

CANADA / JUDGMENT

R.L. v. M.L.**2024 BCSC 106****COURT**

Supreme Court of British Columbia

DECIDED

23 January 2024

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2024 BCSC 106 R.L. v. M.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.L. v. M.L.,

2024 BCSC 106

Date: 20240123

Docket: E180831

Registry: Vancouver

Between:

R.L.

Claimant

And

M.L., 0684268 B.C. Ltd. aka 684268 B.C. Ltd., 0651756 B.C. Ltd., Ticketworld Enterprises Inc., Urban Heights Developments Ltd., 1099537 B.C. Ltd., 0573506 B.C. Ltd., Zenture Enterprises Corp., and D.L.

Respondents

Corrected Judgment: The text of the judgment was corrected on the front page and in paragraphs [89] and [147] on January 25, 2024.

Before: The Honourable Justice MacNaughton

Reasons for Judgment

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No one appearing for the other Respondents.

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 4-7, 10-14,

and 17-20, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 23, 2024

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Overview

- [1] The claimant, R.L., is M.L.'s spouse and the mother of their three daughters. M.L. is the primary respondent and was the financial provider for the family throughout the relationship. The corporate respondents are companies in which M.L. has, or had, an interest. The respondent, D.L., is M.L.'s mother. D.L. holds property in which R.L. claims an interest.
- [2] None of the corporate respondents responded to this family claim.
- [3] The parties have not always agreed with respect to parenting arrangements for their daughters. However, prior to trial, they entered into a consent order for parenting arrangements they considered to be in their children's best interests. As a result, this decision does not deal with parenting arrangements. It deals with the following issues: retroactive and prospective child support, retroactive and prospective spousal support, and division of property and debt arising from the breakdown of the parties' marriage.
- [4] Central to the division of property and debt is the impact of an October 3, 2011 marriage agreement (the "Marriage Agreement"). Much of the trial evidence and arguments were focused on determining its impact. The Marriage Agreement was signed by the parties after they lived together for a number of years, were the parents of two children, and on the eve of the parties' trip to Hawaii for their wedding. It does not deal with child or spousal support.
- [5] At trial, neither party sought to have the Marriage Agreement set aside but they disagree as to its interpretation and its impact on the division of property. Alternatively, M.L. says the Marriage Agreement operates unfairly.
- [6] R.L.'s notice of family claim in this action was filed in March 2018. Previous trial dates were adjourned. In 2020, the trial was adjourned due to Covid-19; in 2021, the trial was adjourned on consent as the parties attempted a mediated resolution; and earlier trial dates in 2023 were adjourned because no judge was available.

Background

Parties

R.L.

- [7] R.L. is 54-years-old. She was born in June 1969 in Port Moody, BC. She did not graduate from high school but took courses in marketing and project management after leaving school.

- [8] R.L.'s first job after leaving school was with Hospitality Marketing Concepts. Her job required a lot of travel and she left it to work for an international shipping company. When she met M.L., she was working as a benefits clerk with the International Woodworkers of Canada. At some point during the parties' relationship, R.L. completed a six-month course in hypnotherapy but she did not complete the practicum because she intended to complement what she learned with a counselling course.
- [9] For the most part, after the birth of the parties' children, R.L. did not work. She was the primary parent and responsible for managing the parties' home.
- [10] After the parties separated, and beginning in June 2022, R.L. began training with School District #41 (the "District") as an educational assistant. She was hired after the training and started working for the District in January 2023.
- [11] Going into the relationship with M.L., R.L. had few assets. This was reflected in the Marriage Agreement; it did not list any assets in her name.

M.L.

- [12] M.L. is 57-years-old. He was born in October 1965 in Croatia and was four-years-old when his family moved to Canada. At first, they lived on a farm in Aldergrove. The family moved to Eton Avenue in East Vancouver where M.L. started school. He described himself as a "model kid" and a "straight A student". He testified that he always had an entrepreneurial spirit. From a relatively young age, he has been self-employed.

