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CANADA / JUDGMENT

## McDowell v. Andrews

2018 BCSC 2216

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 2216 McDowell v. Andrews

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McDowell v. Andrews,

2018 BCSC 2216

Date: 20181213

Docket: E162871

Registry: Vancouver

Between:

Brett Douglas McDowell

Claimant

And

Lisa Eyo Andrews

Respondent

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

The Claimant appearing in person:

B. McDowell

Counsel for Respondent:

K. Simington

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 17, 18, 19, 20, 21, October 2, 3, & 4, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 13, 2018

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## Introduction

- [1] Brett Douglas McDowell and Lisa Eyo Andrews met in late 2012. In early 2013, they began living in the same premises. They both agree that their relationship ended permanently in early August 2016. Mr. McDowell argues that they had a marriage-like relationship throughout. Ms. Andrews disputes that it was ever a marriage like relationship. She argues that if there was a marriage-like relationship, it commenced August 1, 2013 and ended September 26, 2015.
- [2] Mr. McDowell claims that during the relationship he devoted his time and effort to Ms. Andrews' business to the detriment of his own career. Mr. McDowell claims that Ms. Andrews was abusive towards him and he developed posttraumatic stress disorder (PTSD) as a result. He claims compensatory and non-compensatory spousal support. He claims that Ms. Andrews' shares in three companies through which she runs her business are a family asset and should be divided equally. Mr. McDowell claims that two properties owned by Ms. Andrews, one in Zell, Germany and the other in Gibsons, BC, are family property.
- [3] Ms. Andrews' primary position is that they were not spouses so Mr. McDowell is not entitled to spousal support and there is no family property. If they were spouses, Ms. Andrews' position is that the spousal support which she has paid to date satisfies any non-compensatory spousal support award and no compensatory spousal support award is appropriate. In particular, Ms. Andrews asserts that Mr. McDowell did not make any sacrifices to his career and nothing he did in relation to her business was of value.

## Issues

- [4] The issues are:
- a) were Mr. McDowell and Ms. Andrews spouses within the meaning in the Family Law Act, S.B.C. 2011, c. 25?
  - b) if the parties were spouses, are any of the following assets family property:
    - 1) the real property in Zell, Germany;
    - 2) the real property in Gibsons, BC;
    - 3) Ms. Andrews' interests in Lacoudhir Ltd., Lacoudhir Design Limited, and Lacoudhir Inc (collectively, "Lacoudhir").;

- 4) Ms. Andrews' shares in Electra Meccanica Vehicles Corp.;
- 5) the parties' shares in Emris Creative Core Ltd.
- c) if any of the above is family property, shall it be allocated equally or unequally and if unequally, how shall it be allocated?
- d) how shall debt associated with these assets or generally be allocated?
- e) has Mr. McDowell made out a claim in unjust enrichment entitling him to a constructive trust over any of the property?
- g) If any payment is made to Mr. McDowell, should it be set off by Ms. Andrews' claims for:
  - 1) occupational rent for the Gibsons property;
  - 2) interim distribution of property to Mr. McDowell made prior to trial;
  - 3) payment of a vet bill for Mr. McDowell's dog;
  - 4) costs awarded to Ms. Andrews for injured on interlocutory applications;
  - 5) a payment of spousal support on an interlocutory basis;
  - 6) a fine of \$5000 pursuant to s. 213 of the Family Law Act for non-disclosure and breach of court orders prior to trial;
- h) if the deductions from any award payable to Mr. McDowell exceed the amounts awarded to Mr. McDowell, is a compensation payment to Ms. Andrews for the difference appropriate?

### **Preliminary Issue - Credibility**

- [5] A significant issue pertaining to Mr. McDowell's credibility arose in the evidence relating to Mr. McDowell's claim that he developed PTSD due to abuse in the relationship with Ms. Andrews.
- [6] Mr. McDowell sought to introduce evidence of Dr. Gomes, a psychologist he had seen for a workplace assessment and who had prepared a report as part of the workplace assessment in which he stated that Mr. McDowell suffered from PTSD.
- [7] Mr. McDowell had redacted sections of the workplace assessment report that he sought to introduce into evidence. On cross examination, counsel for Ms. Andrews asked Mr. McDowell about the redactions. He testified that the reason for the redactions was because those sections included information about other people whose privacy interests were at stake. Counsel for Ms. Andrews subsequently reminded him that the unredacted version had been appended to an affidavit that he swore earlier in the proceedings. She pointed out that two of the redactions related solely to Mr. McDowell. One of the redactions was:

Mr. McDowell's self-description suggests that he is easily insulted or slighted and tends to respond by holding grudges towards others. He is probably inclined to attribute his own misfortunes to the neglect of others and to discredit the successes of others as being the result of luck or favoritism. He is also likely to be envious of others and disinclined to assist others in achieving their goals and successes.

- [8] Mr. McDowell testified that he did not recall redacting this portion. He testified that his counsel had made a mistake in putting the unredacted version of the report in an affidavit and he asserted that when he swore the affidavit he did know the report was appended to it. He said that he redacted it because Dr. Gomes told him that the passage was not based on Dr. Gomes' observations of Mr. McDowell, but rather on testing results which were not accurate. He testified that he did not know why he redacted it, but he took full responsibility for his error.
- [9] I find that this was an attempt to mislead Ms. Andrews, her counsel, and the court. He wanted to put in the opinion evidence that would help him but not the portion that would not. I did not allow the opinion evidence in at all, so neither portion was in evidence, but Mr. McDowell's actions in redacting the report, tendering it, and then testifying untruthfully about the redactions satisfied me that I had to approach his evidence with care.
- [10] Mr. McDowell's evidence and Ms. Andrews' evidence conflicts in several respects. Determining facts when evidence is in conflict is a matter which involves consideration of the ability and opportunity of each witness to observe events, the firmness of various witness' memory, the ability to resist the influence of interest to modify recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his or her 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: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356.
- [11] On cross examination, there were occasions when Mr. McDowell would argue with cross examining counsel about whether Ms. Andrews' document production had been appropriate or make an assertion about some other conduct during the pre-trial procedure instead of answering a question that was put to him. Some of this was attributable to him representing himself which called for him to be both witness and make objections. But some of these responses were simply deflections. I formed the view that Mr. McDowell thought that only the facts that support his view of the case were fair and appropriate.

- [12] Ms. Andrews testimony included conceding facts that were not helpful to her or were painful to acknowledge. She appeared thoughtful in the sense that on more than one occasion, including on direct examination, she would return to an answer she had previously given and ask if she could give more information because her answer had been incomplete. She did so even when it was not helpful to her and without prompting or direction from her counsel.
- [13] For these reasons, I prefer Ms. Andrews' evidence to that of Mr. McDowell except when his evidence is supported by objective evidence. Except where I state there was a contest about the evidence, the facts I state are my findings of fact. Where there was a contest on the evidence, I will describe the conflicting evidence and state my finding.

Were the Parties Spouses?

- [14] Ms. Andrews was born, raised and educated in Australia. In November 2011 she moved to Vancouver on a visa through Canada's International Experience Canada program. That visa permitted her to live and work in Canada for two years. Ms. Andrews was permitted to renew it for two years which she did in 2013.
- [15] Mr. McDowell was born and raised in Winnipeg. He was in the Armed Forces for a period of time. He moved to Vancouver during the 2011 occupy movement.
- [16] Ms. Andrews and Mr. McDowell met in late 2012. Mr. McDowell was in a relationship. In February 2013, Mr. McDowell decided to leave his relationship. He told Ms. Andrews that he had been emotionally and physically abused in that relationship. He told her that he did not have a place to live but needed to depart the residence he shared with his girlfriend for his psychological well-being.
- [17] The following email exchange that took place on February 4, 2013 was the basis on which Mr. McDowell moved into Ms. Andrews' Yaletown residence:

From Ms. Andrews:

I don't this should be a permanent situation, but if you want to remove yourself from your current situation to maybe get some perspective you can stay with me for a while, until you and Jen find a place. If that's what you decide to do. Might help to see if you can actually get along with me, and live without her. I still am not sure where your choice will end up but I'm going to try and be patient and put in the effort to see where this goes.

From Mr. McDowell:

That is awesome of you. I would like to start spending the night there and that would be a really good start. I am packing my stuff and heading to Treys tonight.

