

CANADA / JUDGMENT

N.R. v. N.P.

2018 BCSC 2318

COURT

Supreme Court of British Columbia

DECIDED

28 December 2018

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2018 BCSC 2318 N.R. v. N.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.R. v. N.P.,

2018 BCSC 2318

Date: 20181228

Docket: E046535

Registry: New Westminster

Between:

N.R. also known as N.S.A.R.

Claimant

And

N.P. also known as N.K.P., H.K.P. and R.S.P. also known as R.P.

Respondent

And

D.S.R.

Respondent by way of Counterclaim

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

The Claimant appearing on his own behalf:

N.R.

Counsel for the Respondent, N.P.:

K. Groves

The Respondent appearing
on his own behalf:

D.S.R.

Place and Date of Trial:

New Westminster, B.C.

June 4-8, 11-15, 18-22, 2018

Vancouver, B.C.

July 3, 2018

Place and Date of Judgment:

New Westminster, B.C.

December 28, 2018

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Introduction

- [1] The claimant, NR, and the respondent, NP, are the parents of ten-year-old JN and nine-year-old JS. Married on June 17, 2007, the parties separated in May 2014. Since then, the children have been residing with Mr. R and Ms. P's parenting time has been supervised. In a s. 211 report, dated March 16, 2018, psychologist Robert Colby recommended continued supervision along with therapeutic interventions directed at stabilizing Ms. P emotionally and psychologically, and addressing concerns about her parenting. Although the parties accept Mr. Colby's recommendations, their allegations about family violence occupied a significant amount of time at the trial. Mr. R alleges that Ms. P was volatile, threatening and sometimes abusive throughout the marriage. Denying many but not all of his allegations, Ms. P characterized herself as the victim in the marriage.

- [2] The main legal issues include child support, spousal support, and perhaps most significantly, the division of family property and debt. Mr. R asserts a modest excluded property claim. Each party accuses the other of some misuse of family funds. Mr. R also alleges Ms. P is hiding assets and income. In June 2016, she purchased the former family home for \$1,400,000 although she is dependent on disability benefits. Both parties seek an unequal division of family property and debt, focused on the remaining sale proceeds.

Background

- [3] I wish to comment firstly on medical records of Ms. P that form part of documentary evidence in this case. For the most part, the records arise from mental health treatment she received and applications for disability benefits from Great West Life ("GWL") and the Canada Pension Plan ("CPP"). Recognizing their content could not be more personal, to protect Ms. P's privacy and the best interests of the children, I have granted an order requiring the parties and the children to be identified in these reasons by their initials only. Below I discuss the evidentiary use of Ms. P's medical records. I say at this point, the opinions they contain have not been admitted for their truth, but the observations of the physicians and medical professionals who prepared them have been along with statements attributed to Ms. P pursuant to the *Ares v. Venner*, [1970] S.C.R. 608 and admissions exceptions to the hearsay rule.

The Parties' Circumstances before Marriage

- [4] Mr. R, now 41, was born in Punjab, India. He is the youngest of three children. In 1996, after his older sister had immigrated to Canada, he and the rest of the family moved here. Mr. R completed grade 12 at an adult high school program in Vancouver. He attended Douglas College and then Simon Fraser University, while working at two jobs. In 2006, Mr. R graduated with an arts degree in criminology and psychology. He began working on call in the security department of the BC Liquor Distribution Branch. Within a few months he had a full-time position there.
- [5] Many years earlier, in 1999, his family bought a house in Vancouver for \$261,000. All three siblings were registered on title. Mr. R's sister paid the down payment with \$25,000 from an RRSP. A mortgage was obtained from VanCity. In that same year, she re-married and moved to Ontario. With proceeds from a line of credit secured the Vancouver house in 2006, the family purchased another house in Surrey. Mr. R and his brother were the registered owners. At the same time, his sister was removed from title on the Vancouver house. Its "declared value" on June 2, 2006 was \$390,600. The family moved to the Surrey house and began renting out the Vancouver house.

- [6] Ms. P, now 43 years old, was born in Vancouver and is the second of three children. Her brother, RP, also a respondent in this proceeding, is four years younger. Both parties characterized Ms. P's upbringing as religious and strict. Her childhood was marred by significant trauma. Her father was an alcoholic who physically and emotionally abused her and her mother. Her mother and her older sister also abused Ms. P. She was sexually abused by a family member.
- [7] After high school, Ms. P completed some post-secondary education in accounting.
- [8] Ms. P described several terrible experiences involving her own family members and R's family that occurred before and after the marriage that left her feeling rejected, ashamed, humiliated and or coerced. For example, she recalled a cousin announcing deeply personal information about her to a crowd present at a prayer event. In response, Ms. P physically attacked her cousin, worsening the embarrassment for her and her family. Throughout her evidence, Ms. P spoke passionately about the negative impact of what she identified as traditional cultural norms regarding women within her family, Mr. R's family and the local Indian community.
- [9] Ms. P's testimony and her medical records indicate she struggled emotionally and psychologically as a young adult. Ms. P was treated for depression and anxiety in 2001 and 2003. In 2003, she took a stress leave from her job and was referred to a psychiatric day program by her long time family physician Dr. Collette. Psychiatrist Dr. Bostinariu also treated Ms. P before she returned to work in or about 2006. In December 2004, Dr. Bostinariu reported to Dr. Collette that Ms. P was avoiding interactions with her family and was generally hopeless and helpless. Ms. P felt suicidal, rated her mood as very depressed, and her affect appeared extremely constricted. Dr. Bostinariu provided a working diagnosis of major depressive disorder, "rule out PTSD secondary to childhood physical and sexual abuse", and anxious and dependent personality traits, writing:

Ms. P grew up feeling unwanted, rejected and fearful of her father's violent behaviour. She had no nurturance from her siblings or parents. She was constantly criticized by the whole family and she develop a low sense of self during these adversities. She defined herself according to cultural norms (physical attributes, intellectual achievements, marital status). Unfortunately she could not meet the standards. She became progressively more depressed and anxious as she advanced in age. She has no skills to cope with difficulties (interpersonal or internal conflicts).

- [10] Ms. P denied none of this but emphasized that she had recovered and was very successful at work before she met Mr. R.
- [11] From early on, Ms. P was focused on financial matters, including investing, typically along with family members. In April 2006, Ms. P entered into a contract to purchase a condominium unit before construction or presale for \$335,000, paying two deposits of \$33,500 with \$61,000 of her own funds and her parents providing the balance (the "Woodward's Condo").

After the Marriage

- [12] The parties met in September 2006, through a matrimonial advertisement placed in a local Indian newspaper.
- [13] They married about nine months later. Ms. P was employed full-time as a project accountant at a private firm. She moved into the Surrey house where the respondent was living with his parents, his brother and his brother's family.

Financial Circumstances

- [14] After the marriage, it was decided Mr. R's brother would own the Surrey house and the parties and Mr. R's father would own the Vancouver house. The parties along with Mr. R's parents moved to the Vancouver house. His brother paid him \$35,000 to equalize the arrangement, which the parties spent on renovations to the Vancouver house. Mr. R was removed from title to the Surrey House and his brother was removed from title to the Vancouver House. In January 2008, when Ms. P and Mr. R's father were registered on title, it had a declared value of \$550,000.
- [15] On August 5, 2009, the parties refinanced with the Royal Bank. A mortgage of \$550,000 was registered against the Vancouver house. Two VanCity mortgages of \$144,581.32 and \$232,283.65 were discharged, resulting in prepayment penalties of approximately \$9178.
- [16] In that same month, the parties completed the purchase of the Woodward's Condo. Both were registered on title and the unit was rented.
- [17] In September 2009, the Vancouver house sold for \$590,000. The total amount owing on the Royal Bank mortgage was \$463,856.45. In November 2009, the parties purchased the former family home in Burnaby for \$625,000. The claimant's father was not registered on title.
- [18] In October 2010, Ms. P purchased another condominium unit in Vancouver for \$273,322, paying a deposit of \$34,165 and obtaining a mortgage from the Bank of Montreal for the balance of \$229,590.48 (the "Union Street Condo"). The Union Street Condo was also rented. After it sold in April 2011, net proceeds of \$103,115.49 were deposited into the parties' joint account. Both testified that most of that amount was loaned to Ms. P's brother, Mr. P, because he had lost a lot of money in the stock market.
- [19] A statement for a BMO Investor account held by Ms. P dated October 26, 2011, shows a balance of \$135,411, which was realized from the sale of securities. Mr. R testified he had no idea what happened to those funds. He also said he had no knowledge of a TD Margins Account belonging to Ms. P. A statement showed a balance of \$28,524.63 on July 16, 2011. Ms. P gave no evidence regarding the funds or either account.

- [20] In April 2012, the parties sold the Woodward's Condo for \$416,000. The payout amounts on the CIBC mortgage and a line of credit were \$276,900.26 and approximately \$67,000, respectively. Ms. P testified to providing the net sale proceeds, approximately \$72,000, to Mr. P.
- [21] The parties also provided Mr. P with significant additional funds in relation to a large parcel of farmland and a subdivision he was developing in Saskatchewan.
- [22] After failing to repay them, on March 31, 2014, Mr. P signed two promissory notes, part of which are difficult to understand. In the first promissory note, however, Mr. P clearly acknowledged receiving \$345,000 from the parties "over the last three years as a personal loan to develop property in Saskatchewan and to recover from losses suffered during the stock market crash in 2011". He promised to pay them \$175,000 on or before December 8, 2014 and acknowledged they were the "rightful" owners of the "farmland" in Saskatchewan which they purchased for \$169,555 that was "legally" under his name. Further, Mr. P promised to transfer clear title on the mortgage renewal date or earlier if the parties agreed to pay the mortgage penalty, forward any rents received and pay all taxes, so long as he held the property. Mr. R testified to subsequently receiving only one rent payment.
- [23] In the second promissory note, Mr. P acknowledged receiving \$300,000 from the parties. Confusingly, those funds are also described as "profit for the lenders for lending the borrower money". Mr. P identified the parties as the "rightful" owners of three sub-divided lots in the Regal Valley sub-division in Durndurn, Saskatchewan to be given "one in each of three phases, and the Lender will pay appropriate costs per lot as per there (sic) share of lot". Other terms include: Mr. P agreed to reimburse the parties by deducting \$100,000 from the total sum owed by them from the profits" and the parties agree to deduct \$200,000 for sub-dividing the farmland from the total sum owed by Mr. P.

Personal Circumstances

- [24] JN was born on February 23, 2008. Sadly, Mr. R's mother suffered a serious heart attack about two days later and never recovered. She died in April 2008. Mr. R had been particularly close to her. The parties separated around that time, reconciling in or the end of 2008.
- [25] Ms. P returned to work following her maternal leave.
- [26] In 2009, Mr. R received a promotion at work and spent one year as an investigator. In August 2010, he found a new job with the security program division of the Ministry of Public Safety and Solicitor General. He continues to work there as a compliance and enforcement investigator.
- [27] After the birth of JS on November 25, 2009, Ms. P was diagnosed with post-partum depression. In or about late 2010, she began to receive disability benefits through GWL. She has not returned to work since then.

- [28] D. Bostinariu treated Ms. P again. She attended regular appointments and medication was prescribed. Ms. P also participated in other counselling sessions and an occupational therapy assessment. Consistent with Mr. R's evidence, the occupational assessment report dated Feb 25, 2011, indicates Ms. P reported Mr. R and her mother were managing all of the meals and housework. She said that before her depression, she and Mr. R shared most of the housework.
- [29] In November 2011, Ms. P applied for CPP Disability Benefits with the support of Dr. Collette. In his opinion, she was unemployable at that stage. In the application, he provided a diagnosis of major depressive disorder, PTSD secondary to childhood abuse, and "post-partum". He also identified anxious and dependant personality traits. Asked to describe physical findings and Ms. P's functional limitations, he wrote her depressive symptoms, anxiety and panic attacks were worsening, obsessive thoughts and insomnia were increasing, and she was unable to care for a child.
- [30] In a reporting letter to Dr. Collette dated July 8, 2011, Dr. Bostinariu provided a similar working diagnosis that included chronic depression resistant to treatment; PTSD; and self-defeating personality traits. Dr. Bostinariu, too, expressed the view Ms. P was not able to work then or in the near future. She noted Ms. P's activities of daily living were minimal, restricted by lack of energy, low self-esteem and fears of being alone in public. Dr. Bostinariu advised the plan was to work on child management issues that would include referring her to parenting classes involving the children.
- [31] In September 2011, during a psychiatric assessment completed by Dr. Simi Kang for GWL, Ms. P described many ongoing symptoms including daily feelings of depression, very poor sleep, low energy, concentration problems, panic attacks, excessive worry, regular thoughts that she would be better off dead, and, on occasion, visual hallucinations. Regarding the children, she indicated her bonding was much better with JN and "not good" with JS, stating overall that she did not feel bonded to him. She also described being dependent on Mr. R and her mother to complete all of the housework and cooking and not participating very much in childcare, again stating Mr. R and mother did most of it. Dr. Kang assessed Ms. P as experiencing moderate to severe depression.
- [32] In February 2012, Dr. Bostinariu advised Dr. Collette that Ms. P's situation was very complicated and challenging. Dr. Bostinariu reported their sessions had focused on anger, conflict resolution and relationships. Dr. Bostinariu stated Ms. P had struggled for many years to have decent relationships with her entire family, writing: "[N] has hard time letting go of the past and is resentful, vengeful and impulsive. She cannot see her outbursts as inappropriate and continues to put herself in conflictual situations and sees herself as a victim of people and circumstances". Dr. Bostinariu also wrote that Ms. P was arguing with Mr. R regularly, instigating the fights herself, had mood swings daily, even hourly, depending on her stress, and although she had gained some insights into her role in the conflicts, she remained unable to refrain from reacting intensely.

