

CANADA / JUDGMENT

Mills v. O'Connor

2025 BCCA 34

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 34 Mills v. O'Connor

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Mills v. O'Connor,

2025 BCCA 34

Date: 20250204

Docket: CA49481

Between:

Michael John Mills

Appellant/

Respondent on Cross Appeal

(Respondent)

And

Nicola Elizabeth O'Connor

Respondent/

Appellant on Cross Appeal

(Claimant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

On appeal from: Orders of the Supreme Court of British Columbia, dated October 30, 2023 (O'Connor v. Mills, 2023 BCSC 1886, Vancouver Docket E191117); and January 5, 2024 (O'Connor v. Mills, 2024 BCSC 20, Vancouver Docket E191117).

Counsel for the Appellant:

A.N. Winters

J.N. Harrigan

Counsel for the Respondent:

J.F. Brown

Place and Date of Hearing:

Vancouver, British Columbia

October 24, 2024

Place and Date of Judgment:

Vancouver, British Columbia

February 4, 2025

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Grauer

Summary:

The parties appeal and cross appeal from the order of the trial judge awarding spousal support, child support, and division of property. They agree and submit that the trial judge made a factual error in failing to identify and apportion a substantial amount of family property available for division. The appellant contends that this resulted in reviewable error in that the judge should not have ordered division of his excluded property. The cross-appellant argues that the judge erred in her tracing analysis of the appellant's excluded property, and that the payment to her should have been greater. The appellant also challenges the judge's award for retroactive child support.

Held: The appeal and cross appeal allowed to the extent necessary to give effect to these reasons. The judge committed a reviewable error in finding there was no family property available for division. She also made a reviewable error in her tracing analysis resulting in a substantial overvaluation of the appellant's excluded property. The judge's approach followed a "first-in, first-out" approach to tracing the value of the excluded property through a series of substitute assets involving increases in the value of that excluded property. The proper approach under the Family Law Act, S.B.C. 2011 c. 25, should recognize that, by operation of the Act, the increase in value of the excluded property is family property intermingled with excluded property, and the exclusion must be traced as through an intermingling of funds on a pro rata basis. In light of these errors, this court varies the valuation of the appellant's excluded property and makes an award for the division of the family property, which includes a reapportionment in the cross-appellant's favour. Although the judge made a palpable error regarding retroactive child support, it was not overriding, and that award is not interfered with.

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Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] This appeal and cross appeal arise from orders made following a lengthy trial in a family law proceeding, with reasons for judgment indexed as *O'Connor v. Mills*, 2023 BCSC 1886. The trial judge later delivered supplementary reasons clarifying the terms of her final order, indexed as *O'Connor v. Mills*, 2024 BCSC 20 ["Supplementary Reasons"].
- [2] The parties' relationship lasted approximately 23 years and at the time of their separation in March 2015, they had been married for more than 20 years.

- [3] The principal issues on appeal relate to the identification and division of family and excluded property. There is also a discreet ground of appeal concerning whether a \$7,000 payment that Mr. Mills, the appellant, made to the parties' adult daughter should have been considered by the judge in calculating the award for retroactive child support.
- [4] This appeal provides an opportunity to consider the appropriate approach under the Family Law Act, S.B.C. 2011, c. 25 ("FLA") to the tracing of excluded property (defined at s. 85) that has been co-mingled with family property. Although several decisions of this court have addressed tracing in passing (see *V.J.F. v. S.J.W.*, 2016 BCCA 186; *Jaszczewska v. Kostanski*, 2016 BCCA 286; *Shih v. Shih*, 2017 BCCA 37; and *Chapman v. Chapman*, 2024 BCCA 372), this court has not yet provided specific guidance concerning the extent to which common law and equitable principles of tracing ought to apply in the context of the FLA and its excluded property provisions.
- [5] The appeal also involves the interplay between ss. 95 and 96 of the FLA and requires this court to consider what remedies should be available in light of material legal and factual errors made by the trial judge. It is significant that the parties agree that the judge erred in failing to identify a substantial sum of family property existing at the time of separation. They ask this court to substitute what it considers to be the appropriate orders, as opposed to remitting this matter to the trial court.
- [6] As I shall explain, I agree that the judge made the initial error that the parties allege, which error fundamentally affected her legal analysis and her conclusions with respect to the division of family property.
- [7] I would not remit this matter to the trial court, given that the record permits us to make the orders respecting the division of property once the judge's errors are corrected. Finally, I would dismiss the appeal regarding the \$7,000 payment made by Mr. Mills to the parties' daughter.

Background

- [8] Mr. Mills and Ms. O'Connor began living together in 1992 and married in 1994. They have three children, born between 1992 and 1998. They separated in 2015, when their youngest child, K, was 17. It is undisputed that K was a child of the marriage between 2015 and May 2021, when she graduated from university. Their other two children were independent by the time of separation.
- [9] Early in the relationship, Ms. O'Connor earned a modest income as a receptionist, but left the workforce around 1994, only returning to work in 2010. She has earned approximately \$75,000 per year since 2014. Mr. Mills worked in construction and his income has fluctuated dramatically. The trial judge imputed to Mr. Mills an income of \$100,000 per year since 2019; no challenge is made to that finding.

- [10] In or around 1994, the parties moved into a house owned by Mr. Mills' parents (the "Bellevue Property"). Mr. Mills' father and mother passed away in 2001 and 2003, respectively. The estate was divided equally between Mr. Mills and his sister, with Mr. Mills receiving the Bellevue Property--which the trial judge valued at \$1,850,000 as of the date of his acquisition in 1994--in his sole name, as well as \$137,112.23 in cash and \$21,842.13 in securities.
- [11] In 2004, Mr. Mills left his previous occupation to devote himself full-time to the renovation of the Bellevue Property for resale. Ms. O'Connor assisted largely by assuming primary responsibility for childcare and occasionally providing other contributions, but it was principally Mr. Mills who undertook the renovation. He obtained \$1,000,000 in financing for the project, for which Ms. O'Connor agreed to be, and was accepted as, a covenantor.
- [12] In 2005, Mr. Mills purchased, in his sole name, bare land in the vicinity of Merritt, B.C. for the purpose of building a family summer home (the "Monck Park Property"). In 2006, he sold the Bellevue Property for \$3,650,000, with net sale proceeds of approximately \$2,596,500 after the payment of fees and debts. Between 2006 and 2008, he oversaw the construction of a home on the Monck Park Property. Ms. O'Connor and the children played some role in this project, but Mr. Mills was "the operating mind behind the build": at para. 88.
- [13] The parties separated in 2015. In 2018, the Monck Park Property was entirely destroyed in a fire. Mr. Mills oversaw the insurance claim. The trial judge made no express finding as to the total value of the claim, but the total net payment Mr. Mills received was approximately \$2,600,000 (the "insurance proceeds"). In 2020, he unilaterally sold the bare land of the Monck Park Property for \$255,000. In October 2022, a month before trial, and following the payment of various family debts and pre-trial advances to both parties, the amount from the insurance proceeds still held in trust (the "Trust Funds") was approximately \$1,878,580.

The Trial Judgments

- [14] Below, I will deal in greater detail with the judge's reasons in relation to the main issues on appeal. By way of summary, the judge made several orders relating to property division, spousal support, and child support.
- [15] On the issue of property division, the judge found that the Monck Park Property was family property as it was owned by Mr. Mills on the date of separation. As the Trust Funds were traceable to the Monck Park Property, the judge concluded that the Trust Funds were also family property: at para. 155. She then found that the value of the Bellevue Property at the time Mr. Mills inherited it from his mother's estate--\$1,850,000--had been used to fund the construction of the Monck Park Property and so was traceable, by way of the insurance claim, to the Trust Funds: at paras. 167-170. The judge reasoned that since there would have been no Monck Park Property without the Bellevue Property, and no Trust Funds without the insurance claim, the fact that the parties incurred debt in relation to these Properties did not result in a loss of Mr. Mills' exclusion: at para. 167. Accordingly, the judge held that the

Trust Funds, in their entirety, were Mr. Mills' excluded property.

- [16] The judge then considered whether Ms. O'Connor was entitled to a share of the Trust Funds, despite the fact they were excluded property, by reason of either ss. 95 or 96 of the FLA. Section 95 permits the court to order an unequal division of family property or debt in circumstances where dividing family property equally would be "significantly unfair". Section 96 provides that a court may order the division of excluded property, but provides that it must not do so unless:
- a) family property or debt located outside British Columbia cannot practically be divided; or
 - b) not dividing the excluded property would be significantly unfair considering the duration of the spouses' relationship and one or more of:
 - i. a spouse's direct contribution to the preservation, maintenance, improvement, operation, or management of the excluded property;
 - ii. the terms of any agreement between the spouses regarding excluded property; and
 - iii. if an order for unequal division of family property under s. 95 is made, the extent to which the significant unfairness at issue cannot be addressed by such an order.
- [17] The judge held that Ms. O'Connor was not entitled to a share of the Trust Funds under s. 95 of the FLA, given her prior finding that the Trust Funds in their entirety comprised excluded property. She found, therefore, that there was no family property to be divided within the meaning of s. 95: at para. 174.
- [18] Turning to s. 96 of the FLA, the judge held that it would be significantly unfair not to divide the excluded property, as the Bellevue Property had been developed for sale, and the Monck Park Property acquired, as a joint family venture between the parties: at paras. 192-194. She ordered that the Trust Funds be apportioned 65/35 in favour of Mr. Mills, after accounting for interim disbursements and other expenses.
- [19] On the issue of spousal support, the trial judge found that although Mr. Mills' income had been extremely modest in recent years, he was fully capable of earning more than he had been. Considering his age, experience, and earning record, she imputed to him an annual income of \$100,000 per year from 2019 prospectively until the age of 71: at paras. 227-233. She held that Ms. O'Connor, by contrast, was likely to continue earning approximately \$75,000 per year for the remainder of her working life: at para. 217. On this basis, and in light of the length of their relationship, the judge ordered that Mr. Mills pay to Ms. O'Connor \$92,000 as a lump sum, in satisfaction of her retroactive and prospective support entitlement: at para. 241.

- [20] With respect to child support, the judge found that Mr. Mills owed retroactive child support for K in the amount of \$10,000, which took into account voluntary payments he had already made: at para. 255. Of particular relevance to the case at bar, the judge decided that one payment of \$7,000 Mr. Mills made to K did not constitute child support, but rather was a payment from the insurance proceeds for the personal belongings that K had lost in the fire at the Monck Park Property: at para. 248.
- [21] The judge granted the parties leave to submit their preferred form of final order concurrently with written submissions on the issue of costs: at para. 265. Several months after the judge gave her reasons, she issued a set of supplementary reasons concerning the terms of the final order. Settling these terms was, in her view, of "paramount" importance given that Mr. Mills had filed a notice of appeal and Ms. O'Connor planned "imminent[ly]" to file a cross appeal: Supplementary Reasons at para. 4.
- [22] In her Notice of Application regarding the terms of the final order, Ms. O'Connor sought relief relating to certain alleged errors and inconsistencies in the trial judgment (Supplementary Reasons at para. 8), which errors include those at issue in this appeal. As to the clarity of her orders, the judge accepted Mr. Mills' submission that the orders were clear when read in the context of the reasons as a whole: Supplementary Reasons at para. 10. As to any errors, she concluded that this was an issue properly within the Court of Appeal's jurisdiction: Supplementary Reasons at para. 10.
- [23] However, the judge did accept that her reasons contained a "clerical drafting error" that permitted her to revisit certain of her orders under Rule 15-1(18) of the Supreme Court Family Rules: Supplementary Reasons at para. 11.
- [24] This error was reflected at para. 171 of the trial reasons, where the judge stated that the value of the Trust Funds was less than the \$1,850,000 exclusion she credited to Mr. Mills (representing the value of the Bellevue Property at the time he acquired it). Noting that at para. 156 of her judgment, the judge had found that the Trust Funds had a value of \$1,878,580.26, it was clear that the value of the Trust Funds exceeded the value of the exclusion: Supplementary Reasons at para. 12. The judge altered her order accordingly.
- [25] Next, the judge clarified her treatment of the portions of the Trust Funds corresponding to household contents and the dwelling structure on the Monck Park Property:
- [15] I also recognize upon reviewing submissions of counsel that I did not specifically address any distinction between the household content portion of the insurance claim which generated Monck Park Trust Funds versus the residential structure component of the claim. My intention was to deal with the Monck Park Trust Funds on a global basis and I did not differentiate, in making my order, between these two portions of the claim. No further order is required in this regard.