- [18] Shortly after that time Mr. McDowell moved in with Ms. Andrews. He argues this was the commencement of a marriage-like relationship. Although Mr. McDowell testified that their marriage-like relationship began at the same time they began living together, his notice of family claim asserts that the marriage-like relationship commenced on August 1, 2013.
- [19] Ms. Andrews argues that she never intended to be in a marriage-like relationship. She believes that persons who are married should be equals, in all ways, including financial, and they never were. She argues that if they had a marriage-like relationship, it did not commence until August 1, 2013 when the parties agreed to move into an apartment together. Her pleadings are to the same effect. Ms. Andrews argues any marriage-like relationship ended by October 2015 when she left Canada and moved to Europe.
- [20] Given the pleadings, I will consider whether the relationship was marriage-like from August 1, 2013 until the time that it ended.

### Legal Principles

- [21] Section 3 of the Family Law Act defines spouses as persons who are married or who live with another person in a marriage-like relationship for a continuous period of at least two years or who had a child with the other person:

3 (1) A person is a spouse for the purposes of this Act if the person

- (a) is married to another person, or
- (b) has lived with another person in a marriage-like relationship, and
  - (i) has done so for a continuous period of at least 2 years, or
  - (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.

(2) A spouse includes a former spouse.

(3) A relationship between spouses begins on the earlier of the following:

- (a) the date on which they began to live together in a marriage-like relationship;
- (b) the date of their marriage.

(4) For the purposes of this Act,

- (a) spouses may be separated despite continuing to live in the same residence, and
- (b) the court may consider, as evidence of separation,
  - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and

(ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

- [22] In *Weber v. Leclerc*, 2015 BCCA 492, the Court of Appeal confirmed that the approach to this issue should be a holistic view of the evidence, taking all relevant matters into account and weighing the factors, rather than a checklist approach of factors considered in other cases. In reaching this conclusion, the Court of Appeal referred to *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.); *Takacs v. Gallo* (1998), 48 B.C.L.R. (3d) 265 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 238; and *Austin v. Goerz*, 2007 BCCA 586, stating as follows:
- [17] First, while *Gostlin* had suggested that economic dependence is a key element of a marriage-like relationship, the majority in *Takacs* explicitly recognized that the intention to live in a marriage-like relationship need not include an intention to be financially interdependent. Second, *Takacs* holds that the intention that is critical is not the intention to be bound by a statutory regime of mutual support, but rather the intention to enter into a relationship similar to marriage. In the context of *Takacs*, the court saw the issue as one of whether the parties' intentions in cohabiting were similar to those that might be expected in a relationship of marriage. The key question was whether the couple saw their relationship as one of indeterminate, lengthy duration. While the majority of this Court accepted that the couple saw eventual marriage as a possibility, it was of the view that they considered their existing relations to be transitory.
- [22] *Austin* establishes that the question of whether a cohabiting couple are in a "marriage-like relationship" is a question of mixed fact and law that requires a broad approach
- [23] The parties' intentions - particularly the expectation that the relationship will be of lengthy, indeterminate duration - may be of importance in determining whether a relationship is "marriage-like". While the court will consider the evidence expressly describing the parties' intentions during the relationship, it will also test that evidence by considering whether the objective evidence is consonant with those intentions.
- [24] The question of whether a relationship is "marriage-like" will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was "marriage-like".
- [31] The weighing of these various factors was for the judge. She considered all of them, and was entitled to conclude, as she did, that the relationship was marriage-like.
- [23] Despite that a check-list approach is to be avoided, it is helpful to set out the factors that may be relevant in determining if two parties are spouses:
- a) the parties' intentions, particularly that the relationship will be of lengthy, indeterminate duration;
  - b) whether there is financial interdependence;

- c) whether the parties resided together and if so, whether they did so in the nature of roommates or in the nature of a couple;
- d) objective evidence of the parties' lifestyle and interactions; and
- e) whether the parties engaged in sexual relations and were intimate in the sense of fidelity and sharing personal information.

[24] This Court has referred with approval to a detailed list of indicia pertaining to shelter, sexual and personal behaviour, household services, social/societal behaviour, and economic support. These indicia are set out and discussed in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) at para. 16; *Gostlin* at paras. 11-12; *Takacs* at paras. 46 and 53; *Fowler v. Fowler*, 68 A.C.W.S. (3d) 909 (B.C.S.C.) at para. 8; and *Kneller v. Greenwood*, 2015 BCSC 1410 at paras. 98-100.

[25] These indicia may be present in varying degrees: *Austin* at para. 57, citing *M. v. H.*, [1999] 2 S.C.R. 3 at para. 59. For example, in some marriage-like relationships, there is a complete blending of finances and property while, in others, spouses keep their property and finances totally separate: *Austin* at para. 58. Although a party may subjectively believe that he or she is not in a marriage-like relationship, the reality may be otherwise: *Takacs* at para. 53.

[26] In *Dey v. Blackett*, 2018 BCSC 244 at para. 235, Mr. Justice Schultes summarized the approach to rationalizing the subjective evidence of the parties' intentions with objective evidence:

[235] While an intention to enter into a relationship similar to marriage - of an indeterminate, lengthy duration - is the essential requirement for finding a marriage-like relationship, a consideration of objective indicators are helpful as a means of testing the parties' professed intentions (or lack of intentions) in that regard, and may also form the basis of inferences as to what their intentions were. Put another way, while intention is the key, a partner who claims or disavows such an intention may not be believed if all of the surrounding circumstances strongly imply the contrary. All of that said, *Takacs* offers the reminder that relationships can fulfill many of the accepted indicators without the couple "intending or in fact entering the kind of psychological and emotional union that one associates with marriage."

## Discussion

[27] The essential question is whether each of Ms. Andrews and Mr. McDowell developed an intention to be in a committed relationship of an indeterminate, lengthy duration, or, if there are questions about their intentions in this regard, whether there is objective evidence that they had a committed relationship of indeterminate, lengthy duration. When they began to live under the same roof, Ms. Andrews stated that she did not think it should be a permanent situation. The question is whether that changed.

- [28] When Mr. McDowell moved into Ms. Andrews' apartment in February 2013, Ms. Andrews was planning to travel in Europe extensively commencing in April 2013. Mr. McDowell and Ms. Andrews got along well and enjoyed each other's company. They decided to travel together.
- [29] Both Mr. McDowell's parents are former Air Canada employees. They were entitled to book flights on Air Canada for themselves and persons designated as family members at very favourable rates. Starting with the April 2013 trip and throughout their relationship, Ms. Andrews was designated to travel on Ms. Martineau's pass. In addition, Mr. Rod McDowell, Mr. McDowell's father, arranged for air cargo shipping for them a very favourable rates when they moved to Montréal and again when Ms. Andrews bought an apartment in Germany.
- [30] In April 2013, the parties left Vancouver and travelled to London and Paris. They returned to Vancouver in August 2013. Ms. Andrews rented a furnished apartment into which they both moved. This is the time at which Mr. McDowell pled a marriage-like relationship began. Ms. Andrews denies a marriage-like relationship existed, but pled that if there was one, it began at this time.
- [31] Mr. McDowell's mother assisted them to move into the apartment. Ms. Andrews' possessions, which she had put in storage when they left Vancouver in April 2013, were retrieved. She testified that there may have been a few things of Mr. McDowell's stored with her belongings. In addition, Mr. McDowell's belongings that had been stored by his ex-girlfriend were also retrieved from storage and moved into the apartment. The parties lived at that apartment for the rest of 2013. Mr. McDowell's dog, Starbuck, also resided with them.
- [32] In October 2013, Ms. Andrews renewed her visa for two years. She testified that they were both aware that this was the maximum that she would be permitted to stay in Canada on that type of visa. Ms. Andrews testified that she discussed with Mr. McDowell the fact that she did not intend to remain in Canada after the visa expired. Ms. Andrews testified that since leaving Australia, it had been her intention that Canada would not be a permanent home for her. She intended to move to the United Kingdom where she had greater ability to work and live permanently as her father was born in the United Kingdom and had citizenship. Mr. McDowell testified that while she talked about wanting to live in the UK, those discussions were in the context of them living there together. Mr. McDowell also testified that he worked on avenues for her to work in Canada beyond her second visa. I find that Ms. Andrews did not intend to do so and Mr. McDowell knew that. They both knew that Ms. Andrews would not be living and working in Canada after October 2015.
- [33] On January 3, 2014 the parties moved to Montréal. They rented an unfurnished property. Ms. Andrews bought furnishings for the property and paid the rent. Mr. McDowell's father arranged for their Vancouver possessions to be shipped from Vancouver to Montréal at his advantageous cargo rates.