- [33] At the same time, Dr. Bostinariu indicated Ms. P had improved. She was no longer suicidal or severely depressed, and was functioning better. In particular she was able to attend appointments alone and cook and clean at home.
- [34] On December 1, 2012, the parties and the children were involved in a motor vehicle accident. Mr. R was driving and Ms. P was a passenger in the front seat. She testified that her injuries have resulted in ongoing excruciating pain and she is unable to enjoy life "like a normal person". Medical records confirm her evidence and she has been diagnosed with chronic regional pain syndrome, which she said involves pain in various areas of her body and migraine headaches. She also said she has fibromyalgia. According to Ms. P, she cannot use her right hand, let her right arm dangle, drive with her right arm, hold a bag, or use a computer for any length of time. Ms. P described receiving several treatments, including injections, which have not been effective in resolving the pain. More recently, she was involved in another accident that she indicated was not her fault.
- [35] In a letter dated September 10, 2013, Dr. Bostinariu described Ms. P's depression as in full remission as of January 2013. The letter closed with "I fully support her attempt to return to school and finish her degree". Around this time, Ms. P began completing CGA courses. Documents indicate she had been attempting to complete the program for many years and had appealed decisions made along the way that would not have allowed her to continue. Ms. P testified that she was attending UBC and writing exams in 2015. In cross-examination, she acknowledged losing her accounting designation because she had not worked for so long, but also said she is appealing the decision.
- [36] In December 2013, Ms. P applied for a disability tax credit certificate. At odds with the view expressed by Dr. Bostinariu, Dr. Collette wrote that she was impaired by "severe depression (on anti-depressants, receiving extensive psychotherapy and vocational rehab)". He also stated that her mood, concentration, focus, and memory had deteriorated, and anxiety, panic, feelings of being overwhelmed, and tearfulness had increased. He answered yes to the question "has your patient's impairment lasted, or is it expected to continue to last, for a continuous period of at least 12 months", and unsure to the question "has the impairment improved, or is it likely to improve, to such an extent that the patient would no longer be markedly restricted?"
- [37] It is unclear whether Ms. P has continued to receive disability benefits due to her mental health issues or her physical condition. On April 28, 2016, Dr. Collette responded to a request for information from GWL regarding her physical condition. In addition to setting out a diagnosis of chronic regional pain syndrome of the right upper limb, he identified her symptoms as severe right neck and arm pain; severe cold intolerance, discoloration, right arm and wrist hyper parasthesia, myofascial pain, and increased anxiety. Dr. Collette advised Ms. P was able to perform daily activities with much difficulty and she was unable to focus on any work duties due to pain. He described Ms. P's response to various medical treatments for pain as very minimal and her prognosis as very guarded.

Family Violence Shortly Before Separation

- [38] Mr. R alleges that on or about April 4, 2014, Ms. P was threatening and abusive toward JN. A video recording he made confirms the allegation. Mr. R said he began recording the incident after she tried to hit JN with a cooking stick. The video shows Ms. P speaking loudly, if not shouting, at JN who begins to cry inconsolably. Mr. R intervenes. Ms. P raises her hand as if to strike JN. She appears very angry. The parties and JN speak to one another mostly in Punjabi. A transcript shows she threatens JN with a severe beating twice, stating, "I will give you a severe beating if you talk too much". She is apparently upset about his behaviour at her parents' home the day before. Mr. R discusses what happened with JN calmly and gently. Ms. P remains agitated and aggressive. She again threatens to hit JN and raises her hand. She also states "I have one son", naming JS and then "I am going to get a new son". Within seconds, she shifts to, "did anyone touch your thingy" which she asks twice. Throughout the incident, Ms. P also berates Mr. R, blaming him for JN's behaviour: "You snap at me in his presence J told me this has spoiled your son". When Mr. R asks her, "Who has been yelling in his presence for the last four or five years", she suggests both of them but then acknowledges it has been her.
- [39] Another video recording made by Mr. R confirms that on May 4, 2014, Ms. P attacked Mr. R with a cricket bat in the former family home. Fortunately the children were not present at the time. The recording begins with Ms. P speaking angrily in Punjabi. Ms. P pushes Mr. R, backing him into a corner. She hits him repeatedly with the bat. Ms. P testified Mr. R was abusive to her off camera, swearing at her and her mother and telling them to beg on the street (because of Mr. P's debts). She insisted that a transcript, which was obtained later, would confirm this. It did not. Instead the transcript is consistent with Mr. R's version of events. He testified she was the one swearing at him and with reference to her mother.
- [40] On May 19, 2014, Mr. R reported the assault to police. Ms. P was away at the time in Saskatchewan pursuing matters involving Mr. P. She was arrested the following day when she arrived at Vancouver airport and charged with assault with a weapon. Ultimately, the charge was resolved by way of alternative measures, with Ms. P acknowledging responsibility for the incident.
- [41] At one point after the separation, Ms. P stayed in a women's shelter briefly. Mostly, she lived with her parents, Mr. P, and his wife at her parents' home. In addition to attending appointments with a series of treating psychiatrists, she participated in other supportive services. She attended Battered Women's Support Services, and still does, grief counselling for parents in 2015, an anger and stress management parenting course, a positive parenting course in 2015, and, more recently, STEP, another parenting course. Ms. P also described being an active member of Co-dependents Anonymous for the past year.

Legal Proceedings

- [42] On May 28, 2014, Mr. R filed his original notice of family claim, naming Ms. P as the only respondent. In her original counterclaim, Ms. P brought a claim against Mr. R's father seeking orders for the return of "monies" he was holding for her, a trust claim, and an alternative claim for restitution or damages based on quantum meruit or unjust enrichment, none of which she pursued. In his first amended notice of family claim, Mr. R added Ms. P's mother and Mr. P as respondents and brought property claims against both of them, including claims to an interest in the Saskatchewan farmland and three subdivided lots, trust claims, and alternative claims again based on quantum meruit or unjust enrichment.
- [43] The day before this proceeding commenced, Ms. P sought parenting time in Provincial Court. Two interim supervised parenting time orders were made. The second, granted by consent on June 3, 2014, provided her with parenting time on Thursdays from 3:30 p.m. to 7:30 p.m. and Saturdays from 10 a.m. to 7 p.m., supervised by one of four named persons.
- [44] Mr. R alleges Ms. P breached the second order, by being unsupervised with the children more than once, and also missing quite a bit of the parenting time available to her.
- [45] At a judicial case conference on November 25, 2014, the parties consented to an order that provided Ms. P with visits on Saturdays from 4:00 p.m. to 6:30 p.m. or as agreed between the supervisors and Mr. R, as well as Christmas and New Year's Day. The supervisors were required to sign an acknowledgement of responsibilities prior to visits.
- [46] On November 28, 2014, Mr. R provided a draft acknowledgement obtained from a supervision agency. The terms included acknowledging the visits would only occur in public places and that neglect resulting in harm to the children during visits would lead to criminal and civil liability. On December 10, 2014, Ms. P advised none of the potential supervisors were willing to sign the acknowledgement and she would be using West Coast Family Centres ("West Coast") instead. Although she later cancelled their supervision service on more than one occasion, all of her supervised visits have occurred at one of their centres.
- [47] Prior to the trial, there were many applications and several orders made on a range of issues some of which have not been entered.
- [48] Two short protection orders were made against Ms. P, the second by consent, on February 26, 2015 and March 18, 2015.
- [49] Ms. P made several applications for unsupervised parenting time and production of a s. 211 report. On December 2, 2015, one such application was adjourned by consent pending a report from Dr. Bostinariu "as to the physical and mental condition of Ms. [P], and her ability to parent the children safely". Ms. P renewed the application and on December 29, 2015, a further consent order was granted that included:

If Dr. Bostinariu provides a letter that complies with the terms of the Order made December 5, 2015, stating there are no issues with (Ms.) [P's] parenting ability, there will immediately be unsupervised parenting granted and that parenting time will gradually be increased by agreement with the goal there will be 50/50 parenting time".

[50] Justice Riley later observed the clerk's notes for the order began with: "If [Ms. P's treating psychiatrist] ".

[51] On January 14, 2016, Ms. P provided Mr. R with a letter from Dr. Bostinariu dated November 3, 2014 that read:

I have seen Ms. [P] for issues related to post-partum depression since 2011. She brought the children on several occasions.

She has never appeared violent or inappropriate in her interaction with me. I observed her interacting with her children when she brought them to my office.

She was appropriate and gentle with both kids and managed them well. Her kids were polite and obedient. I never had concerns about the way she treated or disciplined them.

[52] As it turns out, Ms. P had ended her involvement with Dr. Bostinariu in December 2014. In other words Dr. Bostinariu was not Ms. P's treating psychiatrist when the December 29, 2015, order was made.

[53] On February 3, 2016, Ms. P provided another letter dated January 31, 2016, prepared by Dr. Szeming Yuen a psychiatrist who treated her after Dr. Bostinariu. He wrote:

I have been seeing Ms. [P] since March 2015 at fortnightly intervals to help her deal with the stress secondary to divorce and sorrow generated from the temporary loss of her young children. Based on the information I have obtained and her mental status since her first visit, I have no reason whatsoever to feel concerned about her abilities to provide adequate affection, guidance, and protection towards her children.

[54] Mr. R took the position the prerequisites for unsupervised access in the December 29, 2015, were not fulfilled.

[55] Other orders were made regarding child support and the former family home.

[56] On December 29, 2015, an appraisal of the former family home was ordered, Ms. P was provided with 30 days following receipt of the appraisal to make a binding sales agreement, otherwise Mr. R was granted sole conduct of sale. The order also required 25% of the net proceeds of sale to be paid to each party in the event, Ms. P purchased the former family home.

[57] Mr. R obtained an appraisal dated December 31, 2015, that concluded its market value was \$1,280,000.

- [58] On January 29, 2016, Master Caldwell varied the December 29, 2015, order and provided Ms. P with 30 days from date Mr. R released the appraisal to make an offer to purchase. He also made child support order commencing June 2014. Based on an imputed income of \$35,000 for Ms. P, she was required to pay \$539 per month. Arrears of child support were fixed at \$10,780, which she was ordered to pay at the rate of \$250 per month. Imputing an income at \$61,230 to Mr. R, the parties' proportionate share of s. 7 expenses was specified at 64% and 36%, respectively. The order identified dental expenses, daycare, the Khalsa School as included expenses and school uniforms and tutoring as not. Mr. R was granted leave to make further submissions on this issue at trial.
- [59] Ms. P was also required to provide Mr. R with a copy of her income tax returns and all attachments by no later than June 1 each year along with the notice of assessment or reassessment, in addition to "full and honest disclosure" of her financial information including but not limited to her mortgage application to "Verico Mortgage Group wherein she was pre-approved for \$1,092,667 mortgage amount", bank statements, long term disability benefit statements, investment accounts, mutual fund account statements, RRSPs, and income tax documents from the time of separation.
- [60] Master Caldwell's reasons for judgment indicate Ms. P's imputed income of \$35,000 was suggested by her counsel as a grossed up amount given that a significant amount of her disability income was tax-free. Further, Master Caldwell actually approved specific s. 7 expenses Mr. R had already incurred including \$1,800 in daycare expenses, tuition for the Khalsa School, and various dental care costs.
- [61] On February 24, 2015, Ms. P sent Mr. R an offer to purchase the former family home for the appraised value of \$1,280,000 with a completion date of March 5, 2015. He responded the next day seeking some changes such as postponing the completion date to the end of March or April 1, 2015 and \$5,000 for the household contents.
- [62] On March 4, 2016 Mr. R sent an addendum to the contract of purchase and sale that increased the purchase price to \$1,310,000.
- [63] Both parties made further applications regarding the former family home. On May 10, 2016, Master Caldwell set a deadline of May 27, 2016, for them to reach an agreement about buying out the interest of the other. If not, the former family home was to be sold with the parties sharing joint conduct of sale.
- [64] The parties signed a contract of purchase and sale on the day of the deadline. The purchase price was \$1,400,000. Ms. P qualified for a mortgage of \$960,000 from Gulf and Fraser Fisherman's Credit Union, which involves monthly payments of \$3,956.51. Her application described her gross income as \$16,153.92 from Great West Life Permanent Disability Benefits but also listed "\$14,485.08; CPP Disability: \$8,849.88; CPP Children \$5,635.2". In a list of her assets she included the former family home and its whole value, \$150,000 held in a RBC chequing account and a RBC RRSP of \$5,000. Ms. P testified to making the purchase with loans of \$150,000 from her parents and \$75,000 from her friend CJ.