Relationship

- [13] R.L. and M.L. met and starting dating in October 2005 when M.L. was visiting his mother who lived on the same street as R.L. Both described feeling an instant attraction.
- [14] The parties disagree about whether they commenced living together in the summer or the fall of 2006. Although not much turns on the difference, I accept R.L.'s evidence that it was summer 2006 as she was able to place the date by reference to when she gave up her rental suite and the date of her father's death. R.L. moved into a property already owned by M.L. at 353 North Delta Avenue, in Burnaby ("353 Delta").
- [15] R.L. said she knew that M.L. was a successful businessman who owned Showtime Tickets Inc. ("Showtime"), a ticket reselling business but did not know the details of his business endeavours. She described their vacations to Palm Springs, Las Vegas, and Hawaii in 2006, all of which were paid for by M.L. M.L. also showed her homes that he said he owned with a business partner. She testified that M.L. told her that they had nothing to worry about as their future was secure.
- [16] As the parties were not young when they met, they wanted to have a child and discussed marrying later. They were engaged in November or December 2006. R.L. was then about six-months pregnant.

- [17] The parties agreed that M.L. always made it clear that he required R.L. to sign a pre-nuptial agreement if they were to marry. He had built up significant business assets prior to their relationship and wished to protect them from claims by R.L. in the event their relationship broke down.
- [18] S., the parties' first daughter, was born in May 2007, and is currently 16-years-old. M., the parties' second daughter, was born in February 2009, and is currently 14-years-old.
- [19] The parties married on October 5, 2011 in Hawaii. On the eve of the trip to Hawaii, the parties signed the Marriage Agreement. R.L. testified that she felt pressured to sign the agreement and she was in tears when she did so. The Marriage Agreement was witnessed by D.L.
- [20] Although the Marriage Agreement was subject to review after three years, and every five years thereafter, it was never reviewed or amended.
- [21] The parties' third daughter, J., was born in October 2012, and is currently 11-years-old. In these reasons, I collectively refer to the parties' three daughters as the "Children".
- [22] M.L. has a daughter from a prior relationship. C. was born in November 1999, and is 23-years-old. She testified in this proceeding. When the parties first began living together, C. was with them every second weekend and overnight once a week.
- [23] In about 2000, while M.L. and C.'s mother were still in a relationship, M.L. purchased land and built the home at 353 Delta. They lived there as a family until they separated. After separation, M.L. purchased a nearby home at 342 North Delta Ave. ("342 Delta") and C. and her mother moved into it. M.L. was registered as a 2/3 owner of 342 Delta and C.'s mother was registered as a 1/3 owner.
- [24] R.L. was a traditional stay-at-home parent, responsible for the household, the Children, and C. when she was with them. M.L. earned the family income. Both agreed that M.L. worked long and irregular hours often into the late evening. R.L. testified that M.L. left the family home by mid-morning and often did not return until very late at night or the early hours of the next morning. He usually came home for dinner on Wednesdays when C. was with them. M.L. did not dispute her evidence. R.L. testified that M.L. described what he called "pink" jobs and "blue" jobs; she was responsible for the pink jobs.
- [25] Although the parties' evidence differed about whether it was always their intention that R.L. stay at home after they had children, they agreed that R.L. would stay at home while the Children were young. R.L. testified that M.L. wanted her to be at home and she agreed. R.L. testified that parties planned that, after the birth of their first daughter and her maternity leave, she would not return to work. She did return to work for a short time since, at the end of her first maternity leave, she was pregnant again. She did not return to work after her second maternity leave.