- [34] The parties lived in Montréal from January 2014 through July 2015. During this time, Ms. Andrews travelled to Germany and became interested in acquiring an apartment in Zell, Germany. While she wanted to maintain a residence in London, she found London to be very expensive and felt that she could afford to buy a residence in Germany where she would live for several months a year. She retained a real estate service company to assist her with the search for these properties. In April 2015, Ms. Andrews returned to Zell with Mr. McDowell to look at apartments.
- [35] Mr. McDowell testified that he was extremely involved in the research of apartments as well as the ultimate selection of the apartment that Ms. Andrews purchased. Ms. Andrews testified that when she advised Mr. McDowell that she was looking for an apartment, he took it upon himself to become engaged in the process, and that his assistance was not at her request. She agreed in her evidence that Mr. McDowell was with her when she viewed the apartment she bought and that they had discussed some of the other apartments she looked at. She testified that he did not have anything else to do with the transaction including the negotiation or the finalization of the documentation pertaining to the purchase of the apartment.
- [36] Both parties testified that Mr. McDowell raised the possibility with Ms. Andrews that she could sponsor him for a visa to live in Europe. Ms. Andrews testified that she said she would not sponsor him and discouraged the idea of him moving to Europe. Mr. McDowell did not disagree that he had asked Ms. Andrews to sponsor him, but he disagreed that she had refused to sponsor him. He testified that they discussed options including that he would use the same kind of work visa in Europe that Ms. Andrews had used in Canada.
- [37] There was no evidence that Mr. McDowell ever obtained any kind of visa to work and/or live in Europe. Ms. Andrews did not sponsor him. I accept Ms. Andrews' evidence that she refused to sponsor him for a visa and that he was aware of that.
- [38] On August 1, 2015, they moved from Montréal to Vancouver and stayed in temporary furnished accommodation on Keefer Street for the months of August and September 2015. Ms. Andrews paid for this accommodation. It was temporary because Ms. Andrews had by then made arrangements to move to Germany upon the expiry of her Canadian visa in October 2015. They did not move their belongings but rather packed them up and left them in storage as Ms. Andrews' move to Germany was pending.
- [39] Ms. Andrews left Canada for Germany on September 26, 2015, accompanied by Mr. McDowell and Mr. McDowell's mother. The three of them set up the new apartment. They had belongings that they had left behind in Montréal shipped to them in Germany. Mr. Rod McDowell arranged for that.
- [40] Ms. Andrews testified that she understood that Mr. McDowell's belongings that were in Montréal were shipped to Germany because they packed up the Montréal apartment in a hurry and did not have time to arrange for separation shipment of his belongings, which were few in number. Since shipping was very inexpensive and since they planned that Mr.

McDowell would visit her in Germany from time to time, she thought he would take his possessions home with him as he did. Mr. McDowell's evidence was that they moved his belongings to the Zell apartment because he intended to live there part time.

- [41] After several days setting up the Zell apartment, Mr. McDowell's mother left and Ms. Andrews' father arrived. Mr. McDowell, Ms. Andrews and Ms. Andrews' father travelled for several weeks around Europe. Following that, Ms. Andrews returned to Zell and Mr. McDowell returned to Vancouver.
- [42] Ms. Andrews testified that it was her expectation that when Mr. McDowell left Germany after the visit that coincided with her taking possession of the Zell property, they would drift apart and their relationship would naturally fade.
- [43] Ms. Andrews testified that on two prior occasions she had attempted to end the relationship. She described tension and friction over the unequal contribution of the parties towards financial matters and her growing sense that Mr. McDowell was encroaching on her business in a manner that did not accord with her sense of independence and self-determination. On the occasions when she tried to end the relationship, she testified that Mr. McDowell became distraught and told her that if she ended it with him he would be "out on the streets". Mr. McDowell testified that on many occasions when the parties argued, Ms. Andrews threatened to throw him out on the streets, belittled him and made him feel vulnerable and worthless.
- [44] In the meantime, and before Ms. Andrews left Canada in late September 2015, she had decided to invest in a revenue property in British Columbia. Her intention was to purchase a property, renovate it, rent it for a few years, and then sell it at a profit. She looked at many places in the Lower Mainland and settled on the Sunshine Coast. She was not able to obtain financing without assistance from her family. There is some controversy as to whether Ms. Andrews' parents loaned her or gifted her \$30,000 towards the purchase but given the view I take that the apartment is not a family asset, the characterization of the assistance is not relevant.
- [45] Mr. McDowell testified that he was intimately involved with the purchase of this property, including seeking it out and having the inspection report reviewed by a friend of his. Mr. McDowell also testified that he was involved in the discussions pertaining to the financing. Ms. Andrews testified that Mr. McDowell did involve himself in the search for the Gibsons property but not at her request. She testified that she did not ask to have the inspection report reviewed by anyone. Ms. Andrews returned to BC in December 2015 and took possession of the Gibsons property. Mr. McDowell was not with her at that time. I find that Ms. Andrews was purchasing the property with the mindset that it was her investment but Mr. McDowell was involving himself as though it was a property they were to own together.
- [46] In December 2015, Ms. Andrews returned to Zell without Mr. McDowell. Mr. McDowell went to Winnipeg to spend Christmas with his family. Mr. McDowell travelled to Vancouver after Christmas 2015. Mr. McDowell said that the plan was for him to live in the Gibsons property

and also look for an apartment in Vancouver when working in Vancouver because of the commuting time between the Sunshine Coast and Vancouver. Ms. Andrews testified to a different arrangement. She said that Mr. McDowell had asked her if he could stay in the Gibsons property until he found an apartment in Vancouver. Ms. Andrews agreed. She testified that her understanding was that once he found an apartment in Vancouver he would vacate the Gibsons property so that she could undertake her plan to renovate it and rent it out. Mr. McDowell agreed that the plan was to renovate the property and rent it out. Accordingly, I find that regardless of whose evidence is correct as to how the arrangement came about, it was clear that Mr. McDowell was to live in the property on a temporary basis only because it was to be renovated and rented out.

- [47] In January 2016, Ms. Andrews also established residence in London, England for work purposes by renting an apartment. She began working there and divided her time primarily between London and Zell. Mr. McDowell has not spent any time with Ms. Andrews in her London residence.
- [48] Mr. McDowell's evidence was that although the parties each had work commitments as a result of which they were in different places, they intended to spend time together in Zell, Gibsons and London when their schedules permitted and to travel together.
- [49] Ms. Andrews evidence is that although she did not know how to end the relationship, she was most anxious for Mr. McDowell to find an apartment in Vancouver and move out of the Gibsons property. In June 2016 Mr. McDowell visited Ms. Andrews in Zell. When he left, he took some of his possessions that had been shipped from Montréal to Zell but not all of them.
- [50] In July 2016, Ms. Andrews returned to Canada and to the Gibsons property to undertake some renovations. At that time, Mr. McDowell was living in the property and Ms. Andrews was annoyed that he was still there, not working and not paying rent or contributing to any expenses on the Gibsons property. Ms. Andrews testified that there was a lot of tension and they argued. Mr. McDowell testified that she belittled him and treated him horribly in what he considered to be an escalation of her ongoing abusive conduct.
- [51] At that time, Mr. Rod McDowell was also at the Gibsons property. He and Mr. McDowell had been undertaking renovations including removing tiling from a bathroom, removing a shower, removing and buying new toilets, and flooring work. Mr. Rod McDowell testified that it was clear that things were not good between his son and Ms. Andrews. He testified that she was "pretty mean" to his son.
- [52] After Mr. Rod McDowell left, the couple had a final disagreement on August 3, 2016, after which the relationship ended.

