

CANADA / JUDGMENT

O'Connor v. Mills

2023 BCSC 1886

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1886 O'Connor v. Mills

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O'Connor v. Mills,

2023 BCSC 1886

Date: 20231030

Docket: E191117

Registry: Vancouver

Between:

Nicola Elizabeth O'Connor

Claimant

And

Michael John Mills

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

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Place and Dates of Trial:

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December 1-2;

December 5-9, 2022;

February 7-9, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2023

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- [1] This lengthy family law trial draws into clear focus certain tensions that exist between ss. 95 and 96 of the Family Law Act, S.B.C. 2011, c. 13 ["FLA"] as they existed at the time these proceedings were commenced. Amendments to the FLA introduced subsequent to trial seek to address some of these tensions but do not assist with proceedings commenced prior to said amendments to the FLA coming into force on May 11, 2023.
- [2] The issues of determination of Guidelines income and quantum of support are also live in this matter. However, it is clear that the dispute over what is or is not excluded property and how such property should be divided is the driving force behind the litigation.
- [3] Specifically, as I will articulate in more detail below, this case primarily turns on whether certain real property which the respondent inherited can constitute family property even though the property received and to which it could potentially be traced have always remained in the respondent's sole name.

- [4] If the inherited property did become family property, then there is a claim for unequal division based upon significant unfairness. If the inherited property did not become family property, the question is whether it is appropriate for this Court to make an order dividing the excluded property having regard to the limited scope of this Court's jurisdiction under s. 96 of the FLA.

General Factual Overview

- [5] The claimant, Ms. O'Connor, was born in January 1966. The claimant was born in England and immigrated to Canada in or about 1980.
- [6] The respondent, Mr. Mills, was born in December 1961. He was born and raised in Vancouver, British Columbia.
- [7] The parties met in 1991 and commenced cohabitating in a marriage-like relationship in 1992. Neither party was overly definitive in their evidence as to when this occurred but I conclude it was in or about May 1992, which was approximately six months before the birth of their first child. Even if I am off by a month or two in my conclusion, the exact date of cohabitation is not material to any of the matters in issue. It was unquestionably a long relationship of some 23 years in duration and no material financial transactions occurred in those one or two other months when it is debatable that cohabitation formally commenced.
- [8] The parties married on May 14, 1994, some approximately six months before the birth of their second child.
- [9] Their date of separation had previously been in contention during the litigation process but it is ultimately agreed that the effective date of separation is March 20, 2015. I will return to this point in the course of these reasons for judgment as it does have specific relevance to certain financial issues.
- [10] The parties had three children during the course of their marriage/relationship. Their first son, Robert, was born in November 1992; their second son, Ryan, was born in November 1994; and the parties' only daughter, Katherine ("Kate"), was born in February 1998 (the "Children").
- [11] Both Robert and Kate testified at the trial. Ryan did not. As of the date of trial all of the Children of the marriage are economically self-sufficient with good careers. Having regard to the time it has taken this matter to get to trial, there is a retroactive child support claim for Kate being advanced. It is not argued that Kate was not still a "child of the marriage" when that claim was first advanced despite her now being economically self-sufficient. Accordingly, I need not address the issue of standing to bring a retroactive child support claim for a child over the age of majority pursuant to *Michel v. Graydon*, 2020 SCC 24. The issue turns, as I will address, on the determination of the respondent's Guidelines income and reconciliation of payments for support that were made during the material time in which Kate was a child of the marriage.

- [12] Returning to the chronology, the parties were approximately aged 26 and 31 when they commenced cohabitation. Their son Robert was, as noted, born in quite close proximity thereafter. Although unexpected, the parties were happy to have a child together. They then welcomed Ryan almost exactly two years later. They married while the claimant was pregnant with Ryan. The birth of Kate followed approximately three years later and completed the family unit.
- [13] Although the claimant was the primary caregiver for the Children, she readily acknowledged in her evidence that the respondent was a "really good dad" and closely involved in their care when they were young.
- [14] The parties enjoyed a financially comfortably lifestyle generally until 2010. It was not extravagant, but it was certainly comfortable. The home where they resided, before it was renovated, was older but more than adequate and located in a notably affluent neighbourhood in Point Grey/Kitsilano area. The parties were members of a local private social club and the local yacht club. The claimant regularly played tennis at said private social club. Robert attended high school at a well-regarded private school in their community. Ryan commenced high school at that same private school but was withdrawn at the conclusion of Grade 10 to attend public school.
- [15] There is controversy between the parties on the decision to withdraw Ryan from private school. I have no doubt based on all the evidence that there was a financial motive behind the respondent's decision to not renew Ryan's enrollment in private school for Grade 11. I accept that this upset the claimant as she was not adequately consulted about the decision. Nor, the evidence suggests, was Ryan, although given he was the one of three Children who did not testify I do not specifically have his first-hand evidence on this point. I also, however, accept there is truth to the respondent's evidence that Ryan was not thriving at this private school like Robert had and that the local public high school, which is quite well regarded, was a better fit. Ryan went on to graduate from that school and is actually, at present, the most economically self-sufficient of the Children. Kate attended this same public school for the entirety of her high school years and is, as noted, also economically self-sufficient in a career she enjoys. I thus do not place any weight on the withdrawal of Ryan from private school beyond it providing context to the family dynamics at the relevant time.
- [16] Once the family finances became strained in or about 2010, there was a notable deterioration in the relationship. Around this time, the respondent cashed in certain RRSPs, totalling some approximately \$130,000, and approximately \$9,000 to \$10,000 in RESPs. Some \$90,000 of the RRSPs were in the name of the claimant. To cash them in, the signature of the claimant would have presumptively been required.
- [17] I accept that the respondent, as the party in charge of the family finances, decided to liquidate these assets with little communication or consultation with the claimant. However, the evidence does not support a finding of fact, on the balance of probabilities, that the respondent forged the claimant's signature or orchestrated the withdrawal in a way that

surreptitiously obviated the need for the claimant's signature. Rather, to the extent necessary, I conclude that as spouse in charge of household finances, the respondent took the steps to cash in the investments, presented the documents to the claimant for signing and she signed as requested without fully appreciating what she was signing. Of significance, although the relationship was starting to decline at this point, this was all done some approximately five years before the agreed date of separation.

(i) The Claimant's Employment History

- [18] Prior to Robert's birth, the claimant was employed. Although she does not have any post-secondary education, she was gainfully employed as a receptionist/bookkeeper for a small animation company. She earned, according to her evidence, between \$25,000 and \$30,000 per year. Although this was a modest wage, it must be considered that this was in 1992 and the claimant was, as noted, only approximately 26 years of age. There was thus a realistic opportunity for career advancement for the claimant, whether at that company or possibly for another employer.
- [19] Upon Robert's birth, the claimant took maternity leave and was the primary caregiver for Robert. In noting this, it was not suggested that the respondent was not an active and involved parent. I addressed this point above. However, during the Children's infancy through early grade school years the respondent worked outside of the home as the sole bread winner and the claimant assumed the primary responsibility for childcare and did not re-enter the workforce.
- [20] There was a minor discrepancy between the parties' evidence about whether the claimant was briefly employed in some limited capacity outside the home after Ryan was born. The claimant testified that she was not. The respondent queried that evidence upon a specific recollection that Ryan had broken his arm whilst in some type of third-party care when he was approximately two years old. While not questioning the reliability of the respondent's recollection, as it was quite detailed notwithstanding that Ryan is now some 28 years of age and not challenged on cross-examination, I do not accept that it establishes that the claimant re-entered the workforce after Ryan was born. There are other very plausible explanations for why Ryan might have been briefly in third-party care even while the claimant was remaining at home as the primary caregiver, such as promoting socialization with similar age peers or allowing the claimant to attend some personal appointment when the respondent was working outside the home. More significantly, if the claimant had been employed substantively, I believe the respondent would have been able to provide at least some details as to where she was employed given his ability to otherwise clearly recall material facts from this time frame.

- [21] In any event, this minor discrepancy in the evidence aside, it is agreed by both parties that the claimant was primarily responsible for running the household because the cost of child care would have consumed significantly all or all of the claimant's earnings. There was also no dispute that the claimant was an effective household manager in these years. Indeed, both parties were willing to recognize the roles the other played in the early years of the relationship and were not critical of the other in this regard.
- [22] In 2010, the claimant returned to the workforce in order to assist with contributing financially to the expenses of the family. Her initial income was at just above an entry-level wage, some \$20 per hour, which was understandable given her some 16-year absence from outside employment. This initial return to the workforce was not rewarding and the claimant testified that she "cried basically every day". However, the claimant persisted. This is to her credit and she was successful in her efforts to establish a more rewarding career. Since 2014, she has been earning approximately \$70,000 per annum.
- [23] The following is a summary of the claimant's reported income as set out in her Form F8 financial statement sworn November 3, 2022, and her prior Form F8 financial statement sworn October 8, 2019:

Year

Income

2014

\$70,331

2015

\$76,919 (reassessed)

2016

\$73,489 (reassessed)

2017

\$71,891

2018

\$72,286

2019

\$72,602

2020

\$72,000

2021

\$73,039 (this includes a modest \$485 in interest income from the Monck Park Sale Proceeds (a term I shall later specifically define)).

- [24] As I will address later, the claimant deposes in that same November 3, 2022 Form F8 financial statement that her current Guidelines income is \$73,039 per annum. This corresponds to her 2021 T1 personal income tax return. The last pay statement of the claimant appended to her Form F8 financial statement confirms that the claimant had, as of October 30, 2022, earned a gross year-to-date income of \$60,000. This is entirely consistent with her Form F8 financial statement if one conducts rudimentary reverse math.
- [25] At the time the parties separated in March 2015, Kate was in the tail end of Grade 10. The claimant was employed on a full-time basis and although Kate was age-appropriately mature and somewhat independent, there were still obligations that the claimant was responsible for as the primary caregiver for Kate outside of her employment. Robert and Ryan were over the age of majority and while there were times when financial assistance or other support was provided, it was done on a voluntary basis and not out of necessity from the primary caregiver role as was the case with Kate. Part of this role as the primary caregiver of Kate also involved paying for Kate's extracurricular expenses. To do so, the claimant incurred debt. The claimant retired this debt after there was an interim distribution of family property, but she did incur the debt at first instance to allow Kate to participate in dance, soccer and other such activities.
- [26] It is not disputed that the parties engaged in income splitting prior to the separation through a company of which the respondent was the operating mind. The claimant did not have an objection to this arrangement. It was done for the financial benefit of the family unit. Difficulties arose in 2016, however, as a result of the respondent's failure to keep current with his tax filings. The claimant thus received notice from the Canada Revenue Agency that she was at jeopardy of having her wages garnished on account of the outstanding tax filings for this corporation.
- [27] The outstanding taxes were only paid once there was agreement, negotiated between counsel, to release funds from trust.
- (ii) The Respondent's Employment History
- [28] The respondent earned a bachelor's degree in engineering in 1987. He held a professional engineering designation until approximately 2010. While this designation was no doubt of benefit on the respondent's resume, there is no evidence of him actually using his engineering designation in a material way. In any event, he ceased having this designation some approximately five years prior to separation.

- [29] Having regard to the nature of the construction industry in which the respondent was engaged prior to 2005, there were variations in his income. However, the respondent was consistently employed and his Guidelines income during this period reached at least \$150,000 per annum.
- [30] This income was achieved through a combination of employment income and self-employment income as the positions in which the respondent held vacillated between conventional employment and acting as a self-employed contractor. Subject to the ability to deduct certain limited expenses from his income while being self-employed, the respondent was practically speaking providing the same type of services for substantially similar compensation.
- [31] In 2005, the respondent ceased outside employment or contracted self-employment and concentrated his efforts exclusively on the renovations to the family residence. I will subsequently define this residence as the "Bellevue Property". This was a substantial shift as he was now truly self-employed. The Bellevue Property renovation consumed all of his gainful efforts during the material time.
- [32] It is not disputed that the respondent did a very good job in coordinating, overseeing and managing the renovation of the Bellevue Property. It was acquired, as I will subsequently find, at a cost base of \$1,850,000 and sold for \$3,650,000 before adjustments. The net sale proceeds after adjustments for legal fees, commission and payment of debt were approximately \$2,596,500.
- [33] There is some dispute as to the involvement of the claimant and their Children in the renovation process. On this issue, I ultimately find that both parties have somewhat modified their evidence, to their benefit, with the benefit of hindsight. The respondent was clearly in charge of this renovation and carried the greatest burden. However, the claimant and their Children assisted as needed and were "good sports" about living in a house involved in active renovations when they left their temporary rental property. The greatest assistance the claimant provided I find, however, was being the primary parent to the Children during this time to allow the respondent the ability to focus on this project. Given my conclusion that the parties each gave evidence which I considered to be equally tailored to their position on this issue, I have not considered this in any material way in my overall credibility analysis.
- [34] Returning to the issue of income, in contrast to the stability of the claimant's income, the respondent's income has varied significantly since 2014. There are other issues on this topic which I will address separately. As a starting point, the respondent's reported income on his T1 tax returns for the years 2014 to 2021 can be summarized as follows:

Year

Income

2014

\$19,451

2015

\$129,497

2016

\$25,284

2017

\$133,389

2018

\$131,752

2019

\$46,282

2020

\$4,033

2021

\$1,140

[35] The evidence adduced at trial makes clear that the respondent has had various difficulties with employers or contractors over the last number of years. Having regard to the industry in which the respondent is engaged, some conflict is probably inevitable. However, the conflict which the respondent has had is quite notable and resulted in litigation.

[36] I heard quite a considerable amount of evidence and received various documents into evidence regarding this conflict. Ultimately though, I do not consider it material to detail that evidence in these reasons as the merits of those conflicts and ensuing litigation are a sidebar to the dispute between these parties. They simply inform the conclusion I ultimately reach in terms of determining the respondent's Guidelines income for support purposes.

