

CANADA / JUDGMENT

R.D. v. R.S.D.

2023 BCSC 6

COURT

Supreme Court of British Columbia

DECIDED

4 January 2023

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2023 BCSC 6 R.D. v. R.S.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.D. v. R.S.D.,

2023 BCSC 6

Date: 20230104

Docket: E60539

Registry: New Westminster

Between:

R.D.

Claimant

And

R.S.D. a.k.a. R.D., and S.D.

Respondents

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Claimant:

R. Roxborough

Counsel for the Respondent S.D.:

G. Dale

Counsel for the Respondent R.S.D.:

No one appearing

Place and Dates of Hearing:

New Westminster, B.C.

September 27 and 28, and

November 18, 2022

Place and Date of Judgment:

New Westminster, B.C.

January 4, 2023

Overview

- [1] The claimant, R.D., and the respondent, R.S.D., lived in two residential properties legally owned by R.S.D.'s mother, the respondent S.D., at different times from when they were married in 2014 until their separation in 2020. R.D. claims that these two properties, referred to as the Vancouver property and the Surrey property, were enhanced by contributions that she and R.S.D. made to them and which were made on the understanding that they had an ownership interest in those properties. She asserts they are family property within the meaning of the Family Law Act, S.B.C. 2011, c. 25. The Vancouver property has been sold and the proceeds of its sale are held in a law firm trust account. R.D. seeks payment of \$200,000 of the sale proceeds out of trust pursuant to s. 89 of the Family Law Act on the basis that she has demonstrated a reasonable prospect of success to an interest in the property as family property or property over which she has a constructive trust based on unjust enrichment, that she has need in relation to a s. 89 purpose, and that it will not be harmful to an interest of a spouse.
- [2] S.D. opposes the application on the basis that neither the Vancouver property nor the Surrey property were family property and so s. 89 is not applicable. S.D. has also applied for funds to be paid out of trust to pay off a high interest mortgage on the Surrey property and 80% of the remaining funds in trust to be paid out to her.
- [3] R.S.D. filed an application response opposing R.D.'s application on the basis that neither the Vancouver property nor the Surrey property are family property. He did not dispute that if they are, R.D. meets the necessity requirement under s. 89. Nor did he assert any harm to him if the order is made.

The Issues

- [4] The majority of the submissions pertained to whether the Vancouver property and/or the Surrey property are family property. Neither S.D. nor R.S.D. asserted, in their application responses, that R.D. does not meet the s. 89 necessity test. Neither asserted that R.S.D. would suffer harm as a spouse. Neither expressly asserted that the interests of justice do not justify a distribution. However, on the latter point, I infer from S.D.'s position that the mortgage on the Surrey property be paid and that she be paid out 80% of the balance of the funds in trust, to be a submission that interests of justice do not support R.D.'s application.
- [5] S.D.'s application raises an issue as to how evidence sought to be adduced after the court has reserved but not decided the application should be addressed. It also raises the jurisdiction of the court to order funds paid out to S.D. given that she is not a spouse. Finally, there are questions of whether funds should be paid out to pay out the remaining mortgage on the Surrey property, held by Antrim Balanced Mortgage Fund Limited, and/or to S.D. The last question raises the issue of whether S.D.'s failure to give complete evidence about her financial situation should impact her application.

Whether R.D. Is Entitled to a Section 89 Distribution

Legal Principles- Interim Distribution of Family Property under s. 89

- [6] Section 89 of the Family Law Act provides for an order for interim distribution of family property to help fund resolution of any part of a family law dispute:

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

- [7] Section 81 of the Family Law Act provides that, absent an agreement or an application for an order regarding unequal distribution, spouses are equally entitled to family property. Family property is defined in s. 84 of the Family Law Act and includes real property in which at least one spouse has a beneficial interest. Certain types of property are excluded from family property. Where a spouse claims that property is excluded from family property, the burden of proof falls on the spouse claiming the property is excluded: Family Law Act, s. 85(2).
- [8] In *Etemadi v. Maali*, 2021 BCCA 298 at para. 113 [Etemadi BCCA], the majority adopted four principles applicable to s. 89 interim distribution orders articulated in Justice Butler's dissenting reasons at paras. 50-53. I summarize the four Etemadi principles as follows:

- a) A chambers judge must determine whether the applicant is economically disadvantaged in relation to the prosecution of the litigation or otherwise in pursuit of dispute resolution. If so, then it may be appropriate to make an order that "levels the playing field" or provides for "balanced participation" in dispute resolution.
 - b) The judge must go through a preliminary assessment of the circumstances that considers both of the s. 89 requirements: namely, whether the applicant can show that it would not be harmful to the interests of the other spouse and it is necessary for the purpose of funding dispute resolution.
 - c) Whether an interim distribution is necessary involves careful consideration of the quantum required. A judge should not order distribution in an amount greater than what is necessary.
 - d) The judge must always exercise the discretion conferred by s. 89 on the basis of whether it is in the interests of justice to grant the order sought.
- [9] These principles are drawn from the language and purposes of the provision. An often-cited articulation of the purpose comes from Justice Ballance in *I.F. v. R.J.R.*, 2015 BCSC 793 at para. 192 (endorsed by the BCCA in *Etemadi* at para. 44 and in *Lit v. Lit*, 2019 BCCA 158):
- [192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.
- [10] In *Bartch v. Bartch*, 2018 BCCA 271, writing for the Court, Justice Saunders described the caution required for this analysis in light of the interim nature of distributions made through s. 89:
- [75] Section 89 is a special provision crafted to allow a financially disadvantaged spouse funds to participate in family dispute resolution by sharing in financial resources despite the parties' ultimate respective entitlement not having been determined. While sometimes this is referred to as 'levelling the playing field', I would describe this as a measure to further balanced participation in the dispute resolution processes. Every order under s. 89 entails a degree of risk the case will not turn out as expected, with prejudice to the distributing spouse. This special character demands careful application of the section, so to keep any distribution squarely within the parameters of s. 89.