## Cohabitation

- [53] During the times that Ms. Andrews and Mr. McDowell were living under the same roof, there is no dispute on the evidence that they were sharing a bedroom, and sharing a bed. There is no doubt that the relationship was a romantic one. They were living together as a couple and not as roommates.
- [54] This factor weighs in favour of a finding of a marriage-like relationship when they were living together. However, it is not clear when they stopped cohabitating. Mr. McDowell argues they did not stop cohabitating until August 2016 when Ms. Andrews made him leave the Gibsons apartment. Ms. Andrews argues they stopped cohabitating when she moved to Germany at the end of September 2015.
- [55] I conclude that although Mr. McDowell accompanied Ms. Andrews to Germany, he did not move to Germany as Ms. Andrews did. While their relationship continued, they were no longer cohabitating after October 2015.

## Finances

- [56] From the time Mr. McDowell moved into Ms. Andrews' Yaletown apartment in February 2013 through to their final split in August 2016, Ms. Andrews paid for their housing costs and travel costs. She also paid for some expenses relating to Mr. McDowell's dog. From time to time Mr. McDowell would ask her for money for various things he needed or wanted and usually Ms. Andrews would give him the money he asked for. Mr. McDowell bought some groceries from time to time. Mr. McDowell used Ms. Andrews' debit card and credit card from time to time.
- [57] Ms. Andrews testified that when they travelled together in the spring and summer of 2013, she expected that they would share expenses equally. While in London she arranged for a prepaid credit card attached to a bank account which she had in London. She felt this would be a good way for them to track expenses for sharing purposes. She testified that Mr. McDowell told her he had not brought enough money with him and planned to have money wired to him. However, they left London for Paris before they used the prepaid card. In Paris, Ms. Andrews paid their expenses and Mr. McDowell did not contribute to them.
- [58] Mr. McDowell described the prepaid card as a joint bank account. It was arranged through Ms. Andrews' bank account, to which Mr. McDowell has never had access, but it was not a bank account and they did not use it. I accept Ms. Andrews' evidence that they never had a joint bank account or any joint financial assets.
- [59] Ms. Andrews testified that the issue of finances was a point of tension. She testified that Mr. McDowell told her that his self-esteem was diminished if he was not seen to be an equal contributor to their finances. For this reason, if they were going out socially, he would ask her to give him money or her debit card or credit card before they went out so he could undertake the act of payment. Ms. Andrews permitted this.

[60] When Ms. Andrews moved to Germany and London and Mr. McDowell was living in the Gibsons property, Ms. Andrews was paying the strata fees and the utilities at the Gibsons property. Mr. McDowell was paying for his own food and transportation costs while he lived in the Gibsons apartment. Ms. Andrews testified that after that point, she refused to pay for anything not directly relating to the Gibsons property.

[61] I conclude that Mr. McDowell was financially dependent on Ms. Andrews for his living expenses from the spring of 2013 through the fall of 2015 when Ms. Andrews left for Europe. After that, he was dependent on her for his housing but was providing for his own transportation and food.

Household chores etc.

[62] The evidence around this issue mainly focusses on whether Ms. Andrews' views on cleanliness and the way she addressed Mr. McDowell in relation to those views were part of an abusive dynamic in the relationship. I will address that below. It is sufficient to say that Mr. McDowell participated in the cleaning of their shared living spaces. They had disputes about cleanliness that were less of a problem when she was not living in the Gibsons apartment with him. I conclude that sharing of the household chores was part of their relationship at least until Ms. Andrews started living in Germany.

### **Social and Appearance in Public**

[63] Mr. McDowell called four witnesses to testify as to how the parties behaved when in a social setting or in the presence of family. These witnesses were his father, Rod McDowell, his mother Diane Martineau, his sister Nikki McDowell, and his friend Tristan Haak.

[64] All of these witnesses testified that they behaved like a couple who were committed to each other. All of them interacted with the parties as a couple, until their breakup in August 2016. All of them testified that prior to that breakup, there was no change in the way they appeared which led them to believe the relationship had changed.

[65] Ms. Martineau, Mr. McDowell's mother, spent a considerable amount of time with Mr. McDowell and Ms. Andrews. She helped them move into two rental apartments: one in Vancouver and one in Montréal. She helped them move into the Zell apartment and she visited the Montréal apartment.

[66] Mr. McDowell and Ms. Andrews travelled to Winnipeg on more than one occasion, including once at Christmas, to visit with Mr. McDowell's mother, father, sister and niece. Mr. McDowell's niece calls Ms. Andrews "Auntie Lisa". As I have already described, from very early in their relationship, Ms. Andrews was a "family member" for the purpose of the Air Canada travel passes Mr. McDowell's parents provided to her and which she used to travel.

[67] Mr. McDowell and Ms. Andrews travelled to Australia together to visit her family.

- [68] Over Christmas 2015, Mr. McDowell spent the holidays in Winnipeg with his family without Ms. Andrews. She spent Christmas in Germany.
- [69] Mr. Rod McDowell testified that in July 2016 he travelled to Gibsons to assist with renovations to the Gibsons property. He testified that he did so because his son and Ms. Andrews were jointly residing in the property and had made the investment jointly. He testified that he would not have spent his time on difficult renovations merely to assist Ms. Andrews with an investment in which his son had no part. He testified that he offered to buy them a housewarming gift and since Ms. Andrews did not want a barbecue, he instead bought them supplies for the renovations. It was not clear from his evidence as to how he became informed that they were jointly residing in the apartment and had jointly invested in it. The evidence is clear that Ms. Andrews paid for the apartment out of funds provided in part from her family. Other than when Ms. Andrews travelled to Gibsons in July of 2016 to work on the property, she did not live in it with Mr. McDowell.
- [70] Mr. McDowell asked Mr. Haak to review the inspection report on the Gibsons property for him as Mr. Haak has considerable experience in the construction industry. Mr. Haak testified that he did so on the understanding that this was a property and that Mr. McDowell and Ms. Andrews were buying together. Ms. Andrews testified that it was very clear as between herself and Mr. McDowell that it was her investment property. She testified that she did not ask Mr. McDowell to have Mr. Haak review the inspection report and that she does not recall if, at the time, she was even aware that Mr. Haak had done so or if she discussed Mr. Haak's comments with Mr. McDowell.
- [71] I conclude that Ms. Andrews was of the view that Gibsons was her property and Mr. McAndrew was of the view that it was their property. He communicated about it to his family and friends in a manner consistent with his view. Ms. Andrews did not want the things Mr. MacDowell's mother and his father bought for them as it was her property and she wanted things of her choice in it.
- [72] I conclude on all of the evidence that from at least August 2013, when Mr. McDowell and Ms. Andrews returned to Vancouver to rent an apartment, they appeared to family and friends as a couple who were together in a committed relationship. The cracks in that relationship were demonstrated to friends and family in their interactions over the Gibsons property because its purchase was at a time when Ms. Andrews was in the process of acting in accordance with her desire to end the relationship, as I will explain below.

### Intentions to be in a Committed Relationship of Indeterminate Length

- [73] From the entirety of Mr. McDowell's evidence, I formed the impression that Mr. McDowell was very committed to Ms. Andrews. He was dependent on her emotionally and financially. Although their relationship was difficult for at least a year prior to August 2016, he did not want it to end. From this I conclude that from very early on he had the intention to be in a committed relationship of indeterminate length and that intention did not change until August 2016.
- [74] Ms. Andrews testified that she had specific views around marriage. Because she worked hard to build a successful career, she was focused on finances and the dynamic finances played in relationships. She was determined to not be financially dependent on anyone and she testified that she viewed marriage as an arrangement where parties must be equals including financial equals. She testified that she had no intention to be in marriage without financial equality and she did not understand that she could do so without by doing what she did.
- [75] I accept that until this litigation, Ms. Andrews was not familiar with the concept of a marriage-like relationship or a common-law relationship. She did not think about whether her relationship with Mr. McDowell was marriage-like during its tenure because she did not know that a relationship with a person that included living under one roof and providing financial support could form a marriage like-relationship, nor the potential long-term legal consequences of being in a marriage-like relationship.
- [76] Ms. Andrews testified that by the time she left Canada for Germany in the fall of 2015, there was a lot of tension in the relationship. While she had not broken up with Mr. McDowell, she assumed that their relationship would end naturally as they lived on different continents and were developing their businesses. She was eager for Mr. McDowell to become financially independent and was only prepared for him to live in the Gibsons property until he found a Vancouver apartment.
- [77] I accept that Ms. Andrews formed these views. She communicated them to the Mr. McDowell in two ways, neither of which were direct or express. First, when he asked her to sponsor him so he could live and work in Europe, she refused. Second, after she moved to Germany, she discontinued paying his living expenses with the exception of paying for the expenses on the Gibsons property.
- [78] Ms. Andrews did not, however, put an end date on the time for him to vacate the Gibsons property. She did not express that they should see other people or otherwise terminate or change their romantic involvement.
- [79] The fact that Ms. Andrews did not know that she might be in a marriage-like relationship is not determinative. Some people are in marriage-like relationships without meaning to engage the legal consequences of such a relationship: Takacs at para. 53.