[37] In this regard, the respondent's reported income in 2021 was, as set forth above, extremely modest having regard to his skill set. It is below what is required for even basic economic self-sufficiency without depletion of capital assets.

[38] However, the respondent's evidence at trial was that he had not been making applications for outside employment as he did not want to work for anyone else other than his long-time friend Mr. John Van Dyk or his company, City Engineering. However, the financial relationship between the respondent and Mr. Van Dyk has largely broken down and the respondent had not, at the time of trial, been paid since August of 2022. It is possible some

outstanding claims by the respondent to City Engineering will have been paid in the time it took for these reasons to be rendered but there is no evidence of any plans for ongoing work other than on an "ad hoc" basis with or for Mr. Van Dyk.

- [39] The respondent's present efforts to generate income are to attempt to secure forming and framing jobs in or around the Shawnigan Lake area of the province, where he currently resides. Apart from preparing and distributing posters offering these services, this venture seems to be in its infancy and no revenue has been generated from it.

(iii) Separation

- [40] The parties' marriage, as noted, started to notably deteriorate by 2010. This deterioration was accelerated by the financial challenges faced by the family and, it would appear, were compounded by the aging of the Children and overall changes to dynamics of the family unit. The respondent ultimately entered into a romantic relationship with another individual whilst still married to the claimant. The respondent acknowledges this and there are no credibility issues arising from this fact. I further place no weight on this admission as it relates to the overall merits of the case and indeed would not even reference it in my reasons but for the fact that there have been two family law proceedings commenced arising from the breakdown of the marriage which need to be noted to understand the overall context of the dealings with the alleged family property and/or excluded property.
- [41] In this regard, it is agreed there was a discussion that occurred between the parties on Kate's birthday on February 16, 2014, regarding the extra-marital relationship in which the respondent was engaged. The discussion was initiated by the claimant who had reviewed personal email correspondence of the respondent material to this issue.
- [42] Notwithstanding this discussion, the parties did continue to primarily reside as a family unit in their rental property until that property sold in March 2015. During this time, the respondent was spending significant periods of time at the parties' property outside of Merritt while the claimant remained living in their joint rental property in Vancouver. However, I accept the parties' joint admission, as referred to above, that it was not until they actually vacated their rental property on March 20, 2015, that they formally separated without prospect of reconciliation. From February 16, 2014 to March 20, 2015, there was a period of transition wherein it could not be clearly delineated in black or white terms whether the marriage was truly over. Rather, the family unit was in what I can best describe as a state of gray.
- [43] Some considerable time at trial was spent on the fact that the pleadings in the prior action commenced by the claimant alleged a separation date of January 1, 2016. That date is clearly not correct. However, having regard to the gradual unwinding of the marriage, I recognize there was some room for ambiguity and uncertainty. Again, I conclude this is not a material factor in my overall assessment of the credibility of the parties.

- [44] More significantly, I cannot identify any motive for either party to intentionally fabricate the separation date. It was, as I will refer to on multiple occasions in these reasons for judgment, a long marriage by any standard. Further, there are no material financial transactions between March 2015 and January 2016 which would appear to benefit or prejudice either party. There is also no possibility of concern about collusion as the parties have been separated far longer than the one year required by s. 8 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) on any possible analysis of the facts. This brings me back to my earlier conclusion that there was genuine uncertainty on this issue in the early stages of the litigation, but the eventual agreement to tie the separation date to the joint move of the parties and Kate from the shared rental accommodation on March 20, 2015 is factually sound.
- [45] The final fact I will note in this regard is that it is not contested that upon moving out of this rental property, the claimant and Kate (then age 17) moved into a rental apartment which was partially subsidized by her then employer, a property management company. Robert (then age 22) also resided there at times while pursuing his post-secondary studies. Given Kate was primarily resident with the claimant, this is not material to child support. It is somewhat relevant to spousal support but only nominally so in this particular case as the benefit was not overly significant and the claimant's employment substantially improved her efforts to be economically self-sufficient. The latter fact was to the direct benefit of the respondent given the traditional nature of the relationship prior to 2010.

Prior Litigation

- [46] The claimant initially commenced family law proceedings on October 22, 2015. They were discontinued and these proceedings were subsequently commenced.
- [47] As will be addressed throughout the course of these reasons for judgment, the prior proceedings are relevant in three regards:
- a) the date of separation alleged by the claimant therein;
 - b) the fact that the claimant registered a certificate of pending litigation ("CPL") against the Monck Park Property concurrent with the commencement of the original family law proceeding; and
 - c) the fact that these proceedings were discontinued by the claimant at the request of the respondent together with a discharge of the CPL against the Monck Park Property.

The Bellevue Property and the Administration of the Estate of June Mills

- [48] In or about 1994, the parties moved into a residence owned by the respondent's parents, who were generally known as "Bob" and "June", situated at 4627 Bellevue Drive (the "Bellevue Property"). Their only child at that point was Robert but the claimant was pregnant with Ryan.

- [49] The Bellevue Property was located in an affluent neighbourhood slightly off NW Marine Drive in Point Grey/Kitsilano in the general vicinity of the Spanish Banks, Locarno Beach Park and Jericho Beach.
- [50] At the time they moved into the Bellevue Property, Bob resided at the property for a portion of the year and "went south" to the United States for the duration of the year. June was already in full-time residential care at this point, unfortunately, due to dementia.
- [51] The evidence of the claimant herself is that Bob was an independent individual and generally self-sustaining when living with their family at the Bellevue Property.
- [52] After Bob ceased to have a driver's license in or about 1998, the respondent, the claimant and the respondent's sister, Anne Drinkwater, all cooperated in facilitating his transportation as required.
- [53] I have no doubt that the claimant, in her role as the primary homemaker at the relevant time, did assist Bob with tasks from time to time other than simply assisting with transportation. However, I consider this to be similar to the situation I will detail in the evidence I heard about the assistance provided between the respondent and the claimant's brother. The claimant was a dutiful daughter-in-law who was willing to assist as required and Bob was not one to take unnecessary advantage of that willingness to assist, such that there existed a positive relationship between them during their shared cohabitation of the Bellevue Property.
- [54] This shared living arrangement continued without any notable difficulty until Bob fell while alone in the Bellevue Property. The respondent's sister, Ms. Drinkwater, did check in on Bob. He was ultimately admitted into care at the same facility where June resided, as a result of his injuries. He did not return to reside in the Bellevue Property prior to his passing in 2001.
- [55] Pursuant to the estate planning efforts previously undertaken, title to the Bellevue Property then passed into a testamentary trust to the benefit of June on Bob's passing ("Bob's Estate"). Ms. Drinkwater held the power of attorney for June, which power of attorney was provided prior to June having lost capacity due to her dementia. There is no issue as to the legitimacy of the power of attorney or the conduct of Ms. Drinkwater in exercising her duties thereunder.
- [56] June subsequently passed away in August of 2003.
- [57] In her estate, June left all her assets (including those which she had received as a result of Bob's passing) to the respondent and Ms. Drinkwater in equal shares ("June's Estate"). The respondent and Ms. Drinkwater were also named co-executors of June's Estate.
- [58] As part of the probate process for June's Estate, the respondent and Ms. Drinkwater swore a probate affidavit setting out the value of assets held by June at the date of her death. In the probate affidavit, the value of Bellevue Property was listed in accordance with its 2003 BC Assessment value of \$1,385,000.

- [59] I accept that the listing of the value of the Bellevue Property according to its BC Assessment value from the prior year was in accordance with the advice of counsel retained to help administer June's Estate. While that counsel was not subpoenaed, there was no contrary evidence led on this point and it is, I accept, fairly routine in transfers of this nature, and non-contentious land title transfers of property in family law matters generally, to cite the assessed value where there is no specific evidence to the contrary.
- [60] On April 23, 2004, as part of the administration of June's Estate, the Bellevue Property was registered in the respondent's sole name.
- [61] As part of the same administration of June's Estate, two adjacent real properties located in the Shuswap region of the province (one improved and one vacant) were transferred to Ms. Drinkwater. In addition to these properties (the "Shuswap Properties"), Ms. Drinkwater also received substantially all of the liquid financial assets from June's Estate to achieve the equal division contemplated.
- [62] It was not controverted that the intention of the respondent in receiving the Bellevue Property in the distribution of his mother's estate was to undertake the significant renovation of that property, which I have referenced above. Whereas Ms. Drinkwater had a sentimental connection to the Shuswap Properties she received, the respondent saw development and resale potential in the Bellevue Property.
- [63] Between the transfer of title and August 2004, and consistent with his plan to renovate the Bellevue Property, the respondent sought out external financing. He initially had some issues obtaining this. Upon a suggestion from a friend of the claimant, he successfully obtained financing from Vancity for a \$1,000,000 secured line of credit (the "VC LOC").
- [64] As part of the process of obtaining the VC LOC, the claimant was asked and agreed to be a covenantor, even though she was not on title to the Bellevue Property. She was also not employed outside the home at this time and had not been for some time. The evidence as to why this request was made is thus conjecture by the parties; but I believe it is a fair inference that by virtue of the marriage of the parties and certain income splitting which had been occurring prior to 2004 between the parties (as permitted by the relevant taxation rules at that time) Vancity considered it prudent as part of their risk assessment in granting the financing that both parties be liable for the VC LOC should there be a default.
- [65] Further on this issue, I accept the evidence of the respondent that equity in the Bellevue Property was such that the risk to the claimant was low in taking on this obligation. However, there was still risk. As signing on as a covenantor, had the Bellevue Property been foreclosed on, personal judgment would have presumably been granted at the order nisi stage on the amounts outstanding, plus costs and any protective disbursements. In the event that the Bellevue Property was sold and there was a shortfall, the claimant would have been jointly and severally liable to contribute to same. In any event, it was "family debt" as defined in s. 86 of the FLA as it was incurred in the course of the marriage.

- [66] Against this background, it must be recognized that there was no evidence that the claimant did not willingly sign on as a covenantor once the request was made. This is consistent with her overall evidence of being committed to a joint family venture which saw the respondent generally being in charge of their financial affairs. Had the claimant pushed back on the request to sign on as a covenantor, it is possible that other financing could have been secured. It is also possible, given prior unsuccessful efforts of the respondent, that it would not have been. It is not a situation where it can be proven, on a balance of probabilities, that another offer of financing which did not require the financial commitment of the claimant was on the table.
- [67] In referring to the joint family venture as set out above, I am rejecting the respondent's argument that this needed to be specifically pled and that it amounts to trial by ambush. The sufficiency of pleadings is very important, as recognized in *P.T. v. K.T.*, 2015 BCSC 1184 at paras. 13 and 14:
- [13] Perhaps this practise of boilerplate pleading arises with litigants as familiar, intimate, even, as spouses, unlike other litigants, and offers a view that says " well, we all know what the issues are in this marriage ", or perhaps it is because all family cases, practically, concern three things: children, property, and money. And, to be fair, parenting issues in particular would test any pleading limits, as parenting disputes, in fact, engage almost everything that we are. And the simple fact is that when it comes to children, the Court wants and needs to know everything that it possibly can that might assist in making very difficult decisions in the children's best interests. Assuming fairness is maintained, pleadings should not unreasonably fetter that.
- [14] But in respect of other issues, and in particular non-spousal parties (extended family members, as here, business partners or the like), the normal rules of pleadings cannot be abandoned. A party is obliged to state the claim (or response) in sufficient detail and fullness that the other party can properly plead. Indeed this is an obvious inference arising from Rule 4-6(3):

The court may order a party to serve further and better particulars of a matter stated in a pleading.

- [68] However, this was not a trial by ambush by any means. The parties' theory of the case was well known by both sides regardless of any possible deficiencies in the pleadings and the Court heard over two weeks of evidence before hearing oral submissions (accompanied by lengthy written submissions).
- [69] In this regard, I also recognize the authority cited by counsel for the respondent, *Freeland v. Farrell*, 2022 BCCA 99, is binding authority on this Court. However, I find this authority is notably factually distinguishable. The parties in *Freedland* were romantic partners who decided to purchase property together after a short relationship. It was anticipated that both parties would make equal contributions to the down payment; although that ultimately did not happen. They were, however, registered as joint tenants and signed the mortgage.

Litigation inevitably ensued upon separation.

- [70] The material portions of the decision in Freeland are found at paras. 59 to 62. The analysis culminates in the conclusion of Justice Marchand who, in writing for the Court of Appeal, found that it was "open to the judge to conclude that, given Mr. Freedland's assets and income, any risk of personal liability to Ms. Farrell was not, using the judge's own word "real".
- [71] In this case, the parties had been in a relationship for more than 12 years, married for more than 10 years and had three children together at the time that the VC LOC was obtained. Further, there was no request that the claimant provide a financial contribution as it strictly involved the joint leveraging of an asset which it is acknowledged that respondent inherited free of financial encumbrances. Moreover, the practical reality is that the respondent was well aware that the claimant had no independent financial resources of any significance to contribute even if she wanted to given that the parties had agreed previously that the claimant would absent herself from the workforce to be the primary caregiver for the Children and had indeed done so.
- [72] With the benefit of the VC LOC, the respondent undertook the renovation of the Bellevue Property. As I have detailed, the respondent was clearly the primary driving force and operating mind of this project. While the respondent necessarily had to engage the services of trades and labourers at times, I am firmly satisfied that he was the driving force behind this project which was, as detailed, financially beneficial to the parties.
- [73] The claimant was more indirectly involved in the renovation of the Bellevue Property. She clearly, as I have noted, remained engaged during this time as the primary caregiver of the Children. She also helped with moving the family out of Bellevue into a rental property during the renovation process and then moving back in when the renovation was partially complete. This was likely no small effort given this was a family of five.
- [74] The claimant's direct involvement, however, was more limited even based on her own evidence. I find though it was not insignificant. Her evidence is that:
- a) There were occasions when the renovation process was ongoing that she, along with some or all of the Children, assisted with construction/post-construction cleaning of the Bellevue Property.
 - b) On several occasions she attended at the applicable permitting office at Vancouver City Hall. She says this is because the respondent had an argument with a staff member of City Hall and was unable to attend for a period of time. The respondent denies this. In this regard, I accept that the claimant's evidence is generally more reliable as the respondent conceded he did have such an argument. Whether he was formally precluded from attending at City Hall or whether he just preferred to have the claimant attend to avoid further conflict is immaterial, as I accept that the claimant did attend at City Hall to drop off plans and other required forms as part of the renovation project.

