;
 - f) through pleadings he filed and the Scott Schedule he provided, Qi Liu acknowledged that the BMW was family property;
 - g) unlike with the Coquitlam Property and the company shares, Qi Liu did not claim that he held the BMW in trust for his father; and
 - h) Qi Liu transferred the BMW to Xiao Ma in accordance with the Separation Agreement, demonstrating that he believed he was the owner of the BMW.

- [34] I reject Weiwei Liu's evidence that he actually owned the BMW. At trial, Weiwei Liu asserted that the BMW was registered in his son's name only because he did not have his license with him at the time the vehicle was purchased. I find that Weiwei Liu contrived this explanation to bolster his attempt to prove he owned the vehicle beneficially. This evidence was not confirmed by any other witness at trial. Further, it is inconsistent with the contemporaneous discussions between Qi Liu and his parents about the vehicle.
- [35] Further, Weiwei Liu's late disclosure of the motor vehicle purchase agreement during the third week of trial (despite a specific request at his examination for discovery for production of that document) undermines his credibility on this issue. I accept that Weiwei Liu failed to disclose this document sooner in part because he failed to understand his document disclosure obligation, despite being represented by counsel until shortly before trial. However, I find that it is more likely than not that Weiwei Liu deliberately failed to disclose the motor vehicle purchase agreement sooner because he recognized that the document is inconsistent with his position regarding ownership of the BMW.
- [36] To be clear, I find that Weiwei Liu and Yazhen Gao gifted the BMW to Qi Liu on or about March 28, 2015, before anyone knew that Xiao Ma was pregnant with Qi Liu's child and that, as admitted by Qi Liu, the BMW is family property.

Issue 2: Did Weiwei Liu gift a 99% interest in the Coquitlam Property to Qi Liu and Xiao Ma?

- [37] Weiwei Liu says that he did not intend to gift the Coquitlam Property to Qi Liu and Xiao Ma. He offered a number of reasons why Qi Liu was a registered owner on title to the Coquitlam Property. Weiwei Liu insists that he was always the beneficial owner of the Coquitlam Property and that his son and others including Xiao Ma knew this was the case.
- [38] Qi Liu supports his father on this issue. However, Qi Liu was not a credible or reliable witness, and his evidence was not very helpful in deciding whether or not there was a gift.
- [39] There are no documents other than the contract of purchase and sale from which to discern Weiwei Liu's intention at the time the Coquitlam Property was purchased. As a result, I have relied in part on declarations he and his wife made and actions they took contemporaneously in order to discern whether they intended to gift the Coquitlam Property to Qi Liu and Xiao Ma. I have also considered subsequent conversations and conduct, with care to guard "against evidence that is self-serving or that tends to reflect a change in intention": *Pecore v. Pecore*, 2007 SCC 17 at para. 59.
- [40] There are significant conflicts in the evidence regarding conversations that occurred before and after the purchase of the Coquitlam Property. Assessment of the credibility of the witnesses and the reliability of their testimony is key to deciding whether or not Weiwei Liu gifted the Coquitlam Property to Qi Liu and Xiao Ma.

- [41] Before making findings regarding the conversations and events surrounding the purchase of the Coquitlam Property, I will outline the legal framework that applies in these circumstances.

Presumption of indefeasible title

- [42] The claimant argues that land title registration provides "conclusive evidence at law and in equity" that Qi Liu owns a 99% interest in the Coquitlam Property: s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250; *Virk v. Pannu*, 2006 BCSC 921 at para. 11, aff'd 2007 BCCA 260. However, the presumption of indefeasible title can be rebutted by operation of a resulting trust: *Suen v. Suen*, 2013 BCCA 313 at para. 34. Whether Qi Liu holds his 99% ownership interest in the Coquitlam Property on a resulting trust in favour of Weiwei Liu lies at the heart of this dispute.

Transfer to Qi Liu gratuitous

- [43] The claimant argues that there can be no resulting trust unless the transfer to Qi Liu is gratuitous: *S.N. v. B.N.*, 2021 BCSC 2339 at para. 129, citing *Kerr v. Baranow*, 2011 SCC 10 at paras. 36-37. The claimant argues that Qi Liu provided consideration for his interest in the Coquitlam Property by co-signing the mortgage and pledging his credit. When a mortgage is only available because a co-signer pledges their credit, then the co-signer provides valuable consideration: *Jafar-Gholizadeh v. Larijani*, 2018 BCSC 279 at paras. 127, 133; *Bajwa v. Pannu*, 2007 BCCA 260 at para. 13. However, in this case, I am not satisfied on the evidence that Qi Liu provided valuable consideration.
- [44] At the time he co-signed the mortgage, Qi Liu was an unemployed student and completely reliant on his parents for financial support. There is no evidence that he owned anything other than the BMW his parents had given him. It is unlikely in these circumstances that the mortgage was only available because Qi Liu agreed to co-sign. Further, it is unlikely that Qi Liu's credit was at any real risk, as there was more than enough equity in the Coquitlam Property to cover any default on the mortgage: the property was purchased for \$1,855,000 and the original mortgage was for \$1,200,000.
- [45] The claimant argues that Weiwei Liu's own testimony on cross-examination supports her position that Qi Liu provided valuable consideration for his ownership interest in the Coquitlam Property. I am not satisfied that the evidence establishes on a balance of probabilities that Qi Liu provided consideration for his interest in the Coquitlam Property. Under cross-examination, Weiwei Liu testified that he thought he was told that he was unable to obtain a mortgage on his own because he was a foreign national and that he probably wouldn't be able to get a mortgage without Qi Liu's co-signing. I place little weight on this evidence for the following reasons:
- a) Weiwei Liu's evidence on cross-examination was far from clear regarding what the bank may have told him about any conditions on his mortgage approval;

- b) he was not certain about his recollection of the discussion that he did recount; and
 - c) there were no documents or other evidence from the bank or the mortgage broker or the conveyancing lawyer to corroborate his testimony.
- [46] In any event, any consideration based on Qi Liu's co-signing the mortgage would not justify a 99% ownership interest in the Coquitlam Property.
- [47] I am satisfied on the whole of the evidence that Weiwei Liu granted Qi Liu a 99% ownership interest in the Coquitlam Property gratuitously.

Resulting trust or gift

- [48] In *Pecore*, the Supreme Court of Canada stated that where property is transferred gratuitously, a resulting trust is presumed. The onus of proof is on the person seeking to rebut the presumption to prove on a balance of probabilities that a gift was intended: *Pecore* at paras. 22-24, 43-44. The Court will only rely on the legal presumption of resulting trust if the Court is unable to determine the transferor's actual intention at the time of the transfer: *Pecore* at paras. 23, 43-44; *Creyke v. Creyke*, 2016 BCCA 499 at para. 53. Evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust: *Pecore* at para. 41.
- [49] The Supreme Court of Canada in *Pecore* at para. 55 confirmed that all relevant evidence that might establish the transferor's intention as of the time of transfer should be weighed. Depending on the facts of the case, reliable evidence of intention at the time of the transfer may be contemporaneous or subsequent to the transfer itself: *Pecore* at para. 59. Relevant evidence may include documents pertaining to the asset, declarations and conduct contemporaneous to the transfer, conduct subsequent to the transfer, subsequent control and use of the property, and tax treatment of the property: *Pecore* at paras. 55-70. Control and use of the property after the transfer by the transferor may not be conclusive, as it may not be inconsistent with a gift: *Pecore* at paras. 62-66; *Schouten Estate v. Swagerman-Schouten*, 2014 BCSC 2320 at para. 5. Courts may consider the quality of the relationship between the transferor and transferee in order to determine whether the presumption of resulting trust has been rebutted (i.e., father/son): *Pecore* at para. 37.
- [50] It is with this legal framework in mind that I will review the evidence relevant to determining Weiwei Liu's intention at the time the Coquitlam Property was purchased.

Events prior to purchase of the Coquitlam Property

- [51] Weiwei Liu took the first step toward buying property in the Greater Vancouver area a few months before the Coquitlam Property purchase. Weiwei Liu, Yazhen Gao and their daughter visited the Greater Vancouver area for the first time in March 2015. During that visit, Weiwei Liu and Yazhen Gao were so impressed with Canada that they considered immigrating here. They paid a deposit with an immigration consultant to start the process

of immigrating to Canada under a foreign investor program. And they spent time with a realtor looking at real estate.