- [11] A preliminary merits issue may arise, as it did in *Etemadi*, if the property at issue is not agreed upon to be family property. In such circumstances, the court must consider whether to grant the interim order for distribution of funds despite that the level of interest spouses may have in such property has not yet been agreed upon or determined. Where a party raises a threshold issue on the merits, the applicant must show that there is a reasonable prospect of success on that threshold issue: *Bartch* at para. 19 citing *I.F.* at paras. 190-194.
- [12] Justice Butler also addressed this issue in dissent in *Etemadi*, although, again, the majority accepted his description of the test, at para. 52, that the applicant must raise a "prima facie case of sufficient merit to warrant pursuit". The analysis of the merits threshold should take into account the evidence on necessity and harm.
- [13] Applicants do not have to present a strong prima facie case because this standard would "pose too high a bar to meet at the interim stage. Rather the applicable threshold test is whether the evidence shows there is a reasonable prospect of success": *I.F.* at para. 172. Although *I.F.* was concerned with the existence of a final agreement, this merits threshold was endorsed in relation to family property disputes in *Lit* at para. 44.
- [14] The nature of interim orders means that they are made before trial and without the benefit of a full assessment of the evidence, and therefore, "Chambers judges are not in a position in such applications to weigh the merits of competing positions other than in a cursory way": *Lit* at para. 47. Caution is required when assessing such applications, but caution "does not mean that the court will necessarily be hamstrung on an interim application. While the court is inclined to take a cautionary approach on most every interim application, it strives to ensure that it is not so overly cautious as to be timid.": *I.F.* at paras. 14-15. Conflicting facts or a disputed claim therefore do not preclude a finding of a prima facie case for the purposes of interim distribution: *Lit* at para. 44.
- [15] Evidence is relevant to the consideration of a prima facie case and a reasonable prospect of success. Justice Butler's point in *Etemadi* at para. 51 regarding not deciding "hotly contested issues" indicates that caution should be taken with respect to the evidence for s. 89 applications and going too far on deciding issues pre-trial. However, the majority in *Etemadi* found that Justice Gomery's reasoning in this court, indexed at *Etemadi v. Maali*, 2020 BCSC 1908 [*Etemadi BCSC*], was entitled to deference in part because he did not resolve hotly contested issues but rather confined his analysis to a preliminary assessment based on the record before him and only for the purpose of the interim distribution application. In addition, the majority considered that Gomery J. was appropriately cautious by considering the "plausibility" or "likelihood" of success: *Etemadi BCCA* at paras. 115-116.
- [16] Section 89 requires the court to consider harm in relation to a spouse. Where a party to family litigation is a non-spouse, as here, the question becomes whether harm to that person is relevant to the analysis. That question was answered in *Etemadi BCCA*. The harm analysis is restricted to balancing the interest of spouses because spouses are the parties contemplated within the parameters of s. 89: *Etemadi BCCA* at para. 50 (per Butler J.A. in

dissent, citing Bartch at paras. 75-76). The interests of the non-spouse should be taken into account in considering the fourth Etemadi principle, the interests of justice: Etemadi BCCA at para. 60.

Whether the Vancouver and Surrey Properties are Family Property

- [17] The focus of S.D.'s objection to this order is that neither the Vancouver property nor the Surrey property are family property within the meaning of the Family Law Act.
- [18] R.D. asserts the Vancouver property and the Surrey property are family property because they meet the definition of family property in s. 84 which includes property in which one or more person holds a beneficial interest. In addition, and alternatively, R.D. asserts that she and R.S.D. made contributions to the properties on the understanding that they were "owners" of the properties and they should therefore contribute to their maintenance and income generating potential. In her notice of family claim, among other things, she asserts a constructive trust based on unjust enrichment. S.D. asserts there was no such arrangement and any contributions made by R.S.D. and R.D. were minimal, made voluntarily, and because they were living rent-free.

The Evidence

- [19] I consider the evidence in the record on this application only for the purpose of deciding these competing applications. The record contains eight affidavits sworn by R.D., six sworn by S.D., and seven sworn by R.S.D. S.D. deposed that she denies "each and every allegation contained" in R.D.'s Affidavits #5 and #6. She deposed that she would not respond to R.D.'s "beliefs, opinions or arguments" expressed in her affidavit but was reserving her right "to do so at a later date". I take into account the evidence that S.D. gave, but not her blanket denial of R.D.'s evidence.
- [20] R.D. and R.S.D. were married on August 15, 2014. R.D. alleges that R.S.D. has been physically, emotionally, sexually and financially abusive. She alleges the respondent S.D. is aware of the abuse as they were living in the same home. She alleges that the daughters of herself and R.S.D. were exposed to the abuse. Those allegations have been the subject of interlocutory applications pertaining to protective orders and parenting time.
- [21] The evidence is uniform that R.D. and R.S.D. lived in the Vancouver property from when they were married until they moved into the newly constructed Surrey property. The date on which they moved conflicts but is not material to this application. The evidence is also uniform that R.D. and R.S.D. moved back to the Vancouver property in 2018. In 2020, they moved in with R.D.'s mother. In July 2020, they separated and R.S.D. moved back to the Surrey property.
- [22] R.D. deposed that throughout the relationship, S.D. and R.S.D. told her that they jointly owned the properties. R.D. testified that she was comfortable with an arrangement by which they would live with R.S.D.'s family members and contribute to the properties because such

arrangements are in line with the cultural norms of the ethnic community to which they belonged that the younger generation would work together with the senior generation to maintain and improve the value of real property to create wealth for the family which would be shared with the younger generation. She deposed that S.D. stated that the Vancouver property and the Surrey property would secure their future as a family unit.

- [23] R.D. also deposed that S.D. encouraged her to work hard and pull together as a family on the properties and that she said words to the effect that "these properties are all yours" - meaning that they would be passed on to R.S.D., R.D. and their children. R.D. deposed that she understood that R.S.D. was on title to the properties because he told her that he was on the mortgage for both properties, they received mail from the bank regarding the properties that was addressed to S.D., and R.S.D. signed a contract for an exterminator for the Surrey property. S.D. deposed that R.S.D. did this on her behalf and she paid for it. R.S.D.'s evidence is the same as his mother's.
- [24] R.S.D. deposed that he has never claimed ownership to the Vancouver property or the Surrey property. R.S.D. deposed that his mother never stated, in his presence, that the Vancouver property and the Surrey property belonged to R.D. and R.S.D. S.D. deposed that she did not conduct herself or state anything that could lead R.D. to believe that the Vancouver property belonged to R.D. or R.S.D. S.D. deposed that she never made a representation to R.D. that R.S.D. was a joint owner of the Surrey property. She deposed that she sent R.D. a contract of purchase and sale that showed her, S.D., as the sole purchaser. S.D. deposed, and R.S.D. agreed, that S.D. encouraged R.D. and R.S.D. to save their money to buy a property of their own.
- [25] R.D. agreed that S.D. did encourage them to buy a property, but that the encouragement was for them to follow her example and save for an investment property. R.D. deposed that based on what she was told by the respondents, she was expected to and did focus her efforts on the properties for this purpose and on the understanding that her husband was on title to the properties. She deposed that she did not learn that he was not on title to the Vancouver property until this proceeding began. She deposed that she has known that R.S.D.'s legal title to the Surrey property was only 1% since 2018 when she completed a speculation tax declaration for the property. She deposed she believed that the "legal title was a formality" because she had not been told otherwise. She deposed that R.S.D. was very proud of the fact that he had two properties and spoke to other people about them by referring to them as his properties. R.S.D. deposed that he has never stated that the Vancouver property and the Surrey property are his to R.D. or anyone else.

- [26] R.D. deposed that saving money was impossible while contributing to the family properties in the way that was discussed and expected. R.D. deposed that she and R.S.D. talked about moving out of the family home and getting their own rental accommodation but would ultimately agree that it did not make sense to put money towards rental accommodation when they could put it towards building equity in the Vancouver property and the Surrey property.
- [27] The evidence conflicts on many key points especially around the intentions of S.D., R.S.D. and R.D. with regard to the Vancouver property and the Surrey property and the extent of the contributions that R.D. and R.S.D. made. However, there is also a body of evidence that is uniform and demonstrates contributions that R.D. and R.S.D. made to both properties that supports R.D.'s claims despite the conflicting evidence.
- [28] I will outline the detailed evidence pertaining to both properties.