- [65] Ms. P paid out the parties RBC line of credit which had a balance of \$621,098. Each party received 25% of the net sale proceeds, approximately \$193,000, leaving a balance of \$386,113 held in trust. Mr. R said he used his share to pay legal fees and Ms. P, to fund the purchase of the former family home.
- [66] On September 12, 2017, by consent, Justice Riley ordered Mr. Colby to complete the s. 211 assessment with the cost to be paid from the net sale proceeds held in trust, subject to the parties' submissions at trial. The same order severed Mr. R's claims against Ms. P's mother and Mr. P, requiring the trial of those claims to proceed in October 2017.
- [67] On October 23, 2017, by consent, Justice Harvey ordered Mr. P to pay Mr. R \$275,000 pursuant to a schedule that required equal payments to both parties starting October 20, 2017 and ending September 1, 2021 (the "2017 Order"). The 2017 Order specified the payments were a full and final settlement of the claims against Ms. P's mother as well as Mr. P, and those claims were dismissed.
- [68] Mr. R gave undisputed evidence that Mr. P made the first payments of \$15,000 each, but not the second which required him to pay each of them \$10,000 by April 1, 2018.

Issues

- [69] The main legal issues in this case fall into three categories: property division, child support and spousal support. The parties also significantly dispute the factual basis for the parenting arrangements, although not the arrangements themselves. As indicated, both agree with Mr. Colby's recommendations regarding Ms. P's parenting time remain professionally supervised and participation in psychiatric and other therapeutic services.

Credibility

- [70] Credibility is also significant contested issue in this case. Ms. P and Mr. R gave conflicting evidence about their interactions with one another and their respective families', their involvement with the children, their use of family funds, and Ms. P's income and assets post separation. Each indicates the other is not credible.
- [71] As the trier of fact, I may believe none, part, or all of the evidence given by any witness, and may attach different weight to different parts of that evidence, rather than accepting or rejecting all of it: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.
- [72] In general, I have assessed the truthfulness and accuracy of the parties' testimony by applying the test articulated many years ago in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.) at 357 [Chorny]:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions .

[73] I have also considered the factors identified in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, including:

- the capacity and opportunity of the witness to observe the events at issue;
- his or her ability to remember those events; the ability of the witness to resist being influenced by his or her interest in recalling those events;
- the internal and external consistency of the witness's evidence;
- whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- whether his or her evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and
- the witness's demeanour, meaning the way he or she presents while testifying.

[74] Regarding the last factor, Chorny and other authorities have discussed the dangers of relying wholly upon demeanour to determine credibility, recognizing the risk of preferring the testimony of the better actor, and, conversely, misinterpreting an honest witness's poor presentation as deceptive (see: *R. v. Jeng*, 2004 BCCA 464 at para. 54).

[75] With these principles in mind, I say at this point I have significant concerns about the credibility of Ms. P's evidence. Much of it was internally inconsistent and or inconsistent with other undisputed and objective evidence, as well as video and documentary evidence. Some of the allegations made by Ms. P regarding Mr. R and others were almost outlandish. During cross-examination, she was often evasive, vague, defensive and sometimes unwilling to acknowledge rather obvious circumstances. Her ability to recall events fluctuated with her interest. Although polite, Ms. P also displayed considerable suspiciousness and intensity during her testimony. On several occasions, she misinterpreted what she was being asked. At the same time, she presented as intelligent, very determined and capable.

[76] As I have already indicated, the documentary evidence includes medical records of Ms. P prepared by treating physicians, Dr. Collette and Dr. Bostinariu, as well as reports, assessments and other documents prepared by other physicians and medical professionals in relation to her claims for disability benefits and her pursuit of unsupervised parenting time earlier on in this proceeding. During his own testimony and his cross-examination of Ms. P, Mr. R focused on several of the documents dealing with Ms. P's disability benefits and her statements to Dr. Bostinariu as recorded in the clinical records. I have no doubt Ms. P found the experience distressing and intrusive. Again, what is captured in those records could not be more personal. When she met with physicians and health professionals, she expected confidentiality. Recognizing the difficulty for Ms. P, I attempted to strike a balance between protecting her dignity and Mr. R's right to test her evidence. The reality is, however, many of the allegations and claims she made during her testimony were inconsistent with what is contained in the records. In addition, the records contained statements regarding

circumstances relevant to the factual and legal issues I must resolve.

- [77] Prior inconsistent statements may be used to impeach a witness during cross-examination. As against a party, they are also admissible under the admissions exception to the hearsay rule. I say this bearing in mind the caution expressed in *Edmondson v. Payer*, 2011 BCSC 118 at paras. 24-39, aff'd 2012 BCCA 114, about the use of statements in clinical records. Created by the treating professional, they include a summary or paraphrase of what the party actually said. Importantly, Ms. P did not deny the accuracy of the records. Instead, she suggested that inconsistencies between the records and her evidence were attributable to the insight and understanding of family violence she gained after the separation. She described herself as too ashamed to be truthful to Dr. Bostinariu in particular and failing to appreciate Mr. R was abusive, given her upbringing and the effect of cultural norms, until after the separation.
- [78] While I entirely accept victims of abuse will often normalize their experience of violence, minimize it and or fail to report it at all, I am entirely satisfied the inconsistencies here are properly relied upon to draw the inference Ms. P's evidence on this issue is not credible and some of her statements may be safely relied upon as admissions.
- [79] In contrast, Mr. R's testimony was highly consistent and reasonable. Although some of it was uncorroborated, very little of his evidence was contradicted by the documentary evidence. He displayed an excellent memory and a genuine focus on the best interests of the children. Mr. R was, at all times, respectful, polite and calm, expressing no animosity toward Ms. P. As a self-represented litigant, his command of the voluminous materials and attention to detail were impressive.
- [80] Consequently, in general, I have approached the evidence of Ms. P cautiously and where it conflicts with the evidence of Mr. R, I have accepted his.

Divorce

- [81] The parties have been living separate and apart since on or about May 20, 2014. I am satisfied the requirements for a divorce set out in s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) have been met. I therefore grant a divorce order that will take effect 31 days from the date of these reasons.

Parenting Arrangements

- [82] As I have indicated, since the separation, the children have been living in Mr. R's care full-time. He has also been the sole decision-maker. Ms. P's involvement has been limited to supervised visits and phone calls with the children. Ms. P does not dispute the current parenting arrangements should continue in the interim, pending successful compliance with Mr. Colby's recommendations. There are, however, significant factual disputes regarding the issue of family violence and the history of the children's care, which must be resolved. In addition, there is a minor dispute about guardianship and or the allocation of

parental responsibilities, and the allocation of the cost of the s. 211 report as well as the family's participation in the Family Forward Reunification Program ("FFRP") discussed below.

Statutory Framework

[83] Section 37(1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] requires the court to consider only the best interests of a child in making orders regarding his or her guardianship and parenting arrangements. In this case, each party is a guardian by operation of s. 39. Parenting arrangements include parenting time and the arrangement of parental responsibilities, which encompass various forms of parental decision-making and other obligations with respect to a child, enumerated in s. 41. Only guardians may have parenting time and parental responsibilities: s. 40(1). Parental responsibilities may be allocated to one or both guardians. To determine what is in a child's best interests, the court must consider all of his or her needs and circumstances, including the non-exhaustive list of factors set out in s. 37(2):

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of the person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[84] Family violence, identified in s. 37(2)(g) and (h), is broadly defined in s. 1 of the FLA:

"family violence" includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
 - (b) sexual abuse of a family member,
 - (c) attempts to physically or sexually abuse a family member,
 - (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
 - (e) in the case of a child, direct or indirect exposure to family violence;
- [85] Section 38 requires the court to assess family violence based on a range of considerations including, for example, its seriousness, frequency, whether the children were exposed or directly harmed, and any steps taken by the person responsible to prevent further family violence from occurring.
- [86] Significantly, s. 37(3) provides that an order is not in the best interests of a child unless it protects, to the greatest extent possible, his physical, psychological and emotional safety, security and wellbeing.

Discussion of the Evidence

- [87] My discussion of the evidence relevant to the children's best interests does not consider all of the allegations made by each party, in light of their positions regarding the legal issues and the s. 211 report, and my credibility assessment.
- [88] Mr. Colby's assessment of the parties and the children, which began in October 2017 and occurred over several months, resulted in a 115 page report. The first 30 plus simply summarise documents provided by the parties. His recommendations were:
1. That Ms. [P] remain actively engaged in receiving psychiatric treatment in regards to her emotional and psychological status, which is in part influenced by the breakdown of her relationship with her children and her ability to have access to the children.

Of greater significance, however, is a lifelong sense of detachment from, and sense of impeding intrusion from, significant others in Ms. [P's] life.

In observation of Ms. [P] with the children under supervision, concern is raised about the dynamic of the relationship, both in terms of the children's request for decreased time with their mother and the behaviours presented by [JS], that to proceed with unsupervised parenting mother/son contact at this time, would not lead to a successful and productive parenting involvement.

Ms. [P] has a history of insecurity and depression. She has had periods of anxiety and reportedly instances of verbal and physical aggression. She has been diagnosed with Adjustment Disorder, Depression, and Post-Traumatic Stress Disorder, among other diagnoses. She is presently not on medication. She has taken numerous courses in regards to parenting matters and has been involved in battered women's support groups. Testing raises no issues of clinical psychopathology.

2. It is essential that Ms. [P's] psychiatrist be provided with a copy of this report in order to have more inclusive knowledge of the dynamic of the marital relationship and her historical relationship with the children.
3. The goal of psychiatric intervention is to deal with the issue of Ms. [P's] emotional and psychological status and to stabilize her so that if there is going to be further interventions in regards to the mother/child relationship, there would be a positive base on which to move forward.
4. That until such time as there is a positive and productive relationship possible between Ms. [P] and the children, supervised parenting time continue and supervision be provided through a professional supervisory service.

It is recognized this is a costly process. However it is also a necessary process to assure that Ms. [P] deals with issues of her emotional psychological status, including matters of productive parent/child engagement, and control of anger management issues, before there can be an unsupervised engagement between mother and children.

5. There are serious concerns regarding [JS's] emotional and psychological status, as observed in relationship to his interactions with his mother. While there does not appear to be a more widespread dysfunction in regards to [JS], it is noted that he presents with a high degree of distress in his mother's presence.

It is recommended that the children have a Child Therapist to assist them in terms of the dynamic of the effects of the breakdown of their relationship with their mother on their self-concept and upon their evaluation of their relationship with their mother, in order to provide them with a process in which these matters can be addressed in regards to the children's sense of emotional security.

6. It is felt that Ms. [P's] interactions with the children are highly stilted and limited. It is felt she engaged in conversations with the children which were intrusive regarding the paternal household, questioning the children about their activities within the paternal household, which is not appropriate. It is felt Ms. [P] needs to develop a greater scope of skill in terms of her interactions with the children.

It is recommended that Ms. [P] engage with an intervention team in order to develop a better skill base in terms of communicating with her young sons. It is also felt that needs to be done within a therapeutic milieu in a manner that enhances the relationship and that it can be conducted in conjunction with a program such as the REACH program or the Family Forward Program of Alyson Jones and Associates which would allow both for therapeutic engagement with the children and enhancement and education of parenting skills for Ms. [P], as well as engagement in direct parent/child interaction in joint sessions.

7. It is reported that JS is experiencing significant educational difficulties. This is a matter for review with school staff, and inclusion of a tutor, as has been discussed by Mr. R in conjunction with school personnel, should be considered.
8. This Psychologist is reluctant to present recommendations in regards to maternal parenting time until such time as Ms. P is engaged in ongoing psychological care either through her psychiatrist, Dr. Sandhu, or a registered psychologist, who is aware of the history and parenting dynamics in this matter, and Ms. P is engaged in a parent/child intervention program.
9. When Ms. P is stabilized in terms of her psychological status and through a parent/child intervention program it is felt that supervision is not required to be ongoing, then it is recommended that a program be put in place for Ms. P to have the children in her care on a progressive unsupervised basis. In that case, it is recommended that, at first, the children be in Ms. P's care for two unsupervised day visits, one on a weekend of up to six hours, and one mid-week after school until a half-hour prior to bedtime.
10. It is then recommended that maternal parenting time progress to a single overnight on an alternating week basis, while maintaining a mid-week scheduling, and then progress to an alternating weekend basis within four weeks of that initiating.

It is felt that with success in this area, consideration can be given for moving towards alternate weekend maternal parenting time and eventually shared parenting time, if successful.

11. It is necessary for there to be a reappraisal of the status of Ms. P with the children six months from the date of this report.
12. It is recommended that in the interim, Mr. R have sole parental decision making authority, while keeping Ms. P informed of the children's status.