[Emphasis added.]

[26] Finally, the judge recognized that the trial reasons did not contain an order that any interest accrued on the Trust Funds was to be divided according to the 65/35 ratio applied to the Trust Funds as a whole. Although she considered such an express term to be a "self-explanatory" consequence of the broader distribution, she added a further term to the final order that any post-trial interest would be divided 65/35 in favour of Mr. Mills: Supplementary Reasons at para. 18.

[27] As a result, the judge's trial order stated, in part:

Property Division

5. Pursuant to s. 85 of the Family Law Act, the Monck Park Trust Funds, as defined in the Court's Reasons for Judgment, are the respondent's excluded property.
6. Pursuant to s. 96(b) of the Family Law Act, the Monck Park Trust Funds will be divided 65% in favour of the respondent, and 35% in favour of the claimant.
7. Pursuant to s. 97 of the Family Law Act, to effect the division of excluded property, the respondent will pay to the claimant an amount of \$773,844.14 from the Monck Park Trust Funds, constituting \$657,503.09 in respect of the claimant's 35% share of the Monck Park Trust Funds as at October 2022, plus 35% of post-trial interest earned on the Monck Park Trust Funds, and accounting for the following:
 - a. to adjust the claimant's pre-trial interim distributions from \$320,000 to \$224,000, which represents 35% of the total pre-trial interim distributions of \$640,000;
 - b. to compensate the claimant in the amount of \$127,5000, which represents 50% of the net sale proceeds for the Monck Park land received by the respondent prior to trial;
 - c. to compensate the claimant in the amount of \$95,892.30, which represents 50% of the interim advances paid to CRA on behalf of the respondent on account of taxes prior to trial;
 - d. to compensate the respondent in the amount of \$11,051.25, which represents 50% of the after-tax value of the RRSPs withdrawn by Ms. O'Connor prior to trial; and

thereafter, and subject to the terms of this order, the Monck Park Trust Funds will be the sole property of the respondent.

Implementation and dismissals

10. The respondent will pay to the claimant from his share of the Monck Park Trust Funds:
 - (a) the retroactive child support award of \$10,000 provided for at paragraph 3 of this order;
 - (b) the lump sum retroactive and prospective spousal support award of \$92,000 provided for at paragraph 4 of this order.

On Appeal

- [28] Mr. Mills argues that the trial judge made a critical factual error in failing to identify the totality of family property available for division at the time of trial. He submits that, pursuant to s. 84(2)(g) of the FLA, total family property should include the increase in value of the Trust Funds over and above his presumptive exclusion, which he says should be valued at \$1,850,000. He also says that the value of the Monck Park Property's bare land should be included as family property.
- [29] He also submits that the judge's decision to divide the Trust Funds unequally under s. 96 of the FLA was an error in law and that the judge made a palpable and overriding error in finding that the \$7,000 he paid directly to K from the insurance proceeds was not child support. He submits that the order below should be varied to reduce Ms. O'Connor's entitlement to the Trust Funds.
- [30] Ms. O'Connor acknowledges that the judge erred in failing to recognize that there was family property to be divided in addition to the residue of the Trust Funds. Her position, however, is that the judge's property division analysis under s. 96 of the FLA does not contain a reviewable error and that the ultimate result was fair. On her cross appeal, she argues that the trial judge made a legal error in failing to calculate Mr. Mills' exclusion from the Bellevue Property, the value of which is traceable into the Monck Park Property, on the basis of pro rata tracing, given that the excluded property was co-mingled with family funds. She advances alternative methods for calculating the appropriate division of family and excluded property, which methods would result in the variation of the trial order to increase her entitlement to the Trust Funds.
- [31] It is apparent that the appeal and cross appeal raise closely related issues. I would summarize these issues as being whether the judge erred:
- (a) in failing to recognize that there existed in excess of \$1,000,000 in family property in addition to the Trust Funds available for division at the time of trial;
 - (b) if so, in failing to order an unequal division of family property under s. 95 of the FLA;
 - (c) in finding that Mr. Mills was entitled to exclude the entirety of the Trust Funds from the family property under s. 85 of the FLA;
 - (d) in ordering the division of excluded property under s. 96 of the FLA; and
 - (e) in ordering Mr. Mills to pay \$10,000 in retroactive child support.

Standard of Review

- [32] The standard of review in family law matters is of a "strict and limited scope": *Naimi v. Yunusova*, 2023 BCCA 124 at para. 29. This deferential approach flows from the generally "fact-based and discretionary" nature of family law decisions (*Van de Perre v. Edwards*, 2001 SCC 60 at para. 11, citing *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 10) as well as the

elevated importance of final resolutions in family matters: Naimi at para. 29; Barendregt v. Grebliunas, 2022 SCC 22 at paras. 100-104. As such, an appellate court will interfere with a family law decision only where there has been a material error, a serious misapprehension of the evidence, or an error of law: Hickey at para. 12; Barendregt at para. 103.

[33] However, where a reviewable error is present, an appellate court may, as far as the record permits, draw its own conclusions of law or fact regarding the issue in question: Salomon v. Matte-Thompson, 2019 SCC 14 at para. 32; Housen v. Nikolaisen, 2002 SCC 33 at para. 8.

[34] Certain of the issues raised on this appeal present questions of law reviewable on a standard of correctness, while others present questions of fact and mixed fact and law reviewable on a standard of palpable and overriding error: Housen at paras. 22-23.

[35] The questions of law that this court must address are:

- a) First, whether the judge misapprehended the nature and extent of the family property available for division. In *Xu v. Chu*, 2019 BCCA 414 at para. 34, this court held that a trial judge's failure to include the fair market value of certain real property, the existence of which was clearly based on the record, as family property constituted an error of law. This was because in valuing the property based on the money used to purchase it, rather than its fair market value as of the time of trial, "the trial judge did not apply the methodology mandated by the FLA": *Xu* at para. 34. The error alleged in this case is similar: Mr. Mills submits, and Ms. O'Connor accepts, that the judge failed to identify family property properly, thereby failing to follow the requirements of s. 84(2)(g) of the FLA.
- b) Second, whether the judge erred in considering whether equal division would create significant unfairness under s. 96 of the FLA, before conducting an analysis under (or in relation to) s. 95. For substantially the same reasons as (a), this is a question of law, in that this question involves what this court in *Xu* referred to as the "methodology" set out in the FLA.
- c) Third, whether the judge erred in selecting the method of tracing Mr. Mills' excluded interest in the Bellevue Property through to the Trust Funds. As I will explain, this issue raises a question of law.

[36] This court must also address whether the judge erred in awarding \$10,000 in retroactive child support against Mr. Mills, a question of mixed fact and law.

Whether This Matter Should Be Remitted to the Trial Court

[37] I commence by observing that it is clear that the judge's analysis reflects significant and interrelated factual and legal errors, which I will discuss below. Despite the presence and effect of these errors, however, I agree with the parties that the trial record enables this court to substitute its own analysis without remitting the matter to the trial court.

- [38] Although the parties submit that this court is in a position to make the necessary analysis based on the trial record, it is also true that some of the issues are complicated by the fact that the judge did not make sufficient findings of fact or adopted a global or holistic approach in her analysis--for instance, with respect to Mr. Mills' claim that the proceeds of his personal property contents insurance claim should be recognized as excluded property.
- [39] A new trial will not be necessary if the court can decide an issue on the whole of the evidence before it: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217; *Schenker v. Scott*, 2014 BCCA 203. Similarly, if the "essential primary facts are plain from the record" a new trial is not necessary: *Business Depot Ltd. v. Lehndorff Management Ltd.* (1996), 24 B.C.L.R. (3d) 322 (C.A.) at para. 60, additional reasons 48 B.C.L.R. (3d) 326 (C.A.).
- [40] Where an appellant has alleged that the trial judge erred in failing to make specific findings, the court should not order a new trial unless it is satisfied that there is a real possibility that the issues on which the judge made no specific findings are issues that could reasonably be resolved in the party's favour: *Gibney v. Gilliland*, 71 B.C.L.R. (2d) 314 (C.A.), aff'd [1994] 1 S.C.R. 157.
- [41] Adopting this framework, I am of the view that this court can make the necessary findings regarding Mr. Mills' excluded property claim and the other issues raised by the parties. Notwithstanding this court's jurisdiction to make its own findings based on the record, in doing so I shall be guided by the judge's findings of fact, which were made following a lengthy trial, unless it can be demonstrated that they constitute or cannot be extricated from a palpable and overriding error. Notably, the central questions at issue in this appeal are questions of law--including the question of whether the judge erred in failing to apprehend the family property available for division--and the parties agree as to the amount of family property available for division as well as other key amounts.

Issue #1: Division of Property and Excluded Property

The Reasons for Judgment

- [42] It bears emphasizing that certain of the judge's key findings include:
- a) in addition to the Bellevue Property, Mr. Mills also inherited cash distributions totalling \$137,112.23 and inherited securities valued at \$21,842.13;
 - b) Mr. Mills' intention in receiving the Bellevue Property was to undertake significant renovations, since he saw development and resale potential in the Bellevue Property;
 - c) consistent with his plan to renovate the Bellevue Property, Mr. Mills obtained a \$1,000,000 secured line of credit;
 - d) as part of the process to obtain the line of credit, Ms. O'Connor was asked and agreed to be a covenantor to the loan, though she was not on title to the Bellevue Property;

- e) the equity in the Bellevue Property was such that the risk to Ms. O'Connor in assuming this obligation was low, though it was still a risk in the sense that Ms. O'Connor would have been jointly and severally liable in the event of a foreclosure or other shortfall in repayment;
 - f) there was no evidence that Ms. O'Connor did not willingly assume the role of covenantor to the loan, consistent with her overall evidence of being "committed to a joint family venture";
 - g) Mr. Mills undertook the renovation of the Bellevue Property as the "primary driving force and operating mind", while Ms. O'Connor was involved indirectly by taking on the role of the children's primary caregiver, and by moving the family in and out of the Bellevue Property during the renovation effort, "likely no small effort given this was a family of five";
 - h) the gross sale price for the Bellevue Property was \$3,650,000;
 - i) Mr. Mills purchased the Monck Park Land in August 2005, using funds from the loan, for \$235,624.11, intending to build a family vacation property;
 - j) after the Monck Park Property was constructed, "virtually the entire net worth of the family" was tied up in the Monck Park Property;
 - k) on October 3, 2018, the Monck Park Property was destroyed in a fire (at para. 94), which triggered an insurance claim, generating the insurance proceeds; and
 - l) in September 2020, Mr. Mills unilaterally decided to sell the Monck Park Property, ultimately selling it for \$255,000 without notifying Ms. O'Connor or her counsel: at paras. 62-104.
- [43] The judge began by correctly stating the definition of "family property" as set out in s. 84 of the FLA: at para. 154. She found that the Monck Park Property met the statutory definition. Given that the insurance proceeds were "unequivocally traceable" to the Monck Park Property, she held that the Trust Funds also constituted family property: at para. 155. She valued the Trust Funds at \$1,878,580.26: at paras. 155-156.
- [44] Next, the judge considered the issue of excluded property, noting that in accordance with s. 85(1)(b), inheritances received by a spouse are excluded from family property: para. 158. She stated that while excluded property may change form during a spousal relationship, it maintains its excluded status insofar as it can be traced into family property existing at the time of separation: at para. 161. In terms of tracing, she said:
- [167] The proceeds from the sale of the Bellevue Property were utilized to fund the construction of the residence on the Monck Park Property. The parties also incurred debt. However, I conclude this is not a situation where the co-mingling of the funds resulted in a loss of the exclusion. There would have been no Monck Park Property without the Bellevue Property. And there would be no Monck Park Trust Funds without the insurance claim arising from the destruction of the residence on the Monck Park Property.