- [52] As of March 2015, Qi Liu was a student living with a roommate in rental accommodation in Burnaby. His parents continued to pay all of his expenses. Qi Liu and Xiao Ma had resumed a relationship in the fall of 2014, though a long distance one because she lived and studied in California.
- [53] In March 2015, Xiao Ma visited Qi Liu in British Columbia. Her visit overlapped with Qi Liu's family's visit. It is likely that his parents learned that Qi Liu and Xiao Ma were back together after his parents arrived in Canada on March 20, 2015.
- [54] At some point before March 2015, Qi Liu and his parents had discussed the possibility of his parents' buying a residence in the Greater Vancouver area so he could live there and rent out the remainder of the residence to subsidize the cost of the purchase. Weiwei Liu became more interested in this idea when he visited Canada in March 2015 and learned that he could buy a home outside the downtown core for a reasonable price (in the range of \$500,000). Initially, Weiwei Liu considered buying a townhouse, but the types of properties they looked at changed after he met with a mortgage broker and found out he could get a mortgage. I note that no documents from a mortgage broker were filed in evidence.
- [55] Weiwei Liu asked Qi Liu to continue to research properties available to purchase after he, his wife and daughter returned to China on April 6, 2015. I accept that Weiwei Liu originally considered buying a house in the Greater Vancouver area as an investment and as a place for Qi Liu to live. However, I find that Weiwei Liu's intention with respect to purchasing a property in the Greater Vancouver area changed once he learned that Xiao Ma was pregnant.
- [56] As admitted through the Joint Statement of Agreed Facts, during Xiao Ma's visit to the Greater Vancouver area in March 2015, Qi Liu asked her if they could have a baby. After some initial reluctance, Xiao Ma agreed to try to conceive a baby, and they engaged in sexual relations with the intention of conceiving a baby. She became pregnant before returning to California in early April 2015.
- [57] Xiao Ma learned of her pregnancy in late April 2015. Qi Liu flew to California to tell Xiao Ma's mother about their plans for having the child and to bring Xiao Ma back to British Columbia. Hui Xiao, Xiao Ma's mother, offered a clear and precise account of that discussion. Her evidence was not shaken on cross-examination, and it was largely consistent with Xiao Ma's evidence regarding that conversation. I prefer Hui Xiao's evidence regarding the April 2015 conversation in California over that of Qi Liu.
- [58] In late April 2015, Xiao Ma and Qi Liu told Hui Xiao that Xiao Ma was pregnant and that they were going to return to Vancouver to get married and have the baby. Hui Xiao was shocked at this announcement because she felt that they were not psychologically or financially ready to have a child. Hui Xiao was opposed to their plan. Qi Liu told Hui Xiao that he had

already told his parents about the pregnancy, and his parents were going to fly over from China to buy a property for them. Hui Xiao said that even if they have a house, they would still have no income. Qi Liu told Hui Xiao that his parents would support them financially until they became self-sufficient. Qi Liu said his parents would teach them how to run a business and invest in a business for them. Qi Liu told Hui Xiao not to worry because his parents would support him and Xiao Ma. Qi Liu also told Hui Xiao that his parents would come to Canada for six months each year to look after the baby so that Xiao Ma could return to her studies. Qi Liu's assurance that his parents had committed to support the young couple financially and otherwise alleviated some of Hui Xiao's concerns.

- [59] Qi Liu's version of this conversation was slightly different. He suggested that he told Hui Xiao that his parents would give them a place to live. Qi Liu claims that Hui Xiao asked him about a house. He claims he said he would buy a house for himself and Xiao Ma someday, but that Hui Xiao did not believe him. Qi Liu claims he said that he would try to convince his parents, but he could not guarantee anything. For the reasons outlined above, Qi Liu is simply not a credible witness. On this point in particular, his evidence is improbable. Hui Xiao was worried about how Xiao Ma and Qi Liu would support themselves and a baby, because she knew that both were students who did not work or support themselves. She would have no reason to be comforted by a promise from Qi Liu that someday he might buy a home for her daughter and grandchild.
- [60] Qi Liu acknowledged that he told Hui Xiao that his parents would financially support him, Xiao Ma and the baby and that his parents would come to help look after the new baby so Xiao Ma could go back to school.
- [61] Xiao Ma testified that Qi Liu told her mother that his parents would provide a place for them to live, a vehicle and financial support. Xiao Ma provided few details about this California conversation. However, consistent with her mother's account, Xiao Ma testified that Qi Liu told her that his parents agreed to buy them a house.
- [62] Hui Xiao was not surprised by Qi Liu's parents offer to buy them a house. Hui Xiao testified that, according to Chinese tradition, parents would buy a house for their son, even if the son were financially capable of buying his own house and even if the parents must borrow money to buy the property. Ming Ma, Xiao Ma's father, confirmed this tradition when he testified. Neither Qi Liu, Weiwei Liu or Yazhen Gao denied the existence of this tradition when they gave evidence.
- [63] Consistent with Hui Xiao's account of the conversation, Qi Liu's parents:
- a) financially supported Qi Liu, Xiao Ma and Ethan between May 2015 and their separation in September 2018 by paying their living expenses;
 - b) came to live with Qi Liu and Xiao Ma before and after Ethan was born; and
 - c) invested in a business for the benefit of Qi Liu and Xiao Ma.

- [64] By the end of April 2015, Xiao Ma had moved back to Canada and was living with Qi Liu and his roommate.
- [65] Once she was back in Vancouver, Xiao Ma told her father in China during a conversation by WeChat that she was pregnant. Ming Ma was very upset and opposed to the idea of her having a baby. Ming Ma felt that she needed to be independent and that she needed to complete her education before getting married. Ming Ma wanted his daughter to have an abortion. Xiao Ma told Ming Ma that Qi Liu's parents were quite happy about the pregnancy, and they had decided to purchase a property for them in Canada, to help them look after the baby, and to support them while they had no incomes themselves.
- [66] Qi Liu and his parents claim to recall few details about the conversation in which Qi Liu told them that Xiao Ma was pregnant, including when that conversation took place. This strains credulity given that Qi Liu remained financially dependent on his parents at that time. I accept Xiao Ma's submission that the evidence of Qi Liu and his parents was intentionally vague regarding this important conversation to avoid lending support to the theory that the Coquitlam Property purchase was motivated by Xiao Ma's pregnancy. I find that Qi Liu's parents were aware of Xiao Ma's pregnancy before their second trip to Vancouver in May 2015.
- [67] Qi Liu's parents returned to Vancouver from May 5 to 25, 2015. Qi Liu told Xiao Ma that his parents came to Canada to purchase a property for them, though she does not recall discussing this directly with his parents. Xiao Ma describes herself as very shy during that time period, and much of the communication with his parents was channeled through Qi Liu. I accept that Weiwei Liu and Yazhen Gao travelled to Canada in May 2015 with the intention of buying a property for Qi Liu and Xiao Ma because she was pregnant. There was no evidence that they had planned to return so soon after their first trip to Canada until Xiao Ma became pregnant.
- [68] In May 2015, Qi Liu and his parents viewed the Coquitlam Property and some others. Xiao Ma did not accompany them on all property viewings, as she suffered from morning sickness. She did view the Coquitlam Property before it was purchased.

Purchase of the Coquitlam Property

- [69] Qi Liu signed an offer to purchase the Coquitlam Property on or about May 10, 2015. Qi Liu was the only purchaser identified on the original contract of purchase and sale. Xiao Ma submits and I agree that this original contract is very important in discerning Weiwei Liu's intention. According to Weiwei Liu, Qi Liu signed the original contract of purchase and sale because Weiwei Liu did not speak English. However, this explanation is not persuasive as Weiwei Liu signed a number of documents in English related to the Coquitlam Property.