- [80] However, the intentions and expectations of each of them were closely tied to the fact that for up to two years prior to October 2015, they both knew that Ms. Andrews would no longer be living in Canada after October 2015. Mr. McDowell knew that she had purchased the apartment in Zell. Although Mr. McDowell testified that he intended to be in Zell about six months per year, without a visa or sponsorship, he could not reasonably expect to do so.
- [81] Ms. Andrews' refusal to sponsor Mr. McDowell in Europe, together with her pending move to Europe, meant that neither party could reasonably have intended a relationship of indeterminate or lengthy duration after May 2015.

### Conclusion on Spousal Relationship

- [82] Many of the indicia, including the objective evidence, points to Mr. McDowell and Ms. Andrews having a marriage-like relationship from August 1, 2013 through May 2015 when Ms. Andrews arranged to buy the Zell apartment and refused to sponsor Mr. McDowell to live in Europe.
- [83] Some objective evidence, such as Mr. McDowell and his mother travelling to Germany with Ms. Andrews to set up the apartment in Zell together, Mr. McDowell living and working on the Gibsons property in 2016, and the fact that they continued to share a bed when they were together into 2016 points to a continuation of their relationship in some respects after Ms. Andrews moved to Europe. There was also a continuum of changes after Ms. Andrews moved to Europe. They did not share Christmas with each other or with each other's family for the first time since they started living together. After spending time in Germany and Europe together in 2015, they did not subsequently reside together except for a period in Zell in June 2016 and a week or two in Gibsons in August 2016. They were not together at all between January and June 2016.
- [84] Ms. Andrews was no longer providing financial support to Mr. McDowell beyond allowing him to live in the Gibsons apartment. She communicated to him that she would not pay for anything not directly related to the apartment. She urged him to find an apartment in Vancouver. She was angry that he was still living in the Gibsons property in July of 2016 when she returned to undertake renovations.
- [85] When looking at the issue from the perspective of separating parties, the question is when at least one of the parties intended to live separate and apart, communicated that intention, and acted upon it. If the parties remain under the same roof, the intention to separate need not be mutual but it must be communicated to the other party and acted upon: *Rose v. Guiguet*, 2008 BCSC 1225 at paras. 56-58; *Nearing v. Sauer*, 2015 BCSC 58 at paras. 55-61; *J.J.G v. K.M.A.*, 2009 BCSC 1056 at paras. 35-39. In my view, this analysis is apt in determining whether parties who commenced a marriage-like relationship sustained it for the two years necessary for them to be spouses under Family Law Act s. 3(1)(b)(i).

[86] In this case, Ms. Andrews formed the intention to separate, communicated it and acted upon it by deciding to move to Europe, buying an apartment there and refusing to sponsor Mr. McDowell. Although in some respects the evidence demonstrates a gradual unwinding of their relationship until August 2016 when they had a final fallout, I conclude that the marriage-like character of their relationship ended in May 2015. This was less than two years after it began in August 2013. Accordingly, Ms. Andrews and Mr. McDowell never became spouses within the meaning of the Family Law Act.

[87] Given this conclusion, there can be no claims for spousal support or property division.

### **Abusive Relationship and Post Traumatic Stress Disorder**

[88] Mr. McDowell's claim that abuse in the relationship caused him to suffer from PTSD is most relevant to his claim for spousal support. However, Mr. McDowell also links his unjust enrichment claim to his vulnerability in the relationship due to the alleged abuse and PTSD. Accordingly, notwithstanding that I am not making an award of spousal support, I will consider the claims of abuse and PTSD.

[89] Family violence is non-exhaustively defined in s.1 of the Family Law Act as follows:

"family violence" includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
  - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
  - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
  - (iii) stalking or following of the family member, and
  - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[90] Mr. McDowell claims that he was subjected to spousal abuse by Ms. Andrews through much of the relationship. He claims that this abuse consisted of belittling behaviour, deliberate attacks on his self-esteem, undue criticism of his work, undue criticisms of his housekeeping abilities, spying on him and controlling with whom he could communicate.

- [91] Mr. McDowell claims that he has sought hospital treatment, has been unable to work and has had to rely heavily on pharmaceuticals. The documentary evidence establishes that in August 2016, immediately subsequent to the breakdown of the relationship, Mr. McDowell attended at Vancouver Hospital emergency in distress. Since that time, Mr. McDowell has taken several medications which he testifies are to help him deal with the anxiety and symptoms of PTSD.
- [92] Ms. Andrews testified that throughout their relationship Mr. McDowell told her that he had Attention Deficit Hyperactivity Disorder ("ADHD") and that interfered with his ability to focus and work. She testified that towards the end of their relationship, he told her that he realized he did not have ADHD but rather it had been PTSD all along. When this was put to Mr. McDowell in cross-examination, he did not deny it but rather asserted that he had never required treatment for PTSD prior to the abuse he suffered with regard to their relationship.
- [93] Mr. McDowell sought to have his family doctor, Dr. Ko, testify with regard to his diagnosis. Dr. Ko had been Mr. McDowell's doctor for about two months prior to trial. Mr. McDowell did not deliver an expert opinion from Dr. Ko. Mr. McDowell had not produced clinical records from Dr. Ko. I ruled that Dr. Ko could not give opinion evidence nor refer to diagnoses given by other physicians at the clinic at which he worked. I ruled that Dr. Ko could testify as to factual matters, including times it which he had seen Mr. McDowell and what he observed when he saw him so long as his clinical records were produced by 9 am on the morning on which he was to testify. Mr. McDowell did not produce Dr. Ko's clinical records by the designated time. I did not permit Dr. Ko to testify.
- [94] As discussed above, Mr. McDowell also sought to have Dr. Gomes' report admitted into evidence and to have Dr. Gomes to testify. I did not allow that evidence as no notice had been given and Dr. Gomes could not offer any non-opinion evidence.
- [95] With regard to his allegations of abuse in the relationship, Mr. McDowell testified that Ms. Andrews spied on him, told him that he could no longer Skype or chat with his sister, belittled him with regard to household cleaning standards, screamed abuse at him, criticized the work he did on a project called Lulla Boom, and threatened to put him out on the street if their relationship ended.
- [96] Mr. McDowell points to a few instances of spying. One is that Ms. Andrews read electronic messages that he exchanged with a friend. However, he exchanged these messages with the friend using Ms. Andrews' phone. Ms. Andrews testified that she read those messages when she went to use her phone and found them on her phone. She testified that a final straw in the relationship for her was when she found these messages because in one of the messages Mr. McDowell suggested that he should probably slap Ms. Andrews around because he was bigger.
- [97] Mr. McDowell testified that Ms. Andrews read messages he exchanged with his sister and then messaged Mr. McDowell's sister that Mr. McDowell would no longer be able to use Ms. Andrews' phone to message with his sister. Ms. Andrews testified that Mr. McDowell was

using her phone for this purpose and she had no choice but to see the messages in her text strings. She did not want to see their private message exchanges. That is why she said that the messaging should not take place on her device. She testified that Mr. McDowell had a laptop on which he could, when in Wi-Fi range, message his sister privately. She testified that she never intended to spy, and in fact she did not want to be privy to the communications. I accept Ms. Andrews' evidence in this regard.