Supervised Access

- [89] Recommendation 6 derives in part from Mr. Colby's review of supervised access reports from October 31, 2015, to October 2017. Based on my own review of more recent reports from November 2017 until May 2018, it appears that Ms. P's engagement with the children have remained consistent.
- [90] Mr. Colby writes that Ms. P is highly interactive with the children. This has continued. She is also often affectionate, both verbally and physically. For the most part, the children reciprocate. She brings them food and involves them in various activities. She makes phone calls to her parents, her brother and other family members so they can speak to the children. Ms. P also makes a concerted effort to celebrate special occasions. She is able to set limits, although didactically. For example, after giving the children nerf guns, she makes and enforces rules about how they are to be used. Ms. P also demonstrates an ability to deal with challenging behaviour from both children at times.
- [91] During some visits, however, Ms. P communicates inappropriately with JN and JS. For example, when JS was aggressive she involved JN, asking him where JS had learned his behaviour and whether he acted the same way at home. Similarly, when JS asked her why she does not like Mr. R, she stated he was mean to her and when he and his brother are older she will explain what happened.
- [92] She also involves the children in intense, serious discussions that reflect her own preoccupations. For example, during one visit she made both of them promise, no matter what happens in life, that they will never lie or cheat anyone. She also expresses a strong need for the children's attention, asking them, for example, if they love her and why, whether they talk about her with their classmates, when her birthday is, and what they are getting her. Sometimes she is reactive when they, most often JS, respond poorly to her efforts, such as preparing special foods. In addition, Ms. P probes the children for negative information, asking JS, for example, if he is bullied at school. In late February 2018, she asked the children if she had done anything to hurt them or hit them. When JH said no, Ms. P responded with, "[w]hy don't you want to live with me", to which JH stated, "[y]eah I do". Not surprisingly the report indicates the children appeared hesitant and uncomfortable during this exchange. To her credit, Ms. P recognized she should not have said what she did when the supervisor spoke to her before the next visit.
- [93] Regarding Ms. P's attendance at supervised visits, there were long periods where no visits occurred. She acknowledged cancelling visits in early 2016 because she expected her parenting time to become unsupervised. In or about May 2016, she contacted West Coast's director, Mr. Wong, requesting they resume. He advised her it would take six to eight weeks to arrange for a supervisor, partly because the visits were on Saturdays, their busiest day. In addition, Mr. R had already obtained a court order permitting him to travel with the children that summer. Although Ms. P testified that Mr. R failed to inform her of the trip, it is clear he did. After the trip and nine months of no visits, Ms. P attended two in August 2016. She

testified in direct that the visits stopped after that because of Mr. R and staffing issues. An email from Mr. Wong, who also testified, confirms Mr. R's evidence that it was actually Ms. P who cancelled the service again. In cross-examination Ms. P indicated that during that time, she was getting treatment for her physical injuries and her intention was to bring another application for unsupervised visits.

- [94] Following her termination of the service in September 2016, visits did not occur again until in or about February 2017.
- [95] Ms. P also gave other inaccurate evidence about Mr. R limiting or interfering with her visits. She testified rather dramatically about him denying a request for additional parenting time on Mother's Day in 2016. A letter from his counsel at the time offering seven hours corroborates his evidence that the opposite was true. Visit reports indicate the children recognize Mother's Day arriving with cards etc., no doubt facilitated by Mr. R. I note that between January 14 and May 24, 2018, Ms. P did not confirm or cancelled five weekly visits. Although she testified she was forced to miss visits sometimes because she could not afford the cost, the records indicate she reported being unable to attend because she was ill on some of these occasions.
- [96] Other evidence demonstrates that Mr. R is committed to facilitating the children's involvement with Ms. P. There is no indication he has cancelled visits. The visit reports confirm they arrive on time, and Mr. R will coax JS into getting out of the car when he resists. Mr. R has told Mr. Wong he is flexible about when visits occur. In response to her request, he has readily agreed to change visit days from Saturdays to Sundays.

FFRP

- [97] Mr. Colby's recommendation 6 also discussed the need for an intervention team such as the FFRP offered by Alyson Jones and Associates. Ms. Jones testified at the trial. She explained the FFRP involves a team approach, meaning each parent and each child is assisted by an individual therapist. Those therapists collaborate and the team is overseen by Ms. Jones. The goal of the FFRP is to restore and or building healthy relationships between separated parents and their children that have been disrupted for any number of reasons, including but not limited to alienation and estrangement. Ms. Jones explained participation requires a court order outlining the proposed terms. In addition, she advised both parents must sign an agreement to participate and indicated a delay in starting could result in being placed on a waitlist.
- [98] At the conclusion of the trial, in response to Ms. P's request, I ordered the parties to begin participating in the FFRP based largely on Mr. Colby's concerns about the emotional and psychological status of JS vis-à-vis Ms. P, discussed below, and the risk of delay. The terms of the interim order were as follows:

- (1) The parties will retain Alyson Jones and the Family Forward Reunification Program to work towards establishing safe and positive relationships between [Ms. P] and the Children, and a productive, respectful relationship between the parties forthwith.
- (2) Each party will promptly sign and return any and all releases, authorizations and other documents required by Ms. Jones and or the [FFRP].
- (3) Each party is restrained and enjoined from engaging in any acts or omissions that may jeopardize the success of the [FFRP] with respect to establishing safe and positive relationships between [Ms. P] and the Children, and a productive, respectful relationship between the parties.
- (4) Each party will promptly provide any information and documentation required and requested by [Ms. Jones and/or the FFRP].
- (5) The claimant will provide [Ms. Jones] with copies of:
 - (a) Mr. Colby's report;
 - (b) The clinical records of Dr. A. Bostinariu regarding her psychiatric treatment of [Ms. P] included in Exhibit 3 ;
 - (c) The supervised access reports included in Exhibit 3; and
 - (d) A transcript of this interim ruling.
- (6) The parties are prohibited from providing [Ms. Jones and or the FFRP] with other documents that were admitted into evidence at the trial of this matter absent a request and requirement from [Ms. Jones and or the FFRP] or further court order.
- (7) Ms. Jones and the [FFRP] therapists [she assigns to the parties and or the children] may communicate with the parties' counsel, medical professionals, mental health professionals, social workers and other third parties involved with the parties and or the Children as [Ms. Jones and the therapists] deem necessary for the effective treatment of the parties and the Children, as described in term one of this order. Ms. Jones, and or the therapists, must notify the parties of any such communication promptly.
- (8) The parties, Ms. Jones and the [FFRP therapists] will complete only the intake phase of the Program, absent consent of each party or further court order.
- (9) Either party may apply for directions or orders as may be necessary during the term of this order.
- (10) Ms. Jones or her designate may contact the court in writing through the registry with respect to matters related to the parties' compliance with this order or further recommendations regarding their ongoing participation in the [FFRP, notifying each party of any such communication].

- (11) Ms. Jones or her designate may report from time to time to the court and provide oral evidence on any aspect of the parties' participation in the [FFRP] and compliance with this order.
- (12) Until further order of this court, [Ms. P] must pay the fees of [Ms. Jones and or the FFRP] and provide forthwith the required retainer fee , as well as her credit card information.
- (13) For the purposes of paying the fees [referred to in paragraph 12 only, Ms. [P] may withdraw up to maximum of \$10,000 from the net sale proceeds held in trust by her counsel.
- (14) Ms. [P] must [promptly] account in writing through her counsel to Mr. [R] for any amounts withdrawn from the net sale proceeds.
- [99] As can be seen, term 8 limited the parties' involvement to the intake phase of the FFRP, pending a further order. I was concerned that without the benefit of a final decision, the parties, and Ms. P in particular, would focus on continuing to try and prove their positions and allegations. The objective of the interim order, therefore, was to ensure the family was poised to participate.

The Children's Needs

- [100] Returning to Mr. Colby's report, he observed very positive interactions between each party and the children. Both Mr. R and Ms. P displayed an ability to engage appropriately with each child. JS, however, was ambivalent, oppositional and even aggressive with Ms. P. He moved from showing a great deal of affection to rejecting her and being confrontational. Ultimately, Mr. Colby decided it was necessary to end an observation session. JS became increasingly agitated, demanded Mr. R be called, pushed Ms. P away, was flailing at her, and attempted to leave the office.
- [101] Mr. Colby noted JS has also engaged in some oppositional behaviour with Mr. R before visits by refusing to get out of the car, locking himself in or pretending to be asleep. However JS' classroom teacher described him behaving appropriately and, in fact, very well, as well as appearing happy. She also said he works hard and is achieving at grade level. During interviews Mr. Colby found JS difficult to understand at times. He did articulate that he likes being with Mr. R. JS also said he wants to see him more and Ms. P less.
- [102] In contrast, JN spoke and engaged positively with Ms. P as well as Mr. R. During an interview with Mr. Colby, JN "universally rejected" negative statements about either party. He rated Mr. R in particularly glowing terms, stating for example his father is someone who always helps others and never lets you down. He also identified Mr. R as the family member who is very nice to him, pays attention to him, really understands him, and listens to what he has to say. Regarding Ms. P, JN said she is the person he wants to care for more than anybody else, and he likes being physically affectionate with her.

- [103] JN also said it would be okay to have sleepovers at Ms. P's, he would like the visits to be fifteen minutes longer so he could play longer, but also that he saw each party a good amount of time. Inconsistent with the parties evaluations of JS, his classroom teacher advised he presents as anxious and depressed, is a self-conscious student, very emotional and sensitive. She also described him as very hardworking and easy to get along with. In an enriched program, the teacher said JN is performing at grade level for most subjects and above grade level for math.
- [104] Mr. Colby wrote the children appear to have a close bond with Mr. R and a preference for him that is influenced by being his primary care for a number of years. Similarly, Mr. Colby expressed the view, the three share a positive relationship and the children are very engaged in the father/son relationship. Describing the children as disassociated from Ms. P, Mr. Colby commented there is no indication Mr. R speaks negatively about her to them or in their presence, although they are aware her family has been rejected by the Rs. Mr. Colby also seemed to reject the idea that Mr. R may have been passively influencing the children against her.

Family Violence and the History of the Children's Care

- [105] After reviewing the parties' allegations of family violence, Mr. Colby concluded Mr. R does not present a risk to the children. He did not make explicit findings about any risk Ms. P may pose. Instead he identified the following assumptions as the basis for his recommendations:
1. That both parents verbalize a sincere interest in the children's wellbeing and desire to assure for the children's positive emotional and psychological status.
 2. That there is a high level of distrust between these parents and breakdown of positive communication between them to such an extent they are not able to co-parent the children.
 3. That Ms. P presents with extensive psychiatric history and a history of emotional insecurity and distrust based on life experiences and an inordinately high level of rejection and risk that undermines her sense of wellbeing. Interpersonal trust is a difficult process for Ms. P.
 4. That Ms. P presents as an emotionally labile individual who can respond in a manner that is highly self-protective and exhibited through issues in terms of anger management as she feels herself impinged upon.
 5. That assessments that have been conducted regarding Ms. P's parenting capacity have lacked a full scope of input in there being a lack of objective and clinical observation in regards to the parent/child dynamic, to allow for recommendations to be made in regarding to parenting priorities and dynamics for the R children and Ms. P.

6. That the children present with a sense of detachment from their mother, with limited interest in engaging in increased maternal involvement and that the child, JN presents with a degree of challenge and oppositional behaviour which undermines the mother/son relationship.
7. That professional intervention is required to address issues of the breakdown of the relationship between these children and their mother.

[106] Taken together with Mr. Colby's recommendation that Ms. P's parenting time remain professionally supervised pending successful psychiatric intervention and involvement in a program such as the FFRP, it is clear to me he was at least concerned Ms. P may cause harm to the children's emotional and psychological wellbeing. Assumption 5 is a reference to the letters provided by Drs. Bostinariu and Yuen in support of Ms. P's applications for unsupervised parenting time. Elsewhere in his report, Mr. Colby suggests, rather obliquely, that as treating psychiatrists without access to collateral information and limited exposure to Ms. P's interactions with the children, they were not in a position to offer an objective assessment of her parenting capacity. I agree.

[107] My interim reasons included some findings:

Having heard and considered all of the evidence, I can say at this point, I am satisfied that Ms. [P] was the aggressive party in the relationship. No doubt traumatized by childhood abuse, she struggled with significant mental health issues before and during the relationship, and her symptoms included but were not limited to problems with anger management, volatility, and distorted perceptions. I am also satisfied that Mr. [R] was, and is, a loving, caring and attentive parent to the children, who has not made any deliberate attempts to undermine the children's relationship with Ms. [P].

[108] A summary of the evidence, in addition to Mr. Colby's report, and the supervised access reports, that led to those findings is as follows.

[109] Ms. P made several allegations about being mistreated and ostracized by Mr. R's family after moving into the Surrey House. She indicated the dynamics worsened when she refused to contribute her salary to the payment of household expenses, which she viewed as outrageous. Ms. P alleges she was deprived of food and the food she purchased was taken away from her, even after she was pregnant with JN. I note that in 2011, Ms. P made similar statements to Dr. Bostinariu, but at that time, she reported neither party was invited to share in the evening meal and both of them went to bed "hungry for days".

[110] Ms. P also described in some detail being thrown out of the car by Mr. R and his father and left in the rain and the cold in or about 2009 because she refused to sign a new mortgage for the Vancouver house. Ms. P suggested the trauma of this incident and the stress of living with Mr. R and his family led to JN's IUGR and premature birth.