- [70] Weiwei Liu was added as a purchaser of the Coquitlam Property on or about May 21, 2015 by way of addendum to the original contract of purchase and sale. The purchase of the Coquitlam Property completed on June 1, 2015, with Weiwei Liu paying \$655,000 toward the purchase price and the balance of \$1,200,000 being paid by a mortgage from Bank of Montreal ("BMO"). Title to the Coquitlam Property was registered with Qi Liu as 99% owner and Weiwei Liu as 1% owner.
- [71] Weiwei Liu was added as a 1% owner after BMO provided a commitment letter dated May 20, 2015. As Weiwei Liu recounted, after Qi Liu signed the contract to purchase the Coquitlam Property, they went to the bank and then to the lawyer's office. Stella Yan, a Mandarin-speaking conveyancing lawyer, acted for both BMO and the respondents with respect to the mortgage. Neither Ms. Yan nor any representatives of BMO testified at trial. I accept Xiao Ma's submission that Weiwei Liu was likely added as an owner of the Coquitlam Property at BMO's request. This is consistent with what Qi Liu told Xiao Ma and what Yazhen Gao later told Hui Xiao.
- [72] Weiwei Liu says he decided that ownership of the Coquitlam Property should be registered 99% in Qi Liu's name because that would make it easier to manage the property because his son speaks English. However, Qi Liu could have managed the property by way of power of attorney (which is what both respondents later granted to a third party) or by holding a smaller ownership interest. It is more likely than not that Weiwei Liu held a small ownership interest in the Coquitlam Property on BMO's insistence.
- [73] Weiwei Liu says that he wanted to retain a 1% ownership interest to ensure that they did not sell the Coquitlam Property without his knowledge. Weiwei Liu's ownership stake may have had that effect, but I am not convinced that Weiwei Liu had that intention in May 2015.

Post-purchase events

- [74] Xiao Ma and Qi Liu moved into the Coquitlam Property shortly after the purchase completed on June 1, 2015. They furnished the home with new furniture purchased by Weiwei Liu and Yazhen Gao before they returned to China on May 25, 2015.
- [75] Ming Ma testified that in May or June 2015, Yazhen Gao telephoned him to discuss Xiao Ma's pregnancy and the couple's plan to marry. Yazhen Gao told Ming Ma that she and Weiwei Liu would help solve these problems by buying a property for them, helping to look after the baby, and providing financial support. Yazhen Gao did not directly deny making the phone call. Instead, she suggested that she could not have made the phone call because it would be her husband who would have any such conversation and that she did not know Ming Ma's telephone number. Weiwei Liu denied that either he or his wife had a telephone conversation with Ming Ma in 2015. I accept that Yazhen Gao could have easily obtained Ming Ma's contact information from Xiao Ma and that Yazhen Gao in fact had the telephone discussion with Ming Ma that he described in detail.

- [76] On August 5, 2015, Xiao Ma and Qi Liu were married in Seattle, Washington. By then, they had learned that it might be easier for both of them to immigrate to the United States, because Xiao Ma had a green card there. They also decided that their baby should be delivered in Seattle.
- [77] In August 2015, Weiwei Liu and Yazhen Gao visited Ming Ma and his second wife in Chongching, China. I prefer Ming Ma's account of this visit because it was not shaken on cross-examination, and I found Weiwei Liu and Yazhen Gao less credible for the reasons I have identified. During this visit, Weiwei Liu and Yazhen Gao told Ming Ma that they had purchased a property for Qi Liu and Xiao Ma. They said they had not originally intended to live in Canada, but once they observed Qi Liu's and Xiao Ma's lifestyle (which involved little routine and lots of video games), Weiwei Liu and Yazhen Gao decided to find a partner for Yazhen Gao's business and return to live with Qi Liu and Xiao Ma. This description of Qi Liu's and Xiao Ma's pre-baby lifestyle is consistent with other evidence.
- [78] Qi Liu's parents moved to the Coquitlam Property shortly before their daughter started school in Coquitlam in the fall of 2015. The parents and their daughter occupied the master bedroom in the Coquitlam Property. I accept Xiao Ma's explanation as to why Qi Liu's parents took the master bedroom when they moved in:
- a) it was as a sign of respect;
 - b) the master bedroom accommodated Qi Liu's parents and sister; and
 - c) Xiao Ma preferred to have a bedroom on the main floor during her pregnancy and with a newborn.
- I do not accept that the parents' occupancy of the master bedroom at the Coquitlam Property indicated the true ownership of the residence.
- [79] Xiao Ma's mother came to stay at the Coquitlam Property in September 2015 to help her prepare for Ethan's birth. Weiwei Liu and Yazhen Gao testified that Hui Xiao did not arrive until late November 2015. Although not much turns on it, I prefer the evidence of Xiao Ma and her mother regarding the timing of her mother's arrival. Hui Xiao returned to California in mid-January 2016.
- [80] Hui Xiao told Weiwei Liu and Yazhen Gao that schools for their daughter were better in the United States and that they could more easily secure immigration status in the United States. Hui Xiao referred them to a realtor in California (her second ex-husband) and allowed them to stay at her home when they travelled to California to look for a property to buy in late December 2015. Weiwei Liu and Yazhen Gao bought a home in Irvine, California during that 10-day trip.

- [81] In April 2016, Xiao Ma, Qi Liu, his parents, his sister and Ethan moved to the house that Weiwei Liu and Yazhen Gao had purchased in Irvine, California. By that time, according to Xiao Ma, she and Qi Liu had decided that their future was in the United States and that they would apply for immigration status for Qi Liu. Xiao Ma was aware that they were trying to sell the Coquitlam Property so that afterwards they could buy another property in the United States. She left the details of that transaction to Qi Liu, as he handled the family's finances.
- [82] Before leaving Canada, Qi Liu and Weiwei Liu entered into a listing agreement with a local realtor to sell the Coquitlam Property with a list price of \$2,780,000. They signed a direction to pay, which directed the conveyancing lawyer to provide all sale proceeds to Weiwei Liu. Qi Liu claims that he only found out that he held a 99% ownership interest in the Coquitlam Property when they signed the direction to pay. I do not accept this as true: it is not credible that Qi Liu was unaware of his ownership interest because he signed the original contract of purchase and sale and all the documents to purchase the Coquitlam Property, including initialling instructions to Ms. Yan to register him as 99% owner.
- [83] Weiwei Liu and Qi Liu argue that the April 2016 direction to pay is strong evidence of true ownership of the Coquitlam Property. I accept that it is some evidence of how they viewed matters as of April 2016; however, consistent with the caution from the Supreme Court of Canada at para. 59 of *Pecore*, I find that the direction to pay more likely reflects a change of intention. By April 2016, relations between Xiao Ma and her in-laws had deteriorated. Xiao Ma found it very challenging to look after a newborn, and Qi Liu's parents discouraged Qi Liu from helping her. As of April 2016, Qi Liu and Xiao Ma remained financially dependent on his parents, and there was tension between the generations. I infer that Qi Liu signed the direction to pay on his father's instructions.
- [84] Qi Liu and Xiao Ma moved back to the Coquitlam Property in early 2017 for reasons related to Qi Liu's application for immigration status in the United States and the strained relationship between Qi Liu's parents and Xiao Ma. Before they left, Qi Liu, Xiao Ma and Hui Xiao discussed Hui Xiao's potentially broaching with Qi Liu's parents whether they would buy a property for the young couple in California. Qi Liu argues that this conversation supports his position that if his parents had promised to buy them a home, it had not yet been fulfilled. I do not accept Qi Liu's interpretation of this conversation. I prefer Hui Xiao's explanation that she offered to play the "bad guy" by asking his parents to pay for a second home for the young couple, an offer which the young couple declined.

Conclusion regarding Weiwei Liu's contemporary intention

- [85] After weighing all the evidence, I am satisfied that Weiwei Liu's and Yazhen Gao's intention in May 2015 was to gift the Coquitlam Property to Qi Liu and Xiao Ma. Although they considered buying property in Canada before May 2015, their intention to buy a home for Qi Liu and Xiao Ma crystallized when they learned that Xiao Ma was pregnant.