[Emphasis added.]

[45] It appears that the judge saw the primary tracing issue presented by Mr. Mills' inheritance of the Bellevue Property as being whether a co-mingling of funds resulted in the "loss" of Mr. Mills' exclusion, either because tracing would no longer be possible as a result of co-mingling or, as intimated in paras. 164-170 of her reasons, because co-mingling the value of the excluded property with family property would imply a gift of the excluded property, thus abrogating any claim to an exclusion.

[46] After reviewing the evidence and rejecting the notion that Mr. Mills made a gift of his interest in the Monck Park Property to Ms. O'Connor, the judge concluded:

[170] As such, I find I can not reach any other conclusion than that the Monck Park Trust Funds constitute the respondent's presumptive excluded property pursuant to s. 85(2)(b) [sic, s. 85(1)(b)] of the FLA.

[Emphasis added.]

[47] She then stated that "the litigation thus turns on whether the claimant is entitled to a share of the Monck Park Trust Funds under either ss. 95 or 96 of the FLA": at para. 172. The judge held that s. 95--which she correctly interpreted as applying only to family property that is not also shown to be excluded property--did not apply, given that in her view Mr. Mills had established an exclusion over the totality of the property at issue: at para. 174.

[48] In the event she was incorrect, however, the judge considered the factors set out in s. 95(2) of the FLA (at para. 77), which I refer to below. She noted that the parties' marriage was a long one, that the parties had no agreement relating to their interests in the family property, that Ms. O'Connor had supported Mr. Mills' career, and that there was currently no family debt and no evidence suggesting that any prior family debt had not been incurred during the relationship or for other than a proper purpose: at para. 179. The judge then declined to consider s. 95(3) (which provides that the court may consider whether the objectives of spousal support have not been met in deciding whether to order an unequal division of family property), on the grounds that the Trust Funds were excluded property and therefore did not fall within the ambit of s. 95: at para. 186. It is curious that the judge reached this conclusion having previously embarked upon a s. 95 analysis in the alternative--that is, on the assumption that the Trust Funds did, in fact, constitute family property within the meaning of s. 95.

[49] The judge then turned to s. 96 of the FLA. She quoted extensively from the discussions of the meaning of "significant unfairness" in *V.J.F. v. S.K.W.*, 2015 BCSC 593, *aff'd* 2016 BCCA 186 and *Cook v. Cook*, 2021 BCCA 194. Ultimately, she found that it would be significantly unfair not to divide the excluded property, because renovation of the Bellevue Property and development of the Monck Park Property were both pursued as a "joint family venture": at para. 193. The judge noted that Ms. O'Connor had provided as much assistance in the renovation of the Bellevue Property, and in the acquisition and construction of the Monck Park Property, as Mr. Mills had requested. She held that it would be significantly unfair to allow Mr. Mills' decision to assume primary responsibility for the renovation and

construction of the Bellevue and Monck Park Properties to defeat any claim Ms. O'Connor, as his long-term spouse, might have to the Trust Funds: at para. 194. As such, pursuant to s. 96(b)(i) of the FLA, the judge ordered that the Trust Funds be apportioned 65/35 in favour of Mr. Mills, after taking into account interim disbursements and other expenses.

Legal Framework

- [50] Under s. 81 of the FLA, separating spouses are presumptively entitled to an equal interest in all family property and are equally responsible for family debt, subject to an agreement or order providing otherwise. As seen earlier in these reasons, "family property" includes all real or personal property, including a beneficial interest in property (s. 83(4)), that at least one spouse owns or is beneficially entitled to as of the date of separation: s. 84(1)(a).
- [51] Under s. 85 of the FLA, certain kinds of property, though otherwise qualifying as family property, are excluded from the definition. Property inherited by a spouse is one such category of excluded property: s. 85(1)(b). However, s. 84(2)(g) makes it clear that any increase in the value of excluded property, following the later of the date when the relationship began or when the property was acquired, is to be considered family property and is therefore presumptively divided equally between the spouses. In other words, the FLA clearly distinguishes between the initial value of excluded property and the value of that property as of the date of trial (when, as per s. 87(b)(ii), family property is to be valued for division). Any positive difference owing to an increase in value is presumptively to be shared equally by the spouses.
- [52] While equal division is the statutory default, s. 95(1) of the FLA provides that a court may order an unequal division of family property where equal division would be "significantly unfair" having regard to one or more of the factors set out in s. 95(2):
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[53] In *Healey v. Healey*, 2024 BCCA 68, this court held that the value of an excluded property claim constitutes "any other factor", referred to in s. 95(2)(i), in light of which a court may order the unequal division of family property: at para. 76.

[54] To meet the test of "significant unfairness" under s. 95, a party seeking an unequal division must demonstrate "something objectively unjust, unreasonable or unfair in some important or substantial sense": *Singh v. Singh*, 2020 BCCA 21 at para. 134. This court has described the threshold of significant unfairness as a high one that reflects the Legislature's intent that the general rule of equal division should prevail except where persuasive countervailing reasons militate dispositively in favour of a different result: see *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 41; *V.J.F. v. S.K.W.* at para. 81; *Singh* at paras. 129-134.

[55] Section 95(3) further provides that in assessing whether equal division would give rise to significant unfairness, courts may consider the extent to which a spouse's financial means and earning capacity have been affected by the responsibilities and circumstances of the spousal relationship. A court may do so, however, only if, having already made a determination as to spousal support, the objectives of spousal support set out in s. 161 have not been met.

[56] Section 96 of the FLA contemplates the division of excluded property. The general rule is that there is to be no division of excluded property, yet there are certain exceptions. One of these, set out in s. 96(b), applies where it would be significantly unfair not to divide excluded property given the duration of the relationship between the spouses and one or more of:

(i) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of the excluded property;

(ii) the terms of any agreement between the spouses respecting the excluded property, other than an agreement described in section 93 (1) [setting aside agreements respecting property division], including but not limited to terms respecting the transfer of the excluded property;

(iii) if the Supreme Court makes a determination under section 95 (1) [unequal division by order] respecting significant unfairness, the extent to which the significant unfairness cannot be addressed by an unequal division of family property or family debt, or both.

The Parties' Positions

- [57] The parties agree as to certain amounts that are relevant to the issues on appeal:
- a) The net insurance proceeds from the Monck Park Property attributable to the dwelling totalled \$2,612,020.49, and the gross insurance proceeds attributable to the dwelling totalled \$3,278,068;
 - b) The net insurance proceeds from the Monck Park Property attributable to the contents of the dwelling totalled \$195,491.64;
 - c) The proceeds of sale from the Monck Park bare land totalled \$255,000.00;
 - d) Ms. O'Connor holds an RRSP with an after-tax value of \$22,030.50; and
 - e) The sum of the above values (accounting for the net, not the gross, insurance proceeds) is \$3,084,542.63, this amount being the amount of family property available for division.
- [58] The parties also agree that the trial judge fell into error by failing to identify the family property available for division at the time of trial. In particular, she did not consider whether the Trust Funds included an increase in the value of Mr. Mills' presumptive exclusion. The record establishes, and the parties agree, that there had been an increase, such that s. 84(2)(g) applied to render the increase in value of family property. The parties further agree that in light of the increase, the judge erred in failing to conduct a s. 95 analysis and in proceeding instead to consider only the division of Mr. Mills' excluded property under s. 96.
- [59] The parties disagree with the judge's findings regarding the amount of Mr. Mills' excluded property claim, that is, the \$1,850,000 relating to the Bellevue Property. Mr. Mills says this amount failed to take into account two additional exclusions that were traceable to the Trust Funds, those exclusions being inherited cash totalling \$137,112.23 and inherited securities worth \$21,842.13. Ms. O'Connor challenges the judge's finding that Mr. Mills' exclusion for the Bellevue Property has a present value of \$1,850,000 and argues that Mr. Mills has not established that the cash and securities constitute excluded property under s. 85 of the FLA.
- [60] A related issue concerns the value of the insurance proceeds as they relate to the contents of the Monck Park Property at the time of the fire. Mr. Mills says that the value of his contents was \$242,876.35 and that the judge erred in failing to address this amount in her excluded property analysis. Ms. O'Connor argues that the evidence does not support such a finding. She asserts that Mr. Mills received appropriate compensation from the insurer for his property that was destroyed in the fire.

Identifying Family Property

- [61] Following the parties' separation in March 2015, their primary asset was the Monck Park Property. Had that asset existed at the time of trial, its value at the date of trial (as per FLA s. 87(b)(ii)) would have been a significant component of the judge's starting point for the analysis of family property, family debt, exclusions, and division or reapportionment.

- [62] Due to the loss of the Monck Park home in the October 2018 fire, there was no real property to evaluate and divide at the time of trial. Instead, the parties had the monies they received following the conclusion of the insurance claim and a parcel of bare land where the Monck Park home once stood.
- [63] Since the parties agree that \$3,084,542.63 is the amount of the family property in issue, having identified that amount, the trial judge ought next to have determined whether any part of that sum represented excluded property within the meaning of s. 85 of the FLA (including by conducting an appropriate tracing analysis), before proceeding to consider whether family property should be divided unequally and whether, if necessary, there should be a division of excluded property.
- [64] Instead, the judge's analysis was grounded on the erroneous premise that the family property in issue was limited to the amount of the Trust Funds. This sum exceeds, by approximately \$15,000, the value of Mr. Mills' exclusion relating to the Bellevue Property. The judge did not conduct a s. 95 analysis relating to the division of this \$15,000, and her basis for not doing so is not readily disclosed by her reasons. It is possible that since Mr. Mills was advancing an excluded property claim in excess of the amount of the Trust Funds (relating to the Bellevue Property, inherited cash and securities, and his portion of the contents insurance proceeds), the judge determined that the question of property division would have to be considered exclusively under s. 96. However, after initially noting that Mr. Mills had inherited cash and securities as well as his portion of the contents insurance proceeds, the judge never returned to these claimed exclusions in her analysis. I observe that the amount of the inherited cash itself was said by Mr. Mills to be \$137,112.23, a significant sum. Instead, she focussed entirely on Mr. Mills' exclusion relating to the Bellevue Property. Paragraph 6 of the trial order, furthermore, made it clear that the judge considered the Trust Funds to be synonymous with Mr. Mills' excluded property claim in relation to the Bellevue Property. Her basis for proceeding in this way is difficult to discern, impeding meaningful appellate review of her reasons for judgment: *F.H. v. McDougall*, 2008 SCC 53 at paras. 97-100.

Tracing Mr. Mills' Interest in the Bellevue Property

- [65] Above, I summarized the judge's analysis of why the value of the Bellevue Property can be traced into the Trust Funds. As I will explain, the judge's approach to this tracing question reflects an error of law that is compounded by her failure to apprehend the nature and extent of family property existing at the time of the parties' separation.

The Parties' Positions

- [66] On her cross appeal, Ms. O'Connor argues that the trial judge erred in concluding that the initial excluded value of the Bellevue Property--\$1,850,000--was preserved in its entirety in the Monck Park Property insurance proceeds. In her factum, Ms. O'Connor acknowledges that in British Columbia, "there is no set approach to determining the exclusion that

remains when excluded property is disposed of and property is derived from the excluded property and co-mingled property". Relying on *Gavriel v. Gavriel*, 2017 BCSC 1653, *Venables v. Venables*, 2018 BCSC 1736 and *Liapis v. Keshow*, 2021 BCSC 502, she submits the judge should have applied a pro rata approach to tracing the value of the Bellevue Property into the Trust Funds, given the parties' use of financing and equity to fund both projects, which resulted in a co-mingling of excludable funds with family property.