The Vancouver Property

- [29] S.D. purchased the Vancouver property in 2013 as bare land for \$700,000 and built a house on it. There is no suggestion that R.S.D. or S.D. contributed towards the construction of the residence, financially or otherwise. S.D. deposed that she used the proceeds of the sale of a property located at 1252 East 64th Street, Vancouver, in the amount of \$1,045,000. It is not clear whether she used all of those funds for the Vancouver property. At the time it was sold there were mortgages totalling over \$1.1 million registered against it.
- [30] It is not disputed that legal title to the Vancouver property was held solely by S.D.
- [31] S.D. deposed that she purchased the Vancouver property. S.D. deposed that she had a residence built on the Vancouver property and paid for that entirely without contribution from R.S.D.
- [32] R.D. deposed that the Vancouver property contains two rental suites and a coach house in addition to the upper level which is where S.D. resided when R.D. and R.S.D. were married. R.D. deposed that she and R.S.D. moved into one of the suites of the Vancouver property in 2014, after they were married. She deposed that S.D., R.S.D.'s grandfather (S.D.'s father-in-law), and R.S.D.'s brother also lived in the house on the Vancouver property. She deposed that after discussions with the family, she and R.S.D. moved into the upper level of the house where S.D. lived so they could rent out the suite and generate income for the family. S.D. did not disagree with this, but deposed that she made the decision about the move so that she could collect the rent on the suite.
- [33] R.D. deposed that R.S.D. made regular payments to S.D. which R.D. understood were to help with the mortgage payments. R.D. deposed that these payments exceeded \$1,000 and were made monthly. S.D. deposed that R.S.D. never made "regular" payments to her. In one affidavit she deposed that R.S.D. did not pay household bills when the Vancouver property was her primary residence. In another affidavit, she deposed that R.S.D. paid some of the

household bills. R.S.D. deposed that he never made regular payments to his mother and he did not make household payments when he and R.D. lived in the upper floor of the Vancouver property.

- [34] However, R.S.D. also deposed to a tally of "almost all" of the payments he made for the Vancouver property and the Surrey property in the amount of \$22,000.
- [35] R.S.D. deposed that when they lived in the upper floor of the Vancouver property, they only lived their eight days per month because he was working in Alberta for the balance of each month, and while he was in Alberta, R.D. lived with her mother. R.D. agrees that for a time, R.S.D. was working in Alberta for more days each month than he was in Vancouver, but she denies she lived with her mother while he was in Alberta. She deposed she spent about one day per month at her mother's home.
- [36] S.D. deposed that when she bought the Vancouver property, the mortgagee, Vancity, required a second person to "sign the mortgage contract". She deposed that R.S.D. did so. She deposed that she and R.S.D. discussed that he would have no beneficial or legal ownership in the property because S.D. had three other children whom she wanted to benefit from her will, she did not expect R.S.D. to be responsible for the mortgage or contribute towards it, and if she could not afford the mortgage, she would sell the Vancouver property. She testified that R.S.D. did not pay the mortgage but did contribute towards household expenses and paid a property tax bill. R.S.D. deposed that he was on the mortgage for the reason his mother stated and that he and his mother agreed he would not be on title because he had no interest in the home.
- [37] R.D. deposed that she used her employment income towards household expenses, in particular, groceries and cleaning products. She deposed she spent the whole of her family income on household expenses. S.D. deposed that R.D. was not responsible for the groceries for the entire household of the Vancouver property and that when R.D. purchased groceries on S.D.'s behalf, S.D. reimbursed R.D.
- [38] R.D. deposed that she was responsible for cleaning the upper level of the Vancouver property including the portion in which S.D. lived. S.D. deposed that was not the case. She deposed that she, S.D., was responsible for cleaning the upper floor of the Vancouver property except the room and bathroom in which R.D. and R.S.D. resided. S.D. deposed that R.S.D. contributed to the upkeep of the Vancouver property while he lived there in accordance with her expectations of all of her children. R.S.D.'s evidence aligns with that of his mother.

- [39] R.D. testified that she managed the rental suites and the coach house rental in the Vancouver property including posting advertisements, facilitating showings, vetting the applicants and being the main contacts for the tenants. S.D. deposed that R.D. did so, as did her other children and son-in-law. S.D. deposed that R.D. may have showed the rental units "a few times". She deposed that R.D. was not responsible for managing the rental units. She deposed that was her responsibility and she did most of the work associated with it.
- [40] R.D. deposed to, and appended a copy of, a text from S.D. asking her for her driver's licence for a homeowner application in connection with the Vancouver property. S.D. deposed that this was for an "Application for Owner Builder Authorization" so that she could construct the residence on the Surrey property. She explained she had to provide names and drivers' licences of any persons living with her. R.S.D.'s evidence is the same as his mother's.
- [41] R.D. deposed that after they moved to the Surrey property, she became responsible for managing the upper level of the Vancouver property as an Airbnb short-term rental property. She deposed that this work was more frequent and time-consuming than the long-term rentals because she was communicating with renters on a weekly basis and arranging for the property to be cleaned in between rentals. S.D. deposed that the Airbnb idea was that of her daughter and that S.D. spent \$12,000 furnishing the residence for this purpose. R.D. deposed that she spent \$500 on décor items.
- [42] S.D. deposed that her daughter and son-in-law were primarily responsible for the Airbnb. She deposed that R.D. asked for some responsibility too since she lived with S.D. and could communicate with her efficiently and would like to do it because of everything that S.D. had done for R.D. S.D. deposed that she did not want R.D. involved with the Airbnb but reluctantly agreed that R.D. could take the lead in setting up the online account and dealing with bookings. R.D. disputed that; she deposed that it was made clear that it was her responsibility. She deposed that for a period of time, S.D.'s daughter and other son took over the responsibility because R.S.D. told his mother that R.D. would not do that work any longer. R.D. deposed that the work reverted to her after a month because S.D.'s daughter and other son were not responding to inquiries promptly.
- [43] S.D. deposed that in 2018, when they were living in the Surrey property, R.S.D. asked her if he, R.D., and their daughters could move into the coach house on the Vancouver property to shorten his commute to work as a longshoreman. R.D. deposed that the reason for the request was not commuting time, but a falling out between S.D. and R.S.D. S.D. deposed that she agreed to R.S.D.'s request, but this deprived her of rental income of \$1,500 per month. She deposed that R.S.D. agreed to contribute to household expenses and pay the property tax. S.D. deposed that in March 2020, R.D., R.S.D. and their children moved in with R.D.'s mother; as a result, S.D. was able to rent out the coach house for \$1,900 per month.
- [44] S.D. sold the Vancouver property on December 2, 2021. The order to pay regarding the sale of the property shows receipt of \$2,470,564.33 on the sale. Two Vancity mortgages were paid out on the sale. The first, a mortgage registered against the Vancouver property, was paid

out in the amount of \$1,052,168.28. The second, a mortgage registered against the Surrey property, was paid out in the amount of \$813,333.78. In addition, a second mortgage registered against the Vancouver property was paid out in the amount of \$110,170.51. The balance of the Vancouver property sale proceeds, \$492,142.45, are held in trust by Grandview Law Group LLP pursuant to a court order providing for those funds to be held in trust until further order of the court or written agreement between R.D., R.S.D. and S.D.