- [111] She also alleged Mr. R's parents tried to shame and embarrassed her parents into buying her a new car because she was driving an older vehicle her sister had owned that was in less than ideal condition when the parties married.
- [112] In addition to denying them, Mr. R expressed incredulity over these allegations and many others. Mr. R described Ms. P as isolating herself from his family in the Surrey House. He said he installed a small fridge in their bedroom and brought her food. He emphasized Ms. P's forceful personality meant that no one could tell her what to do. He also gave evidence in support of his own allegations that she was regularly aggressive and threatening towards him as well as fighting with her family members throughout the marriage. Dr. Bostinariu's records confirm that Ms. P reported significant conflict with her parents and Mr. P over the years. Sometimes she described violent encounters. For example, in November 2011, she told Dr. Bostinariu Mr. P hit her with a chair when she asked for her money back and she had to pick up a knife to defend herself. In October 2013, she told Dr. Bostinariu her mother tried to hit her two days earlier.
- [113] Mr. R emphasized his own family was caring, supportive, and not nearly as traditional as Ms. P suggested, stating his parents came to Canada to help his sister because her first marriage was abusive. He said Ms. P was welcomed into the Surrey House, treated well and included in decision-making. In fact Ms. P was the one who wanted the parties to take over the Vancouver House and insisted they obtain a new mortgage because of a connection with the Royal Bank, even though it meant they had to pay a prepayment penalty.
- [114] The parties separated when JH was a young baby after a dispute that occurred the day before Mr. R's mother died in April 2008. After her heart attack, she had remained in hospital in serious condition. He described being very close to his mother and returning from the hospital home happy one day because suddenly she seemed to be improving. He said Ms. P started yelling and screaming and throwing utensils when he called his sister to tell her the good news. Mr. R said he had been trying to appease Ms. P who was unhappy about the time he was spending at the hospital. In distress, he left the home without his wallet or phone. No one could reach him the next day to inform him of her death. Mr. R described Ms. P changing the locks on the family home and "cleaning out" the bank account at that time. However, the evidence also indicates Ms. P and JH stayed with her parents. I accept Mr. R spent as much time as he could caring for JN, feeding him, changing diapers and putting him to sleep. He retained counsel with the intention of pursuing a divorce but was under pressure from family to reconcile. Ms. P wrote him a letter just before he left for India with his mother's remains. In the letter, Ms. P apologized profusely for her behaviour, including what she referred to as "bad behaviour towards Dad", and for hurting Mr. R. She spoke of wanting to have a relationship with his family and thanked him for his patience when she needed it. Ms. P suggested she too was under pressure to make things right and she said what was expected of her, the cultural norm being the woman is entirely responsible for the state of the marriage.

- [115] The parties reconciled in late December 2008 or early 2009. According to Mr. R, Ms. P was back to yelling and screaming at him within a couple of months. He also said things were sometimes good and sometimes bad. Mr. R noticed when Ms. P was happy with him, she fought with her family and vice versa. Mr. R thought he could help Ms. P with her problems.
- [116] After selling the Vancouver House in September 2009, the parties moved to her parents' home while Mr. R managed a renovation of the former family home. After JS was born on November 25, 2009, Mr. R noticed Ms. P behaved differently than she had with JN. She would tell Mr. R that she was too depressed to look after the children. There is no question Ms. P experienced post-partum depression and her mental health deteriorated significantly. I accept that she struggled to function at home and Mr. R became the primary caregiver to both JN and JS, assisted by Ms. P's mother when he was at work.
- [117] He and the children even shared a bedroom and a bed while Ms. P slept alone. Mr. R was also responsible for organizing and taking the children to their activities, preschool, daycare and school. Sometimes Ms. P attended.
- [118] In 2011, Mr. R enrolled JH in a parent participation preschool three days per week. Describing his work schedule as flexible, Mr. R was the "duty parent". After Ms. P lashed out at a teacher, they had to find a new preschool. In or about October 2011, he enrolled JH in another parent participation preschool. Ms. P had an outburst at the second preschool and was convinced another child was bullying JH. Mr. R was present at the time. He described her shouting and yelling at the teacher. He told her to stop but she continued to act very aggressively. Mr. R said some of the children were crying. Not surprisingly, JH was not permitted to continue attending the preschool. An email to the parties dated February 12, 2012, from the president of the organization advised them their membership had been revoked due to Ms. P's behaviour there. Mr. R found a spot for JH at the Burnaby Montessori School. In September 2012, JH started kindergarten there and JS attended the preschool program. A few months later, an issue arose. Ms. P complained to the school JH was being bullied by another child and the child's mother was harassing her. She also complained to the RCMP. The school retained an investigator to investigate her complaints. In a letter dated January 2, 2014, counsel for the school advised the parties the school had concluded there was no evidence to support the complaints, in fact the evidence was to the contrary, that some parents and a number of teachers had expressed concerns about Ms. P's divisiveness and negativity, and the children's enrollment was revoked.
- [119] Mr. R described his routine during that time as getting the children ready for school in the morning, dropping them off, working from home, picking up JH in the late morning and JS at the end of the day. Ms. P was completing CGA courses and said she needed time to study.
- [120] After the Montessori debacle, Mr. R enrolled JH in kindergarten at the Khalsa School and JS in daycare, in Surrey, where his office is also located.

- [121] It is clear that Mr. P's unpaid debts to the parties became a source of increasing stress and conflict. Emails exchanged between Mr. P and Mr. R indicate he was extremely frustrated with Ms. P, Mr. P and their parents. Mr. R testified about promises made and not kept regarding repayment. He also gave evidence, described below, about Ms. P's intense anger over the issue. Ms. P indicated Mr. R was unrelenting and abusive toward her. She alleged he would come into her room at night and tell her she should commit suicide because of what her family had done which I do not accept. She insisted a transcript of the exchange captured by the video recording from May 4, 2014, would show that before she began hitting him with a cricket bat, he told her she and her mother should beg on Granville Street for the money owed. I have already indicated the transcript confirmed Mr. R's version of events instead, which involved her swearing at him and about her mother.
- [122] Ms. P also testified she told Dr. Bostinariu about these same circumstances and her advice was to say nothing, write an exam scheduled for June 2014, and then leave the marriage. There is no such entry in the medical records although later, in September 2014, Dr. Bostinariu writes that Ms. P reported that Mr. R said she should tell her brother and her father to beg on the street. The records also show that in November 2014, Ms. P said she felt she was abused by Mr. R emotionally but did not see it because she wanted to live a fantasy life. On several occasions in the years prior, Ms. P described Mr. R to Dr. Bostinariu as a kind and good person and herself as the instigator of their conflict. As late as March 2014, she referred to him as a very good father. Dr. Bostinariu also discussed Ms. P's anger, feelings of hatred, resentment and a focus on money. Before separation, Ms. P referred to fights and conflicts with family members quite regularly. At times she acknowledges that she lashes out at people and demonstrates some insight.
- [123] One entry indicates Ms. P was less than candid with Dr. Bostinariu about her own behaviour toward JN during the April 2014 incident. On April 4, 2014, Dr. Bostinariu writes that "her son was violent last night. He had many tantrums and broke (N's) objects. She had to verbally direct him. She raised her voice and thinks she was too tough on him." The video and the transcript, as I have indicated, show that Ms. P was, frankly, abusive to JN on that occasion. She threatened to beat him, made other abusive comments and raised her hand to strike him more than once.
- [124] Ms. P testified that her relationship with her parents has improved significantly. Dr. Bostinariu's records indicate that after separation Ms. P described significant conflict occurring in her parent's home while she was living there after separation. For example she told Dr. Bostinariu the police attended at 2:00 a.m. on a Saturday night in July 2014, because of a fight between Mr. P and his wife. Later that month, she told Dr. Bostinariu she had been unable to sleep because of fights between Mr. P and his wife. She continued to complain about their constant fighting, apparently regarding his drug use. She also described Mr. P's wife trying to provoke her and fighting with her. In September 2014, she describes her father as very nasty and her family as not helpful. During their last session in December 2014, Ms. P told Dr. Bostinariu her mother argues with her and swears at her. She

feared being alone in the house with Mr. P and his wife while her parents were in India, but she stayed there to save money. Dr. Bostinariu wrote that Ms. P "fired" her that day, raising her voice and leaving the office "angrily informing me that she will no longer see me".

- [125] Mr. R testified about four unfounded complaints to the Ministry for Children and Family Development ("MCFD") regarding his care of the children after the separation that Ms. P did not deny making. The first occurred in July 2014. Ms. P called the RCMP as well as MCFD alleging the children were malnourished and being mistreated at his brother's home in Surrey. Mr. R was away for work. The RCMP attended and no further action was taken. In November 2014, Mr. R received a call from an MCFD social worker asking about the children being "hit on the bum" and underweight. He consented to contact with the school and the children's doctor and the file was closed. The third complaint, made in April 2015, again alleged inappropriate discipline and malnourishment. Mr. R was attending a field trip with JN when a social worker contacted him. Again, he told her she could speak to anyone or interview the children, but no further action was taken. Much later in September 2017, he received an email from a social worker indicating a complaint had been made about him and his father and their use of discipline. Mr. R explained his father sometimes cared for the children at night. This time MCFD arranged to interview the children at school. Mr. R attended. The children were upset and crying afterwards. JS thought he had done something wrong and was in trouble. Mr. R took them home. They wanted to know why they were asked if anyone was hitting them and where they felt safe.

Current Circumstances

- [126] The children continue to attend the Khalsa School. Ms. P complains it is fundamentalist in its religious orientation, which Mr. R disputes. He testified that most of the teachers are not even Indo-Canadian and the school's academic reputation is very strong. He described the school as very supportive and expressed significant concern about Ms. P disrupting the children's ongoing attendance there, if given the opportunity. He emphasized how destabilizing it was for JN in particular to change preschools and schools a number of times, losing friends and relationships with teachers each time. Ms. P views JS as quite behind academically. According to Mr. Colby, his teacher did not share this concern, but it is clear he is struggling emotionally and behaviourally in his relationship with Ms. P.
- [127] Mr. R has involved the children in range of activities. He described JN as a highly talented cricket player. Mr. R is very involved in a local cricket, and an avid player himself. He established the children's league and coaches. According to Mr. R, JN could one day play on a national team. JN has also played the tabla since he started at the Khalsa School. JS is not interested in cricket. Both he and JN have been involved in swimming and karate.
- [128] There is no question about the deep love both parties feel for the children. Since the separation the children have had virtually no contact with Ms. P's family, except when her parents have made very brief appearances at supervised visits and phone calls. Before the separation, Ms. P's parents, her mother in particular, were very involved with JN and JS. Mr.

R testified that they filed an application for access in the Provincial Court but did not pursue it. Ms. P spoke about how much her family has missed JN and JS and asked that I make an order permitting her parents to attend her supervised visits. Explaining he only became aware of the extent of Ms. P's childhood trauma, her mental health difficulties before marriage, and the intensity of the conflict within the P family during the marriage and after the separation from the records produced in this proceeding, Mr. R was resistant to the children having contact with their maternal grandparents, concerned about exposing them to further conflict and dysfunction. I declined to make any order, absent an application or any evidence from Ms. P's parents. Although the focus should be on Ms. P's relationship with the children, my hope is their re-involvement can be explored through the FFRP.

- [129] The children remain integrated into Mr. R's family. His father cares for them sometimes at night. His brother and his family live nearby. Mr. R and the children visit his sister and her family in Ontario. He described JN's relationship with his sister as particularly close.

Analysis

- [130] Based on the whole of the evidence and preferring Mr. R's evidence to Ms. P's where there is a conflict, I find that before and throughout the marriage, Ms. P struggled emotionally, psychologically and behaviourally. Before the marriage, she received intensive psychiatric treatment for anxiety and depression that was serious enough to prevent her from working for a period of time. Throughout the relationship, she was regularly intensely angry, highly reactive, blaming, and aggressive with Mr. R and others. All of this persisted after her symptoms of depression and anxiety improved in 2013. She remained volatile with Mr. R and her family. Her behaviour included yelling, screaming, threats and physical outbursts. An intense and forceful person, I have no doubt Ms. P is frightening when she is upset. Both children were exposed, jeopardizing their emotional and psychological safety and wellbeing. The video evidence confirms that she was also directly abusive with JN. In the absence of Mr. R, who I accept attempted to shield and protect them from Ms. P, both children would have been at risk of being harmed, both physically as well as emotionally, more seriously.
- [131] Ms. P was also suspicious and seems to remain prone to conclude others are a threat to her and the children. This tendency, along with her anger problem, has led to conflicts with third parties, most significantly the teachers and parents at the children's previous preschools and schools, which undermined their need for stability and consistency. Based on her testimony, I remain concerned about Ms. P misperceiving the children's circumstances and acting impulsively to disrupt them. At this point, I am not satisfied it would be in the children's best interests for Ms. P to play a role in parental decision-making.
- [132] Since the separation, Ms. P has made a concerted effort to improve herself although she has also become rather entrenched in a view of Mr. R that I firmly reject. During her testimony, she found it difficult to take responsibility for her actions, although she tried. Importantly,

many of her interactions with the children under supervision have been entirely appropriate. During short visits, she has demonstrated many of the essential qualities of a capable and loving parent. Leaving aside JS's ambivalence and oppositional behaviour at times, both of he and JN seem to enjoy the visits. I have no doubt it is their best interests that regular positive visits occur.