- [26] Because R.L. assumed responsibility for the Children and the household, M.L. was free to work long hours at Showtime and to pursue his other business interests. The parties had a comfortable lifestyle.
- [27] On the whole of the evidence, I accept that M.L. always controlled the parties' personal and corporate assets and R.L. was never involved in the day-to-day operations of M.L.'s various businesses nor did she have access to, or understand, their finances. R.L. was unsophisticated about business and financial matters and relied heavily on M.L.
- [28] R.L. says that the parties finally separated on June 1, 2017. In his pleadings, M.L. says that the parties "separated in the summer of 2012 [and] attempted reconciliation from July 2016 through January 2017." Both parties agree that there was a final separation in 2017.
- [29] On August 9, 2012, the parties separated and R.L. commenced family proceedings against M.L., 684 and 651 in the BC Supreme Court Action No. E122667 (the "First Action").
- [30] Throughout 2012-2013, the parties met with various professionals to work on the issues in their marriage. They retained a parenting coach, a counsellor and a mediator. In September 2012, M.L. returned to 353 Delta and lived in the basement suite. That arrangement continued through June 2014. During that time, the police were involved with respect to allegations of family violence. It is not entirely clear on the evidence what happened between 2014 and January 2017 but, according to M.L.'s response to the family claim, for at least part of that time the parties were attempting to reconcile.
- [31] The parties never signed a separation agreement and they are not yet divorced.
- [32] Based on my significant concerns about M.L.'s credibility, I accept that the date of separation was in June 2017. There was no triggering event, under s. 56(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], until June 7, 2023 when Justice Fitzpatrick issued a declaratory judgment that the parties had no reasonable prospect of reconciliation, pursuant to s. 57 of the FRA.
- [33] As a result, the relationship is one of medium length of between 10 and 11 years from 2006-2017.
- [34] There is no dispute that the parties' relationship was volatile and tumultuous. It was characterized by multiple separations, followed by reconciliations. R.L. testified about various incidents of physical and emotional family violence. At times, protection orders were in place, M.L. attended anger management and other counselling. At other times, they lived in the same home, but separately.
- [35] R.L. said the parties' relationship was either "really high" or "really low"; there was never any "medium" for extended periods of time. She described M.L.'s temper and how, when her point of view differed from his, he made her think there was something wrong with her or that she was stupid. She described that when he was angry, he changed into a completely different and frightening person. She said he screamed at her, threatened her, and called

her offensive names. She "walked on eggshells" to make sure she did not trigger a reaction from M.L.

- [36] In cross-examination, M.L. agreed that he called R.L. offensive names, including calling her a "bitch", using the "F" word and the "C" word, but said that they both engaged in that type of behaviour. There is written evidence of the names M.L. called R.L. During her testimony, R.L. acknowledged that she called M.L. cruel and a narcissist. She was clearly not proud of her role in this aspect of the parties' dynamic.
- [37] M.L.'s emotional volatility was evident to me when he was cross-examined. He became angry and dismissive when he was pressed by R.L.'s counsel. I will return to this later in my assessment of the parties' credibility.
- [38] R.L. described two specific incidents of physical violence. The first occurred shortly after S. was born, on the stairs at 353 Delta. R.L. said she was carrying S. in her arms and the parties were arguing. She said that M.L. grabbed her by the ear and tried to prevent her from walking away from him.
- [39] M.L. testified that he vividly recalled the argument but denied that he grabbed R.L. by the ear. He said that he "never laid a hand on her" and that violence was "not in his being". He said that they had heated arguments but no physical contact.
- [40] Following the incident, R.L. left the home with S. M.L. said he came home the next day to an empty house.
- [41] At first, R.L. stayed with her mother, but she was concerned that M.L. would find her there. R.L. moved into a motel, but when that became too expensive, she moved to a North Vancouver women's shelter. Through her prior employment contacts, she then moved into a furnished apartment in downtown Vancouver and then to a small apartment in West Vancouver. M.L. paid her rent.
- [42] R.L. testified that M.L. emailed her saying that he wanted her to come home with S., that he was taking anger management courses, and was going to turn things around. By Christmas of 2007, they reconciled and started seeing a marriage counsellor.
- [43] On December 20, 2010, M.L. sent R.L. an email in which he said that he could not put R.L. and the two children "in emotional harms way again". He was working with a counsellor on his "emotional stuff" and that if she felt unsafe he would go to his mother's. The following day, he sent R.L. another email in which he said that he "understood the emotional abuse he had put her through" and the damage he inflicted due to his problems. He expressed sorrow, regret, shame and compassion. He said that he was working to resolve his issues and hoped it was not too late for them.