[45] The proceeds of sale net of expenses and the mortgages against the Vancouver property is \$1,308,225.54.

[46] In summary, the evidence does not conflict that:

- a) S.D. purchased the Vancouver property and built the residence without contribution from R.D. or R.S.D.;
- b) R.S.D. was pledged to the Vancity mortgage which was over \$1,000,000 at the time the property was sold in January 2021;
- c) R.D. did some cleaning of the portion of the house in which she, R.S.D. and S.D. lived, although the extent of what she did is in conflict;
- d) R.D. did some management of the rentals of one of the suites and the coach house of the Vancouver property although the extent of what she did is disputed;
- e) R.D. worked on the Airbnb business pertaining to the upper floors of the Vancouver property after the family moved to Surrey although the extent of what she did and why she did it is disputed;
- f) R.S.D., R.D. and their daughters lived in the Vancouver property rent-free;
- g) R.S.D. made some payments towards utilities, property taxes, and expenses which, together with funds he expended on the Surrey property, totalled at least \$22,000.

The Surrey Property

[47] It is not disputed that legal title to the Surrey property is held by S.D. as to an undivided 99% interest and by R.S.D. as to the remaining 1% undivided interest. S.D. and R.S.D. went on title to the Surrey property in 2015. It was bare land at the time of the purchase. The purchase price was \$500,000.

[48] R.D. deposed that R.S.D. told her he made a financial contribution towards its purchase. R.S.D. deposed that he did not tell R.D. that he made a financial contribution towards the Surrey property. However, he did not deny that he made one. R.S.D. signed on to the mortgage.

- [49] S.D. deposed that R.S.D. did not make a financial contribution towards the purchase. S.D. deposed that R.S.D. was on title only because he agreed to "sign the mortgage" and the lending institution required him to be on title. R.S.D. deposed that he was only on title because their notary said the bank required it.
- [50] The amount outstanding on the first mortgage was \$813,333 when the Vancouver property was sold and the Surrey property first mortgage was paid out. S.D. deposed that "it was understood" between herself and R.S.D. that he would have no beneficial ownership of the Surrey property for the same reasons that they agreed he would have no beneficial ownership in the Vancouver property.
- [51] R.D. deposed that she understood the Surrey property was to be a long-term family home where she and R.S.D. would raise their children. R.D. deposed that construction began shortly after the property was purchased. She deposed that the house was built with two master suites because of the plan that she, R.S.D., their children, and S.D. would live there.
- [52] S.D. denied that she ever intended the Surrey property to be the long-term home of R.S.D, R.D. and their children. She deposed that there were two master suites put in the house because that is what she wanted.
- [53] There is documentary evidence, in the form of emails and texts between contractors working on the house and family members, that identify one of the master suites as being for S.D. and one being for R.D. and R.S.D.
- [54] R.D. deposed that R.S.D. worked on the construction of the house as general contractor organizing the trades and supervising the construction. S.D. deposed that was incorrect, that she acted as the general contractor. S.D. deposed that the individuals who "primarily assisted her" were one of her other sons and her son-in-law, and that she organized the trades with their help. R.S.D. deposed that he did not act as the general contractor. He deposed he had limited involvement in the house during a period of time. He did not explain what period of time that was. There is documentary evidence in the form of texts which shows that R.S.D. was photographing and updating various individuals with the progress of the construction.
- [55] The evidence is uniform that R.D., R.S.D., their firstborn daughter, S.D. and S.D.'s father-in-law moved into the Surrey property. R.D. deposed that she was responsible for the cleaning, upkeep, and all of the groceries for the Surrey property household. She deposed that she was responsible for purchasing groceries for frequent family gatherings of 8-10 people. She deposed that she hired and paid for a housekeeper as she could not manage the cleaning while caring for two young children. R.D. deposed that in 2019, she began working part-time as a youth care worker and she contributed her earnings to the household expenses. R.D. deposed that she understood that R.S.D. paid the utilities on the Surrey property, and undertook the landscaping and repairs on the Surrey property.

- [56] S.D. deposed that R.S.D. occasionally paid household bills associated with the Surrey property. R.S.D. deposed that he occasionally paid for Hydro and utilities.
- [57] S.D. deposed that she purchased groceries for the entire household at the Surrey property. She also deposed that R.D. would purchase groceries for herself, R.S.D. and their children from time to time. She deposed that on occasions she instructed R.D. to purchase groceries for the household but on those occasions, she reimbursed R.D. She deposed that there were not family gatherings frequently, but rather gatherings at Thanksgiving and Christmas. She deposed that she purchased the food for those gatherings and reimbursed R.D. for anything she purchased. S.D. deposed that both she and R.D. paid the cleaning staff for the Surrey residence.
- [58] S.D. deposed that the Surrey property continues to have a private mortgage registered against title in the amount of \$105,000 at 9.95%.
- [59] With regard to the Surrey property, the following is not in dispute on this application:
- a) R.S.D. was pledged to the Vancity mortgage which was over \$800,000 when it was paid out with the proceeds of the sale of the Vancouver property;
 - b) R.D. arranged for housecleaners and paid them at least some of the time;
 - c) R.S.D. did some landscaping maintenance;
 - d) R.S.D., R.D. and their daughters lived in the Surrey property rent-free;
 - e) R.S.D. made some payments towards utilities and expense, which, together with payments made on the Vancouver property, totalled at least \$22,000.

Family Property under the Family Law Act

- [60] Advancing a claim regarding division of family property under the Family Law Act rests on proving one or both of the spouses have some level of ownership over the property at issue on the date of separation. Ownership includes a beneficial interest arising from the common law: Family Law Act, s. 84(1)(a)(ii); V.J.F. v. S.K.W., 2016 BCCA 186 at para. 74.
- [61] R.D. asserts that she and R.S.D. had a beneficial interest in both properties based on the agreement that they would contribute to them as described, because R.S.D. was on the mortgage for both properties and because R.S.D. made payments to S.D. which R.D. believes went towards utilities, property taxes and mortgage payments.
- [62] In Villeneuve v. Agnew, 2018 BCSC 546, Justice Verhoeven considered a summary trial application pertaining to a daughter-in-law's claim that a residence owned solely by her spouse's mother was family property. Her spouse asserted it was not. The allegations were similar to those made by S.D. in this case, albeit the claimant's asserted contribution to the building of the residence included purchasing items that were incorporated into the residence, such as appliances and doors, as well as doing work on the construction, such as

painting. Justice Verhoeven, at paras. 41-43, described the claims as being about, inter alia, a property interest pursuant to s. 84(1)(a)(ii) of the Family Law Act, and held that the claims ought to be addressed at a conventional trial.

- [63] As in *Villeneuve*, the parties' evidence on this application on whether the legal title was subject to an unregistered beneficial interest that could be the subject of a successful claim to family property under the Family Law Act cannot be reconciled. However, given all of the evidence, as well as some uncontroverted evidence of contributions by R.D. and R.S.D., R.D.'s assertion that the contributions that she and R.S.D. made were based on an agreement that they were owners of the property is sufficient to raise a *prima facie* case that one or both of them have a beneficial interest in the properties.