- [86] Weiwei Liu testified that they purchased the Coquitlam Property because he and his wife intended to immigrate to Canada. However, Weiwei Liu had no reason to believe that any plan they might have had to immigrate would come to fruition any time soon. Weiwei Liu understood that he would need to purchase a business in British Columbia in order to qualify under the BC Provincial Nominee Program's Regional Business Succession option: there is no evidence that he tried to find a suitable investment after their first visit to Canada in March 2015. Further, Weiwei Liu testified that there were changes to the program by the time he made further inquiries of a lawyer in 2017; no details of changes were in evidence. Since that initial consultation in March 2015, Weiwei Liu and Yazhen Gao have not taken any formal steps to immigrate to Canada. They remain here on visitor visas.
- [87] In any event, I am troubled by the late and selective disclosure of documents from Weiwei Liu's and Yazhen Gao's immigration consultant. Further, the first time Weiwei Liu suggested the Coquitlam Property was purchased because he and his wife intended to immigrate was apparently at trial. In cross-examination, Qi Liu could not recall whether or not his parents told him in March 2015 that they planned to immigrate to Canada. In short, I do not accept that Weiwei Liu intended to buy the Coquitlam Property as a residence for himself and his wife.
- [88] Weiwei Liu argued that it made no sense for him and his wife to give such a generous gift to Qi Liu and Xiao Ma. Weiwei Liu said that Yazhen Gao sold two thirds of her business over the course of a few months in 2015, and her income was reduced as a result. He noted that both he and his wife had health issues that reduced their ability to earn income. This appeal to logic might have been more persuasive if there was some evidence to demonstrate that the purchase price of the Coquitlam Property represented a significant percentage of the parents' net worth. The respondent failed to adduce evidence of the sale price of the interest in Yazhen Gao's business or any documents related to that transaction. Yazhen Gao's income before and after the sale of part of her business was not in evidence. Further, there was evidence to suggest that the parents had adequate financial resources aside from the Coquitlam Property:
- a) the parents were able to afford to buy their own home in Irvine, which they still own;
 - b) there were three properties in China registered in Qi Liu's name because other properties were already mortgaged in the parents' names (details and values of which were not in evidence); and
 - c) the parents continued to transfer money to Qi Liu and Xiao Ma between January 2017 and September 2018 for their living expenses.
- [89] I am not able to conclude that Weiwei Liu and Yazhen Gao could not reasonably afford to gift the Coquitlam Property to Qi Liu and Xiao Ma. Further, such a gift would not be inconsistent with Chinese tradition, according to the evidence at trial.

- [90] As a result, I find that Qi Liu is the legal and beneficial owner of his 99% registered interest in the Coquitlam Property. Further, Qi Liu's interest in the Coquitlam Property is family property as defined in s. 84 of the Family Law Act, S.B.C. 2011, c. 25.
- [91] Qi Liu argued in the alternative that the down payment and mortgage payments are excluded assets, which should result in reapportionment of the Coquitlam Property in Qi Liu's favour. No authority was cited by Qi Liu, but it appears he was relying on s. 85(1)(b.1) of the Family Law Act. The onus is on Qi Liu to establish on a balance of probabilities that his parents' gift was made to him exclusively: s. 82, Family Law Act. However, in this case, I have found as a fact that Weiwei Liu intended to buy the home for both Xiao Ma and Qi Liu. As summarized by Justice MacNaughton at para. 130 in *DeWolfe v. Flanagan*, 2022 BCSC 1155:

A gift from one spouse's parents, used by the parties to buy a family home or pay down a mortgage, may not give rise to an exclusion claim if the gift was intended to benefit both spouses. The intention of the donor when making the gift is what is relevant: *Cabezas v. Maxim*, 2014 BCSC 767, *aff'd* 2016 BCCA 82 at paras. 22, 29, 36.

- [92] In this case, I have found that Weiwei Liu intended to benefit both spouses even though the property was only registered in Qi Liu's name. Xiao Ma was aware that Qi Liu held title, but she was not concerned because she anticipated they would be together forever. It made sense that Qi Liu would hold the 99% registered interest because he handled their financial affairs.

Issue 3: Did Weiwei Liu gift the shares in the restaurant business to Qi Liu?

- [93] As noted, the shares in the Company are currently worthless. However, whether the shares were gifted to Qi Liu and Xiao Ma or whether the funds used to buy the shares were actually a loan from Qi Liu's parents provides part of the context for ownership of the other assets.
- [94] I have considered the factors identified in *A.B.P. v. K.G.W.*, 2017 BCSC 977 at para. 6 for distinguishing between a gift and a loan in the family law context.
- [95] I accept Xiao Ma's evidence that Qi Liu's parents had long offered funds for Qi Liu and Xiao Ma to do some kind of business, but they did not find anything suitable. Her evidence is consistent with representations made by Qi Liu to Hui Xiao and by Weiwei Liu to Ming Ma in 2015.
- [96] In 2017, Qi Liu's friend Wu Yue He approached Qi Liu and Xiao Ma with an opportunity to invest in a restaurant business. They told Wu Yue He that they would see whether the food was good and that they would have to speak to Qi Liu's parents because they did not have the funds to invest. Qi Liu asked Wu Yue He to provide a business plan, which Qi Liu sent to Weiwei Liu.

- [97] Qi Liu's parents initially forwarded \$100,000 to Qi Liu to invest in the restaurant business. In October 2017, Qi Liu became registered owner of 30% of the class A shares in the Company, and he also held 100 class C shares. Wu Yue He owned 40% of the class A shares and 100 class B shares. A third friend owned the balance of the shares. Wu Yue He, Qi Liu and the other friend were the three directors of the Company. The Company owned and operated the Hi Chicken Pot restaurant when it eventually opened in September 2018.
- [98] Between the fall of 2017 and late December 2020, Weiwei Liu claims that he provided an additional \$30,000 to \$50,000 to the Company, though neither Weiwei Liu nor Qi Liu provided any documents to substantiate the investment nor did they identify amounts or dates of payments. In particular, Qi Liu acknowledged that the exact amount cannot be ascertained because the Company's bookkeeping records were not "orderly".
- [99] After the Hi Chicken Pot restaurant opened in September 2018, Qi Liu received various sums from the Company between November 2018 and late December 2020,. He described these funds as "loan repayment" intended to repay his parents, but his parents allowed him to keep some of the money for his own living expenses.
- [100] When the Hi Chicken Pot restaurant closed in late December 2020 or early January 2021, Qi Liu transferred the remaining funds in the Company's bank account, close to \$95,000, to his mother even though he was aware that Xiao Ma claimed ownership of the shares.
- [101] Turning to the factors identified in A.B.P. to distinguish between a loan and a gift between parents and adult child, I note the following:
- a) there were no contemporaneous documents evidencing a loan from Weiwei Liu to Qi Liu for the funds advanced for the restaurant investment;
 - b) the amount of the "loan" was not clear;
 - c) there was no agreement regarding the timing or manner for repayment of the funds;
 - d) Qi Liu and Xiao Ma did not provide any security for the loan;
 - e) there was no comparable gift to Qi Liu's sister, who was approximately nine years old in 2017;
 - f) Weiwei Liu did not demand repayment of the loan before Qi Liu and Xiao Ma separated;
 - g) the advancement of the funds for the restaurant was consistent with Weiwei Liu's and Yazhen Gao's financial support of the young couple and their promises to provide funds to get them started in business;
 - h) Qi Liu received more than \$50,000 from the restaurant after he and Xiao Ma separated that he kept for his own purposes; and
 - i) Weiwei Liu had no real expectation of repayment within any particular time frame.

[102] On the whole of the evidence, I find that the funds advanced by Weiwei Liu to Qi Liu to purchase shares in the Company were a gift. As a result, Qi Liu was the beneficial owner of the shares.

[103] As with the Coquitlam Property, I find that the shares were family property because Weiwei Liu intended to benefit both Xiao Ma and Qi Liu by providing funds to invest in the Company consistent with representations made by Qi Liu to Hui Xiao and by Weiwei Liu to Ming Ma in 2015.

Issue 4: Is the Separation Agreement enforceable?

[104] The final issue I am asked to decide is whether the Separation Agreement signed by Xiao Ma and Qi Liu on September 11, 2018 is enforceable. Qi Liu argues that the Separation Agreement was unfairly reached and is significantly unfair in effect.

[105] Subject to this Court's authority to set aside agreements respecting property division, s. 92 of the Family Law Act, S.B.C. 2011, c. 25 recognizes that parties may make agreements respecting the division of property and debt, including dividing family property unequally.

[106] Section 93 of the Family Law Act gives the Court authority to set aside a written agreement respecting property division:

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

[107] Section 93 contemplates a two-pronged approach for assessing enforceability under which courts consider both formation and substantive fairness of an agreement: *Hudema v. Moore*, 2021 BCCA 482 at para. 17. At the first stage, if any of the factors identified in s. 93(3) existed when the parties entered the agreement, then it was unfairly reached: *A.K.K. v. A.S.K.*, 2021 BCSC 1602 at para. 50. At the second stage, s. 93(5) requires the Court to consider whether the agreement is "significantly unfair", including consideration of the three factors listed in s. 93(5)(a) - (c). In some circumstances, the factors listed in s. 93(5)(a) - (c) will affect the fairness of the agreement, but more often they will affect whether or not a significantly unfair agreement should be left in place or set aside: *Azanchi v. Mabrhan-Shafiee*, 2021 BCCA 55 at para. 52.