- c) The claimant would, on occasion, attend at the Bellevue Property to let in tradespersons. As the respondent was not working for an outside employer at the material time, this was only occasional as he was primarily the one responsible for managing things as the general contractor. The claimant did attend though as requested.
 - d) The claimant assisted with facilitating the payment of the expenses associated with the renovation. This involved delivering cheques and going to CIBC to make withdrawals to pay certain contractors in cash.
 - e) Although there was a designer engaged, the claimant was consulted in helping make decisions about the "fluffy stuff" such as paint colour and tile. In this regard, it was recognized that the intention of the renovation was for resale purposes and not to personalize the home to her personal tastes. The input the claimant provided on the selection of "fluffy stuff" was helpfully done on this basis.
- [75] The claimant again facilitated the family moving out of the Bellevue Property into a rental property when it was sold in July 2006.
- [76] The renovation efforts undertaken of the Bellevue Property were fruitful and the gross sale price for the Bellevue Property in July 2006 was, as noted, \$3.65 million.
- [77] Before leaving this issue, I note that in addition to receiving the Bellevue Property, it is conceded that the respondent also did receive certain other financial assets from June's Estate as part of the distribution as between him and Ms. Drinkwater. Specifically, the respondent received:
- a) cash distributions totalling \$137,112.23; and
 - b) inherited securities worth \$21,842.13.
- [78] Technically these financial assets came from Bob's Estate which passed, pursuant to the prior estate planning, to June's Estate since he predeceased her. This is immaterial. The funds are unquestionably an inheritance to the respondent.

Monck Park Property

- [79] As part of the division of June's Estate, Ms. Drinkwater, it is acknowledged, received the Shuswap Properties. The improved property had been the family vacation residence for many years and the adjacent vacant lot was acquired somewhat later, at June's initiative, for privacy and ancillary reasons. Ms. Drinkwater, as noted, had a strong emotional connection to the Shuswap Properties.
- [80] Whilst not necessarily sharing the same emotional connection to the Shuswap Properties, the parties (and the Children) all enjoyed times spent at the family "summer home" and wanted to continue that experience going forward.

- [81] As such, the parties, primarily led by the respondent, started scouting out other properties where they could build a new summer home. After some investigations, a property located on Nicola Lake in the vicinity of Merritt was sourced. In addition to its other attributes, this property was more conveniently located for the parties to access as the commute time between Vancouver and Merritt was notably less than the commute time between Vancouver and the Shuswap area in the North Okanagan region of the province.
- [82] The claimant was consulted regarding the purchase of the subject property prior to purchasing. The evidence conflicts as to whether she viewed the property more than once, but I am satisfied that this discrepancy is not material as the evidence is otherwise consistent with the conclusion that the respondent would not, at this juncture of the marriage, have proceeded with the purchase without the approval of the claimant.
- [83] This bare land, located at 6404 Monck Park Road, and generally referred to as the "Monck Park Property" was purchased on or about August 16, 2005.
- [84] The purchase price of the Monck Park Property was \$235,624.11 and it is acknowledged that these funds came from the VC LOC.
- [85] There is a notable contradiction in the evidence with respect to the registration of title to the Monck Park Property.
- [86] The sale documents for the Monck Park Property were prepared in the respondent's sole name. The claimant's evidence is that she queried the respondent about this and he agreed to add her name to title, but that she did not pursue this as it would have been an inconvenience. Specifically, the claimant testified it would be a "pain in the butt". In this regard, I find the claimant's evidence to be a contrived reconstruction of events. Had this been a significant concern of hers at the time, I expect she would have pursued having her name added to title even if there was some inconvenience. I rather conclude that she just did not turn her mind to the issue of title, having regard to the nature of the parties' roles in the marriage at that time and the fact that the respondent was the one generally responsible for negotiations with the developer from which the Monck Park Property was purchased.
- [87] However, in reaching this conclusion, it is apparent on all the evidence that even though title was held solely in the name of the respondent, the Monck Park Property was intended to be a family vacation property and was regularly used as such both during and after its construction. Whether it qualifies as "family property" as defined in the FLA is a legal issue which I will return to in due course. It would, quite clearly, have been considered a "family asset" as defined by the Family Relations Act, R.S.B.C. 1996, c. 128, at that time given that it was ordinarily used for a family purpose.

- [88] The building of the home on the Monck Park Property occurred between 2006 and 2008. Again, I have concluded that the evidence is clear that the respondent was the operating mind behind the build. He would generally be at the property during the week while the claimant was parenting the Children and then return to spend the weekends with the family in the Lower Mainland.
- [89] Given the ages of the Children, they were more actively involved in assisting with contributing their labour to the build of the Monck Park Property than they were to the Bellevue Property renovation. The claimant and the respondent also were jointly engaged in selecting finishing details and with the furnishing of the residence. Again, the claimant testified to the fact that she helped with "fluffy stuff" in building and designing the Monck Park Property. I accept she was involved in this capacity and that the Monck Park Property was decorated at first instance with the intention of it being used by the family versus for resale purposes as was the case with the Bellevue Property.
- [90] The residence ultimately constructed on the Monck Park Property was I find, even without the need for expert evidence, a very elegant home. Both parties' evidence was consistent in this regard. The construction of the residence came, however, at a sacrifice to the family finances. In 2008, virtually the entire net worth of the family was tied up in the Monck Park Property. Compounding with this was the subprime mortgage crisis in the United States of America which impacted the real estate market in Canada as well.
- [91] An initial effort to sell the Monck Park Property was entirely unsuccessful and it was taken off the market.
- [92] As a result of the strain on the family finances, a \$300,000 mortgage was obtained against title to the Monck Park Property from CIBC. The claimant was not a covenantor of this mortgage. These funds were used both for the final finishing of the residence on the Monck Park Property and family expenses. There is not a precise accounting, but the respondent's evidence was that one-third of the mortgage proceeds were used for the Monck Park Property and two-thirds of the mortgage proceeds were used for general family expenses. Having regard to the state of the family finances and recognizing that the respondent's approximation was not substantively challenged on cross-examination, I accept this evidence as being generally reliable.
- [93] As I have addressed separately, this is also around the time when the claimant decided to re-enter the paid workforce in order to contribute to the family's financial needs. This is internally consistent with the respondent's evidence as to the fact that additional monies were required to sustain the household even if there was not a formal accounting done as to how the mortgage proceeds were allocated.

Monck Park Property Fire

- [94] On October 3, 2018, the Monck Park Property was wholly destroyed by fire.

- [95] The cause of the fire at the Monck Park Property is ultimately unknown, but the respondent gave evidence as to the efforts he and a neighbour made to fight the fire once it was detected and the delay, due to the remote location of the property in a small rural community, for the local firefighters to arrive at the scene. Suffice to say that these unintentional but unfortunate delays led not only to the total destruction of the Monck Park Property, but the spread of the fire to an adjacent property owned by a third party not involved in this litigation.
- [96] The respondent expressly denied that the fire at the Monck Park Property was intentionally started and absolutely no evidence was tendered to contradict this. I thus accept it was an accidental fire of unknown origin which unfortunately could not be mitigated due to extenuating circumstances.
- [97] The loss of the Monck Park Property to fire triggered an insurance claim. The respondent was primarily responsible for coordinating this claim. Having regard to the value of the Monck Park Property and its total loss due to fire, I accept it was a challenging process.
- [98] The claimant did assist with certain components of the insurance claim; however, those efforts were fairly limited when compared to the overall process. It must be noted in this regard that the respondent clearly preferred to, with limited exception, be the person in charge of dealing with the claim. This is consistent with the arrangements during the marriage wherein the respondent managed the finances and sometimes "grumbled about it later". In this instance, the claimant participated, as requested, in the Monck Park Property insurance claim process and the respondent cannot reasonably rely on the claimant's more limited contribution to her prejudice since I am satisfied she did all that was asked of her.
- [99] Ultimately, the respondent did very competently manage the insurance claim arising from the Monck Park Fire to the overall benefit of the family unit. The Monck Park Trust Funds are what remains from those efforts, less certain payments and interim distributions. The amount of the insurance proceeds confirms my conclusion that, without the benefit of a pre-fire appraisal, the Monck Park Property was, under the stewardship of the respondent, a very well designed and nicely furnished home.
- [100] Following the receipt of the Monck Park Property insurance proceeds, the respondent was initially desirous of retaining the Monck Park Property.
- [101] Consistent with this, an appraisal of the bare land was commissioned for the Monk Park Property by a qualified appraiser. Said appraisal opined that the fair market value of the bare land was \$440,000.
- [102] This was more than the respondent was willing to pay for the Monck Park Property in the context of any division of family property or alleged family property due to his concern that it failed to consider the necessary remediation to the property from the fire.

- [103] On or about September 15, 2020, the respondent decided to unilaterally sell the Monck Park Property and entered into a contract of purchase and sale accordingly. Neither he nor his counsel notified the claimant or her counsel.
- [104] The sale price was \$255,000.
- [105] This was substantially less than the appraisal of the Monck Park Property obtained in the context of this litigation which opined, as noted above, that the fair market value was \$440,000. The sale, however, was to an arms-length third party and the respondent was able to identify issues which would explain why the appraised value was likely overly optimistic having regard to the condition of the property.
- [106] The greater concern of the Court is that the respondent sold the Monck Park Property unilaterally and without consultation with the claimant or claimant's counsel. The respondent further did so with the knowledge that the claimant had previously removed a CPL against the Monck Park Property at his request. Clearly the claimant could have reregistered a subsequent CPL against the Monck Park Property which would have been an impediment to the respondent's conduct.
- [107] However, given the prior removal combined with the property restraining order made by Master Keighley in December 2019 (which admittedly dealt with the insurance proceeds from the Monck Park Property fire and not the property itself), the respondent's self-help approach to the issue is not condoned by this Court even though I have ultimately concluded that the sale of the Monck Park Property was for fair market value.

Issues to be Determined

- [108] As already alluded to above in my opening summary, I confirm that issues to be decided in this family law action are as follows:
- a) divorce;
 - b) valuation of property;
 - c) determination of family property;
 - d) determination of excluded property;
 - e) unequal division of family property;
 - f) division of excluded property;
 - g) determination of Guidelines incomes;
 - h) prospective spousal support;
 - i) retroactive support - child and spousal; and
 - j) costs.

Credibility - The law

- [109] As is common in highly contested family law matters, credibility plays an important part in the assessment of the evidence in this trial.
- [110] The assessment of credibility by the trial judge is a nuanced analysis. It is also, ultimately, fact specific. However, various justices of this Court have outlined certain factors to be considered when addressing this issue which are very helpful.
- [111] Earlier this year, I summarized my review of the law in family law matters in *L.C. v. Y.S.*, 2023 BCSC 422. Specifically, at paras. 51-57, I stated as follows:
- [51] Before detailing certain key conflicts in the evidence, I will note that credibility plays a key part in the assessment of the evidence in this trial.
- [52] The assessment of credibility by the trial judge is a nuanced analysis. It is also, ultimately, fact specific. However, various justices of this Court have outlined certain factors to be considered when addressing this issue which are very helpful. Having regard to the significance of this issue to the trial, I am going to refer to four decisions of the court which I consider relevant and applicable.
- [53] The first is the seminal decision in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. In *Bradshaw*, Justice Dillon wrote the following oft-quoted passage on credibility:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) ; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).
- [54] There are three recent decisions which follow *Bradshaw* that are also instructive.
- [55] In *M.L. v. R.H.*, 2022 BCSC 1580 at para. 25, Justice Wilkinson helpfully summarized *Bradshaw* as the following list of factors:
1. Is the witness able to resist the influence of interest in modifying their recollection?
 2. Does the witness' evidence harmonize with independent evidence that has been accepted?

3. Does the witness change their evidence during examination for discovery, direct examination and cross-examination, or is it otherwise inconsistent in their recollections?
4. Does the witness' evidence seem generally unreasonable, impossible, or unlikely?
5. What demeanour did the witness exhibit when testifying?

[56] In *S.B.F. v. D.G.F.*, 2022 BCSC 2231, Justice Murray cited Bradshaw and adopted a helpful statement on the distinction between credibility and reliability from the Ontario Court of Appeal:

[29] The distinction between reliable evidence and credible evidence was discussed by Doherty J.A. in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.) at p. 526:

Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[57] Finally, in *L.M. v. K.M.*, 2022 BCSC 689 at paras. 275-82, Justice Fleming sets out a comprehensive review of the credibility issue with reference to Bradshaw. Recognizing that the overall review is instructive, albeit done in a factually distinguishable case, I will note in particular the following paragraphs:

[275] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, may be mistaken about what they recall.

[276] Credibility and reliability are not all or nothing concepts. The trier of fact may believe some, all, or none of a witness's evidence and attach different weights to different part of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

[277] The proper approach to assessing the truthfulness of any interested witness was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357, with these words:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. 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.

[112] This analysis of the law is, I conclude, equally applicable in this case.

Credibility Analysis

[113] As will be apparent from the foregoing, I have elected, with reference to the above legal framework, to make certain conclusions regarding credibility and reliability of the parties in the course of my summary of their evidence for efficiency. There are other broader credibility issues which arose which I will address separately below.

[114] Returning to the parties' respective cases, the claimant called three additional witnesses and the respondent called a single witness - all of whom are family members of the parties.