Unjust Enrichment

- [64] An action in unjust enrichment restores money or property to a plaintiff who can establish that: (1) the defendant was enriched; (2) the plaintiff suffered a corresponding detriment; and (3) there was no juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at para. 32.
- [65] To establish enrichment, the plaintiff must first show that his or her contribution was received and retained by the defendant. The retention need not be permanent, but it must be a benefit which enriched the defendant: *Kerr* at para. 38.
- [66] The plaintiff must also show that the defendant's enrichment corresponds to the detriment suffered by the plaintiff, meaning that there is a "link" between the enrichment gained and the detriment suffered: *Kerr* at paras. 39 and 78. In the family law context, unjust enrichment relating to property is defined by a spouse's contributions to a property: *Pallan v. Pallan*, 2022 BCSC 1347 at para. 102. These contributions can give rise to a finding of a "joint family venture" under the framework from *Kerr*. The contributions must be substantial in the sense that they are more than "minor": *Strudwick v. Morrison*, 1996 CanLII 2240 (BCSC) citing *Peter v. Beblow*, [1993] 1 S.C.R. 980. See also: *Petkus v. Becker* (1980), 117 D.L.R. (3d) 257 at p. 852.
- [67] In *Strudwick*, Justice Blair considered that the efforts that a son, between the ages of 11 and 18, made to assist his father with a farm, three years of which were full-time, to be insufficient to establish a constructive trust based on unjust enrichment. *Strudwick* is awkward to fit into the authorities on joint family ventures because the child was not yet an adult. Children under the age of adulthood often work at their parents' direction without giving rise to any legal expectations or entitlement.
- [68] In *Kerr*, decided 14 years after *Strudwick*, the Court examined the nature of a joint family venture in much greater depth than the case law had previously. Justice Cromwell described the indicia of a joint family venture at paras. 90-99 as including whether the parties worked collaboratively towards common goals; pooling of effort and team work; the decision to have and raise children together; the use of parties' funds entirely for family purposes; and one

spouse taking on all, or a greater proportion, of the domestic labour; and the parties' conduct reflecting a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over the individual interests of the individual members.

- [69] The third step for unjust enrichment, juristic reason, requires the court to determine whether there is "no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention 'unjust' in the circumstances of the case": Kerr at para. 40. There is a two-step analysis for whether a juristic reason exists for enrichment. First, the plaintiff must show that none of the established categories of juristic reasons to deny recovery apply. The established categories are: a contract, a disposition of law, a donative intent, and other valid common law, equitable, or statutory obligations. If the case does not fit into an established category, the plaintiff has made out a *prima facie* case for an absence of a juristic reason. Second, the defendant can rebut the *prima facie* absence of a juristic reason by showing another reason to deny recovery having regard to the reasonable expectations of the parties and any relevant public policy considerations: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 44-46; Kerr at paras. 43-45.
- [70] A successful claim for unjust enrichment based on establishing a joint family venture could result in a monetary award, or could result in a proprietary award like a constructive trust over a portion of the specific property that was contributed to and correspondingly enriched: Kerr at paras. 47-53.
- [71] Based on the uncontradicted evidence, R.D. has made out a reasonable prospect of success on unjust enrichment. She has established substantial contributions and deprivations that rise above the level of minor.
- [72] These include the "property management" services she provided for the short- and long-term rental of the Vancouver property, her financial contributions to the households, R.S.D.'s commitment to the mortgages for the Vancouver property and the Surrey property and his financial contributions to the households.
- [73] In particular, R.S.D.'s agreement to the indebtedness for those properties put R.D. and R.S.D. seriously at risk given that the evidence is that S.D. was collecting all of the income from the properties and they had no formal recourse to address matters if she did not pay the mortgages. In addition, although contested, the evidence that R.D. worked on the revenue generating aspects of the Vancouver property, R.S.D. contributed to the building of the Surrey property by hiring and supervising trades, and that R.D. contributed groceries and household supplies to both properties adds to the evidence to support a *prima facie* case for unjust enrichment, as does the uncontradicted evidence that R.S.D. put significant funds towards utilities and property taxes. I do not agree that this case is similar to *Strudwick*, where a pre-adult child assisted his father with the family farm.
- [74] With regard to juristic reason, S.D. submits that they had an agreement that R.S.D. and R.D. would not pay rent and/or R.S.D. and S.D. donated whatever contributions they made in lieu of paying rent. The evidence of R.S.D. signing on the mortgage is evidence that undermines

this assertion because there is too big a mismatch between the burden he accepted and the benefit of not paying rent, especially given that he contributed about \$22,000 towards property expenses over the same time period. I accept that R.D. has made out a prima facie case that none of the traditional categories of juristic reason applies. Neither R.S.D. nor S.D. raised a policy reason to rebut a finding of no juristic reason.

[75] With regard to whether a constructive trust will be a remedy, if the plaintiff establishes unjust enrichment, the remedy may be monetary or proprietary. The nature of the remedy must reflect the reality of the context in which the enrichment occurred and therefore the approach to the determination of the appropriate remedy must be flexible. An approach that requires the contributions made and benefits received to be tallied on a fee-for-service basis is artificial and often practically difficult: Kerr at para. 69. Before a proprietary remedy like a constructive trust is granted, a plaintiff must first demonstrate that a monetary award is insufficient in the circumstances: Kerr at para. 52. The plaintiff need not elect whether to pursue the monetary or proprietary remedy until they are able to make an informed choice, prior to the pronouncement of judgment: BNSF Railway Company v. Teck Metals Ltd., 2016 BCCA 350 at paras. 67-68.

[76] Given these legal principles, having established a reasonable prospect of success on unjust enrichment based on contributions to real property, the plaintiff has also established a reasonable prospect of success to a constructive trust over that real property or the proceeds of sale.

First Etemadi Principle: Whether there is evidence that R.D. is economically disadvantaged in relation to the prosecution of the litigation or otherwise in pursuit of dispute resolution.

[77] The first principle requires an assessment of the available evidence regarding the financial circumstances of the spouses and their respective capacities and disadvantages in funding resolution.

[78] As discussed above, this factor applies to the balance between the spouses, not between R.D. and S.D.

[79] Although R.S.D. did not appear on the application, he filed an application response. In it, the sole position he took was that the properties are not family property and therefore s. 89 does not apply. He made no submission on whether R.D.'s financial circumstances justify a s. 89 order or about the balance between his position and that of R.D. in relation to s. 89.

[80] Notwithstanding R.S.D.'s lack of response, it is appropriate to consider whether R.D. has discharged her onus on the s. 89 application.

[81] R.D. and R.S.D. have two children, the first born in 2016 and the second born in 2017. R.D. deposed that she was the primary caregiver and worked part-time after their second child was born. Since separation, the children have only resided with R.D. who obtained a protection order in relation to R.S.D. The protection order was extended by consent several times and then extended as a result of a contested application for a further year until August

4, 2023: R.D. v. R.S.D., 2022 BCSC 1290. On the application to extend the protective order, Justice Tucker reviewed transcripts of recordings that the claimant made of interactions between her and R.S.D. Justice Tucker concluded that the transcripts support R.D.'s attestations that R.S.D. physically and sexually assaulted her, threatened her with rape, threatened to kill her and threatened to have her killed by someone else. Justice Tucker accepted that R.S.D. had verbally abused R.D. in front of the children.