- [98] The third incidence of spying that Mr. McDowell refers to is an incident in which Mr. McDowell had written an angry, venting letter to Ms. Andrews. He did not send the letter but the draft of it was on the computer server that Ms. Andrews used for her business. She came across it and read it. She testified that it made her sad and unhappy.
- [99] There is no evidence on which I can conclude that Ms. Andrews spied on Mr. McDowell or attempted to control his communications with other people.
- [100] With regard to household standards, Ms. Andrews testified that she is a clean person. She testified that Mr. McDowell became upset when she asked him to clean. Mr. McDowell testified that she belittled him and screamed abuses at him around this subject. Ms. Andrews denies that. I accept her evidence.
- [101] With regard to Mr. McDowell's evidence that Ms. Andrews belittled and criticized his work, much evidence was led about work they did together on a project called Lulla Boom. Both the evidence of Mr. McDowell and Ms. Andrews painted a picture of a project that went badly. They both blamed each other for how it went. Based on that, one would expect that their discussions were negative and unpleasant. Aside from Mr. McDowell's vague statements that Ms. Andrews belittled and criticized him for his work on the project, he did not give any specific evidence about belittling comments or criticisms that would allow me to conclude that Ms. Andrews emotionally or psychologically abused him.
- [102] Mr. McDowell testified that when they would argue, Ms. Andrews would threaten him that if their relationship ended, he would be out on the street. As discussed above, Ms. Andrews testified that it was the other way around - Mr. McDowell became desperate and said he would be out on the street if they broke up. It is logically correct that Mr. McDowell would not have a place to live if they split up because he did not have accommodation of his own. That situation does not in and of itself mean that an expressed wish to end the relationship amounts to abuse and I find that it did not.
- [103] Mr. McDowell's father testified that when he was with the couple in Gibsons in July 2016 Ms. Andrews was mean to Mr. McDowell with regard to the renovations they were attempting to do. Ms. Andrews testified that during this time tensions were very high in their relationship. They had their final fallout a few days later. Mr. McDowell testified that Ms. Andrews screamed at him and hurled abuses at him as he locked himself and his dog in a room in the apartment.

- [104] Ms. Andrews did not deny that she yelled and screamed at Mr. McDowell. Overall, the evidence is such that if she yelled, screamed and used inappropriate words as part of that break up, it was not one of several incidents of such behaviour or part of a pattern that would amount to emotional or psychological abuse.
- [105] When Mr. McDowell left the following day, the parties' relationship was permanently over. Mr. McDowell testified about significant symptoms of mental anguish and being unwell. He checked himself into the hospital.
- [106] I conclude that Mr. McDowell has not proven that Ms. Andrews was emotionally or psychologically abusive towards him. Rather, their relationship was characterized by many of the same types of tensions that couples find it difficult to navigate. Their relationship included unpleasant arguments and exchanges and hurt feelings as their incompatibility and grievances grew. Then the relationship ended. Mr. McDowell suffered emotionally and psychologically because it ended.
- [107] I conclude that Mr. McDowell has symptoms of which he complains including an inability to focus, anxiety, and zoning out. However, he is not led evidence that links these symptoms to abuse in the relationship nor has he led evidence of an abusive relationship.

### Unjust Enrichment and Constructive Trust

- [108] Mr. McDowell claims that Ms. Andrews was unjustly enriched by his direct or indirect contributions to the acquisition, improvement and maintenance of the Gibsons property, the Zell property, Lacoudhir, a company called Parasol U.K., and shares Ms. Andrews owns in a company called Electra Meccanica. Mr. McDowell claims that she holds these assets in constructive trust for him.
- [109] Unjust enrichment is an equitable claim to remedy the situation where a person makes a substantial contribution to the property of another person without compensation: *Peter v. Beblow* [1993] 1 S.C.R. 980 at 987. An action in unjust enrichment restores money or property to a person who can establish: (1) he or she enriched another person; (2) he or she suffered a corresponding detriment; and (3) the absence of a juristic reason for the enrichment: *Peter* at 987; *Kerr v. Baranow*, 2011 SCC 10 at para. 32.
- [110] For the first element, enrichment, the plaintiff must show that he or she paid something to the defendant or provided services which the defendant received and retained: *Kerr* at para. 38. The retention need not be permanent, but it must be a benefit which enriched the defendant.
- [111] The second element, corresponding detriment, requires the plaintiff to prove that the benefit the defendant received corresponds to a deprivation the plaintiff has suffered: *Kerr* at para. 39.

- [112] The third step, juristic reason requires the court to consider whether there is "no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention 'unjust' in the circumstances of the case": Kerr at para. 40. In *Peter*, the Supreme Court of Canada considered whether household services provided in the role of wife and mother could found an action for unjust enrichment. The Court held that household services could found an action (at p.993), and that the issue should be considered as part of the juristic reason analysis.
- [113] A two-step analysis ensures that the presence or absence of a juristic reason is not assessed on a purely subjective basis: Kerr at para. 43. First, the plaintiff must show that none of the established categories of juristic reasons that would deny recovery applies. The established categories are: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If the case does not fit into an established category, the plaintiff has made out a *prima facie* case for an absence of juristic reason. Under the second step, the defendant can rebut the *prima facie* absence of juristic reason by showing another reason to deny recovery. At this stage, the court looks at the circumstances as a whole to determine whether there is another reason to deny recovery, having regard to the reasonable expectations of the parties and public policy considerations. The two step analysis is described in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 44-46.
- [114] In family cases, the issue of whether the marital relationship serves as a juristic reason engages questions such as whether the claimant conferred the benefit as a valid gift or due to a valid legal obligation owed to the respondent, whether the claimant submitted to or compromised the respondent's claim and whether public policy supports the enrichment: *Peter* at 990-991. Generally speaking, a spouse owes no duty to perform work or services for a spousal partner: *Peter* at 991.
- [115] A remedial constructive trust is available to remedy unjust enrichment: *BNSF Railway Co. v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 55. In the event that a claim in unjust enrichment has been established, there are two criteria that must be met for a remedy of constructive trust. First, the claimant must demonstrate a substantial and direct link, a causal connection or a nexus between his or her claim and the property which is the subject of the remedial constructive trust to be impressed: *Peter* at 997; Kerr at paras. 50-51; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 92; *BNSF Railway* at paras. 57 and 60. Second, the claimant must demonstrate that a monetary award is insufficient or inappropriate in the circumstances: *Peter* at 997; Kerr at para. 52; *Pro-Sys* at para. 92.
- [116] Mr. McDowell argued that he made contributions in the form of advice and service to Ms. Andrews' business throughout the relationship such that she was able to acquire these assets. Mr. McDowell led evidence relating to contributions he made to the maintenance and acquisition of the real properties over which he claims a constructive trust.

Ms. Andrews' Business

[117] Specifically, Mr. McDowell argues that he:

- a) was responsible for successful tax planning and corporate structure decisions she made;
- b) worked on several projects with Ms. Andrews from which she benefited;
- c) organized and co-hosted entertainment events for clients; and
- d) gave her the idea to take founders shares for work she did for a client called Electra Meccanica.

[118] Mr. McDowell claims that as a result of his advice with regard to corporate structure tax planning and on various client matters and projects, Ms. Andrews' business grew in value significantly.

[119] When Ms. Andrews came to Canada in 2011, she was working as a graphic designer and web designer. She called her business Lacoudhir. In Australia, she worked through a structure roughly the equivalent of a sole proprietorship in Canada. There is now a Canada business corporation, Lacoudhir Inc.; a Hong Kong entity, Lacoudhir Ltd.; and a UK entity, Lacoudhir Design Ltd., in which she has a partner who owns half of the shares.

[120] Ms. Andrews testified that her companies have no hard assets of value except laptops and some office supplies. The real assets are her clientele and her reputation. Mr. McDowell did not offer any evidence to dispute this but he claims his input assisted with the development of her clientele, her reputation and her profitability through advice with regard to the corporate structure and tax planning.

[121] Ms. Andrews testified that her corporate structure and tax planning was driven by her accountant in Canada as well as discussions she had with a friend and business associate as to how he had structured his business to take advantage of various international rules and tax planning objectives. She testified that the biggest influence was the research and work her friend had done which she essentially copied in setting up her structure. She testified that Mr. McDowell was very interested in what she was doing and offered his opinions on structure and tax issues but what she did was not based on his advice nor were they his ideas.

[122] Mr. McDowell testified that Ms. Andrews knew nothing of these things and that his input was instrumental.