[115] The first of the lay witnesses was the claimant's brother, Michael O'Connor. Applying the framework set forth above, I find that Mr. O'Connor was both a credible and reliable witness. He answered the questions he was asked in a very forthright way and in a manner consistent with his affirmation to tell the truth. He was candid, helpful and not evasive in any way. He also expressed no bias in favour of the claimant and no apparent animosity towards the respondent.

[116] The evidence of Mr. O'Connor can be summarized by saying that he offered to assist the parties by using his skillset to install the fiberoptic cables and associated fiberoptic systems in the Monck Park Property. On his evidence, which I accept, this work required approximately one-and-a-half weeks of his time. He also assisted, in a more general way, with some general construction tasks during the build of the Monck Park Property. For these tasks, Mr. O'Connor represented a "willing set of hands" but did not offer any particular expertise. Indeed, he readily acknowledged that he actually learned some skills from the respondent as part of participating in these tasks.

[117] Mr. O'Connor was clear that he did not provide any assistance with the expectation of remuneration but did so out of a generalized sense of moral obligation to assist family. However, Mr. O'Connor acknowledged that at the Christmas following his assistance at the Monck Park Property, he was given a card from the parties acknowledging his assistance which was accompanied with what he considered a generous monetary gift of somewhere between \$600 and \$1,000. Mr. O'Connor appreciated the acknowledgement from the parties and said it was a "good Christmas".

[118] The respondent also reciprocated in assisting Mr. O'Connor in building-related matters by helping him replace the subfloor and surrounding drywall when a leak in a shower in a basement bathroom of Mr. O'Connor's residence caused significant damage. The amount of time the respondent spent assisting Mr. O'Connor was less than definitive because it is quite clear to me that neither was "keeping score" in terms of who was helping whom. These individuals were, on the basis of the evidence, two brothers-in-law who had a positive relationship and were willing to assist the other as needed.

- [119] The one exception to this "keeping score" comment is that I did hear evidence that Mr. O'Connor, as a unionized employee, found himself in a situation of being on strike and receiving strike pay that was substantially less than his usual remuneration. During this time, Mr. Mills offered Mr. O'Connor employment as effectively a general labourer at the Bellevue Property during the renovation.
- [120] I again find this to be simply an example of a positive and mutually beneficial relationship wherein the project needed certain basic work done, Mr. O'Connor was in the situation of needing additional income and was able to perform the work required by the respondent on the project.
- [121] In all the circumstances, notwithstanding my findings as to the credibility and reliability of his evidence, I do not find the evidence of Mr. O'Connor to be probative to the issues of determining the key issues of excluded property or the division of excluded property.
- [122] The second witness called by the claimant was the parties' 24-year-old daughter, Kate. Kate was, as noted, 17 when the parties ultimately separated. Apart from her attendance at university and one summer where she resided at the Monck Park Property and was paid to assist the respondent and her brother Ryan with certain construction and household tasks, she has always resided with the claimant until she became independent in or about May 2021. Despite residing with the claimant primarily, she did not demonstrate a bias in favour of either parent.
- [123] There was some evidence led by the respondent regarding Kate's decision to attend Ryerson University in Ontario versus attending the University of British Columbia Okanagan campus ("UBCO"). The respondent's reluctance for Kate attending Ryerson University was, I find, solely financially motivated.
- [124] Although Kate's present employment is not directly aligned with her degree from Ryerson University, she successfully completed her studies at Ryerson and, as noted, is economically self-sufficient. Upon receiving her evidence, I do not consider her decision not to attend UBCO, in the circumstances, to be unreasonable or financially imprudent.
- [125] Ultimately, while I concluded that Kate's evidence was generally credible and reliable, it was again of fairly limited probative value in deciding the substantive legal issues save and apart from the retroactive child support claim.
- [126] The final witness called by the claimant was the parties' eldest son Robert. He is 30 year of age. Robert was, in my observation, the most reluctant to testify of the lay witnesses called. In making this observation, I did not find Robert's evidence to be lacking in credibility or reliability. He answered the questions he was asked in a straight-forward manner and was not evasive. He was, however, somewhat obviously uncomfortable in giving his evidence. I conclude that this is because, despite his age, he is still understandably somewhat uneasy about being drawn into the conflict between his parents and would prefer not to be put in a position where he might be perceived to have taken sides.

- [127] As part of the respondent's case, he called his sister Ms. Drinkwater. Ms. Drinkwater was somewhat less gracious in her evidence as to the efforts of the claimant in the family than Mr. O'Connor was of the respondent. However, there was a lack of any obvious animus between Ms. Drinkwater and the claimant in her evidence.
- [128] The first key portion of Ms. Drinkwater's evidence relates to the administration of June's Estate. Ms. Drinkwater was very clear that the Shuswap Properties held significant sentimental value to her and that she considered it a key priority to retain them. She also would have ideally liked to retain the Bellevue Property but that was not financially feasible. She thus agreed to allow the respondent to receive the Bellevue Property and they set about a process to divide these three properties and the other assets equally in accordance with June's Estate. Ms. Drinkwater's evidence as to the exact process as to how this was done, as addressed above regarding the fair market value of Bellevue, is not identical to the respondent's evidence. However, it is also not inconsistent and given the passage of time, the slight variances are understandable.
- [129] The second key portion of Ms. Drinkwater's evidence relates to her involvement in the respondent's personal finances. The respondent was clearly dilatory in completing his corporate financial statements/tax returns and personal tax returns for an extended period of time. This ultimately resulted in the demand as against the claimant referred to above. The respondent sought the assistance of Ms. Drinkwater and her husband, who is a chartered accountant to organize the underlying source documents and prepare the necessary draft profit/loss statements and balance sheets to send to an outside third party accountant to finalize.
- [130] The outside accountant was not called as a witness. As a result, there were multiple discrepancies identified in cross-examination between the documents prepared by Ms. Drinkwater and her husband and the final documents filed by the outside accountant. This has created some challenges in determining Guidelines income but I cannot conclude that it negatively impacts the credibility or reliability of Ms. Drinkwater's evidence. She, along with her husband, was gratuitously assisting her brother in bringing his tax filings up to date and did not have any control over the final filings that were completed by the outside accountant and which the respondent signed off on.

Additional Findings Regarding the Credibility of the Parties

- [131] In addition to my conclusions above and as incorporated into general conclusions on credibility, I consider it necessary to make several additional findings for the benefit of the overall evidentiary record.
- [132] The claimant presented as a pleasant and generally cooperative witness. There was no marked change in her presentation during direct examination or cross-examination.

- [133] The claimant was not, however, a particularly accurate historian in terms of recalling the chronology of events during this long-term marriage. Her recollection while questioned on various issues, both under direct examination and cross-examination, was less than ideal. The claimant's evidence was, at times, best described as muddled. This muddling of evidence, however, was not always to the claimant's benefit and it did not present as being contrived.
- [134] I am thus not taking issue with the credibility of the claimant except where I have specifically identified above regarding registration of title for the Monck Park Property. Specifically, I cannot find that the claimant was being intentionally untruthful or attempting to mislead the Court.
- [135] Rather, the assessment of the claimant's evidence presents issues with reliability. As alluded to above, it was at times initially contrary to documentary evidence included as part of the evidentiary record (which was generally joint) and at other times very vague, if not contradictory, in terms of dates and monetary amounts. I have thus relied on the documents where I have concerns that the claimant's evidence was not entirely consistent with same.
- [136] The respondent presented as a more sophisticated witness with an extremely good recollection of historical events where same aligned with his interests. When questioned on matters which were not necessarily aligned with his interests, or what he might have perceived to not be entirely aligned with his interests, under cross-examination, the respondent's recollection was notably diminished. His presentation under cross-examination was also somewhat different than under direct examination. I attribute part of that to what I perceived as a general frustration from the respondent as to the length of the litigation process and trial. However, I still must proceed with some caution with portions of the respondent's evidence where I have concluded it is tailored to his self-interest. Stated another way, the respondent's evidence was generally reliable and consistent with the documentation, but I have much greater concern as to the credibility of his evidence than with the claimant.
- [137] In conclusion, I have primarily relied upon the documentary evidence adduced. Where the evidence of the respondent accords with that documentary evidence, I accept that the respondent is the more accurate historian who is best able to lead the Court through the relevant chronology. Where the parties' credibility is directly in issue, I conclude the claimant is the more credible witness save and except specifically indicated regarding registration of the Monck Park Property.

Lack of Expert Evidence and Historical Value of Bellevue Property

- [138] Section 87 of the FLA provides, inter alia, that unless an agreement or order provides otherwise, the value of family property is based on its fair market value and that valuation must be determined as of the date of trial.

- [139] I heard and delivered reasons for judgment in this matter respecting the admissibility of a historical appraisal of the Bellevue Property in advance of the trial proceeding on its merits. That decision is reported at 2022 BCSC 2236. In summary, I concluded that the claimant was not permitted to rely upon a historical appraisal of the Bellevue Property obtained by the respondent on the basis that it was protected by both litigation privilege and settlement privilege.
- [140] In said reasons for judgment, I opined that the lack of expert evidence would likely make determining the value of any exclusion under s. 95 of the FLA difficult. This was a correct assumption but does not change the fact that the appraisal sought to be tendered was cloaked in privilege and there had been, I concluded, no waiver of that privilege.
- [141] As a result of there being no historical appraisal of the Bellevue Property, both parties led what they asserted was non-opinion evidence on this topic--in respect of the negotiations between the respondent and Ms. Drinkwater during the administration of June's Estate, the probate documents in respect of the estate of June, and in the form of various notices of assessment issued by the BC Assessment Authority for properties in the vicinity of the Bellevue Property.
- [142] The Court of Appeal has provided its comments on the use of BC Assessment reports as evidence of fair market value on multiple occasions, both directly and in obiter (see *Dosanjh v. Liang*, 2015 BCCA 18). In the obiter comments on family law matters in *Dosanjh*, the Court stated as follows at paras. 60-63:
- [60] While trial courts have, with some frequency, admitted property assessments as evidence of property value in family law cases, they have generally done so either with the agreement of the parties, or, alternatively, where no other evidence of value has been tendered (e.g. *Chung v. La*, 2011 BCSC 1547). Where proper expert evidence of value has been tendered, the courts have been reluctant to consider property assessments as evidence (see, for example, *Hall v. Mougan*, 2009 BCSC 645).
- [61] In family law cases, a court is often faced with having to assess the value of real property in a situation where neither side is clearly subject to any burden of proof. Rather, the court is simply required to estimate the value of property for the purpose of dividing a family asset. It is not surprising, in such situations, that a court may "grasp at straws" in an attempt to reach a just result. It is simply a matter of doing the best job possible with limited evidence.
- [62] It seems to me that different considerations arise in non-family cases, where one party or the other will generally bear the onus of producing evidence of property value.
- [63] It is not necessary, in this case, to make any pronouncement as to the scope for admission of property assessments as evidence of property value in family law cases, and I will refrain from doing so. In my view, however, there is, absent agreement, no scope for using assessments in place of expert opinion evidence in cases such as the present one.

- [143] The above statement of law was recently relied on by Justice Crerar in *T.C. v. L.A.*, 2020 BCSC 1313 at para. 106.
- [144] In this case, I also heard conflicting evidence about what real estate professionals may or may not have been consulted in the process of administering Bob's Estate to assist in valuing the assets. At minimum, there were at least two realtors involved in providing a comparative market analysis. There may have been more. There may or may not have been an appraiser engaged as well. No documents in this regard are available due to the Monck Park Property fire, the death of at least one of the realtors believed to be engaged and the overall passage of time.
- [145] On this issue, and due to the absence of any documentation to corroborate either parties' recollection of events, I am simply not able to conclude that one party's evidence is more credible or reliable than the other. Clearly a process of valuation was undertaken, that is uncontroverted, but the fact that the parties do not exactly recall how this transpired is not entirely unexpected considering this took place in or about 2004 and the trial of this action commenced in late 2022. Memories of this nature can understandably fade over the course of some 18 years.
- [146] Ultimately, I have concluded that the fair market value of the Bellevue Property as of the date that the respondent received full beneficial and legal ownership of the property in April 2004 was \$1,850,000.
- [147] I reach this conclusion on the basis that the respondent and Ms. Drinkwater administered the affairs of their late mother, June, in a business-like way. Both are sophisticated individuals. Ms. Drinkwater is also married to a chartered accountant who is sophisticated in financial matters. I accept they were trying to divide the estate in a fair and equitable manner based on their mutual decision as to who wished to receive what assets in the administration of the estate. There was, as I have accepted, at least some efforts to obtain some professional advice on valuation as part of this process to ensure fairness between the respondent and Ms. Drinkwater. This distinguishes the case somewhat from the scenario contemplated by the Court of Appeal in *Dosanjh*.
- [148] After these efforts, the mutual conclusion of the respondent and Ms. Drinkwater was that the fair market value of the Bellevue Property at the material time was \$1,850,000. This, in the absence of actual appraisal evidence from the time or an historical appraisal for the purposes of this litigation, is the most reliable evidence before the Court as to the fair market value of the Bellevue Property.
- [149] In contrast, it is virtually impossible for the Court to reconcile the competing BC Assessment reports for other possibly comparable properties tendered by each party. These reports have only the core information about the subject properties. In respect of some of the purportedly comparable properties, the parties were at best able to give some very limited evidence as to their condition beyond that stated in the assessment reports, but not in relation to all the properties. Further, these assessments are from 2004 and I am

prepared to take judicial notice that particular caution should be used when relying on assessments to establish historical value as efforts have been made since that time to bring assessed values into greater alignment with actual fair market value.