- [82] R.S.D. did not deny that he had physically and sexually abused R.D. However, he denied the allegations of conduct impacting his parenting and has sought to have parenting time with the children. By consent, the parties had a s. 211 report prepared. Dr. Elterman recommended that R.S.D. undergo counselling for a period of time, and then after counselling, have short periods of supervised parenting time with the children for a period of time, followed by periods of supervised parenting time up to four hours at a time.
- [83] Subsequent to separation, R.S.D. has paid child support of about \$1,200 per month. R.D. deposed that she has increased her work to 30 hours per week, while raising two children and working on a bachelor degree in psychology to increase her earnings potential. R.D. deposed that in 2022, she expected to earn \$44,000 working an average of 30 hours per week as a Youth Development Facilitator. R.D. deposed that she receives provincial disability benefits totalling between \$10,000 and \$15,000 per annum depending on her employment income, for a total income of about \$54,000-\$59,000.
- [84] R.D. deposed that since separation she has been living with her mother. She pays her mother \$2,000 per month for household expenses. She deposed that without her mother's assistance, she would not be able to afford housing for herself and the children. R.D. deposed that she has student loan debt of about \$30,000. She deposed that she acquired some of this debt prior to her marriage but she was not able to pay it down because she was required to put all of her earnings towards the Vancouver property and the Surrey property.
- [85] During the marriage and prior to separation, R.S.D. worked as a railworker for CN Rail and then as a longshoreman. On his first financial statement made in January 2021, he deposed that his income for child support purposes is \$71,694.05. He has deposed that he is on workers compensation benefits due to a workplace accident. In R.D. v. R.S.D., 2022 BCSC 1290 at paras. 46-48, Justice Tucker reviewed the evidence pertaining to these spouses' respective incomes. She concluded that R.S.D.'s Worksafe BC benefit was about \$67,000 "without gross up". R.S.D. pays about \$1,200 in child support each month. R.S.D. and R.D. share s. 7 expenses equally.
- [86] I am sceptical of R.S.D.'s claim that he pays his mother \$1,000 per month in rent. Both he and his mother deposed that between 2014 and 2020 he never paid his mother money for rent, expenses or the mortgage regularly despite that he and R.D. and one then both of their children were living in properties owned by S.D. Neither S.D. nor R.S.D. have deposed as to why she now requires him to pay rent for one person when she previously did not require him to pay any rent for two to four people.

- [87] Aside from the two mortgages that he guaranteed and which have now been discharged, R.S.D.'s financial statements indicated he has very little debt.
- [88] Notwithstanding that R.S.D. does not dispute this aspect of the s. 89 application, and notwithstanding that S.D.'s application response is silent on this issue, in oral argument S.D. asserted that the difference between R.D.'s means and R.S.D.'s means is not significant enough to justify a s. 89 order.
- [89] The fact that R.D. has managed to increase her earnings while caring for the two children and dealing with the aftermath of abuse that Tucker J. described as "family violence of an extreme nature over the period that the parties resided together " that "included physical, sexual and verbal abuse", is remarkable.
- [90] R.S.D.'s income is about 13-30% higher than that of R.D., depending where on the evidentiary income ranges they fall. R.D. has higher housing expenses, even if I accept R.S.D.'s evidence that he pays his mother monthly rent. She has significant debt and he has very little. He pays child support but she must manage all of the children's expenses, except counselling and dentist which are s. 7 expenses, out of the child support.
- [91] The differences in income are significant especially given the income levels in relation to paying legal fees.
- [92] Given the context of the extreme emotional and psychological disadvantage that R.D. has incurred at the hands of R.S.D., coupled with the financial disparity in their respective positions, I am satisfied that a s. 89 order is justified to level the playing field.

Second Etemadi Principle: Preliminary assessment of harm and necessity

- [93] The second principle - the preliminary assessment of harm and necessity - comes directly from the language of s. 89. Harm is considered to be harm of an enduring nature to the interests of a spouse: *Jadavji v. Khadijeva*, 2021 BCSC 2267, leave to appeal ref'd 2022 BCCA 116 (Chambers) at para. 48, citing *I.F.* at paras. 197-198.
- [94] The applicant can demonstrate necessity by showing that an advance is required to mount a challenge to the other spouse's position at trial that will not jeopardize the other spouse's position at trial: *McKenny v. McKenny*, 2015 BCSC 1345 at para. 57:
- [95] The matters that are at stake in this family proceeding are the claims to the Vancouver property and Surrey property, child support, spousal support and parenting time. These are substantive and serious especially given the family violence inflicted on R.D. and the children as found by Justice Tucker.
- [96] R.D. deposed that to date, she has borrowed \$30,000 from her mother and \$10,000 from her sister to fund the litigation but she is currently \$50,000 in arrears on legal fees. There have been several applications to date.

- [97] R.D.'s counsel has estimated fees to take the matter through a 15-day trial including disbursements and taxes totalling \$290,000. The fees include an estimate of \$11,000 for each contested application. During submissions on this application, counsel for S.D. indicated that his client has applications she intends to bring. Accordingly, R.D.'s counsel's estimate is low if there are multiple contested applications.
- [98] On the evidence, I am satisfied that R.D. cannot afford the fees she has incurred to date nor fees to take the matter through trial.
- [99] I consider the necessity requirement has been met.
- [100] With regard to harm, R.S.D. has not contested this issue. Given that he asserts that the funds in trust are not family property and he has no interest in them, I conclude that there is no harm to him if they are disbursed for the purpose of levelling the financial playing field between him and R.D.

Third Etemadi Principle: the quantum of distribution must be related to the necessity determination

- [101] The third principle flows from the necessity test. Courts must consider the amount of distribution that is genuinely required to resolve the family dispute, because "such orders are extraordinary in nature and must be assessed carefully": Etemadi BCCA at para. 52. Parties should submit a litigation estimate to provide evidence of necessity (I.F. at para. 200) but "[i]t must be remembered that the distribution is to fund dispute resolution, not litigation at any cost": Etemadi BCCA at para. 72 (dissenting opinion). However, in Etemadi BCCA at para. 118, the majority upheld the chambers judge who made an order to avoid "funding brinksmanship" and to move the parties toward resolution, rather than bring them to the edge of litigation and no further. This indicates the breadth of discretion on distribution, provided there is evidence to support the necessity of the amount.
- [102] On this application, one challenge is to relate the quantum of distribution not only to the necessity determination, but also to the family property. I have determined that R.D. has a reasonable prospect of success that the Vancouver property and the Surrey property are family property or subject to a constructive trust for unjust enrichment, but the ultimate interest of R.D. also depends on what the court at trial will determine to be various contributions of S.D., R.S.D., and R.D.
- [103] While it has been observed that a risk that funds will be distributed that are not family property, or beyond the amount ultimately determined to be the applicant's interest in family property, is inherent in s. 89 applications (see Barch at para. 75 and I.F. at paras. 192 and 197), still the court must carefully assess the quantum to be distributed against this: Jadavji at para. 40.