[123] I accept Ms. Andrews' evidence that she received the tax planning and corporate structure advice from her accountant and colleague. I do not need to find whether she knew more or less than Mr. McDowell about these things, because he did not lead any evidence that he did anything that was of value in this regard. I find that the unjust enrichment claim pertaining to corporate structure and tax planning fails on the first branch: there was no benefit to Ms. Andrews.

- [124] Mr. McDowell also points to work he did on several projects for several clients without remuneration.
- [125] The most significant of these was the Lulla Boom project for a client of Ms. Andrews. This was a website development project which had two aspects to it: the front-end and the back-end. Ms. Andrews testified that the front-end is what the user sees and interfaces with. The back-end is the coding which makes the website do what it is intended to do. Ms. Andrews was responsible for the front-end and Mr. McDowell for the back-end. Both of them testified that the arrangement for fees was that the client would pay Ms. Andrews (i.e. Lacoudhir) upon the delivery of a functioning website. Between them, they agreed that they would share the fee equally. The client never paid the fee because they never delivered a functioning website. Ms. Andrews blames Mr. McDowell for the failure of the project. Mr. McDowell blames Ms. Andrews and the client.
- [126] Mr. McDowell testified that he had the ability to do the back-end coding, but the client had not set up its portion of things properly and the project as a whole did not come together properly in the timeline envisioned. As a result, Mr. McDowell went back to the client and discussed how it should have been set up. He was given a time extension to complete the work.
- [127] Mr. McDowell testified that unbeknownst to him, Ms. Andrews did not know how to connect her front-end work with the coding language that he was using. Ms. Andrews testified that it was clear that she was not proficient in the language he was using on the back-end and that was the reason she asked him to do the work. She testified that he did not have the ability to do what he said he would do and kept asking for extensions to do it until he essentially ran out of interest and did not complete the project. She said it damaged her relationship with the client and her reputation because she had never failed to deliver on a website design before.
- [128] It should be noted that although the client did not pay Lacoudhir, Ms. Andrews did cause Lacoudhir to pay Mr. McDowell's company, Emris Creative Corp., about \$25,000 for his work. Emris paid the almost the same amount back to Lacoudhir for work that Lacoudhir did and invoiced to Emris Creative Corp. for its website. According to the evidence, this was so that Emris Creative Corp. could demonstrate business activity as part of its goal to achieve Scientific Research and Development tax credits from the government of Canada. This in and out invoicing and exchange of funds does not change the essential facts that neither Lacoudhir, Ms. Andrews, Mr. McDowell or Emris Creative Corp. were paid for the Lulla Boom work.
- [129] I do not need to determine who was correct about why the project failed in order to determine the unjust enrichment issues. The undisputed fact is that neither Ms. Andrews nor Lacoudhir was paid for the work because the compensation for the project was payment upon delivery of a functional website. The website did not get beyond the testing stage and was never functional. Accordingly, I find that if there was a benefit that Mr.

McDowell provided, which I will assume but not find, and that he suffered a deprivation in terms of the hours he put into the project, there is nonetheless a juristic reason for the benefit and deprivation, namely the contractual terms agreed that the payment would be made, and would only be made, in the event of a completed website.

- [130] In addition to Lulla Boom, there were a few other projects on which Mr. McDowell did work for Ms. Andrews. He did voice-over work which was related to his previous work as an actor. It took an hour. He was not paid. Ms. Andrews argues that the work he did gave him contacts to further his acting career. It may be that Mr. McDowell did not see the matter in the same way. In any event, in my view, one hour of non paid work does not meet the test of a benefit to Ms. Andrews or a detriment to Mr. McDowell. This argument fails on the first and second branches of the unjust enrichment test.
- [131] The third job took Mr. McDowell two days. The payment for that work was applied to Ms. Andrews' credit card as she had paid for approximately \$800 in dental work for Mr. McDowell. This argument fails on the second branch of the unjust enrichment test, as there was no deprivation.
- [132] Mr. McDowell's evidence was that Ms. Andrews sought his input and advice on all matters pertaining to her business. Ms. Andrews testified that Mr. McDowell had asked her for work and had asked her to involve him in various things. She did so but on most occasions he did either did not complete the work or did not start it. There is no evidence before me on which to conclude that Mr. McDowell provided a benefit to Ms. Andrews' business through input and advice. This argument fails on the first branch of the unjust enrichment test.
- [133] With regard to Parasol, it is a UK company in which Ms. Andrews has no interest. Mr. McDowell's claim to an interest in Ms. Andrews' interest in Parasol fails on the basis that she has no interest in Parasol.
- [134] Ms. Andrews did some work for a company called Electra Meccanica in exchange for founders' shares. Mr. McDowell claims he had the idea that she should do the work for founders' shares instead of requiring a payment as he believed the business had real value. He testified he negotiated this arrangement for Ms. Andrews and was involved in bringing it to fruition. Ms. Andrews testified that she was having coffee with her accountant and talked about the Electra Meccanica website work. Her accountant, who also did work for the company and received founders' shares, said she could structure it that way. She agreed, but did very little work for them and forgot about it. She did ultimately receive the shares and became aware that she had when Mr. McDowell made a claim to the shares. In my view, even if I accept his evidence, he simply had an idea which he voiced. He has not demonstrated a deprivation. His claim falls on the second branch of the test.

## The Zell Property

[135] Mr. McDowell claims that he did the work to identify the Zell property for purchase and provided valuable advice in negotiating the terms. The work that Mr. McDowell did appears to be internet research that was adjunctive to the real estate professional Ms. Andrews retained to assist her. He also looked at the property with her, and assisted her to move into the property.

[136] I find that Mr. McDowell's claim fails on the second branch of the unjust enrichment test, there was no deprivation or if there was it was more than offset by the benefit to Mr. McDowell in being permitted to stay in the property with Ms. Andrews and travel around Europe with her from the property at her expense. In addition, it fails on the juristic reason, or third branch, as Mr. McDowell assisted with locating the apartment on his own initiative. His assistance with moving in was because he was travelling with her. These are acts that were clearly done with donative intent.

## The Gibsons Property

[137] With regard to the Gibsons property, I accept that Mr. McDowell assisted Ms. Andrews in looking for properties but he did so at his own initiative and not at her request. The search for the property was work for which she used a realtor. With regard to renovations, I accept that he did valuable work on renovations for which he was not compensated. However, I accept that value was far outstripped by the value he derived by occupying the property without paying any rent or covering any of the expenses on it between January 2016 and August 2016. This argument fails on the second branch, ie: there is no detriment to him.

[138] Based on all the evidence, I conclude that Mr. McDowell has not established unjust enrichment with regard to the contributions he made towards Ms. Andrews' real properties or her business.

Ms. Andrews' Claims

## Interim Payment of \$10,600

[139] At a judicial case conference on May 16, 2017, Ms. Andrews agreed to pay \$10,600 to Mr. McDowell on the basis that the payment was without prejudice, that it not be treated as spousal support, and it be accounted for in the final division of family property or spousal support.

[140] I have found that there is no family property to be divided and Mr. McDowell is not entitled to spousal support. In accordance with the accounting called for by judicial case conference order, I order Mr. McDowell to repay \$10,600 to Ms. Andrews.