- [150] As a final comment on this issue, I acknowledge that the respondent gave evidence at trial about the "floor area ratio" of certain properties and how that relates to fair market value. Although that evidence was allowed at the time, I am not prepared to give it any weight as it is clearly quasi-expert evidence which seeks to rely on the respondent's expertise in the construction and development industry. It is entirely distinguishable from the evidence given, for example, as to whether he had been inside a potentially comparable residence in the course of parenting the Children or where on the street a potentially comparable residence was located. Those are purely factual matters and do not stray into the quasi-expert/expert realm.
- [151] In light of the fact that no admissible expert evidence was tendered, I return then to my conclusion that the value agreed upon between the respondent and Ms. Drinkwater is, in the circumstances, the best estimation of fair market value. The respondent and Ms. Drinkwater were not operating fully at arms-length but they each had a motivation to agree upon a value that accorded with their own self-interest. That makes it much closer to an arm's-length transaction than a situation where a family member sells an asset to another family member for nominal or suspiciously low consideration. Further, even if the Bellevue Property had theoretically been able to be sold, unrenovated, for somewhat more than what the respondent and Ms. Drinkwater agreed on, there would have been real estate commissions and legal fees payable. This would have likely brought the respondent and Ms. Drinkwater back to an equivalent position or very close thereto.
- [152] The starting point of the family property and excluded property analysis is thus, I find, that the respondent starts out with a presumptive exclusion, pursuant to s. 85 of the FLA, of \$1,850,000.

Determination of Family Property

- [153] The definition of "family property" is comprehensively set out at s. 84 of the FLA.
- [154] Simply stated, subject to s. 85 of the FLA, "family property" constitutes all real property and personal property that, at the date of separation, otherwise known as the triggering event, is owned legally or beneficially by at least one spouse (s. 84(1)(a)).
- [155] The parties are spouses and the Monck Park Property was owned by the respondent at the agreed date of separation. The Monck Park Property thus clearly constitutes "family property". Further, the substantive remaining property for division is the insurance proceeds from the Monck Park Property fire (the "Monck Park Trust Funds"), which are unequivocally traceable to the Monck Park Property. The Monck Park Trust Funds thus also constitute "family property" pursuant to s. 84(1)(b) of the FLA.

[156] The Monck Park Trust Funds were, as at the end of October 2022, \$1,878,580.26. Interest will have been earned on those funds and there may, based upon discussions at the conclusion of trial, have been some further interim distributions from the Monck Park Trust Funds by consent. I am, however, conducting my analysis on the basis that the Monck Park Trust funds are approximately \$1,878,580.26.

Determination of Excluded Property

[157] As set out above, the definition of family property under s. 84 of the FLA is subject to the determination of excluded property under s. 85 of the FLA. Again, simply stated, the purpose of s. 85 is to remove certain defined classes of property from the proverbial "family pot" presumptively created under s. 84.

[158] Section 85(1)(b) of the FLA specifically provides that inheritances to a spouse are excluded from family property.

[159] The onus on proving an exclusion under s. 85 lies with the spouse seeking to rely on this provision (s. 85(2)).

[160] The interplay between ss. 84 and 85 of the FLA can thus be summarized as follows: all property that a spouse owns legally or beneficially at the date of separation is presumptively considered family property and is presumptively equally divisible pursuant to s. 81 of the FLA. However, if a spouse can prove, on the balance of probabilities, that property meets the definition of "excluded property" set out in s. 85 of the FLA, then that property gets set aside in a separate pot and is dealt with differently.

[161] Excluded property may change form over the course of a relationship or marriage. This does not automatically result in the loss of an exclusion. It is, however, necessary to trace the claimed excluded property into the family property that exists at the date of separation. If this chain of continuity cannot be proven, then a claim for excluded property cannot be maintained even if it is accepted that one spouse had what would otherwise qualify as excluded property at first instance. It is an analysis of determining whether, on the basis of all the evidence, including documentary and viva voce evidence, the proverbial "bouncing ball" can be followed.

[162] The above is acknowledged to be a simplified description of the law on this issue. The law has already been clearly articulated by the Court of Appeal in *Shih v. Shih*, 2017 BCCA 37. *Shih* stands for the proposition that nothing in the FLA demands "precision" or "mathematical certainty" in the standard of proof for establishing a claim to excluded property.

[163] In assessing whether initially excluded property subsequently loses its characterization, it is necessary to look at the issue of the intention of the parties at the material time. The material time being at the time of any transfer or other dealings and not retrospectively after separation when there has already been a triggering event.

- [164] The issue of intention in family law matters concerning excluded property was addressed by our Court of Appeal in *Venables v. Venables*, 2019 BCCA 281. In *Venables*, the factual matrix was notably different as during the course of a relatively short marriage the husband transferred assets that would otherwise have constituted excluded property into joint names with his spouse. Part of the reason for the transfers was to qualify for a modest tax benefit. The trial judge, Justice Marchand (as he then was) concluded that there was an intention to gift and that this resulted in the loss of the exclusion.
- [165] On appeal, Justice Griffin writing for the Court said as follows regarding the issue of intention to gift at para. 95:
- [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property: *V.J.F.* at paras. 74-79; *Namdarpour* at para. 46.
- [166] In this case, however, the respondent inherited the Bellevue Property following June's passing and the ultimate administration of June's Estate, all of which occurred in the mid-portion of what I have concluded was a long-term marriage. This was not contested and is, in any event, clearly proven in the documents in evidence.
- [167] The proceeds from the sale of the Bellevue Property were utilized to fund the construction of the residence on the Monck Park Property. The parties also incurred debt. However, I conclude this is not a situation where the co-mingling of the funds resulted in a loss of the exclusion. There would have been no Monck Park Property without the Bellevue Property. And there would be no Monck Park Trust Funds without the insurance claim arising from the destruction of the residence on the Monck Park Property.
- [168] In this regard, I will refer to my earlier finding of fact that I do not accept the claimant's evidence that the respondent agreed to have her name put on title to the Monck Park Property and that the claimant simply declined to do so out of convenience. I find this evidence is contrived because the claimant appreciates that the fact that title to the Bellevue Property and the Monck Park Property were in the respondent's sole name is a significant legal impediment to her claims under ss. 85 and 95 of the FLA.
- [169] Beyond this evidence which I have rejected, there is simply no evidentiary foundation to support a finding that there was an intention to gift to the claimant by the respondent. It is not enough to suggest this was the possible plan or, more accurately, might have been possibly discussed as a potential plan. There is simply no actual evidence of such a plan. I note that my conclusion might have been different had documents been prepared to transfer the Monck Park Property into joint names that simply never were submitted to the Land Title Office or if there had been some even rudimentary correspondence between the

parties confirming an intention as between the parties that the claimant be on title for the Monck Park Property. There is, however, none of the above. The only evidence was the vague testimony of the claimant which I have rejected.

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

[171] This amount is less than the amount of the respondent's presumptive exclusion of \$1,850,000 representing the value of the Bellevue Property at the time he became the sole registered owner of said property. The respondent is not entitled to credit for this discrepancy--nor is it submitted by his counsel that he should.

[172] The litigation thus turns on whether the claimant is entitled to a share of the Monck Park Trust Funds under either ss. 95 or 96 of the FLA.

Unequal Division of Family Property

[173] The unique distinguishing feature of this case, as I have already touched on above, is that both the Bellevue Property and the Monck Park Property were always in the sole name of the respondent. This resulted in my above conclusion that the Monck Park Trust Funds are not family property.

[174] By virtue of this conclusion, s. 95 of the FLA, which permits unequal division, is not applicable as it pertains only to family property.

[175] Specifically, s. 95(1)(a) of the FLA provides as follows:

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

(a) equally divide family property or family debt, or both, or . . .

[Emphasis added]

[176] My conclusion in this regard is also consistent with the fact that s. 96 of the FLA specifically provides for the division of excluded property. If s. 95 permitted the division of property which does not meet the definition of family property, s. 96 would be effectively redundant.

[177] Notwithstanding my conclusion that the Monck Park Trust Funds are not family property, I will briefly consider the possible application of s. 95(2) in the event that conclusion is incorrect.

[178] Section 95(2) sets out the factors the court must consider in applying s. 95(1) of the FLA:

95 (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

(a) the duration of the relationship between the spouses;

- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[179] Applying the s. 95(2) factors, I find as follows:

- a) This was a long marriage by all standards.
- b) There was no agreement between the spouses other than possibly the evidence as to the circumstances of the purchase of the Monck Park Property and whether an offer was made to place title in joint names, which evidence I have expressly rejected.
- c) The claimant was very supportive of the respondent's career. Her role as the primary caregiver of the Children was key to allowing the respondent to be able to pursue the various opportunities that became available to him over the course of the relationship. The detriment to her career prospects from these efforts is properly addressed under the spousal support analysis, but I accept the claimant's role contributed to the respondent's career advancement prior to separation.
- d) There is no current family debt and there was no evidence led that suggested that the prior family debt, now retired, was not incurred in the course of the relationship or for a bona fide purpose. The evidence is clear that the parties started to live beyond their means and debt was incurred to sustain the household. The evidence that the respondent spent some family monies on his extra-marital relationship prior to separation, which I accept as accurate, does not change my conclusion that the amount of money, while not precisely quantified,

was extremely minor compared to the overall family expenses at the material time. These expenses were some meals and modest inter-provincial travel expenses. They were not for lavish gifts, international travel or the like. I have no doubt that the claimant considers these expenditures which are, to some extent, inter mingled into the prior family debt to be unfair to her but they cannot, in my view, reach the threshold of amounting to significantly unfair. Such a conclusion would require the court to scrutinize the day-to-day spending of a spouse to a level that is functionally impossible.

- e) This is not a situation where the family debt exceeds the value of family property given, as noted, all family debt has been retired.

Spousal Support and Unequal Division Pursuant to s. 95(3) of the FLA

[180] Section 95(3) is an arguably underutilized provision of the FLA which connects claims for unequal division of family property where there is also a claim for spousal support.

[181] Specifically, s. 95(3) provides as follows:

95 (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

[182] This provision is apt in this case because of the issues regarding determination of the respondent's Guidelines income and, due to his age, his anticipated time remaining in the workforce (including self-employment) generally.

[183] However, in my view, s. 95(3) must be read in conjunction to s. 95(1). This means that the claimant is also unable to avail herself of relying on this provision in light of my conclusion that the Monck Park Trust Funds are not family property.

[184] This, I consider, is consistent with the "modern principle" of statutory interpretation. The "modern principle" is the official approach to statutory interpretation in Canada as articulated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd*, [1998] 1 S.C.R. 27 (see in particular para. 21). See also for example in the family law context, *Francis v. Baker*, [1999] 3 S.C.R. 250, 177 D.L.R. (4th) 1.

[185] The core of the modern approach is that the language of any statute must always be interpreted purposefully and in context. The wording of the legislation alone is insufficient to achieve this goal. The words must be read and analyzed with a purposeful analysis. Why was the legislation written and enacted? What were the drafters trying to achieve? The court, in applying the modern approach, must also keep in mind all of the rules, principles and maxims that might apply.

[186] Were the Monck Park Trust Funds to meet the definition of "family property", s. 95(3) of the FLA would be very apt in this factual matrix. Given the Monck Park Trust Funds are not "family property", I conclude the claimant cannot, pursuant to the modern approach to statutory interpretation of the language of s. 95(3), avail herself of relief under this subsection.

Section 96 of the FLA

[187] Section 96 of the FLA, as it existed at the time of trial, gives the court limited jurisdiction to order the division of excluded property.

[188] Specifically, s. 96 of the FLA reads as follows:

96 The Supreme Court must not order a division of excluded property unless

- (a) family property or family debt located outside British Columbia cannot practically be divided, or
- (b) it would be significantly unfair not to divide excluded property on consideration of the duration of the relationship between the spouses and one or more of the following factors:
 - (i) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of the excluded property;
 - (ii) the terms of any agreement between the spouses respecting the excluded property, other than an agreement described in section 93 (1) [setting aside agreements respecting property division], including but not limited to terms respecting the transfer of the excluded property;
 - (iii) if the Supreme Court makes a determination under section 95 (1) [unequal division by order] respecting significant unfairness, the extent to which the significant unfairness cannot be addressed by an unequal division of family property or family debt, or both.

[189] The most instructive authority on s. 96 of the FLA remains, in my view, *V.J.F. v. S.K.W.*, 2015 BCSC 593, affirmed 2016 BCCA 186. Specifically, trial judge, Justice Walker, concluded as follows at paras. 78-88:

[78] Even if the \$2 million payment did not change in character and remained excluded property, the FLA provides for a division of excluded property if "it would be significantly unfair" not to do so. Section 96(b) provides for a division of excluded property after consideration of the "duration of the relationship" and a spouse's "direct contribution to the preservation, maintenance, improvement, operation or management of excluded property": . . .

[79] In *Remmem*, Butler J. considered the meaning of "significantly unfair". Although his comments were made in the context of an unequal division of family property per s. 95 of the FLA, I find them instructive for the approach to be taken to s. 96 (even though the factors to be considered are different in s. 96). He stated at para. 44:

The FLA provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), courts had a discretion to divide family property in unequal shares if the court found that the division of property (pursuant to agreement or the provisions of the FRA) would be unfair having regard to the factors set out in that section. The first and obvious difference between the discretion given under the FRA and the discretion given in Part 5 of the FLA is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely "unfair". There must be a finding that the division of property pursuant to the statutory scheme is "significantly" unfair. The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact -- something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).