- [133] Sometimes, as I have outlined, Ms. P's communications with the children reflect ongoing problems with reactivity, self-focus, suspicion, blame and impulsivity, as well as an inability to distinguish her own emotional needs from those of the children. Ms. P's history of missing visits when they were more frequent, cancelling West Coast's supervision at least twice, resulting in long periods of no access and missed visits in 2018 point, also suggest sustained parenting, absent significant change, would be difficult for her.
- [134] To varying degrees and in different ways, JN and JS display emotionally vulnerability. I accept and share Mr. Colby's concern about JS. The opposition and ambivalence he displayed toward Ms. P during the assessment is troubling. JN's difficulty appears to be manifesting at school, although Mr. Colby's report indicates he may be reluctant to reveal anything other than positive thoughts and feelings regarding the parties.
- [135] Mr. Colby's recommendations for intervention are well supported by the evidence. Dr. Yuen's letter and other documents indicate he did not have an accurate picture of Ms. P's parenting, her role in the breakdown of the marriage, including her propensity for family violence. It is critical that her treating psychiatrist receive copies of both the s. 211 report and these reasons. The same is true of psychologists and/or therapists Ms. P may retain pursuant to the recommendations.
- [136] I have already set out my earlier finding that Mr. R is a loving, caring and attentive parent. To be clear, I do not accept he has attempted to undermine the children's relationship with Ms. P. I am satisfied his decision-making and care of JN and JS have been motivated by a focus on their best interests. The evidence establishes that requiring her parenting time to remain supervised was not only appropriate, but necessary.
- [137] Mr. R opposes being required to contribute to the cost of the s. 211 report and the family's participation in the FFRP, arguing it is Ms. P's mental health, anger management problem and abusive behaviour that made the report and the intervention necessary. While I accept that without her history and Mr. R's insistence on supervision of her parenting time, an assessment may not have been pursued, and certainly participation in the FFRP is largely required to address her limitations, I am not prepared to impose all of those costs on Ms. P. Fault, in my view, is not an appropriate lens through which to determine this issue. In any event, it is clear Ms. P struggles at least in part because of the significant harm she suffered as a child. Further, the s. 211 report has assisted Mr. R in proving his relative strengths as a parent, as well as identifying and clarifying the needs of the children. Through the FFRP, I expect Mr. R will gain a much better appreciation of Ms. P's mental health and emotional challenges, as will the children. He will also have the opportunity to resolve the ongoing

emotional consequences of being in an abusive marriage. Successful participation, in other words, benefits him as well as her but, most importantly, their children.

[138] In part, I accept Ms. P's submission that only interim orders should be made at this stage regarding parenting arrangements, based on Mr. Colby's recommendations and pending her successful engagement with the recommended interventions. The goal of those interventions is to stabilize Ms. P emotionally and psychologically and to improve her relationships with the children, thereby eliminating the need for supervision and allowing for an increase in her parenting time. Similarly, with meaningful improvement, it is likely she will be able to play a positive role in parental decision-making.

[139] Accordingly, having considered all of the children's needs and circumstances, the factors enumerated in s. 37(2) and s. 38 and the imperative set out in s. 37(3), I have determined the following orders are in their best interests:

1. The children will reside primarily with Mr. R;
2. On an interim basis, Ms. P's parenting time:
 - a) will be supervised by West Coast or another agency agreed to by the parties in writing, unless the FFRP recommends otherwise; and
 - b) will include not less than one visit per week for 2 hours, and such other times agreed to by the parties or as recommended by the FFRP;
3. Both parties are guardians of the children;
4. On an interim basis, all of the parental responsibilities set out in s. 41 of the FLA are allocated to Mr. R. The order will also include the following additional terms:
 - a) Mr. R must keep Ms. P informed of the children's status, including any significant circumstances related to their health, education, activities and religion; and
 - b) Mr. R is free to travel with the children for up to 14 days without the consent of Ms. P but he must provide her with 30 days notice of any travel that will interrupt her scheduled visits;
5. All of the parties' communication, aside from their interactions at supervised visits or through the FFRP, must occur by email and be respectful, factual and brief, unless there is an emergency in which case they may speak by telephone;
6. The terms of the interim order regarding the FFRP are now a final order except term 8, which is vacated. Term 12 is varied to include:
 - a) Ms. P must pay the fees of the Program for the parties and the children's first three months of participation, after the intake phase is complete. After that each party will pay the cost of their own therapy and share the cost of the children's therapy equally. Any other costs will be borne 60% by Ms. P and 40% by Mr. R;

7. Further terms of the FFRP order are as follows:
- a) The parties will support the children's participation in the FFRP;
 - b) The parties will follow the recommendations of the FFRP regarding Ms. P's parenting time, including the need for and form of supervision, location and frequency;
 - c) The parties will cooperate with the process prescribed by the FFRP for a period of up to 24 months;
 - d) After the parties and the children have participated in the FFRP for six months, Ms. Jones and or the FFRP therapists will provide a status report to the parties regarding the goal of establishing safe and positive relationships between Ms. P and the children and productive, respectful relationship between the parties; and
 - e) The parties are at liberty to apply for a review of a FFRP recommendation that would result in a significant change in Ms. P's parenting time.

Division of Property and Debt

- [140] The parties' main assets are the remaining sale proceeds of \$386,113, Mr. R's public service pension, and the judgment debt owed to them by Mr. P under the 2017 Order.
- [141] Each party, as I have indicated, asserted a modest excluded property claim, although Ms. P did not pursue hers in closing submissions. Both also sought an unequal division of the remaining sale proceeds. Ms. P asks that Mr. R's pension be divided pursuant to Part 6 of the FLA, from the date of marriage until May 20, 2014. In addition, Ms. P asked for an equal division of Mr. R's excluded property in the event his claim was successful.
- [142] Ms. P's claim to an exclusion was based on the deposit she paid from her own savings from before the marriage towards the purchase of the Woodward's Condo, approximately \$61,000. Mr. R did not dispute her evidence that the net sale proceeds were loaned to Mr. P in 2012. Ms. P did not go on to suggest that her excluded property could be traced to an existing asset, namely the judgment debt owed by Mr. P pursuant to the 2017 Order.
- [143] I permitted Mr. R to amend his pleadings during the trial. Mr. R identified three real properties as subject to exclusions: the Vancouver Property, the Surrey Property and the former family home. He asserts that he had an interest in the Vancouver Property and the Surrey Property at the time of marriage and that the former family home was purchased with the proceeds from the sale of the Vancouver Property.

Statutory Framework

- [144] Under s. 84 of the FLA, all real and personal property owned by one or both spouses at separation is "family property", unless it is excluded property. Section 81 provides that upon separation, each spouse is presumptively entitled to an undivided half interest in all family property as a tenant in common and equally responsible for family debt, regardless of use

or contribute. Excluded property includes, among other things, property acquired by a spouse before the relationship, gifts to a spouse from a third party, and property derived from such excluded property: ss. 85(1)(a), (b.1), and (g). The burden of proof is on the spouse claiming the exclusion: s. 85(2).

- [145] Unless an agreement or order provides otherwise, family property is valued based on its fair market value, determined as of the date of the agreement dividing family property and debt or the hearing date: s. 87. Section 95 permits the court to order an unequal division of family property and debt, if it finds an equal division would be significantly unfair based on the considerations enumerated in subsections (2) and (3). An order for the division of excluded property is not permitted unless one of two narrow grounds are established, the second being it would be significantly unfair not to do so, based on the duration of the relationship and the direct contributions of a spouse to the excluded property: s. 96(b).

Excluded Property

- [146] Ultimately, Ms. P did not suggest a portion of the debts R's owed to the parties at separation or the 2017 Judgment was derived from the \$61,000 she paid to purchase the Woodward's Condo before the marriage.
- [147] Regarding Mr. P's exclusion claim, Ms. P conceded his interest in the Vancouver Property before the marriage was excluded, but argued the exclusion has been lost because Mr. R failed to prove the former family home was purchased with monies from the sale of the Vancouver Property.
- [148] In *Shih v. Shih*, 2017 BCCA 37, the Court of Appeal discussed the evidence required to prove property is excluded because it is derived from excluded property or the disposition of excluded property:
- [41] The inherent challenge which confronts litigants under the FLA is that in many relationships of any significant length, documents will have been destroyed and memories dimmed. A legal standard that demands mathematical certainty or precision risks defeating legitimate claims.
- [42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.
- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.

- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [149] Mr. R testified his brother paid him \$35,000 to compensate him for his interest in the Surrey Property, when it was agreed he would own the Vancouver House and his brother would own the Surrey Property, which I accept. The parties used those funds to renovate the Vancouver Property. Although Mr. R had an interest in both properties when the parties married, given the change in ownership a short time later, I am satisfied that the property he acquired before the marriage is reasonably valued at \$35,000 plus one-half of the equity in the Vancouver Property, in or about the time of marriage.
- [150] I also accept Mr. R's evidence that the net proceeds from the sale of the Vancouver House were deposited into the parties' joint RBC account. A bank statement shows a deposit of \$116,190.84 next to which Ms. P wrote "Vancouver House" and a deposit of \$30,000, on October 1, 2009. The former family home was purchased on November 13, 2009, using funds from this same joint account. Mr. R testified he was certain the net sale proceeds were used to make the down payment and the deposit of \$30,000. He identified a withdrawal of \$30,000 on October 13, 2009, as the deposit funds, which was described in the bank statement as a cheque. The bank statement also shows multiple transactions between October 1 and November 9, 2009, including significant deposits of \$87,577.24 and \$104,500 on October 13 and November 9, 2009, respectively, and withdrawals of \$87,577.24 and \$80,000 on October 13, 2009. Neither party was able to explain the source of the deposits or the purpose of the withdrawals. While the deposit and withdrawal of \$87,577.24 on October 13, 2009, appears to be a flow through transaction, before the deposit of \$104,500, the balance in the account went as low as \$3189.16. In other words the net sale proceeds had been depleted. I am left to conclude that Mr. R has not established that the down payment on the former family home was derived from excluded property or its disposition.
- [151] I reach the opposite conclusion with respect to the deposit of \$30,000, largely because I am satisfied the deposit and withdrawal of \$87,577.24 was part of an unrelated transaction, and the balance in the account prior to the deposit of the net sale proceed was \$604.82. Consequently, other than the flow through transaction, the net sale proceeds were the only source of funds at the time the deposit was withdrawn.
- [152] Therefore, I find that \$30,000 of the remaining net sale proceeds from the former family home are Mr. R's excluded property.
- [153] In this event, Ms. P asked for an equal division of the excluded property. On these facts, s. 96 of the FLA prohibits the court from ordering any division unless it would be significantly unfair not to divide the excluded property based on the duration of the relationship and a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

[154] Ms. P's submission is aimed at her contributions to the Vancouver Property in the context of Mr. P's receipt of the net equity from the Woodward's Condo. The submission rests on her allegation that she was forced to sign a new RBC mortgage of that property that resulted in a substantially higher amount, which I reject. Instead, I accept Mr. R's evidence that it was Ms. P who insisted on the RBC mortgage even though it resulted in a penalty payment. There is simply no basis upon which I could find that not dividing Mr. R's excluded property would be significantly unfair.

Family Property

Valuing the Former Family Home

[155] Although the parties agreed to a purchase price of \$1,400,000 in the contract of purchase and sale, Ms. P argues the former family home should be valued based on its appraised market value as of the hearing date, \$1,290,000. She suggests she was compelled to pay \$1,400,000 because Mr. R refused to accept her earlier offer of \$1,280,000, the appraised value at the time. Ms. P also suggests an issue arises from the December 29, 2015, order which required the remaining sale proceeds to be held in trust "pending further order or written agreement between the parties".

[156] I do not agree. The order simply provides a mechanism for securing the proceeds. The truth is, Mr. R was always willing to sell the former family home on the open market. Ms. P chose to purchase the former family home for \$1,400,000.

[157] In my view, by entering into the contract of purchase and sale, the parties also agreed to the value the former family home at that time for the purposes of dividing family property. Under s. 92, spouses are permitted to make agreements respecting the division of family property including agreements that value family property differently than it would be under s. 87, which presumptively requires family property to be valued based on its fair market value as of the hearing date.

[158] In any event, there is no evidence to suggest the purchase price differs from the fair market value of the former family home when the agreement was made. As the purchaser, Ms. P assumed the risk that its value would fall. Equally, she was entitled to the benefit of any increase.

[159] Ms. P's further related submission that Mr. R's portion of the remaining sale proceeds should be "debited" to account for half the mortgage payments she has made since the "2016 refinancing" is baffling. Inexplicably, Ms. P refers to herself as a tenant in possession of the former family home. She is the sole registered owner. I cannot conceive of how Mr. R might be responsible for her obligation to pay a mortgage she obtained to purchase the property based on a contract that removed his ownership.

[160] Accordingly, there will be no adjustment to the remaining sale proceeds based on Ms. P's mortgage payments in determining the division of family property.

Reapportionment

- [161] As I have indicated, both parties argue the remaining sale proceeds of \$386,113 should be divided unequally in their favour. Mr. R asks for a 75% share. Ms. P's position is less clear. Her submissions were based on the former family home being valued at \$1,290,000, and proposed various amounts be "debited" from Mr. R. In addition to one half of the mortgage payments, those amounts included \$89,000, being the amount he withdrew from the RBC line of credit in May 2014; \$6,745.16, her calculation of the net amount owed to her based on a division of other family property and debt; and \$15,294 to compensate her for the jewellery she alleges Mr. R disposed of after the separation.
- [162] Section 95(1) of the FLA allows the Court to order an unequal division of family property or family debt if an equal division of either or both would be significantly unfair based on one or more of the considerations enumerated in subsections (2) and (3).
- [163] Several cases have considered the meaning of the significantly unfair requirement. The threshold is a high one and has been interpreted as requiring unfairness that is "compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44. In *Jaszczewska v. Kostanski*, 2016 BCCA 286, the Court of Appeal concluded an equal division should prevail unless persuasive reasons can be shown for a different result; what is required is something objectively unjust, unreasonable, or unfair in some important or substantial sense (paras. 41 and 42).
- [164] The starting place for an analysis of significant unfairness is the notional financial position the parties, assuming an equal division of the family property and debt: *Remmem* at para. 43. Here, an equal division of the most significant family property, the remaining sale proceeds, would provide each party with approximately \$178,000 in addition to approximately \$193,000 received in 2016. The 2017 Order also entitles each party to payments from Mr. P amounting to one-half of \$275,000 over time. I note that the family property in relation to the 2017 Order, that is what one or both parties owned at separation, was in fact the debt owed by Mr. P then. Ms. P is also presumptively entitled to a share of Mr. R's public service pension based on an entitlement period that begins with the date of marriage and ends with the date of separation, approximately seven years. The parties have made no submissions about its value.
- [165] Neither party relied expressly on the grounds enumerated in s. 95(2) in arguing for an unequal division. Mr. R's submissions however invoked s. 95(2) (f), (g) and (i) which read:
- 95 (2)
- (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;

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

[166] The court may consider non-disclosure of financial assets under s. 95(2)(i). It is accepted that an equal division in the face of a failure to disclose assets may result in significant unfairness: *M.C.V. v. F.V.*, 2018 BCSC 96 [M.C.V.] at para. 123. Under the Family Relations Act, R.S.B.C. 1979, c. 121, the "Cunha approach" has been developed to address material non-disclosure or concealment of assets that involved drawing an inference the value of undisclosed was equal to the value of the known assets for the purpose of ensuring an equal division: *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.). The principle applied, however, only when there was a sound basis for concluding one spouse was hiding assets and some evidence regarding the value of those assets: *Laxton v. Coglon*, 2008 BCSC 42; *Wu v. Sun*, 2011 BCCA 239. Under the FLA, the Cunha approach remains applicable as a mechanism for providing an equal division of family property: *Nearing v. Sauer*, 2015 BCSC 58 at para. 134; *M.C.V.* at para. 127; and *C.P. v. K.W.A.*, 2018 BCSC 332 at para. 257.