- [104] To relate the distribution sought, \$200,000, to R.D.'s claim that the Vancouver property and the Surrey property are family property, involves considering what portion of those properties would be family property and what portion might be allocated to her at trial. I readily accept that although R.D. has established a reasonable prospect of success, it is not possible for R.D. to present a precise case as to percentages of the Vancouver property and Surrey property that could be determined to be family property at this stage.
- [105] However, there is some evidence to define the parameters. The proceeds on the sale of the Vancouver property were about \$1,308,000 before taking into account what S.D. contributed to the lot purchase and building of the house. Her uncontroverted evidence is that she used some or all of the \$1,045,000 she obtained from the sale of another property. On her evidence, she used less than \$700,000 of those funds towards the lot purchase since the purchase price of the Vancouver property was \$700,000 and she deposed that she needed R.S.D. to co-sign a mortgage to complete the purchase. She did not depose as to the costs to construct the residence. Since she deposed she paid those costs, I assume she knows what they were but decided to not include that in her evidence. I conclude that it is likely that she put less than the \$1,045,000 she had into the land purchase and building. I infer that the increase in value to the Vancouver property prior to its sale, after accounting for S.D.'s initial cash input, was a minimum \$500,000 and could be as high as over \$1 million. This is the possible family property component of the proceeds of the sale of the Vancouver property.
- [106] The declared value on the title of the Surrey property was \$500,000. I understand that is what the land purchase price was. The evidence conflicts as to whether R.S.D. made a financial contribution to the purchase of the lot or the building of the residence. The cost to build the residence was not in evidence. The mortgage that R.S.D. signed on to and that was paid out from the proceeds of the sale of the Vancouver property was over \$1,000,000 at the time it was paid out. The most recent assessed value of the property is \$2,288,000. I conservatively estimate that the family property would be in the order of \$800,000.
- [107] The total of the potential family property I have identified ranges from \$1.3 to \$2.3 million. However, it is at least possible, and perhaps likely, that only a percentage of this would be family property and that S.D. would retain a significant increase not only in what she put into the property but its increase in value over the years that R.D. and R.S.D. contributed to it.
- [108] Given this, and despite the estimates of the costs of the litigation going forward, I am of the view that an interim distribution of \$200,000 is too high at this stage. I appreciate the downside of only funding a portion of a reasonable estimate of the go forward costs of litigation as described by Gomery J. in *Etemadi BCSC*, but on this case, the evidence as to what could be the value of the family property is too uncertain for the amount of distribution that R.D. seeks. In *Etemadi BCCA* Butler J.A. held he would have adopted a more iterative approach where a lower amount is approved with leave for the applicant to apply again once more evidence is in hand and the needs can be assessed with greater

precision. The majority in Etemadi BCCA explained that the approach described by Butler J.A. and the approach adopted by Gomery J. were both within the discretion of the court deciding a s. 89 application.

- [109] As I will discuss below, S.D. seeks a distribution that includes \$105,000 to discharge the high interest rate Antrim mortgage on the Surrey property. I am of the view that this is appropriate for the reasons I give below.
- [110] It is proportionate and appropriately balances the risk of too great a distribution versus the downside of underfunding R.D. in this high conflict litigation, to approve distribution of the same amount, \$105,000, to R.D. under s. 89 with leave for her to seek further distribution in the future.

Fourth Etemadi Principle: the interests of justice

- [111] The fourth principle considers whether the order sought, or a modified version, is in the interests of justice. This assessment comes after the necessity and absence of harm requirements are met. Interests of justice are engaged in s. 89 applications because they are discretionary orders: Bartch at paras. 56, 62. Courts should consider third party interests and ways to preserve such interests at this stage: Etemadi BCCA at paras. 79, 86.
- [112] Neither S.D. nor R.S.D. addressed this principle in their application responses. However, the tenor of S.D.'s oral submissions inferentially raised this factor with relation to her interests in the funds held in trust and in relation to what she sees as a very weak or non-existent claim to family property.
- [113] These are two sides of the same coin. If R.D.'s claim of family property fails, then any funds distributed to her will be S.D.'s funds and cause her harm that may be irreparable. While I consider R.D. to have passed the prima facie case threshold of a claim to family property, it is not a certain claim.
- [114] In *M.T.P. v. R.L.B.*, 2022 BCSC 156 at paras. 54-56 and 60, Justice Lyster held that having met the merits threshold, the applicant's reasonable prospect of success was found to attenuate the potential harm of the applicant not being able to repay the distribution.
- [115] I consider the potential of irreparable harm to S.D. to weight against making a s. 89 order. However, it is attenuated by R.D. having met the merits threshold and can be attenuated further by making an order to permit the payment out of the Antrim mortgage on the Surrey property, a matter which is causing S.D. cash flow issues.

[116] Also, I conclude that making no s. 89 order would be against the interests of justice. This case involves very serious issues to be tried on property but also on parenting, child support and spousal support in the context of what has been found to be extreme family violence perpetrated over years. To refuse R.D. resources to do so when she has established a reasonable prospect of success for an interest in the funds held in trust and in the Surrey property would not be in the interests of justice.

S.D.'s Application to Repay the Surrey Property Antrim Mortgage and Payment Out to S.D. from the Vancouver Property Sale Proceeds

[117] S.D. applies for orders that funds to discharge the Antrim mortgage on the Surrey property be paid out of the funds held in trust from the proceeds of sale of the Vancouver property; and that 80%, or alternatively, 50%, of the balance of the funds held in trust be paid out to her.

[118] This application is not made under s. 89 of the Family Law Act because S.D. is not a spouse. S.D. argued that the Court has jurisdiction under the inherent jurisdiction of the court to make the order.

[119] I do not need to consider exercising the inherent jurisdiction of the court. The money is held in trust pursuant to a consent order that it be held until further agreement of the parties or further order of the court. In my view, that order provides the Court with jurisdiction to entertain the application and make the order sought. R.D. did not argue otherwise.

[120] S.D. deposed that her financial circumstances are dire. She is 58 years old and retired. There are two suites in the Surrey property which together with her CPP survivor's pension generate income of \$3,150 per month.

[121] S.D. deposed that she has borrowed \$35,000 from her daughter and son-in-law. She deposed the funds they advanced to her came from their lines of credit. She deposed that she pays the interest on their lines of credit monthly, totalling \$480 per month. S.D. deposed that she is responsible for the Antrim mortgage on the Surrey property of \$887 per month. S.D. deposed that she has credit card debt totalling \$13,000.

The New Evidence

[122] In an affidavit sworn in support of her application and in opposition to R.D.'s s. 89 application, S.D. described a residence located at 1251 East 64th Street, Vancouver. She deposed that this was the first residence that she and her late husband, R.S.D.'s father, resided in. She deposed that her father-in-law and her husband were joint tenants of the 1251 residence. She deposed about that residence in connection with her evidence that she and her late husband worked at a janitorial business and used their income from that, and other efforts, to buy, manage and sell multiple properties.