- [67] Ms. O'Connor also says that in concluding Mr. Mills had an exclusion of \$1,850,000 at separation, the trial judge "froze" Mr. Mills' exclusion as of the day of his inheritance in 2004. She argues that because there was an increase in value following the date of Mr. Mills' inheritance, the net sale proceeds represent a co-mingling of excluded and family property. Furthermore, she emphasizes that expenses such as the line of credit and costs of sale were incurred in relation to the Bellevue Property. On this basis, Ms. O'Connor submits that it was unfair to assume that the initial investment of \$1,850,000 was preserved as excluded property and that only the increase in value was used to pay down the family expenses incurred by the parties.
- [68] Mr. Mills' position is that Ms. O'Connor has not identified any error of law, of fact, or in the judge's exercise of discretion with respect to the tracing of the value of his Bellevue Property inheritance. Rather, Mr. Mills says that notwithstanding Ms. O'Connor's acknowledgment that there is no set approach, she suggests that a different approach to tracing, being pro rata, would have been fairer. He says this is not a proper ground of appeal.

New Issues or Arguments on Appeal

- [69] Mr. Mills also argues that the pro rata approach now advanced by Ms. O'Connor was not argued at trial and should therefore not be entertained by this court. I shall first address this issue.
- [70] Ms. O'Connor submits that her position as to the appropriateness of pro rata tracing does not raise a new issue on appeal, but rather constitutes a "supplemental argument to the issue raised at trial as to the value of Mr. Mills' exclusion". She says that the value of Mr. Mills' exclusion was a central issue at trial, and that the pro rata approach is consistent with her position below that Mr. Mills had not established a "full" exclusion of \$1,850,000. In the alternative, if the pro rata approach does constitute a new issue on appeal, she submits that the interests of justice require this court to consider its application.
- [71] This court's discretion to entertain a new issue on appeal will generally be exercised in exceptional circumstances "where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so": *Quan v. Cusson*, 2009 SCC 62 at para. 37; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 51. As a general rule, a court of appeal should avoid considering new issues on appeal unless it is clear that, "had the question been raised at the proper time, no further light could have been thrown upon it": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 32, citing *Lamb v.*

Kincaid (1907), 28 S.C.R. 516 at 539.

- [72] The test for determining whether a new issue should be considered on appeal has three components, as framed by Saunders J.A. in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 45. The court should consider whether:
- a) The issue is truly "new";
 - b) The evidentiary record is sufficient to decide the issue; and
 - c) The interests of justice support granting an exception to the general rule against hearing new issues, considering the potential prejudice to the opposing party.
- [73] While Mr. Mills may be technically correct that the pro rata approach was not specifically raised by Ms. O'Connor at the trial, from my review of portions of the Transcript, the fact remains that the issue of tracing itself was discussed by both counsel at some length. I referred to the judge's brief tracing analysis and conclusion at paras. 44-46, above.
- [74] In my view, Ms. O'Connor should be permitted to advance this argument. First, I am not persuaded that the pro rata submission falls within the category of what properly constitutes a new ground of appeal. A new issue or argument is "legally and factually distinct from the issues litigated at trial": Quan at para. 39. By contrast, arguments that invoke different legal concepts but aim at the "same fundamental question" will not constitute new arguments on appeal: Quan at para. 40. This court's decision in *Webster v. Ernst & Young*, 2000 BCCA 229 is of assistance. In *Webster*, the defendants (respondents on appeal) took issue with the plaintiffs' decision on appeal, to frame their cause of action in negligent misrepresentation around the idea of a "loss of opportunity". This court held:
- [21] Nor do I agree that the plaintiffs' reference to "loss of opportunity" in their argument on appeal imports a "new issue" on which the trial judge was not requested to assess damages. In fact, I see the phrase "loss of opportunity" as something of a red herring in this case. We are not concerned here with a claim for loss of business opportunities - as we would be, for example, if it were found that the plaintiffs would not have left FG but for the defendants' negligent advice. What is at issue is the assessment of possibilities that may affect, positively or negatively, the quantum of damages for a loss that has been established. That was not a "new" issue, but formed a central part of the court's task, as it does in almost every case of negligent misstatement. "Loss of opportunity" may be a convenient label to put on the process of quantification of damages in such cases, but it adds little to the necessary analysis.
- [Emphasis added.]
- [75] In this case, the "central" or "fundamental" (Quan at para. 40) question is the value of Mr. Mills' exclusion relating to his inheritance of the Bellevue Property. Whether and how this inheritance can be traced to the family property existing for division as of the time of trial was the central issue at trial. Ms. O'Connor's decision to frame her tracing argument around

the doctrine of pro rata sharing presents a modified--and, in my view, more precise--approach to the issue than that which she advanced at trial, but this does not transform the tracing question into a new issue on appeal. In other words, considering Ms. O'Connor's argument on pro rata tracing will not "transform [this] appeal into a new, and entirely different, proceeding, one divorced from how the trial was conducted": *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 519 at para. 27. On the contrary, Ms. O'Connor's argument goes squarely to the very same issue that was before the trial judge.

[76] Even if I had concluded that Ms. O'Connor's position on pro rata tracing constituted a new issue, it is in the interests of justice for her to be granted leave to make it. This is because:

- a) The record contains sufficient evidence for this court to decide the issue (*R. v. J.F.*, 2022 SCC 17 at para. 41) and the parties were able to make submissions on this issue at the hearing of the appeal.
- b) The parties have agreed that the judge's errors require this court to perform its own analysis of family and excluded property. Both parties, including Mr. Mills, have asked that this matter not be remitted to the trial court. It is conceptually problematic for Mr. Mills to maintain that this case should not be remitted while also arguing that an essential issue on appeal, such as tracing, not be properly considered by this court.
- c) Given that the existence and value of Mr. Mills' exclusion was a central issue at trial, there is no apparent reason to suppose that there is relevant, material evidence that "might have been led at trial if it had been known that the matter would be an issue on appeal": *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296 at para. 23. In this sense, it bears emphasizing that the correct approach to tracing excluded property raises a question of law, not fact.

Principles of Tracing

[77] At the outset, it will be helpful to clarify what Ms. O'Connor contemplates in referring to tracing pro rata and to contrast this proposed approach with other common methods, including the approach adopted by the judge in this case. Doing so, however, requires a review of certain concepts and principles.

[78] In fairness to the judge, the analysis that follows arises from the manner in which this issue was argued in this court as opposed to at the trial. This appeal is also the first opportunity for this court to consider the appropriate approach to tracing in a family law context. Although the identification of excluded property was recently considered in *Chapman*, the issue of tracing an interest in excluded property through a co-mingling of family and excluded property on a pro rata basis did not arise.

[79] Tracing is an analytical exercise whereby a court tracks the value that attaches to a proprietary interest through successive transactions into substitute assets: *Oosterhof, Chambers, McInnes, and Smith, Oosterhof on Trusts: Texts, Commentary, and Materials* (7

ed.) (Carswell, 2009) at 1213; *Foskett v. McKeown*, [2001] 1. A.C. 102 (H.L.) at 127-129, per Millett L.J. In the present case, the question is whether and to what extent the value attaching to the Bellevue Property at the time of Mr. Mills' inheritance can be traced to the Trust Funds.

- [80] Tracing can become most complex in cases where value is co-mingled. A simple tracing exercise with no co-mingling arises when value that is used to buy one asset is then used to acquire another, and so on. In those circumstances, the original value has come to inhere in a different res but otherwise remains discrete. When value is co-mingled, value from multiple sources inheres in the same asset or within a set of indistinguishable and fungible objects, for example, gold bars (*In re Goldcorp Exchange Ltd.*, [1995] 1 A.C. 74 (J.C.P.C.)) or identical wine bottles (*In re London Wine Co. (Shippers) Ltd.*, [1986] P.C.C. 121 (H.C.)). The question becomes whether and in what manner the original value survives in the intermixture and can thereby be traced into successive transactions for substitute assets.
- [81] Courts have developed different methods and principles to assist in tracing value through substitute assets where an intermixture has taken place. An early approach was set out in *Devaynes v. Noble*; *Clayton's Case*, (1816) 1 Mer. 572, 35 E.R. 781 (Ch. Div.). *Clayton's Case* adopted what can be described as a "first in, first out" approach to tracing through an intermixture: if, following an intermixture, there are competing claims against a shortfall, contributors take in the order of their contributions. The rule from *Clayton's Case*, long the subject of criticism for its often unfair and generally arbitrary operation, has been generally rejected in Canada and retains only a very limited scope of application: *Greymac Trust Co. v. Ontario (Ontario Securities Commission)*, [1988] 2 S.C.R. 172, affirming the Ontario Court of Appeal's decision in *Re Ontario Securities Commission and Greymac Credit Corp* (1986), 30 D.L.R. (4th) 1.
- [82] While the court in *Greymac* acknowledged that there may be certain circumstances in which a court could, in the interests of justice, trace a proprietary or beneficial interest using a "first in, first out" approach, it held that pro rata tracing (discussed below) should be the norm where it is possible to discern the proportionate contributions of the parties: at 13-16. In explaining its decision, the court, at 15, adopted Learned Hand J.'s observation in *Re Walter J. Schmidt & Co.* (1923), 298 Fed. 314 at 316, that:

To throw all the loss upon one, through the mere chance of his being earlier in time, is irrational and arbitrary, and is equally a fiction as the rule in *Clayton's Case*. When the law adopts a fiction, it is, or at least it should be, for some purpose of justice. To adopt it here is to apportion a common misfortune through a test which has no relation whatever to the justice of the case

[Emphasis added.]

- [83] To re-state Judge Hand's reasoning in more contemporary terms, where a court is asked to trace the interests of innocent contributors to a mixed fund, under circumstances where it cannot be said what 'actually' happened to each contribution, the court must decide the issue on the basis of principle (this is what is meant by the reference to a "fiction"). That

being so, it is "arbitrary and irrational" to decide the matter based on a principle that privileges the interests of one party over the other based on the timing of their respective contributions, a factor that, in most cases, bears no legal relation to "the justice of the case". This deficiency in the rule from Clayton's Case is, as I will discuss below, salient to the question of tracing under the FLA.

[84] Justice Marchand (as he then was) came to a similar conclusion in *Gavriel v. Gavriel*, 2017 BCSC 1653. Discussing the question of whether certain excludable funds could be traced into a subsequently purchased property, he observed:

[62] Given the comingling of funds in Mr. Gavriel's account, I cannot accept his testimony that all of the \$18,000 settlement (net of reimbursement for out of pocket expenses) was used to make the deposit and a portion of the down payment on the Penticton property. On the documentary evidence, I could just as easily conclude that only the funds deposited from Gateway were used.

[63] In my view, it would be equally unfair to exclude all of Mr. Gavriel's settlement as it would be to exclude none of it

[Emphasis added.]

[85] He went on to observe that, given the evidentiary uncertainty described immediately above, a pro rata approach to tracing the excludable funds was fairest under the circumstances: at para. 63. I will turn to that approach now.

[86] The more modern approach to tracing through intermixtures sees innocent contributors share rateably, that is, in proportion to their contributions: *Oosterhof* at 1248; *Foskett* at 132. Proportionate, or pro rata, sharing reflects the concept that innocent contributors to a mixed fund should be treated equally. In the absence of an evidentiary foundation upon which a court may draw conclusions about what has happened to specific contributions (given that the contributions are either indistinguishable or have come to inhere within the same asset), pro rata sharing avoids artificially and arbitrarily preferring the interests of certain contributors over others: *Foskett* at 132. Different principles apply in the case of wrongful intermixtures (for instance, where a trustee intermingles their own funds with funds they hold in trust for another's benefit).