[167] Mr. R argues that Ms. P has been hiding significant assets, pointing to the unexplained transfers in and out of a joint account she shares with her mother, her ability to purchase the former family home that involved qualifying for a mortgage that requires monthly payments that exceed her income, and unproven alleged loans. He also argues that he was left "significantly out of funds" due to the large amounts of money the parties gave to her family members, namely Mr. R and, to a lesser extent, her mother, during the marriage. Mr. R alleges that in early 2016, Mr. R provided funds to Ms. P, from the sale of land in Saskatchewan, which she then deposited into the joint account and used to purchase the former family home.

[168] Mr. R suggests that given Ms. P's failure to provide honest and complete evidence about her financial circumstances and her ownership of the former family home, it would significantly unfair to divide the remaining sale proceeds equally. Mr. R submits that without an increased share of the proceeds, he will be unable to buy a house for himself and the children.

Funds Provided to Mr. P

[169] Mr. R gave largely undisputed evidence about funds the parties provided Mr. P during the marriage. He specified that in or about 2011, Mr. P borrowed from them to invest in three apartments located in Gastown or Yaletown that were being sold due to bankruptcy, telling the parties he expected to make huge profits. The parties borrowed \$70,000 from Mr. R's father which they lent to Mr. P for this purpose. Ms. P did not deny the loan from her father-in-law or the loan to Mr. P, testifying instead she could not recall.

- [170] Mr. R also testified to providing significant amounts to Mr. P from his VanCity line of credit. Statement shows multiple transfers amounting to more than \$97,000 in June through November 2011 that reference "Robby", often into the same account, which I accept were transfers to Mr. P. Mr. R specified the transfers referencing "Robby" and "HH" were installments for the apartments. He identified a loan of \$31,500 provided to Mr. P on or about June 24, 2011, from their joint account and smaller amounts provided in May and July 2011. Copies of cheques confirm that much earlier on, Ms. P wrote Mr. P cheques for \$7,000 and \$91,000 in 2011. He also received a money order for \$97,000. In July 2011, he received another one for \$30,000.
- [171] Mr. R emphasized that he never trusted Mr. P, but Ms. P constantly threatened to take away the children if he did not do as she asked. She too was under a great deal of pressure from her family. At one point, they were told Mr. P would commit suicide if she did not give him money. Mr. R recalled her father telling him in 2011 that Mr. P had suffered heavy losses in the stock market, begging him to provide money, promising to assume responsibility for the loan, and offering to sell land in India.
- [172] Consistent with Mr. R's evidence, Ms. P testified in direct examination to loaning Mr. P the net sale proceeds from the Union Street Condo, which were initially deposited into the parties' joint account because he took a "very big hit" in the stock market and owed money to a "big oil company". She also acknowledged loaning Mr. P the net sale proceeds from the Woodward's Condo.
- [173] The parties' loans to Mr. P included significant amounts in relation to large parcel of farmland and a subdivision he intended to develop in Saskatchewan. Regarding the subdivision, in one of the promissory notes, he agrees to purchase lots for the parties, transfer title to them and deduct what he owed.
- [174] Over time, Mr. P's failure to repay and transfer the land led to significant conflict between the parties and Mr. P and Ms. P's parents. Mr. R testified that in January 2014, her parents went to India, promising to sell land and give the parties the proceeds, but they returned with no money. Although Ms. P characterized Mr. R as unrelenting and abusive in his pursuit of repayment, I accept, as I have already said, Ms. P was enraged at times with Mr. P and her parents about the situation. For example, on February 21, 2014, Ms. P called Mr. R asked him to pick her up. She was out with her mother and Mr. P and they fought. Ms. P was furious with Mr. P because he bought himself an Audi, despite the debts he owed the parties. Once in the car Ms. P took Mr. R's phone and began calling Mr. P non-stop. Phone records confirm a multitude of calls to the same number. She also sent him text messages showing she was fraught over his conduct and apparently abusive remarks he had made:

I haven't seen the deposit of 50K as our agreement FYI Monday morning your property will be seized You told me that I am a f* prostitute and that N pimps me out - I promise u now. You will be pimped out now, for sure. by the way you took money from the "pimp & prostitute". don't go crying to mom & dad and not the pure "wife" So u used our money to buy Audi - Q5 Using people's money and lying to them as if there is no tomorrow. You are right people love liars like u. U elder abuser - took all ur parents money and left them with debt

- [175] As I have indicated, not long after that on March 31, 2014, Mr. P signed two promissory notes acknowledging he had borrowed \$345,000 and \$300,000 from the parties. Mr. P testified the parties incorporated a limited company because Ms. P wanted title to the property Mr. P had agreed to transfer as part of his repayment, transferred to a company. The parties retained a law firm in Saskatoon. A draft purchase and sale agreement between Mr. P and the company was made but never executed.
- [176] It is clear that only Mr. R sought recovery of Mr. P's outstanding debts after the separation on behalf of the parties. After adding him as a respondent and pleading claims against him, Mr. R pursued document production from Mr. P and examined him for discovery.
- [177] Mr. R testified that during his examination for discovery, Mr. P gave evidence that in January 2016 he sold some of the Saskatchewan farmland he owns. Although this evidence is not admissible for its truth, there is no dispute about Mr. P's ownership, which is corroborated by documents.
- [178] Mr. R alleges Mr. P provided Ms. P with significant funds that she used to buy the former family home, pointing to her second Form F8 financial statement made January 26, 2016. She lists as an asset \$223,176.80 held in a joint RBC account with her mother. Ms. P denied receiving or using any funds from Mr. P after the separation.
- [179] Although she acknowledged the parties loaned him large amounts of money during the marriage in her direct evidence, Ms. P was often evasive, and, apparently, unable to recall details when Mr. R asked her about the loans in cross-examination. Asked if she kept track of them and whether a handwritten list she prepared was a list of those loans, she replied with, "it was not a good time for me" and "I don't remember a lot", adding she would have done what Mr. R told her to do, none of which I found believable. Her poor memory regarding this issue was also inconsistent with the detailed evidence she gave about financial circumstances from long ago, other alleged incidents during that same time frame and long ago, and her obvious interest in financial matters.
- [180] Ms. P gave no evidence suggesting she attempted to address Mr. P's outstanding debt with him after separation, or that she was even concerned about the issue. Similarly, she did not discuss his breach of the 2017 Order, which has already deprived each party of a \$10,000 payment. She did complain, however, about the 2017 Order being granted by consent. Ms. P testified her lawyer did not discuss the matter with her before advising the court she was consenting, without indicating what she thought should happen instead.

[181] Again, the 2017 Order required Mr. P to pay a total of \$275,000. Based on evidence of parties and the documentary evidence, I am satisfied that, over time, they loaned him amounts close to the figures shown in the promissory notes. At separation, most of that balance remained outstanding.

Ms. P's Financial Circumstances

[182] In addition to alleging Ms. P has received and failed to disclose funds received from Mr. P, Mr. R makes the assertion that she has provided incomplete and inaccurate evidence regarding her financial circumstances in general, suggesting her purchase of the former family home based on her disclosed income and assets makes this obvious.

[183] When asked how she qualified for the mortgage of \$960,000 in 2016 based on her disability income, Ms. P testified her parents lent her \$150,000 and she borrowed \$75,000 from her friend, CJ. This evidence is inconsistent, as I indicated earlier, with her mortgage application. She listed \$150,000 as an asset held in a bank account and liabilities that include the RBC mortgage, a private second mortgage, a "Scotia loan" and a small credit card debt. Ms. P also testified that \$50,000 deposited in her own RBC account on May 30, 2016, through a branch to branch transfer from an account ending in "0480" was a loan from CJ. Statements for the joint account she shares with her mother show many transfers to and from this number. Ms. P identified another transfer of \$6,000 from "0480" on December 19, 2016, as from her parents.

[184] When asked how she was able to make the monthly mortgage payments of \$3,956.51, Ms. P testified her parents lend her money, she borrows money from friends, she takes cash advances on credit cards, and, since March 2017, she has received rental income, excepting in April 2017. The loans set out in her various Form F8 financial statements are difficult to reconcile with the mortgage application and some of her evidence. Furthermore, the financial statements indicate that after the purchase of the former family home, Ms. P's credit card debt actually decreased until more recently.

[185] Ms. P's second Form F8 made January 26, 2016, identified \$300,000 in loans from "Friend & Family", incurred in May 2014. Her first Form F8 made November 12, 2014, however, identified loans of \$20,000 from her parents. She did not explain the discrepancy.

[186] Ms. P's third Form F8 made November 1, 2016, again listed loans from friends and family of \$300,000 without specifying when those loans were incurred, along with other unsecured debts, including Scotiabank at \$7,600, Amex at \$9,500, and MBNA at \$15,600, and a car loan.

[187] A fourth Form F8 made August 31, 2017, listed a loan of \$70,000 from CJ and loans from family members of \$310,000. The other unsecured debts had reduced somewhat: Scotiabank at \$1,969; Amex at \$9,433; and MBNA at \$14,489.

- [188] Ms. P's most recent Form F8 included the same loan amount from CJ and \$350,000 from family members. Her other unsecured debts were Scotiabank at \$13,300; Amex at \$9433; and MBNA at \$14,489.
- [189] Ms. P was cross-examined about various deposits and withdrawals in and out the joint bank RBC account she shares with her mother after the separation, many of which involved very large sums of money. For example, there were branch to branch transfers of \$125,250 and \$125,000 on July 2, 2015. The same day, \$125,000 was transferred back to the "0490" account. On July 6, 2015, \$126,400 was transferred in from a different account ending in "0320". On September 11, 2015, a matured GIC of \$100,000 was deposited into the joint account. A GIC redemption deposit of \$100,099.73 was made September 14, 2015. The same day \$200,000 was withdrawn for a GIC purchase. On January 8, 2016, \$150,000 was deposited. On January 15 and 25, 2016, \$75,000 and \$33,000 were transferred in. On February 1, 2016, \$223,230 was transferred out. On June 1 and 2, 2016, transfers of \$38,000 and \$63,484 were received, followed by \$20,000. Ms. P testified that most, if not all, of the funds flowing into the account belonged to her mother, along with the GICs.
- [190] Although Mr. R requested documents regarding the alleged loans from family and friends, Ms. P did not produce anything. Neither CJ, nor any of Ms. P's family members testified. Ms. P's evidence regarding the loans and the flow of funds through the joint account is, therefore, uncorroborated.
- [191] Given the implausible and sometimes inconsistent evidence Ms. P gave regarding her finances post separation and her poor credibility generally, I do not accept that she has borrowed over \$400,000 from friends and family or anything close to that amount to purchase the former family or pay the mortgage, although it is clear she has been making monthly payments that exceed her apparent income. Nor do I accept that she has also been relying upon credit card advances.
- [192] As I have indicated Ms. P did not respond to Mr. R's evidence regarding her two investment accounts, which had balances of \$135,411 and \$28,524.63 on particular dates in 2011. I accept that he was entirely unaware of one of the accounts during the marriage and has no knowledge of what happened to the funds or investments held in either account.

Conclusions

- [193] In all of these circumstances, I draw the inference that Ms. P had undisclosed assets at separation and separate and apart from that she has received significant funds from family members since then. There is no evidence that would allow me to determine the value of her undisclosed assets at separation or now. Given Mr. P's ownership of land in Saskatchewan, his debt to the parties at the time of separation which was at least double the amount he is required to pay under the 2017 Order, Ms. P's anger over his debt before separation and her apparent lack of concern after separation, I also draw the inference that Mr. P provided her with some of the funds she has received from family members, because

of the debt he owed to the parties.