- [123] S.D. also deposed about a property located at 1252 East 64th Street, Vancouver which she and her late husband purchased. She deposed that her mother-in-law was on title to a one-third interest even though her mother-in-law had not contributed to the purchase of the 1252 property. She deposed that was because her late husband was on title to the 1251 property and because of "family dynamics".
- [124] S.D. did not depose to anything about the 1251 property except as described above. After submissions on this matter were concluded, and the matter was under reserve, R.D. discovered that S.D. has an undivided one-third interest in the 1251 property. She sought to bring this evidence to the attention of the Court as it is relevant to the evidence that S.D. gave as to her means to fund this litigation and what she described as her dire financial circumstances.
- [125] In response, S.D. deposed as to the history of the 1251 property and those on title to it with her which include her mother-in-law and her sister-in-law, jointly to a one-third undivided interest, her now deceased father-in-law to an undivided one-third interest, and herself and her husband to an undivided one-third interest. S.D. deposed that she has been estranged from her mother-in-law since 2009 and from her sister-in-law for several years. She deposed she does not know of any steps by her later father-in-law's estate to deal with his interest. She deposed that she presumes her mother-in-law and sister-in-law are managing it "in some fashion".
- [126] R.D. deposed that to her knowledge, S.D. and her mother-in-law and sister-in-law are not estranged. She attached pictures of them socializing in 2018. It is also noteworthy that S.D.'s mother-in-law and father-in-law had been separated for many years and S.D.'s father-in-law resided with S.D. in the Vancouver property and the Surrey property prior to his death.
- [127] S.D. objected to the Court receiving further evidence about the 1251 property and considering it on these applications. Her first objection is that R.D. did not deliver a notice of application in relation to this evidence. She relied on *Dupre v. Patterson*, 2013 BCSC 1561, for the proposition that without a notice of application, the opposing party does not have sufficient notice of what the arguments will be.
- [128] S.D.'s second objection is that the circumstances do not meet the requirements for the Court to receive further evidence after judgment has been reserved, relying on *K.H.D. v. O.O.M.*, 2021 BCSC 1806.
- [129] In order to receive new evidence after judgment has been granted but the order not entered, there should be a notice of application setting out what evidence is to be considered and for what purpose: *Hansra v. Hansra*, 2017 BCCA 199. The court must consider whether a miscarriage of justice would occur without re-opening and whether a rehearing would change the result. The principles that animate the exercise of discretion are finality, the cogency of the evidence, delay, fairness and prejudice: *Hansra* at para. 59.

- [130] These circumstances are not on all fours with *Hansra* because in this case the reasons for judgment had not been issued.
- [131] In *K.H.D.*, Master Elwood, as he then was, considered the request of the applicant on an application for parenting time with his children to "re-open the hearing to adduce new and fresh evidence" that the respondent was interfering with the applicant's ability to maintain a relationship with his children. Master Elwood held, citing *Chan-Henry v. Liu*, 2017 BCSC 134, that the same considerations apply to re-open an application as to re-open a trial. Those considerations are similar to those applied in the line of cases to which *Hansra* belongs. Master Elwood emphasized the consideration of whether the applicant can show that a miscarriage of justice will result if the application is not re-opened and that the new evidence would probably change the result.
- [132] *Chan-Henry*, like the *Hansra* line of cases, pertains to applications to re-open after the court has given reasons for judgment but before the order has been entered. Master Elwood did not find that distinguishable from the circumstance where the court has not yet made a decision.
- [133] I am not persuaded that the same test should apply to an application where the court has not rendered a decision. The interest of finality is not nearly as great. The interest in deciding the case on the relevant evidence takes on greater significance. The court may not be able to determine whether the fresh evidence would "change the result" because the decision has not yet been made. It may be that many of the same factors are relevant, but the balancing of them is, in my respectful view, different.
- [134] Nor would I necessarily require a notice of application is necessary to hear further evidence and submissions where the matter is not the subject of a decision. It is sufficient for the party seeking to adduce new evidence to advise the other party what that evidence is, and to use the regular process for seeking to re-appear. That is what R.D. did in this case.
- [135] In any event, in this case, I am readily satisfied that a miscarriage of justice would result if the evidence were not received. The evidence is cogent: it is a land title document showing S.D. on title to a property that has a recently assessed value of \$1,460,000. S.D., in her evidence on her application, went through her financial situation in some detail to explain what she described as dire financial circumstances. This gap in her evidence is relevant to the relief she seeks.
- [136] The evidence is admissible.

The Antrim Mortgage on the Surrey Property

- [137] In support of this relief, S.D. deposed that the interest on the Antrim mortgage, which was initially a second mortgage, is 9.95%. Despite having paid out the first mortgage with the sale proceeds from the Vancouver property, S.D. is unable to raise funds using the Surrey property at a more conventional rate of interest because of the certificate of pending litigation filed by R.D. against the Surrey property.
- [138] I have misgivings about S.D.'s evidence given her failure to disclose her ownership interest in the 1251 property, however there is objective evidence corroborating her assertions regarding this mortgage.
- [139] Most importantly, if R.D. is correct that the Vancouver property and the Surrey property are family property or subject to a constructive trust, none of those who have an interest in both are harmed by payment out of the high interest mortgage on the Surrey property out of the proceeds of sale of the Vancouver property. If the Vancouver property is family property or is subject to a constructive trust, but the Surrey property is not, then the ability of R.D. to be compensated is secured by the certificate of pending litigation registered against the Surrey property. That property cannot be dealt with until this litigation is concluded and the equity will be secure to compensate any improperly paid out funds.
- [140] If the Vancouver property is not family property or subject to a constructive trust but the Surrey property is, then there is no harm to R.D. in using Vancouver property proceeds to pay out the Surrey property high interest mortgage.
- [141] I am satisfied that it is appropriate to order that the Antrim mortgage on the Surrey property be paid out of the funds held in trust from the proceeds of the sale of the Vancouver property.

Payment Out to S.D.

- [142] S.D. seeks 80%, or alternatively 50%, of the funds held in trust so that she can restore her ability to support herself and her investments and pay her legal bills.
- [143] S.D.'s evidence was incomplete about the facts that support this aspect of her application. Her failure to identify and address a major asset that she holds is significant and casts doubt on the evidence she has led about her financial circumstances, including why she has not had resort to this asset. In her reply evidence, which I have also considered, S.D. did not explain why she did not address this asset. Her evidence that she has very little information about it is hard to accept, given her detailed evidence about the efforts she and her husband made to acquire and own property in the lower mainland. The rest of her evidence displayed intimate knowledge of her property holdings and their impact on her financial circumstances. Her assertion that she does not know much about this valuable asset that is of the same type makes no sense.

[144] S.D.'s application must fail because it was brought on an evidentiary basis that was incomplete and remains unreliable. I dismiss the portions of S.D.'s application other than the payout of the Antrim mortgage on the Surrey property.

Disposition

[145] Pursuant to s. 89 of the Family Law Act, I order that R.D. be paid \$105,000 out of the funds held in trust from the sale of the Vancouver property. She has leave to reapply for further funds to be paid out.

[146] Pursuant to the terms of the order of the court under which the funds are held in trust, I order that \$105,000 be paid out to discharge the Antrim mortgage on the Surrey property.

[147] I dismiss the balance of S.D.'s application.

[148] R.D. has been substantively successful and is entitled to costs on both applications. Given S.D.'s conduct, I order those costs be paid in any event of the cause forthwith.

"Matthews J."

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Prepared on 28 October 2026 · Esheria