## Occupational Rent

- [141] On October 15, 2016, Mr. McDowell brought an application without notice for exclusive occupation of the Gibsons property. Mr. Justice Groves granted the order. A term of the order was that Ms. Andrews could move to set the order aside on 14 days notice to Mr. McDowell.
- [142] On May 17, 2017, Madam Justice Ker made a consent order vacating the order of Groves J. She did so in conjunction with the judicial case conference order in which Ms. Andrews agreed to pay \$10,600 on the terms described above.
- [143] In *L.W. v. F.W.*, 2018 BCSC 1924, Mr. Justice Walker reviewed the law pertaining to occupational rent. In cases other than family law, occupational rent is claimed by a co-owner who has been ousted from the property on the basis that a co-owner has the right to equal entitlement to use of the property: *L.W.* at para. 166. In family law cases, the parties are not co-owners in a profit making enterprise, they are in a committed relationship: *Hack v. Hack*, 2013 BCSC 2134 at para. 39. In family law cases, occupational rent is an exceptional remedy, used cautiously to achieve equity between the parties: *Ross v. Ross*, 2013 BCSC 1716 at para. 47; *Casey v. Casey*, 2013 SKCA 58 at para. 48. It is usually used in connection with reapportionment of family assets.
- [144] This case has features of both types of cases. It was brought as a family case but I have decided that the parties were not spouses. The property in question was never intended to be a matrimonial home, but rather an investment property to be rented out. However, even though I found the parties were not spouses, they did have a committed relationship for almost two years and Ms. Andrews did permit Mr. McDowell to live in the Gibsons property which she acquired around the time she moved to Europe and they ceased cohabitating. Based on these mixed features, I believe that it is appropriate to proceed cautiously and to only use occupational rent if it is necessary to achieve equity.
- [145] Ms. Andrews intended to renovate the Gibsons property and rent it out. Mr. McDowell and his father did some renovations prior to the August 2016 breakdown of the relationship. After the breakup, Ms. Andrews remained in Gibsons for a further few days and worked on the property. When she returned to Europe, the property was not in a state that it could be rented out. She did not lead any evidence of plans to complete the renovations in the near future.
- [146] Accordingly, when Mr. McDowell was granted exclusive possession of the property, it was not ready to be rented out. Ms. Andrews had the right, under the order, to apply to set it aside on 14 days notice. She did not move to do so until May 2017. There is no evidence that she had plans to finish the renovations prior to then.
- [147] I find that Ms. Andrews was not deprived of rental income due to Mr. McDowell's exclusive occupation of the property. Occupational rent is not necessary to do equity between the parties. I dismiss the claim for occupational rent.

## Veterinary Bill

[148] Ms. Andrews paid one half of a veterinary bill incurred by Mr. McDowell. The evidence was that one of the categories of expenses that Mr. McDowell habitually asked Ms. Andrews to pay, and which she did pay, was dog expenses. Ms. Andrews said she paid this bill after the August 2016 breakup because Mr. McDowell threatened to bring a court application and that would cost her more than the vet bill. That is unfortunate if that is the case but there is no clearly asserted legal basis for repayment of it and so I do not allow it.

## Overpayment of Spousal Support

[149] On December 4, 2017, Master Harper ordered Ms. Andrew to pay Mr. McDowell spousal support in the amount of \$400 per month from January 1, 2018 through April 1, 2018. Those amounts were paid. The order did not specify that it was interim (which it clearly was) or without prejudice.

[150] Although I have found that Mr. McDowell is not entitled to spousal support, the interim order is presumed to be correct at the time it was made. It is also recognized that it was made on an evidentiary basis that may change at trial: *Tedham v. Tedham*, 2003 BCCA 600, at para. 62.

[151] In *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453, Madam Justice Warren considered whether to order repayment of spousal support paid under an interim order in circumstances where she found different incomes at trial than had been in evidence before the judge who heard the application. She held that such an order is properly characterized as variation of spousal support under s.167 of the Family Law Act or s.17 of the Divorce Act (which is not applicable in this case).

[152] Section 167 of the Family Law Act reads as follows:

## Changing, suspending or terminating orders respecting spousal support

167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
  - (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
  - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
  - (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

- (3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
- (a) the order is necessary to relieve economic hardship that
  - (i) arises from a change described in subsection (2) (a), and
  - (ii) is related to the relationship between the spouses, and
  - (b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

[153] Following the reasoning in *Tedham*, I start with the proposition that Master Harper's order was presumed to be made in circumstances where the full evidentiary picture was not before her. I can infer that she did not have the same evidence that was before me pertaining to whether the parties were spouses. I conclude that the condition in s. 167(1)(b) is met in that there is evidence of a substantial nature before me that was not before Master Harper, specifically the body of evidence that I considered in concluding that the parties were not spouses.

[154] I order Mr. McDowell to repay \$1600 paid by Ms. Andrews in spousal support.

## Costs

[155] There were several pre-trial interlocutory applications after which costs were awarded to Ms. Andrews, one in the cause, one in any event of the cause, and one simply "costs thrown away". Two of the applications were to adjourn the trial. Ms. Andrews seeks an order that they now be paid to her in the total amount of \$14,423. She has presented bills of costs appending disbursement details pertaining to these applications.

[156] Generally speaking, after the court orders costs, they are assessed by registrars on presentation of the bill of costs. However, the court has jurisdiction to summarily fix costs of all or part of a family law proceeding: see Supreme Court Family Rules 16-1(1) and 16-1(14).

[157] Ms. Andrews has been successful on all issues except her claim for occupational rent and the vet bill. The parties have invested considerable energy and financial resources on this case. In my view, it is appropriate to summarily fix these application costs. I do so as follows:

- a) March 27, 2018 order of Master Scarth - I allow the tariff items as claimed. I reduce photocopies for 25% in a rough justice approach to avoiding overhead that may have increased the claim. I do not allow the claim for parking. The total is \$4,873.06 inclusive of taxes.

- b) April 18, 2018 order of Master Dick - I allow the tariff items as claimed. I reduce photocopies for 25% in a rough justice approach to avoiding overhead that may have increased the claim. The total is \$7,091.52 inclusive of taxes.
- c) September 13, 2018 order of Master Muir - I allow the tariff items as claimed. I reduce photocopies for 25% in a rough justice approach to avoiding overhead that may have increased the claim. The total is \$2,295.44 inclusive of taxes.

[158] The total is \$14,263.02.

## Fine

- [159] Ms. Andrews seeks an order that Mr. McDowell be fined \$5,000 based on failure to produce documents in breach of the rules and court orders.
- [160] On December 4, 2017, Master Harper ordered Mr. McDowell to produce specific documents and categories of documents by January 15, 2018. On March 27, 2018 Master Scarth ordered Mr. McDowell to make document production of the documents listed in paragraphs 8 and 9 of Master Harper's order in "accessible format" by March 27, 2018. Master Scarth adjourned the issue of whether Mr. McDowell pay a fine of \$5,000 to the trial.
- [161] Mr. McDowell was cross examined on document production issues at trial. He maintained on cross examination that he made document production in accordance with Master Harper's order. He testified that he delivered the documents via an end box to counsel for Ms. Andrews. When it was put to him that he did not produce those documents until September 2018, just before trial, he insisted he had produced them previously but they were not accessed until that date.
- [162] Section 213 of the Family Law Act provides a broad tools to the court to make orders to compel timely disclosure. It is intended to be broader and used more robustly than its predecessor, s.92 of the Family Relations Act R.S.B.C. 1996, c.128: G. (J.D.) v. V. (J.J.), 2013 BCSC 1274 at para. 10-27.
- [163] Factors relevant to a finding that there has been non-disclosure and the severity of any order made under s. 213 include the circumstances of the case, the degree of non-disclosure, the reasons for the late disclosure, the complexity of the required disclosure, how onerous the required disclosure was, when it was made and the relevance of the non-disclosure to the facts in issue: G. (J.D.) at para. 28.
- [164] Very little evidence is before me to fashion an appropriate order. I infer from Master Scarth's order that Mr. McDowell did make production in some form but not in a way which was accessible to claimant's counsel. On the evidence before me, Mr. McDowell was trying to comply but perhaps imperfectly and not in a timely way.
- [165] Given the circumstances and the evidence, I decline to order a fine.

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**Order**

[166] I order as follows:

- a) Mr. McDowell and Ms. Andrews were never spouses as that term is defined in the Family Law Act and as such:
  - 1) Mr. McDowell is not entitled to spousal support;
  - 2) there is no family property or family debt to be divided;
- b) Mr. McDowell's claims for constructive trusts over property owned by Ms. Andrews based on unjust enrichment are dismissed;
- c) Mr. McDowell pay Ms. Andrews \$10,600 to account for the without prejudice payment of \$10,600 she made pursuant to the May 16, 2017 order of Madam Justice Ker;
- d) Mr. McDowell to repay \$1600 paid by Ms. Andrews in spousal support;
- e) Ms. Andrews' claims for occupational rent, reimbursement of the veterinary bill, and a fine pursuant to s.213 of the Family Law Act are dismissed;
- f) Mr. McDowell pay Ms. Andrews costs of the three applications described above that I have summarily fixed in the amount of \$14,263.02; and
- g) Ms. Andrews' claim for a fine is dismissed.

[167] Subject to any matters of which I am unaware, Ms. Andrews has been substantially successful and is entitled to costs.

"Matthews J."

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