[87] Under the general auspices of the pro rata approach to tracing through an intermixture, two methodologies are to be distinguished: first, the pro rata ex post facto approach and, second, the pro rata approach using the lowest intermediate balance rule ("LIBR"). The pro rata ex post facto approach contemplates the total amount of the intermixture, which often takes the form of a fund but may be represented by any kind of asset, available for division. On this approach, a contributor's interest in the intermixture is determined based on the proportion of their contribution to the overall amount of contributions made over the lifetime of the intermixture. Pro rata sharing using LIBR is different in an important way. The ex post facto approach does not contemplate fluctuations in an intermixture's value over

the lifetime of the intermixture and does not take into account the times at which different contributions were made. The effect of LIBR, however, is that a contributor to a mixed fund cannot have an interest in that fund greater than the lowest balance in the fund after their contribution: *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42 O.R. (3d) 257 (ONCA) at para. 14. As the court in T.D. stated, LIBR:

- [191] is grounded, ultimately, on the premise that tracing rights are predicated upon the model of property rights. LIBR seeks to recognize that at some point in time, because of earlier misappropriations, an earlier beneficiary's money has unquestionably left the fund and therefore cannot physically still be in the fund. Accordingly, it cannot be "traced" to any subsequent versions of the fund that have been swollen by the contributions of others, beyond the lowest intermediate balance in the fund
- [88] While LIBR may in many cases be the most accurate method of tracing through an intermixture, it can become complex and, therefore, costly to litigants. This is a particularly important consideration in family law cases, where the tracing exercise is to be conducted flexibly, reconciling the objectives of "ease, clarity and simplicity with fairness": *Liapis* at para. 273; *C.M. v. N.L.*, 2020 BCSC 3 at para. 174. In respect of tracing excluded property, as *Riley J.* (as he then was) stated in *Ernst v. Carmichael*, 2019 BCSC 68:
- [29] the FLA contemplates a "more flexible approach" to the following of excluded property into derivative property. This approach is justified by the objectives of the excluded property regime under which parties should generally be allowed to keep what was theirs going into the relationship, and the reality that parties will often "co-mingle excluded property with family property over time, including using excluded property to purchase other property or refinancing excluded property to purchase other property
- [Emphasis added.]
- [89] *Riley J.*'s observations in *Carmichael* echo those of *Fenlon J.* (as she then was), in *P.G. v. D.G.*, 2015 BCSC 1454 at para. 76, in which she adopted the British Columbia Ministry of Attorney General's statement, in its White Paper on Family Relations Act Reform, that the FLA's excluded property regime:
- [76] seems to better fit with people's expectations about what is fair. They 'keep what is theirs,' (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship
- [90] LIBR may be an appropriate and fair rule to apply to the tracing of excluded property in rare circumstances. However, as a general rule, the relative--and important--simplicity of the FLA's approach to excluded property indicates to me that a pro rata ex post facto approach is appropriate: on this point, see *C.P. v. K.W.A.*, 2018 BCSC 332 at paras. 95-100; *C.M. v. N.L.*, 2020 BCSC 3 at paras. 173-174; and *Liapis v. Keshow*, 2021 BCSC 502 at paras. 273-276.

- [91] I would add that, given the complexities that can be associated with tracing, a trial judge may refer the matter to the registrar, an associate judge, or a special referee for an inquiry under Rule 18-1(1) of the Supreme Court Family Rules, B.C. Reg. 188/2024.

Discussion

- [92] In conducting her tracing analysis, the judge does not appear to have adopted either a pro rata ex post facto approach or a pro rata approach guided by LIBR. She reasoned that because there would have been no Monck Park Property without the Bellevue Property, the portion of the Trust Funds traceable to the Bellevue Property corresponded to the undiminished value of the Bellevue Property.
- [93] This approach is most similar to the rule in Clayton's Case (which has been generally rejected in Canada, though it may retain some applicability in the interests of justice on a case-by-case basis) because Mr. Mills' exclusion was treated on a "first in, first out" basis. At para. 161, the judge describes the tracing analysis in terms of following a metaphorical "bouncing ball" through to the endpoint of a series of transactions, in this case along a trajectory beginning with Mr. Mills' inheritance of the Bellevue Property. Presumably, if the judge had correctly apprehended the full extent of family property, the "bouncing ball" would have carried through, unmodified, to establish a \$1,850,000 exclusion out of the more than \$3,000,000 of family property available for division. This is a paradigmatic example of a "first in, first out" approach to tracing, which treats excluded property more favourably than family property. As I will explain, the principles set out in the FLA require that family and excluded property be treated in an equal way that does not prefer either category over the other.
- [94] Here, as in many situations that involve tracing issues, the record does not disclose an evidentiary basis to conclude what was 'actually' done with the value traceable to Mr. Mills' excluded property. Indeed, given that this value came to inhere in the same asset as non-excludable family property and debt, the drawing of such a conclusion seems impossible. Where difficulties with tracing arise, the matter should thus be resolved based on the presumptions, referred to above, that are fair and reasonable to apply in a given case.
- [95] Neither Ms. O'Connor nor Mr. Mills can be considered a 'wrongdoer' with respect to the intermingling of the excluded and the family funds; theirs is an ordinary situation typical of shared family finances. In light of this, they ought, in my view, to be treated equally in the tracing analysis; as I have described, such equal treatment generally excludes a "first in, first out" approach to tracing excluded property. However, since the FLA governs the disposition of property on the breakdown of a spousal relationship, what it means for the parties to be treated equally in the tracing analysis must also be determined, at least in part, in accordance with the applicable statutory provisions.

- [96] The presumption of equal sharing is foundational to the approach to property division taken in the FLA and is consistent with a principled understanding of spousal relationships as equal partnerships. In my view, it would not be consistent with the FLA's default provision of equal sharing (as set out in s. 81), nor with this more principled view of the spousal relationship, to prefer an excluded property claim in carrying out the tracing analysis in the absence of evidence supporting such an approach. It is certainly true that the FLA's excluded property provisions indicate legislative intent that spouses, within certain limits, be entitled to keep what is 'theirs': Venables at para. 86. But this does not imply the further conclusion that where a court is asked to determine what has been done with an intermixture of excluded and family property, the presumption of equal sharing and responsibility must yield to a spouse's excluded property claim. In my view, neither principle need yield to the other; a pro rata approach to tracing reconciles the demands of both.
- [97] It is important to note that the exercise of tracing a spouse's excluded property interest through a co-mingling of excluded and family property only stands to reduce an exclusion compared to its original value where there has been a depreciation in the value of the intermixture. All appreciations in the value of excluded property are family property: FLA s. 84(2)(g). However, where an intermixture of family and excluded property has depreciated (that is, where--as in the present case--the intermixture has a value as of the time of trial less than the aggregate value of the total contributions as of the time they were made), "the party claiming an exclusion may not be able to claim the full value": Zellweger at para. 47, citing C.P. at para. 99. As I observed above, in the absence of evidence, the FLA discloses no basis to presume that a loss in value (be it a withdrawal from an account, a decrease in the value of securities or real property due to market fluctuations, etc.) should be attributed to family rather than excluded property, or vice versa.
- [98] It is true that there is no 'one size fits all' approach to tracing in the family property context. However, in my view, it would be an error of law to adopt an approach to tracing that ignores the FLA's clear instructions that increases in the value of excluded property are to be considered family property and, as such, presumptively divided equally (s. 84(2)(g)); that spouses are equally entitled to family property and equally responsible for the payment of family debt (s. 81); and that a party claiming that property is excluded is responsible for demonstrating that: s. 85(2).
- [99] In summary, I conclude that it is appropriate, and in keeping with the requirements of the FLA, generally to approach the exercise of tracing excluded property through a co-mingling of family and excluded property on a pro rata basis. However, I also acknowledge that different methods of tracing may be appropriate, on occasion, in order to arrive at a division of property that is fairest in the particular circumstances of a case.

- [100] The judge's tracing analysis in the case at bar is part and parcel of her error in failing to apprehend the full extent of family property available for division. As I have discussed, substantial family property in excess of the value corresponding to Mr. Mills' claimed exclusion existed at the time of separation. This additional family property corresponds to the increase in value of the Bellevue Property, which increase is to be treated as family property and presumptively divided equally between the parties.
- [101] This increase in value can be understood as a type of "contribution" analogous to a contribution to a mixed fund: the excludable value attributable to the Bellevue Property was co-mingled with additional family property, and this total value was then used, through the sale of the Bellevue Property, to build the Monck Park Property. Other increases in value--also non-excludable family property--are reflected in the insurance proceeds and in the sale proceeds of the Monck Park bare land.
- [102] It remains to be considered whether tracing should be assessed pro rata based on the ex post facto or LIBR approach. The judge's reasons offer no guidance on this point, nor does the FLA itself. In her factum, Ms. O'Connor appears to suggest that the ex post facto approach is appropriate. I agree. To conduct a LIBR-based analysis in the circumstances of this case would necessitate a detailed consideration of essentially every transaction the parties conducted, over the course of many years, involving family property bearing a traceable connection to the original value of Mr. Mills' excluded property. There is nothing in the record to suggest that this would be possible, let alone practical from a logistical and cost-based standpoint: T.D. at para. 37. More importantly, as I noted above, the FLA does not generally call for a valuation of family property that is sensitive to fluctuations in value and transactions occurring during the spousal relationship: Zellweger at para. 48. In respect of Mr. Mills' excluded property claim, the relevant dates are the date of Mr. Mills' inheritance and the date of trial, that is, when family property was to be valued: Zellweger at para. 48. This is consistent with the pro rata ex post facto approach, which considers the proportionate contributions against the total amount remaining for distribution.
- [103] However, to conduct a pro rata ex post facto analysis properly and completely, it is necessary to consider other contributions that might diminish the proportion of an intermixture that can be traced to a particular contribution. This is to be distinguished from the application of LIBR in that the timing, or order, of the contributions is immaterial; what matters is simply how many contributions there were, for how much, and what remains for division at the relevant time.
- [104] With the foregoing in mind, in my view, Mr. Mills' excluded property interest relating to the Bellevue Property can be traced as follows, involving several 'contributions' of family property in the form of increased value:

- a) Mr. Mills inherited the Bellevue Property, which at the time of the inheritance had an excludable value of \$1,850,000, as found by the judge. This sum can be considered the first notional contribution to what would become the intermixture of his excluded property with the family property generated by the increase in this property's value.
 - b) The Bellevue Property subsequently increased in value, ultimately selling for \$3,650,000. This represents a \$1,800,000 contribution to the notional 'fund', in the form of non-excludable family property.
 - c) The net proceeds of sale from the Bellevue Property, \$2,596,500, funded the acquisition of the Monck Park Land (in that the proceeds of sale were partially used to satisfy the line of credit that funded the purchase of the Land, a family debt) as well as the construction of the Monck Park Property.
 - d) The parties agree, and as is confirmed by the record, the gross insurance proceeds attributable to the Monck Park Property (without its contents) was \$3,278,065. Subtracting this value from the net proceeds of sale from the Bellevue Property yields an increase in value of \$681,565.
 - e) The proceeds of sale from the Monck Park bare land--\$255,000--also constitute an increase in value traceable to Mr. Mills' excluded property interest in the Bellevue Property, in that the net proceeds from the sale of the latter funded the purchase of the land, which was then sold.
- [105] All told, then, in addition to Mr. Mills' initial exclusion of \$1,850,000, there were three further increases in value that, for the purposes of tracing, can be understood as contributions to the intermixture of excluded and family property: (1) \$1,800,000 in family property, from the increase in value reflected in the gross sale proceeds of the Bellevue Property); (2) \$681,565, the increase in value reflected in the difference between the gross insurance proceeds (related to the dwelling structure) from the Monck Park Property and the net proceeds of sale from the Bellevue Property (which proceeds funded the acquisition of the bare land and the construction of the Monck Park Property); and (3) \$255,000 from the sale of the Monck Park bare land.
- [106] This results in contributions totalling \$4,586,565, of which Mr. Mills' excluded \$1,850,000 contribution comprises 40.3%.
- [107] The total family property available for division (before accounting for Mr. Mills' exclusion) at the time of trial had a value of \$3,084,542.63, as the parties have agreed. To calculate the value of Mr. Mills' exclusion, I would not simply attribute to him 40.3% of this overall sum. This is because the total value includes an RRSP held by Ms. O'Connor, which does not appear to bear any traceable connection to Mr. Mills' excluded property, as well as the household contents portion of the insurance proceeds from the Monck Park Property. As I explain below, I would not accede to Mr. Mills' submission that he is entitled to claim an exclusion in relation to these proceeds. As such, from the \$3,084,542.63 available for

division, I would subtract the \$22,030.50 value of the RRSP and the \$195,491.64 value of the contents portion of the insurance proceeds. It is necessary to do this to avoid over-compensating Mr. Mills in relation to his excluded property claim. Mr. Mills' proportionate contribution of excluded property to the family property available for division does not and cannot entitle him to claim that share in respect of all the family property at issue, but rather only in respect of that family property representing an intermixture of excluded and family property (through an increase in the value of the family property). In other words, the original value of the Bellevue Property (the source of Mr. Mills' exclusion, bearing in mind that I would find that he has established no other exclusions) bears no established connection to Ms. O'Connor's RRSP or to the household contents portion of the insurance proceeds, and, as such, Mr. Mills cannot claim any credit in relation to those funds on the basis of tracing.