- [80] In *L.G. v. R.G.*, 2013 BCSC 983, at para. 71, Mr. Justice Brown described the phrase "significantly unfair" as found in s. 95(1) of the FLA as "essentially a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'". It is, he said, "Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart [sic] from the default equal provision."
- [81] A determination of significant unfairness turns on the individual facts of each case. In the absence of a definition of the term in the FLA, I found it useful to draw on cases defining the phrase in other contexts where no specific definition is found in the applicable statute. In *459831 B.C. Ltd. v. Strata Plan BCS 1589*, 2012 BCCA 44, in dealing with the Strata Property Act, S.B.C. 1998, c. 43, the Court of Appeal said at para. 15 that the "characterization of an action as significantly unfair is not a matter of discretion but is an inquiry requiring consideration of the facts before the court and what legally constitutes unfair action." The Court referred to the definitions given to the phrase in other strata property and unrelated oppression cases such as *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, *Blue-Red Holdings Ltd. v. Strata Plan VR 857*, [1994] B.C.J. No. 2293 (S.C.), *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 - "unfairly prejudicial", "burdensome, harsh, wrongful," and "lacking in probity and fair dealing" - and, as I read the reasons for judgment, concluded that significantly unfair must be something more than "mere prejudice and trifling unfairness".
- [82] The Court adopted a two-part test that included an objective assessment of the reasonable expectations of the petitioner. That test was not advanced by the parties in this case. In my opinion, the factors set out in s. 96(b)(i) and (ii) of the FLA point to considerations that are different than reasonable expectations.
- [83] The FLA has not set the bar so high that finding significant unfairness is next to impossible. For example, in *Cabezas v. Maxim*, 2014 BCSC 767, the Court found that significant unfairness would result from the unequal division of the claimant's purported excluded

property given the respondent's contributions to the maintenance of the property, her decision to undertake liability on the mortgage, her greater contribution towards expenses, and the length of their cohabitation of 6.5 years, which is some three years less than the marriage between Mr. F. and Ms. W.

- [84] Ms. W. also made significant contributions to the preservation, maintenance, and following separation, improvement and management of the Vancouver property. She incurred debt to increase its value of the excluded property in order to avoid a loss to Mr. F. if it was sold at the time of separation. In all, Ms. W.:
- (a) agreed to encumber the Richmond property which she owned to obtain funds to build the new house in Vancouver;
 - (b) pledged her credit to obtain a line of credit and encumbered the matrimonial home with a mortgage to secure it, without which it would not have been possible for Mr. F. to proceed beyond purchasing the bare land;
 - (c) agreed to proceed with construction of the house after separation, which in turn saved Mr. F. from at least a one-half million dollar loss in the value of the property, and increased her indebtedness on the line of credit from just over \$10,000 at separation to approximately \$1.1 million, and thus put her interest in the Richmond property at risk in the event of cost overruns on the project or a downward change in market value or both;
 - (d) was legally responsible to pay the construction bills which were invoiced to her in her name; and
 - (e) worked closely with contractors, tradespeople, and suppliers in the construction of the new home, and, at the request of Mr. F., paid the bills so that he would not be distracted from his duties at P. Co.
- [85] Thus, as a result of her agreement to proceed with the construction of the house on the Vancouver property and her ongoing involvement with the project, Ms. W. saved Mr. F. from a significant loss (assuming it was still excluded property) and freed Mr. F. to pursue his work duties without distraction. There was no upside to her agreeing to proceed since her share of the debt at the time of separation was \$5,000 (i.e., one-half of the amount drawn on the line of credit). Ms. W. agreed to proceed with construction to avoid the loss. There was no expectation at that point of making a profit, and in fact, the profit was minimal at approximately \$50,000 to \$60,000.
- [86] As well, Ms. W. made significant contributions to the household and her ongoing support for Mr. F. for close to 10 years, which I am satisfied greatly assisted Mr. F. to develop his relationship with M.I.
- [87] I find the contributions made by Ms. F. to have been direct and in accordance within the meaning given to that concept in other cases decided in this province: *Campbell v. Campbell*, [1990] B.C.J. No. 1267 (C.A.); *Detta v. Detta*, 2001 BCSC 1222.

- [88] In the circumstances, given the weight of her significant contributions relevant to the factors set out in the FLA, I would order the trust funds to be divided equally in the event that the \$2 million payment was excluded property. To do otherwise would be significantly unfair.
- [190] I was also referred to the more recent decision of the Court of Appeal in *Cook v. Cook*, 2021 BCCA 194. Specifically, I was referred to paras. 41-50 of *Cook*:
- [41] I turn, now, to the substantive issues on appeal. The appellant, citing *Jaszczevska* at para. 41, says family property should not be divided unequally unless equal division would lead to unfairness that is "compelling or meaningful having regard to the factors set out in s. 95(2)" of the Family Law Act. [Emphasis in original.]
- [42] He argues that the factors set out in s. 95(2) do not support a reapportionment of assets in this case. Two such factors which the judge considered to be critical, the duration of the relationship and Ms. Cook's contributions to the household and to childrearing, had nothing to do with the inheritance that created the only disparity. In the circumstances, he says, there is no cause to disturb the fundamental principle that the parties should share equally in the fruits of their labour but retain assets held outside the marriage.
- [43] The principles upon which the appellant relies are canvassed in *Venables v. Venables*, 2019 BCCA 281. In that case, Justice Griffin, writing for the Court, reviewed the legislative history of the property division provisions in the Family Law Act. She described the policy embodied in the provisions as follows:
- [85] The category of "family property" in s. 84 of the FLA recognizes that many modern relationships are like a partnership or joint venture, with give and take and various forms of contribution, including indirect contribution through child care, household management and other means, and so presumptively any acquisition or growth in assets during that relationship should be shared equally upon the relationship ending. Because of the wide variety of indirect contributions made during a spousal relationship, a spouse is not required to directly contribute to family property in order to be entitled to a presumptive equal share in it.
- [86] The category of "excluded property", established by s. 85 of the FLA, carves out certain types of property from the family property category. It is meant to cover property a spouse acquired to which the other spouse did not contribute, because either the property was acquired before the relationship or it came about by inheritance or certain other specified means (gifts from a third party, settlement of a claim, insurance proceeds, discretionary trusts and property derived from excluded property).
- [87] The excluded property regime reflects the reality that many modern relationships do not last a lifetime and the perspective that, since the other, non-acquiring spouse had nothing to do with the acquisition of the excluded property, it is presumptively fair that the non-acquiring spouse should not share in the other's excluded property upon the relationship ending.

[Emphasis added.]

- [44] It is difficult to reconcile the trial judge's conclusion, in the case at bar, that significant unfairness is produced by the disparity that is the result of an inheritance, with the view that it is presumptively fair that excluded assets are not to be divided.
- [45] It must be borne in mind that the property provisions of the Family Law Act were drafted to create more certainty by identifying two categories of property and a starting point for what would typically happen on separation of spouses: Venables at para. 84.
- [46] That certainty is undermined by substituting another concept of fairness for that established by the Act. Even under the prior legislation, the Family Relations Act, R.S.B.C. 1996, c. 128, the case law emphasized that courts should not apply "abstract concepts of fairness" when dividing family assets. In *Pasch v. Blackmore*, 2011 BCCA 420, Justice Groberman, for the Court, held:
- [15] The provisions of the Family Relations Act do not invite a court to apply abstract concepts of fairness to the division of family assets. Section 56 of the Act sets out the presumption that family assets are to be divided equally. While s. 65 allows a court to depart from equal division, it does not give the court free rein to find the "fairest" possible division of property. Instead, it requires equal division unless the court finds that such division would be "unfair" having regard to the enumerated factors. The interpretation of s. 65(1) was considered by this Court in *S.B.M. v. N.M.*, 2003 BCCA 300. Donald J.A., speaking for the Court, said:
- [23] ... The question is not whether an unequal division would be fair The Legislature created a presumption of equality -- a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends.
- [47] In *Pasch*, the trial judge had concluded that the equal division mandated by the provisions of the Family Relations Act was unfair (the then-prevailing, and less onerous, standard for reapportionment) because the generosity of one spouse's parents in making an interest-free loan had permitted the parties to purchase the matrimonial home. The home had increased substantially in value over the course of a 4-year marriage. The judge reapportioned the property in a manner that reflected the contribution of the parents to what he considered to have been a "windfall" for the unrelated spouse. But there was no doubt the parents had advanced a loan rather than taken an equity interest in the property. The reapportionment reflected the trial judge's conception of fairness rather than consideration of the factors enumerated in the Family Relations Act. The reapportionment did not withstand appellate review.

- [48] The principle that animated the judgment of this Court in Pasch is still valid. We ought not to find unfairness in the outcome contemplated by the legislation and that is, therefore, presumptively fair. Under the current Family Law Act regime, "[t]he starting point in the division of property analysis already applies significant exclusions": V.J.F. at para. 10, citing *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 60. An unequal starting point suggests that an unequal end point is similarly contemplated by the statutory regime.
- [49] As noted above, the factors that may be considered in order to identify "significant unfairness" in an equal division of property include "any other factor that may lead to significant unfairness", other than insufficient compensatory spousal support, which is specifically addressed in s. 95(3). While this confers considerable discretion on a trial judge, the discretion must be exercised judicially, and it has been narrowly defined by this Court. In *Singh v. Singh*, 2020 BCCA 21, Justice Garson observed, at para. 136, that the general provision referring to "any other factor" was preceded by a list of specific items, and applied the rule of statutory construction that limits the general term "to the genus of the narrow enumeration that precedes it". She held:
- [138] [If] the rule applies, the class cannot be any factor "that may lead to significant unfairness" as this would violate the second requirement as set out by Sullivan. The other factors enumerated in s. 95(2) suggest consideration of aspects of the relationship between the spouses, including its duration, the terms of any agreement, as well as the characteristics of family assets and debt and how the spouses have influenced their value. One of the considerations in s. 95(2)(g) includes an analysis of a spouse's good faith or motive. These factors are broad. Nevertheless, in my view, they all relate to a limited class, namely, the economic characteristics of a spousal relationship.
- [Emphasis in original.]
- [50] In my opinion, the trial judge erred in law in finding that it would be significantly unfair to equally divide family property because of a disparity arising from events unrelated to the parties' marriage. Financial advantage alone, unrelated to the economic characteristics of a spousal relationship, does not justify a departure from the usual rule. Unless necessary to give effect to an order for compensatory support, neither the unequal division of family property, nor the division of excluded assets, was called for by the Act. [Emphasis in original.]
- [191] Although I accept that *Cook* is binding authority on this Court as it relates to the interpretation of "significant unfairness" within the context of s. 95 of the FLA and provides helpful context as to the legislative intent in creating greater certainty, it is not directly on point in considering a claim for division of excluded property under s. 96 of the FLA. Indeed, the only consideration of s. 96 of the FLA in *Cook* is the summary of the appellant's position at para. 5:

[5] The appellant says there would be no significant unfairness in the equal division of family property, and there is no basis for an award of compensatory spousal support in this case. The parties were similarly situated after their separation as retired persons with comparable incomes (primarily their pensions), they had divided their family property equally, and the only disparity between them arose out of the appellant's receipt of an inheritance as the marriage was ending. He argues the discretion afforded to trial judges by the Family Law Act does not permit judges to substitute subjective conceptions of fairness for the regime established by the legislation. In particular, he argues, the legislation is not intended to rectify disparity arising solely from excluded property. That is reflected in the express limit on the court's discretion in s. 96:

96 The Supreme Court must not order a division of excluded property unless

- (a) family property or family debt located outside British Columbia cannot practically be divided, or
- (b) it would be significantly unfair not to divide excluded property on consideration of
 - (i) the duration of the relationship between the spouses, and
 - (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

[192] Having regard to my findings of fact set out herein, I have concluded that this is a situation, as contemplated in s. 96(b)(i), where it would be significantly unfair not to divide excluded property on consideration of the duration of the relationship between the spouses and a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of the excluded property.

[193] Although this case was not strictly pleaded as a "joint family venture" case, a point addressed in argument, this was a joint family venture. The claimant assumed the role asked of her during the marriage and contributed as required to both the Bellevue Property and the Monck Park Property. Her contributions in terms of managing the household and caring for the Children were indirect but there are other direct contributions which I have identified including assisting with trades, assisting with construction cleaning, assisting with permitting, assisting with limited interior design decisions and, most importantly, providing a personal covenant for crucial financing that might otherwise not have been possible to obtain but for her cooperation and agreement to assume the corresponding risk.

[194] Said another way, I consider it to be significantly unfair, as that term is defined above, for the respondent to rely on the fact that he chose to assume primary responsibility for the renovation of the Bellevue Property and the build of the Monck Park Property whilst retaining title to these properties in his sole name to defeat substantially all claims that the claimant, as his long-term spouse, has to the Monck Park Trust Funds.

- [195] Balanced against the foregoing is the fact that the only substantive property the parties have to divide are clearly derived from the respondent's inheritance and are, as I have concluded, presumptively excluded property.
- [196] Having regard to all of the circumstances, I consider it appropriate to exercise my discretion to order that the claimant shall, subject to my further orders, receive 35% of the Monck Park Trust Funds and the respondent shall receive 65% of the Mock Park Trust Funds pursuant to s. 96(b) of the FLA.

Monck Park Sale Proceeds

- [197] As I have detailed above in the review of the evidence, the respondent sold the Monck Park Property, as bare land, for the net sum of \$255,000 following the fire. I have concluded that this represents fair market value even though it was less than the joint appraised value.
- [198] The respondent did so unilaterally, however, even though the claimant had previously cooperated with removing the CPL on the Monck Park Property at his request. With the benefit of a CPL, the claimant could have at least had an opportunity to object to the sale of the property at below appraised value.
- [199] In the circumstances, I conclude that having regard to the contributions that the claimant made to the Monck Park Property and the overall analysis of the law, all as set forth above, it would be significantly unfair for there not to be an equal division of the Monck Park Property sale proceeds.
- [200] I recognize that this departs from my overall conclusion as to the division of the Monck Park Trust Funds. However, having regard to the amount in issue and the unilateral conduct of the respondent in selling the Monck Park Property, I consider it appropriate to exercise my discretion in this regard.
- [201] The respondent must thus compensate to the claimant, from his share of the Monck Park Trust Funds, the sum of \$127,500 for her equal share of the Monck Park Property sale proceeds.