[108] Qi Liu asserts that the Separation Agreement was unfairly reached, that it is significantly unfair in effect, and ultimately that it should be set aside.

Formation of the Separation Agreement

[109] In assessing whether the Separation Agreement was unfairly reached, I have considered the useful summary of the principles that apply to the s. 93(3) considerations at para. 285 of *Y.L. v. G.L.*, 2020 BCSC 808. As a starting point, the Court "should consider the s. 93(3) considerations holistically, and not in isolation to each other": *Y.L.* at para. 285(a).

[110] In order to assess whether the Separation Agreement was unfairly reached, it is necessary to review the circumstances leading up to its formation.

[111] In or about May 2018, because Xiao Ma's mood was low, she and Ethan went to China for a few months to stay with Ming Ma. In August 2018, Qi Liu travelled to China to accompany Xiao Ma and Ethan back to Canada. While they were at Ming Ma's home, Xiao Ma discovered that Qi Liu was having an affair with another woman. Qi Liu and Xiao Ma acknowledged in the Joint Statement of Agreed Facts that Qi Liu's affair led to their separation.

[112] While at her father's home, Xiao Ma told her father about Qi Liu's affair. Ming Ma said he wished she would divorce Qi Liu.

- [113] After leaving Ming Ma's home in August 2018, Qi Liu, Xiao Ma and Ethan spent a week visiting Qi Liu's parents at their home in Anping before leaving China. Qi Liu asked Xiao Ma not to tell his parents about his affair, as he feared they would be upset.
- [114] Xiao Ma, Qi Liu and Ethan returned to Canada in early September 2018. On the plane ride home, Xiao Ma raised the possibility of divorce. Qi Liu said he regretted his affair and wanted to stay with Xiao Ma and their child. He said he would end the affair. However, after meeting with the other woman, Qi Liu could not bring himself to discontinue the affair. Over the next few weeks, during which he and Xiao Ma both lived in the Coquitlam Property, Qi Liu vacillated between relationships, but he felt unable to break off the affair.
- [115] In the meantime, Xiao Ma asked her mother to come stay with her. Hui Xiao arrived in British Columbia on September 4, 2018 and stayed at the Coquitlam Property with Xiao Ma, Qi Liu and Ethan.
- [116] Qi Liu's parents and sister arrived in British Columbia on September 6, 2018 and moved into rental accommodation in Richmond. At that time, they were not aware of Qi Liu's affair or the couple's discussions about divorce.
- [117] When Qi Liu would not commit to ending the affair, he and Xiao Ma discussed separation terms. Qi Liu said he was prepared to give Xiao Ma the Coquitlam Property, the BMW and his business. He also promised to give Xiao Ma \$4000 per month for her and Ethan's living expenses. Xiao Ma asked how he intended to fund the monthly payments. Qi Liu said he would pay her from funds his parents gave to him. Qi Liu told Xiao Ma that she could have custody of Ethan as long as he could see him.
- [118] After they discussed separation terms, Xiao Ma found a lawyer to draft a separation agreement. The law firm sent a checklist of basic questions related to assets, income and parenting. Xiao Ma handwrote the answers with some input from Qi Liu. The handwritten notes included a term that Qi Liu would pay child support of \$4000 per month.
- [119] At that point, Xiao Ma was aware that Weiwei Liu owned 1% of the Coquitlam Property. Both of them understood that Weiwei Liu would have to sign documents if the house was to be sold. When she completed the checklist, Xiao Ma planned to live at the Coquitlam Property. She did not know the value of Qi Liu's interest in the Company, but she knew that they had invested approximately \$150,000. At that time, Xiao Ma planned to work at the restaurant and use her salary and dividends from the Company to pay her living expenses, including mortgage payments on the Coquitlam Property.
- [120] Xiao Ma gave Qi Liu the completed checklist and told him to review it carefully. Qi Liu told Xiao Ma that he trusted her. He did not review the checklist carefully before signing under the note that said that he was willing to give her 99% of the Coquitlam Property, 30% of the Hi Chicken Pot restaurant (i.e., Qi Liu's shares in the Company), and the BMW. Qi Liu suggested for the first time in cross-examination that perhaps Xiao Ma inserted these terms after he signed his name: I reject this suggestion as implausible.

[121] Xiao Ma sent the completed checklist to the lawyer.

[122] Xiao Ma testified that the law firm sent a copy of the Separation Agreement to her and to Qi Liu by email with advice that they should read the document carefully before signing it. Xiao Ma was not able to provide a copy of her email exchange with the law firm because her access to her email account was blocked by the respondents (as detailed above). Unfortunately, the law firm was not able to produce its file. Qi Liu claimed not to remember receiving an email with a copy of the Separation Agreement. Xiao Ma testified that she told him to read it, but he responded by saying he did not have to because he trusted her. I find that it is likely Qi Liu received a copy of the Separation Agreement from the law firm by email and decided not to read it.

[123] On or about September 11, 2018, Xiao Ma and Qi Liu met with a Mandarin-speaking lawyer from the law firm that drafted the Separation Agreement in order to sign the agreement. I accept that the lawyer gave each of them a copy of the Separation Agreement with instructions to review it carefully and left them alone so they could do so. Qi Liu did not review the document carefully. When the lawyer returned, Qi Liu was anxious to sign the Separation Agreement without further review. However, the lawyer insisted on reviewing each page of the Separation Agreement with Xiao Ma and Qi Liu and briefly explaining each term. The lawyer specifically explained to Qi Liu that he needed to sign that he was waiving his right to independent legal counsel.

[124] The key terms of the Separation Agreement included the following:

- a. Xiao Ma would have sole custody of Ethan;
- b. Qi Liu would transfer his 30% ownership interest in the Company to Xiao Ma once the agreement was signed;
- c. Xiao Ma would use her income from the Company to support Ethan;
- d. Xiao Ma would continue to reside in the Coquitlam Property;
- e. Qi Liu would transfer his entire ownership interest in the Coquitlam Property to Xiao Ma by September 11, 2019;
- f. Qi Liu would transfer ownership of the BMW to Xiao Ma within a week of signing the agreement; and
- g. Both Qi Liu and Xiao Ma waived any claim for spousal support.

[125] The Separation Agreement says that the parties had been living separate and apart since September 1, 2017. Qi Liu argued that this statement in the Separation Agreement indicates that Xiao Ma intended to separate before September 2018. In my view, the separation date in the Separation Agreement was an error. I accept Xiao Ma's evidence that she did not intend to separate until she found out about Qi Liu's affair.

- [126] The one-year time frame for the transfer of the Coquitlam Property was intended to give Qi Liu an opportunity to finalize his immigration status and potentially avoid some transfer taxes that might otherwise be payable.
- [127] Xiao Ma instructed the law firm not to include in the Separation Agreement the \$4000 per month for child support that was included in the initial checklist. She was worried that it might create difficulties for Qi Liu if he missed payments, and she recognized that he was giving her enough.
- [128] Qi Liu transferred the BMW to Xiao Ma as contemplated by the Separation Agreement. He did not transfer the other assets. They consulted an accountant regarding the share transfer, but the accountant raised an issue that delayed that process. Xiao Ma did work at the Hi Chicken Pot restaurant for a few weeks when it opened in September 2018 (after the Separation Agreement was signed). She was paid salary but did not receive any dividends.
- [129] Qi Liu continued to reside at the Coquitlam Property after the Separation Agreement was signed. His girlfriend went to China for most of the month of September 2018. When she returned, Qi Liu again bounced back and forth between relationships. After an argument, Qi Liu stopped responding to Xiao Ma's messages. Xiao Ma then received a message from Qi Liu's email account that suggested the Separation Agreement was not fair, that he signed under mental distress, and that he wanted custody of Ethan. A few days later, Xiao Ma was deleted from Qi Liu's family's WeChat group. Weiwei Liu changed the locks on the Coquitlam Property, effectively locking Xiao Ma out. Xiao Ma left for California with Ethan in November 2018, where they continue to reside.
- [130] I will consider whether the Separation Agreement was formed in an unfair manner before considering whether the substance of the agreement is significantly unfair.