[108] This subtraction results in the amount of \$2,867,020.49, 40.3% of which is \$1,155,409.26. In my view, this is the value of the portion of the family property traceable to Mr. Mills' excluded interest in the Bellevue Property.

The Inherited Cash and Securities and the Personal Contents Portion of the Insurance Proceeds

[109] At trial, the judge found that Mr. Mills received cash distributions totalling \$137,112.23 and securities worth \$21,842.13: at para. 77. The judge found that the funds were "unquestionably an inheritance to [Mr. Mills]": at para. 78. However, after finding these inheritances as a fact, she failed to address whether Mr. Mills could claim exclusions in respect of them, making no express findings on these points. In addition, her discussion of the insurance proceeds from the fire at the Monck Park Property did not distinguish between the portion of those proceeds attributable to the dwelling structure and the household contents. She dealt instead with the proceeds on a "global basis" (Supplementary Reasons at para. 15), despite the fact that it was only the portion of the proceeds' value attributable to the dwelling structure that was relevant to the tracing of Mr. Mills' excludable interest in the Bellevue Property. In assessing the value of Mr. Mills' exclusion, then, it was necessary to maintain an analytical distinction between the dwelling structure and the contents portions of the insurance proceeds, insofar as that was possible based on the record.

[110] The judge's approach to these issues requires this court to consider whether Mr. Mills has established exclusions relating to the above inheritances as well as the household contents portion of the insurance proceeds.

The Parties' Positions

[111] Mr. Mills bore the onus of establishing on a balance of probabilities that at the time of separation the cash and securities were excluded property, as he claims: s. 85(2). He submits there was clear evidence, unrefuted by Ms. O'Connor, that the cash and securities were

traceable into the Trust Funds. He says he led documentary evidence showing receipt of the securities on April 2, 2004, into his CIBC Wood Gundy account, the deposit of the net sale proceeds of the Bellevue Property at CIBC Wood Gundy on July 16, 2006, and the use of these funds for the construction of the Monck Park Property. He says he also gave viva voce evidence that the cash was put towards the renovation of the Bellevue Property, specifically to build the garage, and notes that this evidence was not challenged on cross-examination.

- [112] Relying on Jaszczewska at para. 59, Ms. O'Connor argues that Mr. Mills did not prove that the inherited cash and inherited securities were traceable into property that existed at separation. She acknowledges that a portion of the cash may have gone towards the renovation expenses of the Bellevue Property but says there was no cogent evidence to confirm the value of the use of the funds or that these funds increased the equity, as would be required to establish an exclusion on the basis of tracing.
- [113] Ms. O'Connor also refers to the judge's concerns as to Mr. Mills' credibility. She points out that the judge found that some of Mr. Mills' evidence was tailored to his self-interest, though she held that his testimony was reliable when consistent with the documentation in evidence: at para. 136.
- [114] Regarding the inherited cash, Ms. O'Connor submits that Mr. Mills relies on his own evidence, uncorroborated by any documentation, to support the assertion that it was used to fund the renovation. She says this is not reliable evidence, as neither of the parties was earning income at the time, and that it is therefore reasonable to conclude that the funds were used for living expenses, including for the children's expensive private schools, and therefore dissipated during the time of the parties' relationship.
- [115] Regarding the inherited securities, Ms. O'Connor points to Mr. Mills' evidence that the funds were invested into RRSPs that the trial judge found were dissipated during the relationship: at para. 16. There could therefore be no claimed exclusion for these amounts, as they did not exist at the time of trial.
- [116] The next point to consider relates to Mr. Mills' claim to the portion of the insurance claim, which he says corresponds to his own household contents. The judge addressed the household contents in her supplementary reasons, stating:
- [15] I also recognize upon reviewing submissions of counsel that I did not specifically address any distinction between the household content portion of the insurance claim which generated Monck Park Trust Funds versus the residential structure component of the claim. My intention was to deal with the Monck Park Trust Funds on a global basis and I did not differentiate, in making my order, between these two portions of the claim. No further order is required in this regard.

[Emphasis added.]

- [117] Mr. Mills says that both parties gave evidence that, at the time of separation, they had divided their household contents. Ms. O'Connor furnished her rental apartment with what she took, and Mr. Mills took his items to the Monck Park Property.
- [118] Mr. Mills led evidence as to the value of the contents of the Monck Park Property for which he was reimbursed by the insurer. In total, he says his lost contents were valued at \$242,876.35. He argues that the judge erred in addressing this issue in a global fashion and that it was evident that she accepted there was an amount attributable to him for lost contents that ought to have been identified.
- [119] Ms. O'Connor submits that Mr. Mills did not establish that the contents of the Monck Park Property had a value of \$242,876.35, nor that the parties agreed to divide contents, nor that any portion of the contents was Mr. Mills' excluded property. She points to the fact that the insurer's final release valued the contents at \$195,491.64 and that this is the only objective evidence of such value. She says Mr. Mills signed the release and by doing so accepted the value ascribed to the contents.
- [120] Ms. O'Connor argues that while Mr. Mills produced a spreadsheet he created of contents which totalled \$242,876.35, his evidence at trial confirmed it was only the highlighted portion of \$61,255.86 that he claimed as excluded property. She says that on Mr. Mills' own spreadsheet and evidence, the majority of the contents of Monck Park Property were purchased during the relationship and are family property. The only documentary evidence of the value of the furniture inherited by Mr. Mills is from Ms. Mills' estate documents, which valued her furniture at \$5,000.
- [121] Finally, Ms. O'Connor submits that when Mr. Mills received the first payment of the insurance proceeds of \$97,745.82, his own evidence was that he used it to pay off a mortgage of \$56,000 he obtained in 2017--after separation--and that the rest of that payment was used for his personal benefit. Ms. O'Connor notes that the trial decision did not account for Mr. Mills' receipt of this first payment. In her submission, if Mr. Mills was entitled to any portion of the contents payment in respect of excluded personal property, he has been adequately compensated by receipt of the first payment.

Discussion

- [122] Certain basic principles apply to the issue of Mr. Mills' excluded property claims to the inherited cash and securities as well as the household contents portion of the insurance proceeds. In particular, Mr. Mills argues that the judge erred in failing to make express findings relating to these matters. It is well established that the purpose of reasons for judgment is to set out, from a functional and contextual perspective, the legal and factual basis for a judge's decision. It is not necessary for a judge to refer expressly to every piece of evidence underlying a finding of fact. Rather, the question of whether a trial judge's reasons are sufficient, factually speaking, is a "very low bar" that is reached when the factual basis of a decision can be understood, looking to the reasons as well as the record, as the case

may be: R. v. G.F., 2021 SCC 20 at paras. 71-73. Only in a "very rare case" will a decision fail for factual insufficiency: G.F. at para. 71. Furthermore, appellate courts are to assess reasons for judgment in a way that is "functional and contextual", considering whether they explain the judge's decision in light of the evidence before the trial court, the submissions of the parties, and the manner in which the trial unfolded: G.F. at para. 69, citing R. v. R.E.M., 2008 SCC 51 at para. 17. Deficient reasons alone are not an independent ground for appeal: if the reasons are deficient on their face but the "what" and the "why" of the decision are clear based on the record, no error based on insufficiency has been committed: G.F. at para. 70, citing R.E.M at paras. 38-40 and R. v. Sheppard, 2002 SCC 26 at paras. 46, 55.

- [123] In addition, an appeal is from an order, not the reasons for judgment: N.K. v. M.H., 2020 BCCA 121 at para. 76. This principle is particularly relevant to the case at bar, where, for the reasons I have given, the judge did not address certain material points in her reasons and made errors of fact that then led to errors of law.
- [124] As I have observed, having found the judge made several material errors, it is open to this court, based on the trial record and the submissions of counsel in this court, to reconsider the judge's conclusions relating to Mr. Mills' claimed exclusions regarding the inherited cash and securities, as well as the household contents portion of the insurance proceeds.
- [125] I would not accede to Mr. Mills' submissions regarding the inherited securities, inherited cash, and the household contents portion of the insurance claim. While it is true that the judge did not make findings on these points, in my view, the record and the submissions made before this court disclose a sufficient basis on which to uphold the judge's implicit conclusion that Mr. Mills had not established traceable exclusions relating to the inherited cash and securities or the household contents portion of the insurance proceeds: N.K. at paras. 62, 69.
- [126] To begin, Mr. Mills has not met the onus of proving an exclusion in relation to the \$137,112.23 in cash that he inherited from his mother's estate. He gave evidence at trial that the inherited cash was used to fund the renovation of the Bellevue Property. He has not identified any documentary evidence in support of this claim. However, in a finding that Mr. Mills has not challenged on appeal, the judge found his evidence only to be credible where it was supported by documentation, out of a concern that Mr. Mills tailored his evidence to his self-interest: at paras. 136-137. In light of this finding--which, as a finding as to credibility, is owed particular deference on appeal--I am unprepared to accept that the inherited cash was used to fund the renovation of the Bellevue Property.
- [127] In addition, given that Mr. Mills and Ms. O'Connor substantially relied on financing to sustain their very comfortable lifestyle (at para. 92), Mr. Mills has provided no corroborated contrary evidence to establish that the cash was not dissipated during the course of his and Ms. O'Connor's spousal relationship.

[128] The amount of the securities is, at best, a modest portion of the excluded property claim. Of greater significance is that those securities, as argued by Ms. O'Connor, can be traced to RRSPs that were dissipated during the parties' relationship, thus abrogating any possible claim to the exclusion of the value of the securities: at para. 16. Having reviewed significant portions of the evidentiary record that was before the judge on these particular issues (and doing so in light of the fact that she made no express findings on this point), I would conclude that Mr. Mills has not established that their value remained excluded property as of the time of trial. Nor am I satisfied that the record establishes that the portion of the insurance proceeds relating to household contents should result in an additional exclusion for Mr. Mills. Having reviewed the release provided by the insurer, which Mr. Mills signed, as well as the evidence to which we were referred by the parties in their factums and submissions, I would conclude, for the reasons submitted by Ms. O'Connor outlined at para. 119 above, that Mr. Mills has not established that the subject funds were excluded property at the time of trial.