Interim Distributions

- [202] There have been interim distributions of property made throughout the course of this litigation.
- [203] Subject to the below, the evidence at the conclusion of trial was that the parties had each received \$320,000 in interim advances (\$640,000 total distributed). These are offset against their entitlement to the Monck Park Trust Funds. These are subject to my overall conclusion that the respondent is entitled to 65% of the Monck Park Trust Funds and the claimant is entitled to 35%.

- [204] The respondent received additional interim distributions to pay a CRA judgment in the amount of \$26,359.67 and outstanding income taxes of \$165,424.91. The respondent effectively concedes that he must compensate the claimant for 50% of these sums in the overall division of the Monck Park Trust Funds. This amount is \$191,784.58, of which 50% is \$95,892.29.
- [205] Any interim distributions which have been made, by consent, since the conclusion of the trial and pending these reasons for judgment shall be simply factored into the calculations I have made as to the division of the Monck Park Trust Funds with whichever party receiving the distribution accounting from their share of the proceeds on the basis of the overall allocation of 65% of said trust funds be credited to the respondent and 35% of said trust funds to be credited to the claimant.

Ancillary Property Issues

- [206] There are certain ancillary property issues raised at trial which must be addressed. They are not legally complicated and so I am going to deal with them summarily.
- [207] The claimant shall return to the respondent the oil landscape painting the respondent inherited from June within 30 days of these reasons for judgment. If the claimant elects, this can be done between counsel.
- [208] It is conceded that there needs to be an adjustment for RRSPs of some \$27,430.50 which were disposed of. Had the RRSPs not been disposed of, there could have been a spousal rollover without tax consequences. Having regard to the fact that the RRSPs were disposed of, I am going to make what I acknowledge to be a rudimentary reduction of 20% to account for taxation. The after-tax value of the RRSPs is thus determined to be \$22,030.50 and the adjustment payment as between the parties, to be paid through the division of the Monck Park Trust Funds, is \$11,051.25.
- [209] There is no obligation to account for gifting of the 2004 Audi vehicle to Robert after separation. The value of this vehicle was, I accept, approximately \$4,000 and I further find the parties would have likely gifted this vehicle to Robert in any event. I note in this regard that Robert did not incur significant educational expenses as did his siblings.
- [210] The claimant is not, in these circumstances, obligated to account for jewelry which she was gifted by the respondent throughout the course of the marriage. In reaching this conclusion, I recognize that, in certain circumstances, jewellery of significant value may be gifted and need to be considered in the division of family property. There is law on this point. Even on the respondent's own evidence, however, the jewellery in this case was of relatively modest value when one considers the family's overall financial circumstances and the length of the marriage. The respondent, I am satisfied, received gifts from the claimant of at least moderately similar value throughout the course of the marriage and the Court is not in a position to conduct a precise accounting of these spousal gifts.

[211] The claimant and the respondent will retain all property, personal property and chattels in their possession unless otherwise specified by this Court.

[212] The claimant and the respondent will be responsible for all debts in their personal names.

Summary Regarding Property Division

[213] For clarity, I consider it appropriate to summarize my key orders with respect to property division before dealing with the remaining issues:

- a) The Monck Park Trust Funds shall, at first instance, be allocated 65% to the respondent and 35% to the claimant.
- b) The \$320,000 in interim distributions made prior to trial shall be allocated in accordance with subparagraph (a) such that the respondent shall be entitled to credit for 65% of these interim distributions and the claimant entitled to credit for 35% of these distributions in the overall accounting.
- c) The respondent must compensate to the claimant, from his share of the Monck Park Trust Funds, the sum of \$127,500 for her share of the Monck Park Property sale proceeds.
- d) The respondent must compensate the claimant, from his share of the Monck Park Trust Funds, the sum of \$95,892.30 on account of the funds he received to pay the CRA judgment and back taxes.
- e) The distribution of the Monck Park Trust funds shall be adjusted to account for \$11,051.25 in RRSP equalization as calculated above.

Canada Pension Plan ("CPP") Credits

[214] The parties' CPP credits should be divided for the period of the relationship, from May 1, 1992 to March 20, 2015. There will be an order that the parties' unadjusted pensionable earnings earned during that period will be divided under the Canada Pension Plan Act, R.S.C. 1985, c. C-8 upon either party applying.

[215] Both parties shall be obligated to provide any documents which may be required in order to effect the division of the parties' CPP credits.

Entitlement to Spousal Support

[216] The respondent concedes that the claimant is prima facie entitled to spousal support pursuant to the provisions of the Divorce Act. The issue to be determined is quantum, which largely turns on the determination of Guidelines incomes and, to a lesser extent, duration having regard to the ages of the parties.

Determination of Guidelines Income

- [217] As set out above, the claimant is employed on a full-time basis by a third-party company. There is no suggestion she could be earning more. She receives a straight T4 income and claims no deductions. The determination of her Guidelines income is thus simple as it equates to her Line 15000 income (formerly line 150 income) as reported on her annual income tax return. That is currently \$73,039 per annum. Subject to raises from time to time to account for inflation or possible lateral career moves to a similar position, I find it is unlikely there will be any significant material change in the claimant's Guidelines income. The claimant is, I conclude, employed to the maximum degree of her available skillset at an income which I shall round up slightly to \$75,000 when addressing the issue of making a lump sum award.
- [218] I am not prepared, as suggested by the respondent, to order that the claimant should be imputed income from the "rent" she received from certain of the Children while they were residing with her at times after reaching the age of majority but no longer qualifying as "children of the marriage". This was essentially room and board and while the claimant did not track the expenses incurred as one would do in a formal rental situation, I accept there were costs associated with any one or more of the Children residing with her and that it is appropriate they provided some monies to offset those costs. She also provided the "launching pad" for them to start their careers. Considering they are all economically self-sufficient and now living independently, this was a reasonable decision and one that I conclude the parties very likely would have made had the family unit still been in tact.
- [219] I consider my conclusion regarding the "rent" issue of the claimant, both in terms of the subsidy and the amounts received from the adult Children, all as described above, to be consistent with the general principles set forth in the decision of the Court of Appeal in *Nielsen v. Neilsen*, 2007 BCCA 604, which, while factually distinguishable in certain regards, remains substantially on point.
- [220] In contrast to the relative stability of the claimant's employment in recent years, the respondent has had notable challenges in both his self-employment and employment efforts in recent years. I ultimately cannot conclude that these challenges generally amount to intentional under-employment as same have been judicially considered under s. 19 of the Guidelines.
- [221] The respondent did intentionally absent himself from the workforce while being responsible for the renovation of the Bellevue Property. That, however, was a joint decision and one that was financially beneficial to the family unit.
- [222] This is thus not generally a situation where the respondent was not working intentionally or working for unreported income. These are situations where the respondent actually did provide services and then issues arose and he was either terminated or did not get paid for the services rendered for various reasons.

- [223] However, bad faith is not required to impute income (see for example, *Drygala v. Pauli*, [2002] O.J. No. 3731 (C.A.) at paras. 24-36) and the respondent had an obligation to provide support, both child support, for so long as Kate remained a "child of the marriage" and spousal support for so long as entitlement exists.
- [224] The respondent thus, I conclude, had an obligation to find employment or self-employment which was adequately remunerative of his skill set. In this regard, I reference my earlier findings of fact that the respondent is clearly a capable and intelligent individual who has managed large-scale commercial projects and also small-scale residential projects in his industry. The respondent's interpersonal skills, however, do present some challenges in his employment/self-employment efforts.
- [225] Having regard to the issues that have arisen since the respondent undertook overseeing the renovation of the Bellevue Property, I cannot conclude that his income of approximately \$150,000 per annum from prior to the Bellevue Property renovation is reliable. The respondent's skill set is, I conclude, somewhat less marketable than it was then given his periodic absences from traditional employment and interpersonal conflicts in the course of his work which limit his ability to obtain entirely positive references when pursuing new opportunities.
- [226] On the other hand, the \$150,000 per annum that the respondent was capable of earning in the years preceding 2004 would be substantially greater now, some approximately 19 years later, due to, at minimum, inflation.
- [227] Having regard to all the circumstances and pursuant to the discretion conferred on me by s. 19 of the Guidelines, I consider it appropriate to impute the respondent an income of \$100,000 per annum effective as of 2019.
- [228] In reaching this conclusion as to the Guidelines income of the respondent, I confirm I am relying on my finding of fact that the respondent is clearly an intelligent individual who has a remunerative skill set. I heard some limited non-expert evidence about related health issues pertaining to the respondent but nothing in the evidence supports a conclusion that he is precluded from or incapable of working. He is possibly approaching the latter portion of his working life but he has certainly not aged out of the workforce.
- [229] Further, the respondent has re-partnered and that partner, whose native country is Russia but who resides for extended periods in Canada with the respondent and relies on the respondent for financial support. He is thus clearly motivated to find work of some variety, whether it be employment or self-employment, to provide that support. That motivation will also likely require the respondent to potentially work somewhat longer than he might have otherwise had the family unit stayed intact.

- [230] I do not, however, accept the submission of the claimant that the respondent will work until age 75. That stretches his motivation and corresponding obligation too far. Instead, I think it is more realistic to conclude that the claimant will work for approximately 10 more years until he is 71.
- [231] In this regard, I refer to *Graham v. Graham*, 2018 BCSC 1888, wherein Justice Maisonville concisely set out the principles surrounding the effect of voluntary retirement on spousal support at paras. 82-85:
- [82] Where there is a voluntary retirement, the court must consider the circumstances of the retirement carefully to ensure the payor was not prompted by an intention to avoid a support order: *Vennels* at paras. 29-31 and 34:
- ...
- [83] If the retirement, however, is not voluntary because of economic circumstances, medical reasons, employer's actions, or because the payor is otherwise unable to work, the court will tend to reduce the maintenance payable.
- [84] If the payor is still capable of earning an income despite retiring, their application to terminate spousal support will likely fail: *Bentley v. Bentley* (2009), 174 A.C.W.S. (3d) 448 (Ont. S.Ct. J.) at para. 20; *Bullock v. Bullock*, 2007 BCSC 318 at para. 7:
- [7] the petitioner applied unsuccessfully in Ontario to vary on the basis that he had withdrawn from the workforce at age 62. The court found on that occasion that the petitioner had retired voluntarily but was able to continue earning an income. His average annual income during most of the years post-divorce had been about \$160,000. See *Bullock v. Bullock*, [2004] O.J. No. 909 (S.C.J.), at para. 7. The court refused to accept the voluntary retirement as a material change of circumstances for the purpose of spousal support variation (at para. 10) and went on the find that the petitioner had a capacity to earn income of at least \$120,000 per annum (at para. 16).
- [85] If the payor spouse has some capacity to work following retirement, it is appropriate for the court to attribute additional income: *Gajdzik v. Gajdzik*, 2008 BCSC 160.
- [232] *Graham* was recently relied upon by Justice Punnett in *Ernst v. Ernst*, 2023 BCSC 65 wherein, after analysing the issue, he concluded at paras. 94 and 95:
- [94] In summary, the principles to be applied are the following. If taking early retirement was motivated by a desire to avoid a maintenance obligation, the Court will most likely impute income: *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421 at para. 26. If the retirement is "not voluntary because of economic circumstances, medical reasons or an employer's actions and the payor cannot work, the court will tend to reduce the maintenance payable; otherwise, if the payor can still earn an income, his application to terminate or vary spousal support will likely fail": *Szczerbaniwicz* at para. 27, citing *Bentley v. Bentley*, 2009 CanLII 3779, [2009] O.J. No. 441 (S.C.J.), *Bullock v. Bullock*, 2007 BCSC 318 at para. 7.

[95] Even where there is no evidence that a voluntary early retirement was taken to avoid the payment of maintenance, the obligation remains. The Spousal Support Advisory Guidelines: The Revised User's Guide (Ottawa, Department of Justice, 2016) addresses early retirement for the purposes of the Spousal Support Advisory Guidelines [SSAG] at 101:

When the payor retires "early" and seeks a reduction in spousal support, there will be close scrutiny of the decision to retire. When will a retirement be described as "early"? The courts are not always clear. For our purposes, an "early" retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as "voluntary" and not necessary or reasonable, then it is likely that spousal support will not be changed

[Emphasis added in Ernst.]

[233] In my view, my conclusion that the respondent will retire at age 71 is entirely consistent with these principles. Whilst retirement at 71 might not be considered "early" in most circumstances, I consider the above analysis on point given the evidence that the respondent had, prior to separation, indicated an intention to work until age 75. In this particular factual matrix, retiring at 71 does invoke the "early retirement" analysis.

Lump Sum Spousal Support

[234] Both parties made submissions on the basis that lump sum spousal support was appropriate having regard to the concession as to entitlement, the respondent's income as of the date of trial and the desirability for a clean break. Notwithstanding this, the Court must still be satisfied that such an award is appropriate as the presumption begins with ordering periodic support.

[235] In this regard, I will refer to the decision of the Court of Appeal in *Parton v. Parton*, 2018 BCCA 273. *Parton* considers this issue with reference to the provisions of the FLA even though the parties there were also married. I thus consider its analysis of the issue to be binding notwithstanding that the relief that I am granting on this issue is pursuant to the Divorce Act having regard to the doctrine of paramountcy.

[236] Specifically, I refer to paragraphs 43-48 of *Parton*:

[43] Once entitlement is established, the amount and duration of spousal support are determined based on consideration of the conditions, means, needs and other circumstances of the spouses: s. 162, Family Law Act. The "means" of a spouse include his or her capital base, employment income or earning capacity and any other available source of benefits or gains: *Leskun v. Leskun*, 2006 SCC 25 at paras. 29-32. The duration of spousal support may be for a limited term or indefinite, depending on the length of the marriage and self-sufficiency considerations: *Chutter* at paras. 108-109; *McIntire v. McIntire*, 2012 BCCA 214 at para. 17.