Financial disclosure (s. 93(3)(a))

- [131] Qi Liu says the Separation Agreement ought to be set aside because Xiao Ma failed to disclose significant property. In particular, Qi Liu alleges that Xiao Ma failed to disclose bank records for a Toronto Dominion account that she falsely claimed to have stopped using in 2013. I am not satisfied that the evidence substantiates Qi Liu's allegation that Xiao Ma failed to disclose significant assets.
- [132] In support of his allegation of non-disclosure, Qi Liu relies on Xiao Ma's Bank of America account records that show certain deposits to her Bank of America account appear to be from a Toronto Dominion ("TD") account. Qi Liu argues that these deposits must be transfers from her TD account to her Bank of America account. However, without evidence or an admission as to how to decode the Bank of America records, I am not able to conclude that the impugned deposits are actually what Qi Liu suspects they are. Other deposits to Xiao Ma's Bank of America account that are clearly from a third party include a similar descriptor to the one used in the impugned transactions, which undermines Qi Liu's theory.

[133] In any event, I do not accept that Xiao Ma failed to disclose "significant" assets in September 2018 when the Separation Agreement was signed. From the time she became pregnant in the spring of 2015 until after the parties separated, Xiao Ma did not work outside the home, and she was financially dependent on Qi Liu and his parents. Qi Liu acknowledged that he looked after the family finances when they were together. He said that he often left his bank card for Xiao Ma to use when he went to work. There is no evidence that Ming Ma or Hui Xiao gave any money to Xiao Ma between the spring of 2015 and September 2018, and neither was cross-examined on that point. Qi Liu did not suggest any other potential source of funds for Xiao Ma as of September 2018.

[134] In short, Qi Liu failed to establish that Xiao Ma failed to disclose "significant property".

Vulnerability (s. 93(3)(b))

[135] Qi Liu argues that Xiao Ma took improper advantage of his vulnerability. I do not find that the evidence meets the threshold required to set aside an agreement on this basis.

[136] Justice Matthews outlined the following principles at para. 285 of Y.L. which apply when evaluating one spouse's vulnerability in the context of s. 93(3)(b):

- d) with regard to one spouse taking advantage of the other's vulnerability, including the other's ignorance, need or distress:
 - i. the parties' relative abilities to understand financial matters is relevant to the assessment of whether one party took advantage of the other's vulnerabilities;
 - ii. vulnerability of a less powerful party should not be presumed, there must be evidence to support a finding of vulnerability;
 - iii. whether the party who asserts vulnerability had input into the content of the agreement is relevant to assessing this factor;
 - iv. legal advice may negate vulnerability but does not necessarily do so and the absence of legal advice does not lead to a presumption that a vulnerability has not been exploited;
 - v. the parties' respective bargaining power is relevant to vulnerability and includes whether one of the parties was at an immediate economic disadvantage because the other party controlled the cash or had better access to cash;
 - vi. physical and/or emotional abuse is relevant;
 - vii. the timing of emotional or physical abuse in relation to the time at which the agreement was made is relevant in the sense that if a party is living in active fear and makes the agreement to get away from an abuser, that is different than a situation where there was an incident of abuse a significant length of time prior to when the agreement was made, especially if the parties were living in different locations when the agreement was made;

[137] An objective review of the factors identified in Y.L. do not support a finding that Xiao Ma took improper advantage of Qi Liu's vulnerability:

- i. Qi Liu was at least as able as Xiao Ma to understand the financial implications of signing the Separation Agreement: he had completed a business administration diploma from KPU in November 2015, and he handled the family finances for himself and Xiao Ma during their marriage;
- ii. Qi Liu had input into the content of the Separation Agreement, and he reviewed the key terms related to property division;
- iii. Qi Liu did not have less bargaining power; in fact, as between the parties, Xiao Ma was the spouse at an immediate economic disadvantage because Qi Liu controlled the couple's cash and had better access to cash, and he continued to have financial support from his parents whereas Xiao Ma did not at the time the Separation Agreement was signed;
- iv. there was no credible evidence of physical or emotional abuse.

[138] As set out in *Miglin v. Miglin*, 2003 SCC 24:

82 Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement.

83 Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

[139] I am not satisfied that Qi Liu's emotional state rendered him "vulnerable" such that he was incapable of making a binding agreement. I accept that Qi Liu was quite stressed and emotionally upset as he weighed his options of staying with his wife and child or leaving them to be with the other woman. He described what he calls a suicide attempt on September 5, 2018. On that day, on his version of events, he drank a half a bottle of hard alcohol, locked himself in the bathroom and cut his wrist with shards from the broken porcelain alcohol bottle. He acknowledged that Xiao Ma broke into the bathroom and stopped him from causing further harm to himself.

[140] On the other hand, Xiao Ma described the cut as not really deep, and she felt the incident was intended to make her agree to his request to wait for him while he carried out his affair. I accept Xiao Ma's assessment that the cutting incident was more likely an attempt by Qi Liu to manipulate Xiao Ma rather than an indication that he was so psychologically distraught that he genuinely lacked capacity to enter the Separation Agreement. I am reluctant to

accept Qi Liu's evidence regarding his psychological condition without independent corroboration. Qi Liu did not lead expert evidence regarding his psychological state or tender records from the psychologist that he apparently saw once in the fall of 2018. Qi Liu's conduct through the discrete steps leading up to the signing of the Separation Agreement and his voluntary transfer of the BMW a few days later is not consistent with distress amounting to vulnerability.

- [141] In this case, on the whole of the evidence, I find that Qi Liu's level of vulnerability was not more than one might reasonably expect in the circumstances of marriage breakdown, nor was it sufficient to warrant interfering with the agreement reached by the parties.
- [142] In any event, I do not find that Xiao Ma took improper advantage of Qi Liu's mental state. I accept that Qi Liu offered to give Xiao Ma the family assets and monthly child support of \$4000, the latter of which she instructed the lawyer not to include in the Separation Agreement. Qi Liu acknowledged that he signed the separation checklist before the bathroom incident. Qi Liu was anxious to sign the Separation Agreement without reading it carefully, but the lawyer reviewed the key terms with the couple, including that Qi Liu was waiving his right to obtain independent legal advice. Xiao Ma cannot be held responsible for Qi Liu's failure to obtain legal advice when he was or ought to have been aware of his entitlement to do so: *De Medeiros v. Hodgson*, 2018 BCSC 408 at para. 102.
- [143] In particular, I do not accept Qi Liu's evidence that he felt pressure from Xiao Ma and Hui Xiao to sign the Separation Agreement. He was vague about what either of them allegedly did or said to put pressure on him. Neither Xiao Ma nor Hui Xiao were cross-examined on this alleged pressure, contrary to the rule in *Browne v. Dunn*. Further, as set out in detail above, Qi Liu generally lacks credibility. Although Xiao Ma and Qi Liu spent little time negotiating the terms of the Separation Agreement and signed it shortly after they returned to Canada, the short time frame does not establish that Qi Liu was pressured into signing the Separation Agreement or that his consent was vitiated as a result.
- [144] Finally, I do not accept Qi Liu's evidence that Xiao Ma acted deliberately to take advantage of him. Qi Liu says that he saw an electronic message exchange between Xiao Ma and her father shortly after the Separation Agreement was signed in which Ming Ma allegedly told Xiao Ma that she was well rid of this husband who did not take the time to read the Separation Agreement before signing it. I find it implausible that an electronic message on a phone would be readable from the distance at which Qi Liu claimed to have read it. Neither Xiao Ma nor Ming Ma was cross-examined on this alleged exchange, contrary to the rule in *Browne v. Dunn*. Further, as set out in detail above, Qi Liu generally lacked credibility.
- [145] In assessing whether Xiao Ma took improper advantage of Qi Liu's vulnerability, I have not ignored her emotional state at the time. I accept Hui Xiao's evidence that, as of September 2018, Xiao Ma was upset to the point that she was not eating or sleeping properly due to the sudden and unexpected breakdown of her marriage.

Parties' understanding of what they were signing (s. 93(3)(c))

- [146] Qi Liu argues that he "did not understand the nature and consequences of the agreement". Although his counsel advanced this position in final submissions, Qi Liu did not testify to that effect at trial. I find that Qi Liu was capable of understanding and did understand the key terms of the Separation Agreement.
- [147] The Separation Agreement was not particularly complicated. The key terms regarding responsibility for Ethan and transfer of assets to Xiao Ma were clear and initially suggested by Qi Liu. Qi Liu understood that he was required to transfer the BMW to Xiao Ma and in fact did so shortly after signing the Separation Agreement. He took steps to transfer the shares in the Company but did not complete that process. I am satisfied that Qi Liu understood the consequences of signing the Separation Agreement.