Conclusion

[129] Mr. Mills is entitled to claim an exclusion of \$1,155,409.26, flowing from his inheritance of the Bellevue Property. He has not established exclusions relating to inherited cash and securities nor to the household contents portion of the insurance proceeds. Subtracting Mr. Mills' exclusion from the total family property available for division at the time of trial, being \$3,084,542.63, results in the amount of \$1,929,133.37. If this sum were apportioned equally between the parties, Ms. O'Connor would receive \$964,566.69 while Mr. Mills would receive a total of \$2,119,975.94, accounting for his exclusion.

[130] This leads to the question of whether an unequal division of family property should be ordered. In light of my conclusions on this issue, it is not necessary to consider whether Mr. Mills' excluded property should be reapportioned under s. 96.

Whether There Should Be an Unequal Division of Family Property Pursuant to s. 95 of the FLA

[131] In considering whether there should be reapportionment under s. 95, I will bear in mind the judge's alternative s. 95 analysis, to which I referred above.

The Parties' Positions

[132] The parties agree that there was family property that the judge should have considered for the purposes of a reapportionment analysis pursuant to ss. 95(1) and (2) of the FLA. They disagree on the approach that should be taken with respect to that family property.

- [133] Ms. O'Connor submits that the starting point for the analysis of significant unfairness should be to consider the financial situation the parties would be placed in if family property were divided equally. Relying on Healey, she says Mr. Mills' excluded property can and should be considered in the analysis if it is related to the economic circumstances of the spousal relationship.
- [134] She points to the gross disparity between the parties' financial positions if the family property is divided equally and Mr. Mills receives the full benefit of his excluded property. In light of my findings above relating to the proper value of Mr. Mills' excluded property, I will note at this point that this disparity, while lessened on a proper accounting of Mr. Mills' exclusion, remains significant. As indicated above, if Mr. Mills retains the full value of his exclusion of \$1,155,409.26 and 50% of the remaining family property, then Ms. O'Connor would receive \$964,566.69 while Mr. Mills would receive a total of \$2,119,975.95.
- [135] Mr. Mills' position is that reapportionment is not appropriate. In his response factum on the cross appeal, he says that Ms. O'Connor is relying on "general concepts of financial disparity, and seeks to import the equitable concepts of unjust enrichment into the reapportionment analysis".
- [136] He also argues that reapportionment under s. 95(3) is not required since the trial judge made a lump sum spousal support award having regard to the appropriate principles for income determination and the objectives of spousal support. He says s. 95(3) is engaged only if the objectives of spousal support have not been met and that, since the spousal support award is not under appeal, it should not be disturbed by this court by way of reapportionment under s. 95(3).
- [137] Finally, he says that if this court concludes that there should be a reapportionment of family property, then it should be "in the vein" of what was ordered in Healey, being a 65/35 distribution in Ms. O'Connor's favour. That submission was made in the context of his excluded property being valued by the judge at \$1,850,000, not the reduced value that I have found would be appropriate. However, Mr. Mills advanced his position on the apportionment of family property while also submitting that this court should significantly increase his other claims for excluded property in relation to the inherited cash, securities, and his personal contents portion of the insurance proceeds, none of which submissions I would adopt.

Discussion

- [138] As urged by the parties, I agree that we can, on the basis of the trial record and the parties' submissions in this court, perform the required s. 95 analysis.
- [139] This leads to the approach recently followed by this court in Healey. Like this case, Healey concerned the unequal division of family property under circumstances where, because of substantial exclusions, equal division resulted in a significant disparity in the parties' post-separation financial circumstances. Writing for this court, Horsman J.A. held that the

"significant unfairness arising from [this] gross disparity" was "a central unifying theme" of the appellant's arguments on appeal: at para. 2. In my view, the same is true here: the key question determining whether and how to divide the family property available for apportionment is the significant unfairness, in all the circumstances, that would result if family property were to be divided equally.

[140] This case differs from Healey in that the judge in this case did not err in addressing the issues of spousal support and property division in the wrong order. Rather, she erred in failing to find any family property to be divided at all. That error, in my view, has the same legal effect as that in Healey, which underscores why the analysis in that case is of assistance here. As Horsman J.A. observed in Healey:

[69] First, and critically, the judge overlooked the starting point for an analysis of significant unfairness, which is the financial situation the parties would be placed in if family property is divided equally. In considering a claim for unequal division of family property, the court should proceed by first making a notional equal division of property, and then determine whether such an equal division would be significantly unfair, given the factors in s. 95(2) and, where applicable, s. 95(3) of the FLA: Remmem v. Remmem, 2014 BCSC 1552 at para. 43; Parton BCSC at paras. 81-82; Polard v. Polard, 2017 BCSC 1963 at para. 19.

[Emphasis added.]

[141] I further agree with the observations in Healey that the value of a spouse's excluded property claim is relevant to the question of significant unfairness within the meaning of s. 95: at para. 76. As an aside, I would note that Healey differs factually from this case in that in Healey, the parties agreed to the value of Mr. Healey's excluded property, which was not the case here, a factor that does not affect the analysis to be undertaken under s. 95. I would also observe that since the parties in Healey agreed to the value of the excluded property, a tracing analysis was not required.

[142] On the question of whether Ms. O'Connor has met the significant unfairness test under s. 95, and in particular whether she has demonstrated "something objectively unjust, unreasonable or unfair in some important or substantial sense" (Singh at para. 21), the judge's findings at para. 179 of her reasons are instructive. These findings included that the parties' marriage was a long one "by all standards" and that Ms. O'Connor was "very supportive of [Mr. Mills'] career", in that her labour as primary caregiver to the children enabled Mr. Mills to pursue the various opportunities that became available to him over the course of the relationship.

[143] In addition to these factors, I would note:

- a) The judge also found that the parties were engaged in a "joint family venture" in renovating the Bellevue Property and in acquiring the Monck Park land and building the Monck Park Property there. This joint venture involved Mr. Mills generally being in charge of the financial affairs, and the judge found that the "practical reality is that [Mr. Mills] was well

aware that [Ms. O'Connor] had no independent financial resources of any significance to contribute given that the parties had agreed previously that [Ms. O'Connor] would absent herself from the workforce to be the primary caregiver for the Children and had indeed done so": at para. 71. Ms. O'Connor's involvement was more indirect, as she acted as the primary caregiver of the children, helped move the family into a rental property, and also provided some administrative assistance during the renovation of the Bellevue Property: at paras. 67 and 71-74;

- b) Mr. Mills has an excluded property claim in the amount of \$1,164,101.32, which constitutes "any other factor...that may lead to significant unfairness", pursuant to s. 95(2)(i): Healey at para. 76.

[144] Mr. Mills was able to continue working as a result of the labour Ms. O'Connor performed within the context of their family, which allowed him to pursue various opportunities and, presumably, saved the family a great deal of money that would otherwise have been spent on childcare. The phrase "spouse's contribution" in s. 95(2)(c) has been interpreted to encompass a range of all levels of contribution provided by spouses, including the efforts of a spouse that negatively impacted their own career and enhanced the career or career potential of the other: Healey at para. 75, citing *Nearing v. Sauer*, 2015 BCSC 58 at para. 141; *Parton v. Parton*, 2016 BCSC 1528 at para. 61.

[145] It is also noteworthy that in the particular circumstances of this case, much of the work Mr. Mills was able to perform, as a result of Ms. O'Connor's work caring for the children, related to the preservation of his excluded property interest: he renovated the Bellevue Property, carrying his interest in that property, in the form of the proceeds of sale, through to the Monck Park Property, which he also constructed using those funds. Furthermore, Mr. Mills' work on these properties appears to have been a driving force of the family's economic circumstances, in part because he performed the work on those properties instead of pursuing other employment. As in Healey, the question of significant unfairness is intertwined with the value attributable to excluded property, because the excluded property was related to the economic conditions of the spousal relationship, in that the parties relied upon it to finance their lifestyle: Healey at para. 79.

[146] To recap, an equal division in these circumstances would result in Ms. O'Connor being entitled to \$964,566.69 while Mr. Mills would receive a total of \$2,119,975.95, accounting for his excluded property claim. In my view, such a division would give rise to significant unfairness in the sense of "something objectively unjust, unreasonable or unfair in some important or substantial sense": Singh at para. 134. This was a lengthy marriage in which Ms. O'Connor gave up formal employment to work within the home, suffering prejudice to her own financial circumstances and earning capacity, while Mr. Mills was able to advance his chosen "employment". Since his excluded property was central to the economic circumstances of the spousal relationship, it would be significantly unfair for Ms. O'Connor to receive less than half of what Mr. Mills would receive on an equal division.

[147] While the parties have made submissions on s. 95(3) of the FLA, in my view, and accounting for this court's substituted valuation of Mr. Mills' excluded interest, it is not necessary to consider ordering an unequal division of family property under that provision. The judge suggested that, had s. 95 been (in her view) applicable, s. 95(3) would have been "very apt in this factual matrix": at para. 186. Her reasons, however, do not suggest that the objectives of spousal support under s. 161 of the FLA have not been met through her spousal support order, which is a statutory prerequisite to the application of s. 95(3). I would add that the spousal support order is not a ground of appeal in either the appeal or the cross appeal and that, in any event, a fair and reasonable result can be reached without recourse to s. 95(3).

[148] The issue then becomes how this significant unfairness should be remedied. In Healey, this court found a 65/35 reapportionment to be appropriate. Healey involved a wider disparity in what the parties would have received on an equal division (in that case, the respondent had a claim to more than \$10 million in excluded property): at paras. 70-73. However, in my view, a 65/35 apportionment is also appropriate in this case. The increase in the value of Mr. Mills' excluded property should be apportioned more generously in Ms. O'Connor's favour, to account for the centrality of the excluded property to the economic circumstances of the spousal relationship. Taking this into account, I would order a 65/35 division of family property in Ms. O'Connor's favour, resulting in the following reapportionment:

- a) \$1,253,936.69 to Ms. O'Connor; and
- b) \$675,196.68 to Mr. Mills, which, when added to his excluded property claim of \$1,155,409.26, results in a total of \$1,830,605.94.

[149] In my view, this re-apportionment addresses the significant unfairness arising from the equal division of family property I described above. Ms. O'Connor will be provided with resources that allow her a measure of financial stability and economic self-sufficiency, as well as an ability to plan for the future. This division also recognizes the significant role that the Bellevue and Monck Park Properties played in maintaining the marital standard of living. On a 65/35 division of family property, Mr. Mills is left with his significant excluded property, and his career potential, which the judge found would result in an annual imputed income of \$100,000. In my view, he should have no difficulty maintaining an equal, if not superior, standard of living to Ms. O'Connor's.

Issue #2: Retroactive Child Support

The Trial Reasons

[150] The judge briefly addressed the issue of retroactive child support towards the end of her reasons for judgment. She found that Mr. Mills had made sporadic and discretionary payments of support between 2015 and 2019, as well as some direct payments to K thereafter. The judge found that these direct payments were "not very substantial in all the circumstances, apart from a payment of some approximately \$7,000 that came from the

insurance proceeds from the Monck Park Property fire which were directly attributable to [K's] personal belongings and thus do not constitute support": at para. 248.

[151] The judge considered and applied the factors set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37. In respect of the D.B.S. factors, the trial judge found, at para. 253, that:

- a) Mr. Mills was on notice that there was a child support claim in respect of K, but that Ms. O'Connor took no steps to advance the issue on an interim basis;
- b) Mr. Mills' decision to unilaterally terminate support shortly after Ms. O'Connor filed her notice of claim was blameworthy conduct, particularly in light of the evidence that Mr. Mills was making voluntary monthly payments to his new romantic partner;
- c) K's circumstances during the period for which retroactive support was sought were "comfortable" and that K had graduated university and "achieved economic self-sufficiency at a young age"; and
- d) The retroactive award sought was modest and would not cause hardship to Mr. Mills.