- [44] If there are no dependent children, the duration of spousal support typically becomes indefinite (not specified) after 20 years of marriage and continues, subject to the normal process of variation and review, for so long as there is entitlement: SSAG at ss. 7.1 and 7.5; *Rozen v. Rozen*, 2016 BCCA 303 at paras. 31-32. However, as is clear from s. 7.5.2 of the SSAG, an order for indefinite spousal support does not necessarily mean permanent support, nor does it mean that support will continue indefinitely at the level set by the formula. Nevertheless, following the breakdown of a long marriage, spousal support often winds up, in practice, being permanent: s. 7.5.2 of the SSAG.
- [45] While each case is fact-specific, in long marriages with children, the marital standard of living may be used to determine a reasonable measure of appropriate compensation: *Zacharias* at paras. 52-54. Even if the recipient spouse has attained a degree of self-sufficiency, spousal support based on compensatory principles should continue until compensation is achieved: *Chutter* at para. 79; *Tedham* at para. 60. Depending on the facts, this means that in some cases full compensation is likely to remain elusive: *Rozen* at para. 60. In other words, although compensation for the economic disadvantage arising from the marriage is always the goal of spousal support based on compensatory principles, in some cases that goal can never be fully achieved.
- [46] The SSAG is a useful tool in guiding the determination of the appropriate quantum and duration of spousal support. While advisory only, it is generally consistent with the law in British Columbia: *Chutter* at para. 100. The SSAG formulas provide a range for periodic payment or lump sum spousal support awards taking into account case-specific factors, such as the length of the marriage, the parties' ages and their respective incomes or capacities to earn.
- [47] In some cases, a lump sum spousal support award is preferable to an order for periodic payments. When deciding whether to make such an award, the court should weigh the advantages and disadvantages of a spousal support order in lump sum form compared to those of an order made in the more common periodic payment form. In *Davis v. Crawford*, 2011 ONCA 294, the Ontario Court of Appeal discussed the relevant factors for consideration and, in doing so, emphasized the need to distinguish the purpose of a lump sum spousal support award from the effect of such an order. As the Court noted, any lump sum spousal support order will, in effect, involve the transfer of property from one spouse to another, although the redistribution of assets is not the purpose of spousal support:
- [60] It is well accepted - and undisputed - that a lump sum award should not be made in the guise of support for the purpose of redistributing assets: *Mannarino; Willemze-Davidson v. Davidson* (1997), 98 O.A.C. 335 (C.A.), at para. 32. Moreover, the governing legislation does not recognize redistribution of assets as one of the purposes of a spousal support award.
- [61] That said, a lump sum order can be made to "relieve [against] financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home)": *Family Law Act*, s. 33(8)(d).

[62] In any event, the purpose of an award must always be distinguished from its effect. Any lump sum award that is made will have the effect of transferring assets from one spouse to the other. The real question in any particular case is the underlying purpose of the order: Willemze-Davidson at para. 32.

[63] Similarly, it is well accepted that an important consideration in determining whether to make a lump sum spousal support award is whether the payor has the ability to make a lump sum payment without undermining the payor's future self-sufficiency.

...

[66] Most importantly, a court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages of making such an order.

[67] The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example, short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.

[68] Similarly, the disadvantages of such an award can include the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.

[69] In the end, it is for the presiding judge to consider the factors relevant to making a spousal support award on the facts of the particular case and to exercise his or her discretion in determining whether a lump sum award is appropriate and the appropriate quantum of such an award.

...

[48] The factors discussed in Davis generally apply in this province when lump sum spousal support is considered. In Robinson v. Robinson, 2011 BCSC 1489, for example, after quoting extensively from Davis, Justice Watchuk awarded \$330,000 in lump sum spousal support. In explaining her reasoning, Justice Watchuk noted that a lump sum award is appropriate in circumstances where the payor spouse has insufficient income to pay spousal support on an ongoing basis, but has capital assets with which to make a lump sum payment. She also noted that lump sum spousal support may contribute to self-sufficiency and assist the recipient spouse to achieve an appropriate standard of living. This Court upheld her

decision in reasons indexed as 2012 BCCA 497.

[Emphasis in original.]

[237] Applying the aforesaid legal principles, I accept the submission that lump sum spousal support is appropriate in these circumstances.

[238] In terms of quantum, the parties provided various DivorceMate calculations. I am not going to go through each of them as they are contained in the parties' lengthy written submissions. Instead, I have elected to summarize them as follows:

- a) The respondent proposes to pay lump sum spousal support of \$65,000 which includes a retroactive component, from March 20, 2015 to December 31, 2022 (on the incomes as detailed) and a prospective component from January 1, 2023 to June 30, 2038, based upon a Guidelines income of \$83,765.00.
- b) The claimant submits that the range of spousal support ranges from \$70,632 (based upon a Guidelines income to the respondent of \$130,000 per annum and a duration of five years on the low end of the range) to \$264,866 (based upon a Guidelines income of \$150,000 to the respondent and a duration of 15 years at the high end of the range). Relying on the mid-point, as suggested by the claimant, the range of spousal support for a duration of 10 years ranges between \$136,989 and \$182,031 based upon a Guidelines income of \$130,000 and \$150,000 per annum.

[239] On the basis of the Guidelines incomes which I have already determined for the parties as set forth above, factoring in my conclusion as to the respondent's likely retirement date and taking into consideration the submissions I received with respect to the discount rate for lump sum spousal support awards utilizing the DivorceMate software, I ran various calculations of my own.

[240] As with the parties' submissions, the amounts vary depending upon the inputs and even using the same inputs there is, of course, a range of awards.

[241] Having regard to all of my findings of fact and a consideration of the above law, I have concluded that a lump sum spousal support award in the amount of \$92,000 is appropriate and accords with the principles of the Divorce Act and the Spousal Support Advisory Guidelines. This amount includes both any claim for retroactive support and prospective support. In accordance with the law, this amount shall be non-taxable in the hands of the claimant.

[242] The lump sum spousal support award shall be deducted from the respondent's share of the Monck Park Trust Funds at the time of distribution.

Retroactive Child Support

- [243] Child support generally should be addressed prior to addressing spousal support. The priority of child support over spousal support is indeed codified in s. 15.3(1) of the Divorce Act.
- [244] In this case, however, the claim for child support is a retroactive claim only as Kate is conceded to no longer be a "child of the marriage" and is economically self-sufficient. I have thus concluded it is appropriate to deal with it subordinately to the property division and spousal support claims.
- [245] Following separation until trial in December 2022, the respondent was arbitrary in the amounts he paid for support. To be clear, he did pay support but did so in amounts in his discretion and subject to deductions which he considered appropriate.
- [246] As best as can be reconciled from the documents, it is established that the respondent paid the claimant the following amounts:
- a) In 2015, a total of \$9,000;
 - b) In 2016, a total of \$8,800;
 - c) In 2017, a total of \$12,500;
 - d) In 2018, a total of \$10,234; and
 - e) In 2019, a total of \$5,000.
- [247] The only year where there was a direct contradiction between the viva voce evidence and the documents was in 2015. In that year it was asserted by the respondent that he paid upwards of \$11,000. I conclude that the amount formally proven, on the balance of probabilities, was \$9,000.
- [248] The respondent also did, I accept, make certain payments to Kate directly as Kate confirmed same in her evidence. These were not very substantial in all the circumstances, apart from a payment of some approximately \$7,000 that came from the insurance proceeds from the Monck Park Property fire which were directly attributable to Kate's personal belongings and thus do not constitute support. Further, the law is well established that child support is to be paid to the recipient parent and not the child unless there is an agreement or court order that provides otherwise, particularly where a child is under the age of majority. There are various legal and policy reasons for this but none more apparent than the fact that this practice was part of the reason why Kate was called to testify at her parents' family law trial.
- [249] Similarly, I do not accept the fact that, in these circumstances, the respondent paid for Kate's cell phone bills between separation and in or about May 2021 entitles him to a credit as against his support. The evidence confirms the respondent historically deducted his global cellular telephone expense as a business expense. Although not universally the case,

I accept that the exercise of adding back the personal component of the expense attributable to Kate to the respondent's income and then allocating him credit as against child support where there was no order or agreement for support in place would be a futile use of judicial resources here. Suffice to say that Kate benefited from the respondent paying her cell phone until in or about May 2021.

- [250] Further, as it is relevant to the issue of blameworthy conduct, the respondent testified that he sent his last support payment to the claimant on May 24, 2019. The claimant filed her second notice of family claim on April 29, 2019, and served it shortly afterward. The respondent claims his last payment was purely coincidental to events in the litigation. The respondent further admitted on cross-examination that in March 2020, he began sending \$2,000 per month to his current romantic partner. He further confirmed on cross-examination though he never re-started sending support to the claimant.
- [251] The law on retroactive child support is very well settled by the Supreme Court of Canada where there is an agreement or court order in place. The success of an application for a retroactive change in support depends on the occurrence of a material change in circumstances from when the original amount was set: *D.B.S. v. S.R.G.*, 2006 SCC 37; *Michel v. Graydon*, 2020 SCC 24; and *Colucci v. Colucci*, 2021 SCC 24.
- [252] It is even more complicated in this type of situation where there is a delay in bringing on an application for interim support between the commencement of proceedings and trial.
- [253] Applying the four D.B.S. factors, I conclude as follows:
- a) The claimant commenced family law proceedings twice. In both instances there was a child support claim advanced for Kate. The respondent was thus on notice. The claimant, however, took no steps to advance the issue on an interim basis and it languished (I expect because there was the above voluntary payments and some support provided directly to Kate).
 - b) The respondent's decision to unilaterally terminate support was blameworthy, particularly when his decision to provide voluntary monthly support to his new romantic partner is considered. As it relates to his financial circumstances, Kate ought to have been the priority.
 - c) Kate's circumstances during the period of time when retroactive support is sought were comfortable. She did not go without. She graduated university and, as noted, has achieved economic self-sufficiency at a young age.
 - d) The retroactive award will not cause hardship to the respondent. The amount sought is modest and the respondent has the benefit of an unequal portion of the Monck Park Trust Funds even after allocating for the interim distribution and spousal support.

- [254] Considering these factors, I conclude that the blameworthy conduct of the respondent and the lack of hardship outweigh the lack of diligence of the claimant in pursuing an interim support award. Kate's lack of need is more of a neutral factor given the fairly modest nature of the award I shall make.
- [255] Specifically, having considered the Guidelines incomes of the parties at the material time and the voluntary payments, I have concluded that an award of \$10,000 in retroactive child support is appropriate. This amount is, I will acknowledge, somewhat arbitrary as it includes retroactive basic child support and retroactive s. 7 special and extraordinary expenses, but that is somewhat inevitable given the documentary record and the need to reconcile the net disposable incomes of the parties at the material time without the benefit of there having been an interim child and spousal support order which would have taken into consideration all of these interrelated factors.
- [256] The \$10,000 retroactive child support award shall be paid out of the respondent's share of the Monck Park Trust Funds.

Divorce

- [257] All of the requirements of a divorce pursuant to s. 8 of the Divorce Act have been satisfied and I have before me a clearance certificate and a registrar's certificate of pleadings. There is clearly no prospect of reconciliation. Having regard to the pool of family property available to the parties, I further see no prejudice to either one of granting the divorce prior to my order effecting the division of property potentially being signed and entered.
- [258] Accordingly, I shall order, pursuant to s. 8 of the Divorce Act (Canada), that the claimant, Nicola Elizabeth O'Connor, and the respondent, Michael John Mills, who were married at Stateline, Nevada, USA, on May 16, 1994, shall be divorced from each other, such divorce to take effect 31 days after the date of these reasons.

Costs

- [259] Costs pursuant to R. 16 of the Supreme Court Family Rules are always at the discretion of the trial judge.
- [260] In a lengthy trial such as this, it is difficult for the parties to make fulsome submissions on costs given that the outcome of the trial is unknown to the parties at the conclusion of submissions.
- [261] Further, it is possible that there are submissions to be made with respect to formal offers that may have been exchanged pursuant to R. 11-1.
- [262] In the circumstances, counsel for the parties agreed that the issue of costs should be addressed after the issuance of these reasons for judgment.
- [263] The schedule I will set to deal with costs is thus as follows:

- a) Counsel for the claimant shall submit written submissions on costs, through Supreme Court Scheduling, within 30 days of issuance of these reasons for judgment.
- b) Counsel for the respondent shall submit written submissions for costs, through Supreme Court Scheduling, within 60 days of issuance of these reasons for judgment.
- c) Counsel for the claimant and the respondent may agree, by consent, to extend these deadlines to account for other trial obligations or scheduled vacations, but confirmation of any adjusted schedule for submissions must be provided to the Court, through Supreme Court Scheduling, before the 30-day deadline for receipt of the claimant's submissions.
- d) Following receipt of submissions from both parties, an oral hearing on costs shall be scheduled at a date convenient to counsel and the Court. In the event it is necessary to facilitate an earlier date, leave is presumptively granted for counsel to appear at the cost hearing(s) via MS Teams.

Form of Order

- [264] There are various components to the final order which I have made herein in these reasons for judgment. I can foresee the possibility that there may not necessarily be consensus as to how the terms of the final order are to be documented. In the normal course, such issues would be dealt with through the usual process of applying to settle the terms of the order before the registrar pursuant to the Supreme Court Civil Rules.
- [265] However, in this case, I will grant leave to the parties, if necessary, to submit their preferred form of final order through Supreme Court Scheduling at the same time that written submissions on costs are due to be filed. Any discrepancies can be addressed by the Court in the course of the oral submissions which I have ordered above at para. 263.

Delay

- [266] On a final note, I want to acknowledge to the parties that these reasons for judgment were delivered later than I originally intended. I recognize the uncertainty has undoubtedly been stressful to the parties. This was not intended. Unfortunately, an unexpected injury to the presider's dominant hand and wrist in the period in which this matter was under reserve made drafting, editing and finalizing of these lengthy reasons, together with the necessary review of the large volume of exhibits, take longer than anticipated.

"Hardwick J."

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