Common law enforceability considerations (s. 93(3)(d))

- [148] Qi Liu did not specifically argue that there were "other circumstances that would, under the common law, cause all or part of" the Separation Agreement to be voidable: s. 93(3)(d). In any event, I find there are no such circumstances that apply in this case.
- [149] As noted by Justice Johnston in *Donnelly v. Weekley*, 2017 BCSC 529, a family law case in which one former spouse sought to set aside a separation agreement:
- [126] At common law, a contract may be voidable if it were formed as a result of duress, undue influence, fraud, or some misrepresentations. Unconscionability was developed by the courts of equity to relieve against bargains that were contrary to good conscience. It is unclear, and counsel did not address, whether the legislature intended to exclude equity when it inserted the phrase "voidable at common law".
- [150] Qi Liu has not established that he signed the Separation Agreement under duress. There was no "oppressive contractual conduct directed by one party towards another to compel them to act to their disadvantage": *G.C.G. v. M.J.T.*, 2016 BCSC 1277 at para. 104. Qi Liu's consent was not vitiated by the actions of Xiao Ma or anyone else.
- [151] Further, I am satisfied that there was no undue influence exerted on Qi Liu. As stated by Justice Davey in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 at 713, 1965 CanLII 493 (B.C.C.A.): "A plea of undue influence attacks the sufficiency of consent". Qi Liu suggested that Xiao Ma had "control" of him and that he did whatever she wanted him to do. By way of example, Qi Liu recounted a few occasions when his social activities were curtailed at Xiao Ma's request. I do not accept that this routine type of compromise within a marital relationship establishes that Xiao Ma controlled Qi Liu or vitiated his consent to the Separation Agreement.
- [152] There is no evidence that Qi Liu was induced to enter the Separation Agreement as a result of fraud or misrepresentation.

- [153] It remains unclear whether unconscionability is a factor to be considered under s. 93(3)(d). As noted by Justice Schultes when interpreting s. 19.3(1)(c) of the Family Law Act, which uses similar language to s. 93(3)(d), it is "reasonable to assume that the legislature understood the difference between equitable and common law remedies when it specified the latter": *Aujla v. Aujla*, 2021 BCSC 1126 at para. 24.
- [154] Even if unconscionability is a factor to consider under s. 93(3)(d), I am not satisfied that it applies in this case. A "plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker": *Morrison* at 713. I do not accept that Xiao Ma was the stronger party or that she used such power to take unfair advantage of Qi Liu.

Conclusion regarding formation of the Separation Agreement

- [155] Considering the s. 93(3) factors holistically, I am not satisfied that the Separation Agreement was unfairly reached.

Significant unfairness

- [156] Qi Liu argues that the Separation Agreement is significantly unfair and ought to be set aside pursuant to s. 93(5) of the Family Law Act; however, he failed to meet the onus on him to prove that the Separation Agreement is significantly unfair. In particular, Qi Liu failed to prove that unequal division of family property was significantly unfair when considered in the context of Xiao Ma's explicit waiver of her entitlement to spousal support and in recognition of child support that Qi Liu would have been obligated to pay for at least 15 years into the future.
- [157] Section 92 of the Family Law Act recognizes that, subject to s. 93, spouses may agree to divide family property equally or unequally. Where an agreement is not set aside based on unfairness in how it was reached, the Court retains jurisdiction under s. 93(5) of the Family Law Act to set aside or replace all or part of an agreement if the agreement is "significantly unfair".
- [158] As recently noted by our Court of Appeal, "[s]ignificant unfairness represents a high threshold for setting aside an agreement": *Azanchi* at para. 51. In *Jaszczewska v. Kostanski*, 2016 BCCA 286, our Court of Appeal considered the meaning of "significant unfairness" in the context of s. 95(2) of the Family Law Act, a section which authorizes the Court to order unequal division of family property or family debt or both if it would be significantly unfair to do otherwise:
- [41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the [Family Relations Act, RSBC 1996, c. 128] to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is

"weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": Remmem at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.

- [42] No doubt the nuanced meaning attaching to the test of "significant unfairness" will develop in the case law. No other province uses the same test, so there is no clear persuasive authority to look to. It would be unwise to attempt to define the test with too much precision in anticipation of circumstances arising in individual cases; however, one can say that reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense.
- [159] The onus of proving that an agreement is significantly unfair rests on the party seeking to set aside the agreement: *Reiner v. Reiner*, 2021 BCSC 1514 at para. 43.
- [160] The valuation date for determining whether the Separation Agreement is significantly unfair must be the date it was entered into, that is, September 11, 2018: *Babijowski v. Wolanicki*, 2022 BCSC 2126 at para. 69.
- [161] The question, ultimately, is whether Qi Liu has met the onus of proving that the unequal division of property in the Separation Agreement was significantly unfair as of September 11, 2018. I find that he has not. The financial terms of the Separation Agreement required Qi Liu to transfer the main family assets to Xiao Ma, and, in exchange, the parties agreed that Xiao Ma would use her income from the Company to support Ethan, and she agreed to waive her claim for spousal support. The analysis to determine whether the Separation Agreement was significantly unfair might normally involve consideration of the September 2018 value of the assets transferred to Xiao Ma as compared to the then present value of her entitlement to receive spousal support and Qi Liu's obligation to pay child support. Unfortunately, the evidence at trial was insufficient to allow this comparison. In particular, there was very little evidence regarding the value of family assets as of September 2018.
- [162] Pursuant to the Separation Agreement, Xiao Ma became entitled to the following family assets:
- a) The BMW;
 - b) 99% share in the Coquitlam Property; and
 - c) Qi Liu's 30% shareholding in the Company.

- [163] I am not satisfied that there was sufficient evidence at trial to prove the value of the BMW as of September 2018. Qi Liu estimated that the BMW was worth approximately \$40,000 as of September 2018, but there was no basis for this estimate other than his estimate of depreciation from the purchase price of \$78,190 in March 2015. Although Xiao Ma did not object to the admissibility of Qi Liu's evidence, I give it little weight as he is not qualified to opine on the value.
- [164] There was no evidence to prove the amount of equity in the Coquitlam Property as of September 2018, though I accept it was likely at least \$1,000,000. There was no appraisal or other evidence filed at trial that would allow me to determine the value of the Coquitlam Property as of September 2018. The Coquitlam Property was purchased June 1, 2015 for \$1,855,000. According to a mortgage account breakdown statement, the amount owing on the mortgage was approximately \$862,850 as of September 12, 2018. Qi Liu's financial statement made July 11, 2022 attributed a higher value to the property without attaching a BC Assessment statement or other proof of valuation. I accept that it is more likely than not that the Coquitlam Property had equity of approximately \$1,000,000 as of September 2018.
- [165] It is difficult to assess the likely value of the shares in the Company as of September 2018 without a business valuation as of that date, which was not part of the evidence at trial. Although Weiwei Liu invested approximately \$100,000 in October 2017 to buy 30% of the shares in the Company and may have contributed up to an additional \$50,000, the amount invested does not necessarily reflect the value of the shares as of September 2018. The restaurant had not opened when the Separation Agreement was signed, though it did open shortly thereafter. However, there was no guarantee that the Hi Chicken Pot restaurant would be successful, and there was no guarantee that the Company would actually pay dividends or provide ongoing employment for Xiao Ma. Qi Liu failed to establish the value of the shares of the Company as of the signing of the Separation Agreement.
- [166] Although not explicitly stated in the Separation Agreement, I am satisfied that the unequal division of assets in favour of Xiao Ma was intended to reflect a lump sum payment in lieu of ongoing child support and spousal support that might have otherwise been payable by Qi Liu. Qi Liu did not attempt to quantify what that lump sum amount might have been as of September 2018. There was evidence at trial regarding Qi Liu's earnings as of September 2018; however, Qi Liu did not attempt to quantify what child support or spousal support would have been payable on a go-forward basis in order to establish that the unequal division of property in favour of Xiao Ma was significantly unfair.
- [167] Based on the evidence at trial, it is not obvious that the Separation Agreement was significantly unfair when considering the present value of future support payments, based on the information available as of September 2018.
- [168] Qi Liu received significant financial support from his parents that the parties used for their living expenses, which might properly have factored into his income for purposes of calculating support under the Federal Child Support Guidelines, SOR/97-175. For example,

in 2017, Qi Liu's parents deposited approximately \$119,000 into his account for living expenses, and he reported earnings from employment of approximately \$7000. Qi Liu earned taxable income of approximately \$30,000 in 2018 and received between \$87,000 and \$112,300 from his parents in 2018 to cover living expenses. Qi Liu likely expected to continue to receive financial support from his parents given his initial offer to pay Xiao Ma \$4000 per month in child support from such funds.