[152] On the basis of the record before her, the trial judge ordered retroactive support in the amount of \$10,000. She acknowledged that the amount was "somewhat arbitrary" and accounted for a number of factors, including special and extraordinary expenses under s. 7 of the Guidelines: at para. 255. She noted that the arbitrariness of this award was "somewhat inevitable given the documentary record and the need to reconcile the net disposable incomes of the parties at the material time without the benefit" of any interim order: at para. 255.

The Parties' Positions

[153] Both parties agree that the judge made an error of fact when she found that the \$7,000 payment from Mr. Mills to K from the insurance proceeds was attributable to personal belongings and not rent. Both Mr. Mills and K confirmed that in June 2021, Mr. Mills paid K approximately \$7,700, \$7,000 being for rent when she was staying with her mother and approximately \$700 relating to the personal belongings she lost in the fire.

[154] Mr. Mills' position is that the judge erred in not taking the \$7,000 into account in making the retroactive child support award of \$10,000. Ms. O'Connor argues that Mr. Mills did not establish that the amount was paid for a time frame when K was still a child of the marriage. She takes the position that the payment was voluntary. In any event, she submits that the judge made a global retroactive award based on a consideration of the D.B.S. factors she identified, and says that Mr. Mills has not established that the judge made any reviewable error in doing so.

Analysis

[155] It is clear on the evidence that the judge made a palpable error regarding the payment to K: only an additional payment of \$700, rather than \$7,000, related to the personal belongings that K lost in the fire. The issue, however, is whether this error was an overriding one, that is, whether it was determinative of the outcome such that the decision cannot stand without it: *Salomon* at para. 33; *Benhaim v. St-Germain*, 2016 SCC 48 at paras. 38-39.

[156] At trial, Ms. O'Connor gave the following evidence on this point:

Q Okay. And so, Ms. O'Connor, did [K] pay you rent at any point during that time she was living with you?

A After she graduated, yes.

Q And when was that, again?

A In -- she graduated in May or June of '21.

Q 2021?

A 2021. Yes.

Q Okay. So prior to that, did she pay you rent?

A She paid -- yeah. She tried to pay a little bit of rent at some point.

Q Okay.

A Prior to that, I think her dad sent her some -- oh, yeah. Absolutely, actually. When they got the money -- and I don't - I'm sorry. I can't remember the dates. When all the children got the money from their portion of the stuff up at Nicola Lake, the insurance, Mike included \$7,000 into [K's] portion for money that she was supposed to pay her. He said he'd pay her for seven months or something.

Q How do you know about that?

A She told me.

Q Okay. And did you say that she paid you rent?

A And she -- well, she gave me the \$7,000 at that point.

[157] Before this court, counsel for Mr. Mills relied on the evidence given by K on this point, in response to questions about what support payments she had received from Mr. Mills:

Q Okay. Okay. And then you said that you didn't move out until a year after you graduated?

A Yes.

Q Were you paying rent at any point during that period?

A Yeah. I was giving \$1,000 to my mom each month that my dad had transferred me.

Q Okay. When did that start?

A That started - the first payment that I got from my dad to pay that was in January of 2021, I believe, but they were to cover kind of - oh, wait. Sorry. I paid the thousand dollars a month for rent from my dad while I was still in school, and then after I graduated, I paid my mom rent up until I moved out.

Q When did you receive the payment from your dad that you just mentioned?

A There were a few payments in January of 2021 and then June of 2021

Q And what were the amounts that he sent you?

A There was one for 3,000 which was the January one and then the 7,000 in June.

Q Did you have any discussion with your - what was your understanding of what your dad's intention was for those payments?

A I was just told, I think from, my mom that it was agreed upon that he was paying rent during that time.

Q He was paying rent?

A He was paying me money to pay for rent.

[158] It is not in dispute that K graduated from her post-secondary studies in May 2021, commenced working in June 2021, and that Mr. Mills' obligation to pay child support ended at the end of May 2021.

[159] K continued to reside with her mother after June 2021 and I am not satisfied, on the evidentiary record, that Mr. Mills has established that the \$7,000 payment for "rent" made in June 2021 was for the time frame prior to May 31, 2021. On the basis of K's evidence excerpted above, relied upon by Mr. Mills, it seems more likely that, as Ms. O'Connor suggests, the \$7,000 was a voluntary payment made by Mr. Mills to assist his daughter for the months after she started working in June 2021, when he no longer owed support obligations but K was nonetheless still residing with her mother and paying rent.

[160] It is also important to note that the \$7,000 payment came from the insurance proceeds which, as I have already discussed, related largely to family property. Mr. Mills has not established that the amount in question was his property, which he then used to pay K in satisfaction of his obligation to pay retroactive child support, rather than family property; in my view, Mr. Mills cannot claim credit for support he 'provided' using funds belonging, in part, to Ms. O'Connor.

[161] Accordingly, I conclude that the judge's error, while palpable, was not overriding. Although she was clearly wrong that the \$7,000 was attributable to K's personal belongings destroyed in the fire, it is far from clear that these amounts should properly have been credited to Mr.

Mills as child support payments. The onus was on Mr. Mills to establish a reviewable error on the part of the trial judge, and he has not done so. The judge acknowledged that the retroactive award of \$10,000 was "somewhat arbitrary" by necessity, and was responsive to the D.B.S. factors as she found them. This kind of discretionary accounting is owed particular deference in the family law context, where records can be sparse and clear answers elusive: Hickey at para. 12. The trial judge's palpable mischaracterization of the nature of the \$7,000 payment to K was not an overriding factor in her decision. I would dismiss this ground of appeal.

Remaining Issues

Post-Trial Interest

[162] In her supplementary reasons, the judge made an order that any post-trial interest on the Trust Funds be divided 65/35 in Mr. Mills' favour, to reflect her order regarding the reapportionment of the excluded property. I have ordered that Mr. Mills is entitled to \$1,830,605.94 of the total \$3,084,542.63 of family property available for division as of the time of trial, while Ms. O'Connor is entitled to \$1,253,936.69. As proportions of the overall total, this amounts to approximately a 60/40 apportionment in Mr. Mills' favour, I would therefore vary the trial order to provide that post-trial interest be apportioned 60/40 in Mr. Mills' favour.

Pre-Trial Disbursements, RRSP, and CRA Advance

[163] The judge accounted for several pre-trial transactions in calculating the amount of the payment to be made by Mr. Mills to Ms. O'Connor to give effect to the division of property she ordered. In light of my different conclusions on Ms. O'Connor's entitlement, these numbers must be adjusted.

[164] An interim distribution of \$640,000 was made from the Trust Funds before trial, divided equally between the parties. Thus Ms. O'Connor has already received \$320,000, which must be credited towards her total entitlement. The judge also accounted for the proceeds of the sale of the bare Monck Property land, but this flowed from her error in not recognizing the total amount of family property to be divided; as such, the value of Ms. O'Connor's entitlement to the proceeds of sale from the land is already part of her total entitlement as accounted for above.

[165] Mr. Mills received interim distributions to pay a CRA judgment in the amount of \$26,359.67 and outstanding income taxes of \$165,424.91, totalling \$191,784.58. This sum does not need to be accounted for in calculating the payment to Ms. O'Connor, as the deficit resulting from this interim distribution will lie with Mr. Mills, where it belongs, once Ms. O'Connor's payment is made and he retains the balance of the Trust Funds.

- [166] However, as Ms. O'Connor concedes, we must account for Mr. Mills' entitlement to 35% of the after-tax value of the RRSP disposed of by her before trial. The after-tax value, as found by the trial judge, was \$22,030.50, of which 35% is \$7,710.68. This must be subtracted from the payment owed to Ms. O'Connor from the Trust Funds, to compensate Mr. Mills for its value.
- [167] In summary, as reflected in the new terms of the varied trial order below, Ms. O'Connor should receive a payment of \$926,226, being her total entitlement of \$1,253,936.69 less the \$320,000 she has already received and less the \$7,710.68 owing to Mr. Mills on account of the RRSP whose value she retained.
- [168] This entitlement represents a \$152,381.87 increase as compared to what Ms. O'Connor would have received under the terms of paragraph 7 of the trial order (representing an approximately twenty percent increase over the original \$773,844.14). However, it is difficult to assess the 'true' increase in Ms. O'Connor's entitlement due to an additional issue that arises out of the manner in which the judge appears to have arrived at her original amount of \$773,844.14. In her reasons, the judge found no family property outside the Trust Funds to divide. However, in her order she accounted for pre-trial disbursements made to the parties, which disbursements were made using funds this court has now identified as family property. As can be discerned from the trial order, in the course of determining the sum Mr. Mills was to pay Ms. O'Connor, the judge accounted for a \$96,000 "adjustment" to Ms. O'Connor's pre-trial interim distribution, reducing it from its actual amount of \$320,000 to a notional \$224,000, which she observed represented 35% of the total pre-trial interim distribution of \$640,000.
- [169] In effect, this represents an unacknowledged determination, without analysis or reasons, to divide family property in the same 65/35 apportionment in Mr. Mills' favour that the judge used to divide what she found to be Mr. Mills' excluded property. The judge's order to "adjust" Ms. O'Connor's pre-trial interim distribution could only have been made under the authority of s. 95 of the FLA, because its effect was to divide family property unequally--and in Mr. Mills' favour, despite the court's determination, under s. 96, that unequal division of Mr. Mills' excluded property was necessary to avoid significant unfairness to Ms. O'Connor.
- [170] This final adjustment, made essentially without explanation in the terms of her order, compounds the fundamental error identified by both parties and addressed above: the judge failed to appreciate and address the whole extent of family property available for division. The judge seems to have treated the pre-trial distribution as an extension of Mr. Mills' exclusion, despite there being no basis in law, the facts, or on her own reasoning, to have done so. It is accordingly difficult, and of minimal utility, to contrast this court's varied final order to that of the judge.

The Trial Order

[171] In accordance with these reasons, I would vary paras. 5, 6, 7 and 10 of the trial order as follows:

Property Division

5. Pursuant to s. 85 of the Family Law Act, \$1,155,409.26 of the total family property identified at para. 57 of these reasons for judgment is Mr. Mills' excluded property.
6. Pursuant to s. 95 of the Family Law Act, the balance of the family property, subtracting Mr. Mills' excluded property, will be divided 65% in favour of Ms. O'Connor and 35% in favour of Mr. Mills.
7. Mr. Mills will pay Ms. O'Connor the amount of \$926,226, being her 65% share of the family property available for apportionment, accounting for Mr. Mills' excluded portion, the pre-trial distribution to Ms. O'Connor of \$320,000, and Mr. Mills' 35% entitlement to the after-tax value of the RRSP withdrawn by Ms. O'Connor prior to trial. Thereafter, the remainder will be the sole property of Mr. Mills in satisfaction of his claim to excluded property and his 35% share of family property.

Implementation and dismissals

10. Mr. Mills will pay to Ms. O'Connor:
 - (a) the retroactive child support award of \$10,000 provided for at paragraph 3 of this order;
 - (b) the lump sum retroactive and prospective spousal support award of \$92,000 provided for at paragraph 4 of this order;
 - (c) the sum of \$926,226 provided for at paragraph 7 of this order.

Disposition

[172] I would allow the appeal and the cross appeal to the limited extent required to give effect to these reasons.

[173] I would vary the trial order as provided above.

[174] In my view, Ms. O'Connor has achieved substantial success on this appeal. With respect to the division of family property, she will receive more out of the Trust Funds (\$152,381.87, plus post-trial interest) than would have been the case under the trial order. I would also note that she has succeeded in her cross appeal of the judge's valuation of Mr. Mills' excluded property claim and has successfully responded to each ground of appeal raised by Mr. Mills. In contrast, Mr. Mills' success on this appeal is limited to the issue that the judge erred in identifying family property, which was agreed to by Ms. O'Connor.

[175] Accordingly, I would award Ms. O'Connor her costs in this court.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Grauer"

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