- [194] The 2017 Order is the result of Mr. R's effort alone. Although it finally resolved his claims against Mr. P and Ms. P's mother, as I have indicated, as between the parties, it is what Mr. P owed to them at the time of the separation that constitutes the family property.
- [195] Pursuant to s. 95(2)(g)(ii) and (i), I conclude it would be significantly unfair to divide the remaining net sale proceeds equally. Ms. P kept for herself and failed to disclose family property received from Mr. P, no doubt facilitating the purchase of the former family home. An equal division of the remaining net sale proceeds, therefore, would leave Mr. R with less than one-half of the available family property, although he alone pursued the recovery of the debt Mr. P owed to both of them.
- [196] Despite my conclusion and the ongoing application of the Cunha approach, I do not consider it appropriate to infer the value of Ms. P's undisclosed assets is equal to the remaining net sale proceeds. Bearing in mind the shift to an excluded property regime under the FLA, I recognize that funds provided by third parties unrelated to Mr. P's debts at separation would not fall within the definition of family property. At the same time, Ms. P bears the burden of proving any of her assets are excluded property. Doing the best I can with the available evidence, I value the family property portion of the funds she received from Mr. P at \$150,000, based on the asset she identified in the mortgage application and the balances in the joint RBC account leading up to June 2016, when she purchased the former family home.
- [197] I am satisfied that providing Mr. R with \$75,000 more than Ms. P of the remaining sale proceeds addresses the significant unfairness that would arise from an equal division, subject to further comments regarding adjustments she proposed.
- [198] Given my findings and conclusions, it is clear that Ms. P's claim for an unequal division pursuant to s. 95 cannot succeed.
- [199] Ms. P argues that various deductions from and credits to Mr. R's share of the remaining sale proceeds should be made on other grounds. Most significantly, she proposes \$89,000 be deducted based on amounts Mr. R withdrew from the parties' RBC line of credit in May 2014. Mr. R testified to withdrawing the funds to pay off various debts including, most significantly, a loan from his father used to provide funds to Mr. R, another debt of \$4,000 owed to his father, small balances owing on his VanCity line of credit, his RBC visa, a CIBC visa, an Alaska Airlines credit card, and a Costco credit card. I am satisfied that all of those debts were family debts as defined by s. 85 of the FLA. As part of the \$89,000, Mr. R withdrew \$3,000 to retain counsel and \$32,000, which he said he used to pay the mortgage and other expenses. Having declined to impute any value to Ms. P undisclosed assets, but given the inference they existed at separation, in my view it is appropriate to refuse to deduct any portion of the \$35,000 not spent to eliminate family debt or maintain the former family home. Nor do I intend to order an equalization of the balances in the parties' various bank accounts and investment accounts held at separation, including Ms. P's \$5,000 RRSP

which she acknowledges is family property spent by her after separation.

- [200] Mr. R sold his vehicle, a Mazda, which was family property, in early 2016 receiving \$4,385.44. Ms. P is entitled to half of that amount.
- [201] In the result, Mr. R is entitled to \$30,000 for his excluded property and \$215,556 for his share of the family property portion of the remaining net sale proceeds (\$75,000 + half of \$281,113, which is \$386,113 - \$105,000), less \$2192.72 (Mazda) which shall be paid to him forthwith from the funds held in trust.
- [202] Ms. P's share of what remains in trust, is subject to the following. Ms. P must first pay from her share the outstanding arrears of basic child support and s. 7 expenses and prospective basic and s. 7 child support as set out below. Further, she must ensure that \$15,000 of her share remains in trust until further order of the court, to secure payment of a costs order.
- [203] Regarding Mr. R's public service pension, I grant an order that Ms. P be provided with her proportionate share pursuant to Part 6 of the FLA from the date of marriage to May 20, 2014. The parties may appear before me if they require clarifications or further orders to execute the division of property orders I have made.
- [204] Ms. P's claim against Mr. R's father is dismissed as if determined on the merits. I also dismiss her jewelry claim. Jewelry Mr. R gave to her or purchased by her during the marriage is family property. While jewelry she owed before marriage or received from third parties would be excluded and therefore not subject to division, I do not accept Mr. R or anyone on his behalf took any such jewelry.

Child Support

- [205] Both parties agree the income of \$35,000 imputed to Ms. P in the Interim Child Support Order remains appropriate resulting in a table amount of \$562 per month.
- [206] Ms. P testified that she has been receiving disability benefits from Great West Life since late 2010, which pay \$1,249 per month. She began receiving CPP disability benefits in 2012 and estimated the monthly payment at a little over \$1,000. She agreed that her income should be "grossed up" because the GWL disability benefits are not taxed.
- [207] Based on the positions of the parties, I impute an annual income of \$35,000 to Ms. P for the purposes of ongoing basic child support and s. 7 expenses. I therefore order Ms. P to pay \$562 in basic child support on the first of each month commencing July 1, 2018, until further order of the court.

Arrears

- [208] Mr. R says the total amount payable under the Interim Child Support Order is \$26,411. He has received \$7,255.06 through the Family Maintenance Enforcement Program ("FMEP"). A FMEP document dated May 20, 2018 shows arrears of \$19,807.32 and \$21,523.76 as the total amount owing, including interest and default fees.
- [209] Ms. P suggests she owes \$19,569.94 in basic child support arrears, calculating the total amount payable at \$26,825 (based on the basic monthly amount increasing to \$562 under the new Guidelines in 2017). Ms. P asks that the arrears be fixed at \$14,077.39 by setting off \$8,254 in retroactive spousal support from the date of separation to the end of the trial. In my view, the only retroactive amount would be for the period before she filed her original counterclaim.
- [210] Mr. R's submissions focused on the principles that govern applications to reduce or cancel arrears. The test requires an applicant to establish both a material change of circumstances and that it would be grossly unfair not to do so. Whether or not a material change is required when the arrears arise under an interim order is an academic question because Ms. P is not asking that the arrears be reduced or cancelled. If she were, I certainly would agree with Mr. R that she has not come close to establishing the second part of the test. As he points out, when Ms. P received, as they both did, 25% of the net sale proceeds in or about June 2016, rather than paying child support, she reinvested the whole amount in the former family home. Similarly, there is no evidence she paid any child support with the \$15,000 she received from Mr. R pursuant to the 2017 Order. Her evidence also makes it clear she has prioritized her own financial interests over her legal obligation to provide financial support to the children.
- [211] Deciding whether to fix the arrears in an amount less than the amount payable under the Interim Child Support Order requires me to determine Ms. P's claim for spousal support.
- [212] Ms. P calculates her proportionate share of s. 7 expenses owing under the Interim Child Support Order at \$2,761.45, based on basic tuition for the Khalsa School, the patient-pay part of dental expenses and daycare expenses. Mr. R calculates her share up to November 29, 2017, at \$6,163.58. Accepting the expenses he has listed in Exhibit 10, I require Ms. P to pay Mr. R that amount for previous s. 7 expenses, from her share of remaining sale proceeds held in trust.
- [213] Regarding s. 7 expenses for December 2017 onward, based on Mr. R's line 150 income in his 2017 income tax return, I find his guideline income to be \$65,096. The parties will contribute to the cost of ongoing s. 7 expenses in proportion to those incomes. Ms. P will pay Mr. R her proportionate share, which will continue to include school tuition, daycare expenses and medical and dental expenses as provided for in s. 7, in addition to other expenses agreed upon by the parties in writing, within 14 days of him providing her with a receipt showing proof of payment.

Spousal Support

- [214] Ms. P seeks retroactive and prospective spousal support until August 1, 2018 based on a monthly amount of \$221, relying upon DivorceMate calculations for 2014 through 2017, that uses the custodial payor formula under the Spousal Support Advisory Guidelines ("SSAG"), incomes for Mr. R from \$62,542 (2014) to \$65,096 (2018), for Ms. P \$35,000 (from employment) and no amount for s. 7 expenses. The range for periodic support in 2014 is from a low of \$181 to a high of \$241; \$221 is the mid-range amount. The range increases very modestly in 2015 and then only at the high end in 2016 and 2017. I note that when s. 7 expenses are included, estimated at \$3,000 per year, the range is lower (from \$170 to \$226 with a mid-range amount of \$198).
- [215] The SSAG only becomes relevant, however after the threshold issues of entitlement has been established. Ms. P submits she was and remains entitled to spousal support on compensatory and non-compensatory grounds.
- [216] The objectives of a spousal support order set out in s. 15.2(6) are the starting point for determining entitlement. They include:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [217] The court must also consider the condition, means, needs, and other circumstances of each spouse including the factors set out in s. 15.2(4):
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- [218] The underlying goals of compensatory and non-compensatory spousal support are the equitable sharing of the economic consequences of a marriage or its breakdown and narrowing the gap between the needs and means of the spouses: *Chutter v. Chutter*, 2008 BCCA 507. Compensatory support is intended to provide redress for an economic disadvantage arising from the marriage or its breakdown (such as diminished earning capacity and lost career opportunities from taking on childcare responsibilities) or the conferral of an economic advantage upon the other spouse (such as enhanced earning

capacity through career development). Where there is no compensatory basis for support, need alone may establish entitlement to non-compensatory support. The concept of need goes beyond the necessities of life and varies with the circumstances of the parties, including the marital standard of living and the other spouse's post-separation standard of living: Chutter at para. 55; H.C.F. v. D.T.F., 2017 BCSC 1226 at para. 196; and Loesch v. Walji, 2008 BCCA 214 at para. 39-41.

- [219] Taking into account the statutory objectives and the evidence relevant to the factors in s. 15.2(4) of the Divorce Act, I conclude that Ms. P is not entitled to compensatory or non-compensatory support. Regarding compensatory support, the evidence simply does not establish that she was economically disadvantaged due to the marriage or its breakdown. Nor did she confer an economic advantage upon Mr. R. I have already found that for most of the marriage, she was not the primary parent to the children, nor was she ever mainly responsible for housework, although she remained at home from February 2009 onward. Mr. R was always involved in caring for the children and the main parent when he was not at work. Before Ms. P developed serious depression in 2009, both parties worked and shared the household duties. After that Mr. R and Ms. P's mother were responsible for child care and housework. After Ms. P's depression resolved, she began to focus on completing accounting courses. Although she was able to be more involved with the children and perform some household duties, at her request, Mr. R arranged for JS to attend daycare. JN was attending school by then. Mr. R transported the children to and from school and daycare. After separation, the children remained with Mr. R. He has been entirely responsible for all aspects of their care while also working full-time.
- [220] Despite her ongoing receipt of disability benefits, disabling mental health issues in the past, evidence of a chronic pain condition in more recent years, and accepting she may continue to face barriers to employment, I conclude Ms. P is also not entitled to non-compensatory support. I have reached this conclusion largely based on my assessment of the parties' relative means and needs.
- [221] By consent, I imputed an income of \$35,000 to Ms. P for the purposes of child support. I am not satisfied however, that this income, along with the assets and debts she has disclosed, accurately reflect her means and needs since the separation. I have already indicated I do not accept that she has been making a monthly mortgage payment that exceeds her declared income, with loans from friends and family and credit card advances. I have also inferred Ms. P has undisclosed assets and has likely received significant funds from family members. Before she purchased the former family home in June 2016, Ms. P was living with her parents. Her early financial statements identify a rental expense that I have no confidence she was actually paying. Until Mr. R sold the Mazda, Ms. P had the vehicle in her possession, without contributing to the cost of insurance.
- [222] In addition to receiving disability benefits from CPP and GSL, and although she has been living in the former been living in the former family home since in or about July 2016, Ms. P started receiving rental income in March 2017 (excepting April 2018) of \$1,250 per month.

Post separation, her RBC account shows monthly deposits from "Canada" of over \$1,200 until early 2017, when they dropped to less than \$1100. Both amounts exceed the T4A amount of \$9084.12 for 2017. It may be the monthly deposits include a CPP children's benefit. The GWL deposits were approximately \$1,340, sometimes slightly higher, before dropping to \$1,190, for about six months, starting in January 2017. In July 2017 she received \$1,213.89 from GWL. The records for her account end July 25, 2017.

- [223] Based on a monthly payment of \$1,049 from CPP (\$12,588), the \$1,249 she said she receives from GWL (\$14,988), and gross rental income of \$15,000, her annual income before grossing up the disability income is \$42,576.
- [224] In addition to large sums flowing through the bank account Ms. P shares with her mother, her own account also shows frequent branch to branch transfers from "0490" and several other accounts, as well as transfers out. There are also regular email and internet transfers into the joint account, as well as ATM deposits and deposits with no further description.
- [225] Since 2016, Mr. R and the children have been living in a modest rental suite at a cost of \$900 per month. Although his financial statements indicate, with the exception of his vehicle, that the rest of his expenses are also modest, they well exceed his annual income. The expenses for the children include the cost of extracurricular activities, such as cricket for JN, music lessons for both children and tutoring for JS that are not subject to the order for s. 7 expenses. Given Ms. P's very limited parenting time since the separation, the cost of providing basic care to the children is greater than it would be most parents with primary care.
- [226] In the event my conclusions regarding entitlement are wrong, based on the same considerations regarding the parties' means and needs, I am satisfied no amount of spousal support should be payable before or after the trial up to the end date in 2019 proposed by Ms. P.
- [227] I therefore dismiss Ms. P's claim for spousal support.
- [228] Accordingly there will be no adjustment to the outstanding arrears of child support. Ms. P will therefore pay Mr. R forthwith the arrears as calculated by the FMEP for basic child support prior to July 1, 2018 as well as arrears of s. 7 expenses as provided for in these reasons, and basic child support and s. 7 support pursuant to the prospective child support orders in these reasons up to and including December 1, 2018 from her share of the remaining sale proceeds held in trust.

Costs

- [229] Unless there are circumstances I am aware of, Mr. R is entitled to his costs, as the substantially successful party.

"Fleming J."

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