- [169] On the other hand, when the Separation Agreement was signed, Xiao Ma had no income. She anticipated working at the Hi Chicken Pot restaurant, but she had not started that employment. By the time she signed the Separation Agreement, she considered the possibility of renting the Coquitlam Property in order to subsidize the mortgage payments she would have to make. Her income earning potential remained limited, and her role as primary parent was likely to have an ongoing effect on her career path and ability to earn income. I am satisfied that Xiao Ma was entitled to spousal support on a compensatory basis, and her entitlement likely would have continued for a number of years given how young Ethan then was.
- [170] As with any agreement, there is value in certainty and finality. Xiao Ma recognized that ongoing monthly payments might create difficulty for Qi Liu if he was unable to meet his commitment. On the other hand, if Qi Liu's financial fortunes improved, then his support obligations would have increased. The Separation Agreement allowed the parties to make a clean break and reduced risk and uncertainty for both parties, which I consider to be a factor that militates against a finding of significant unfairness.
- [171] Although the parties deferred argument on what spousal and child support would be payable if the Separation Agreement is set aside, the evidence at trial suggests that Qi Liu has received less financial support from his parents post-separation than he did prior to separation, which means that actual spousal support and child support payable might be less when determined based on information current to 2022. However, whether or not the Separation Agreement is significantly unfair must be assessed as of September 2018 and not based on changes in circumstances since that date.
- [172] In sum, I am not satisfied that Qi Liu has met the onus on him to prove that the Separation Agreement is significantly unfair.

Conclusion

[173] As a result, I find as follows:

- a) Weiwei Liu gifted the BMW to Qi Liu in March 2015;
- b) Weiwei Liu gifted a 99% interest in the Coquitlam Property to Qi Liu and Xiao Ma in May 2015;
- c) Weiwei Liu gifted the shares in the Company to Qi Liu in October 2017;

d) The Separation Agreement signed in September 2018 is enforceable.

[174] I find that the BMW is family property, as admitted by Qi Liu. I find that the Coquitlam Property and shares in the Company are family property for the reasons set out above.

[175] In anticipation of this potential outcome, the parties agreed to the following orders:

1. BY CONSENT, the lands and premises legally described as follows:

Civic Address: [address redacted] British Columbia

Parcel Identifier: [redacted]

Legal Description: [redacted]

(the "Property")

be listed within thirty days of the reasons for judgment and sold, by private sale, free and clear of all encumbrances.

2. BY CONSENT, the claimant, Xiao Ma, and the respondents, Qi Liu and Weiwei Liu (the "Parties"), shall have joint conduct of the sale, either by retaining one realtor to list the Property or each retaining their own respective realtors to co-list the Property.
3. BY CONSENT, if at any time during the co-listing of the Property, the Parties receive a bona fide offer by an arms-length purchaser that the Parties are willing to accept (the "Bona Fide Offer"), or a party seeks court approval of an offer (as set out in paragraph 5), the respondent, Weiwei Liu, shall have the first right, exercisable up to one business day before the Offer expires to purchase the Property for the price and upon the terms and conditions set forth in the Bona Fide Offer or offer submitted for court approval,
4. BY CONSENT, the sale shall be subject to the approval of the Court unless otherwise agreed to in writing by the Parties.
5. BY CONSENT, either of the Parties may file an application at the Court to approve an offer to purchase the Property and such offer does not need to be agreed to or entered into by the other Party.
6. BY CONSENT, either of the Parties (or their nominee) may submit an offer to purchase the Property which shall be subject to the approval of the Court unless otherwise agreed to in writing by the Parties,
7. BY CONSENT, any person or persons in possession of the Property do forthwith and until further Order of the Court, permit any duly authorized agent to inspect, appraise, or show to any prospective purchaser the Property including the interior of the premises between 9:00 a.m. and 7:00 p.m. Monday through Sunday inclusive, but excluding statutory holidays, and to post signs on the Property stating that the Property is offered for sale;

8. BY CONSENT, the net sale proceeds shall be paid out in accordance with the following priorities:
 - a) firstly, in payment of taxes, arrears of taxes, interest and penalties on arrears of taxes, owing in respect of the Property;
 - b) secondly, in payment of selling commission and applicable taxes thereon;
 - c) thirdly, in payment (on account) of the amount due and owing to the Bank of Montreal in satisfaction of the mortgage and assignment of rents registered against the Property under registration nos. CA4431746 and CA4431747;
 - d) fourthly:
 - a. 1% of the balance of the sale proceeds paid to Weiwei Liu; and
 - b. 99% of the balance of the sale proceeds paid into the trust account of the claimant's counsel, Harper Grey LLP.
9. BY CONSENT, either of the Parties may apply to the court for further directions.

[176] Finally, as indicated at the outset, Xiao Ma and Qi Liu have consented to the following orders with respect to parenting:

UPON BEING ADVISED THAT THE CHILD OF THE MARRIAGE IS:

Jiarui Liu, born on December 7, 2015 (the "Child").

1. Pursuant to ss. 39, 41 and 45 of the Family Law Act, the claimant, Xiao Ma, and the respondent, Qi Liu, are joint guardians of the Child and will share the enumerated parental responsibilities listed in s. 41(a) to (f) and (h) to (1) of the Family Law Act as follows:
 - a) make day-to-day decisions affecting the child and having day-to-day care, control and supervision of the Child;
 - b) make decisions respecting where the Child will reside;
 - c) make decisions respecting with whom the Child will live and associate;
 - d) make decisions respecting the Child's education and participation in extracurricular activities, including the nature, extent and location;
 - e) make decisions respecting the Child's cultural, linguistic, religious and spiritual upbringing and heritage;
 - f) subject to section 17 of the Infants Act, give, refuse or withdraw consent to medical, dental and other health-related treatments for the Child;
 - g) give, refuse or withdraw consent for the Child, if consent is required;

- h) receive and respond to any notice that a parent or guardian is entitled or required by law to receive;
 - i) request and receive from third parties health, education or other information respecting the Child;
 - j) subject to any applicable provincial legislation,
 - i. start, defend, compromise or settle any proceeding relating to the Child, and
 - ii. identifying, advancing and protecting the Child's legal and financial interests;
 - k) exercise any other responsibilities reasonably necessary to nurture the Child's development.
2. The claimant, Xiao Ma, will be solely appointed the parental responsibility enumerated in s. 41(g) of the Family Law Act -- i.e. she will solely apply for a passport, licence, permit, benefit, privilege or other thing for the Child and the respondent, Qi Liu's signature, if required, is dispensed with.
3. The Child will reside primarily with the claimant, Xiao Ma, in San Jose, California.
4. The respondent, Qi Liu, will have parenting time with the Child as follows:
- a) the respondent, Qi Liu, will have a 30 minute video call, by Facetime or WeChat, with the Child every Wednesday and Saturday at 6:00 p.m. PST;
 - b) should the respondent, Qi Liu, travel to San Jose, California, the claimant, Xiao Ma, must allow for generous and reasonable in-person parenting time between the respondent, Qi Liu, and the Child. The respondent, Qi Liu, must give at least 7 days advance notice to the claimant, Xiao Ma, of his trip; and
 - c) should the claimant, Xiao Ma, travel to the Lower Mainland of British Columbia, she must allow the respondent, Qi Liu, generous and reasonable in-person parenting time with the Child. The claimant, Xiao Ma, must give at least 7 days advance notice to the respondent, Qi Liu, of her trip.
5. Neither party will travel with the Child outside the State of California without the other party's written consent, which consent will not be unreasonably withheld, with the exception that the claimant, Xiao Ma, may travel with the Child outside of the State of California for less than 14 days and such consent will be waived from the respondent, Qi Liu.
- [177] The claimant is entitled to costs, subject to any offers or other matters that may affect costs. The parties may arrange with court scheduling in the next 30 days to make submissions before me on any costs issues arising from these orders.

"Lamb J."

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