- [44] R.L. testified about a second incident of physical violence in 2017. It occurred after she took M.L.'s cell phone. Although both parties describe the incident differently, they agree that M.L. was recording their conversation and had been doing so for months. He said he did so because he felt extremely unsafe and had to protect himself from R.L.'s false allegations. He described his phone as his "lifeline".
- [45] M.L. testified that R.L. grabbed the phone out of his pocket. R.L. said she picked it up from the kitchen counter, or island, because she was upset that she was being recorded. M.L. forcefully took his phone back from R.L. He said he grabbed her from behind, spun her around, and held her arm, forcing her to drop the phone. She fell or was pushed onto the couch. R.L. testified that M.L. bit her hand so that she would release the phone. One or two of their children were in the kitchen during this incident.
- [46] Regardless of which version of this altercation is accurate, it was an incident of family violence and despite his earlier evidence, M.L. clearly "laid a hand" on R.L.
- [47] Although the police were involved with the family on a number of occasions, R.L. did not immediately call the police after the phone incident. When she did so a few days later, she was told that there was nothing they could do because it occurred days before.
- [48] M.L. described R.L. accusing him of cheating and said that she has trust issues that were difficult to overcome. He testified that R.L. called him a narcissist and said that he was cruel and an abuser. He described R.L. physically attacking him. This evidence was not put to R.L. in cross-examination and she was not given an opportunity to respond to it. As a result, I give it no weight.
- [49] I conclude that the parties' relationship involved both emotional and physical abuse which resulted in a number of separations and subsequent reconciliations, until the final separation in June 2017.

M.L.'s Business Interests

- [50] M.L.'s business activities and the corporate entities involved are not straightforward and a number of the business entities controlled or owned by M.L., either as part of his ticket selling business interests or his real estate ventures, are listed as corporate respondents in this action.
- [51] For clarity, I divided M.L.'s business interests into two categories, which I will address in turn. First, I summarize the history of M.L.'s ticket reselling business ventures and the relevant corporate entities involved. Second, I summarize the nature of his real estate ventures. I then provide an overview of each of the corporate respondents listed in this action, including their interrelationships and corporate structures.

- [52] Unfortunately, on his evidence, M.L.'s corporate arrangements were complicated and unclear. I have done the best I can with the evidence that was available to me. As set out later in these reasons, due to the parties' joint retainer of a business valuation expert for trial purposes, no forensic analysis of the corporate arrangements was conducted.

Ticket Reselling

Showtime

- [53] When M.L. was in high school, he worked at the Coliseum at the Pacific National Exhibition. He was intrigued by ticket sellers he saw outside the Coliseum "scalping" event tickets at well above face value. He started doing the same and, despite being threatened and assaulted, he was successful at it.
- [54] On May 5, 1995, M.L. incorporated Showtime. He opened a Showtime office across from BC Place. M.L. described Showtime as the first Canadian retail ticket reselling agency. It openly and transparently bought tickets from customers who were selling and resold them to customers who were buying. Prior to Showtime, ticket reselling was considered a shady business done by scalpers. M.L. made efforts to legitimize the industry and was regarded by the media and others as a trusted source of information in respect of ticket reselling.
- [55] M.L. joined a group called the Entrepreneurs' Organization, an international organization with many active chapters, including one in Vancouver. He also joined the Canadian Ticket Broker's Association. He worked to protect ticket buyers from unscrupulous sellers and promote openness and guarantees in the business.
- [56] Through M.L.'s commitment and hard work, supported by R.L.'s responsibility for their Children and home, by the time of the 2010 Vancouver Olympics, Showtime had 30 employees.
- [57] M.L. testified that he expected to make a lot of money during the Olympics and then retire. That did not happen. Showtime contracted with and paid a supplier for "millions" of Olympic tickets. The supplier defaulted. Showtime had already sold those tickets all over the world. M.L. described how it was standard practice in the ticket reselling industry to sell tickets before they were received.
- [58] After the supplier defaulted, Showtime scrambled to find available tickets in the marketplace to deliver on its customer commitments. M.L. described how people were "waving money" at Showtime but it had nothing to sell. Showtime's accounting system and point of sale website crashed. Customers showed up to pick up tickets that Showtime had no record of them buying.
- [59] Ticketmaster, a primary ticket vendor, refused to sell tickets to Showtime so he, his employees, and his family members personally bought tickets from Ticketmaster. He testified that Showtime hired what he described as a "hobo army" - unhoused individuals who were paid to wait in line to buy tickets from Ticketmaster - with prepaid visa cards.

M.L.'s evidence was confirmed by the evidence of Holly Konsmo, a former Showtime employee, who testified at trial. Both R.L. and C. testified about buying tickets for Showtime. Prepaid visa cards would be in their own and others' names to avoid limits on the number of tickets one buyer could buy. R.L. testified that, at M.L.'s request, she purchased tickets on her RBC credit card and, despite his promise to pay the credit card debt, he did not. As a result, the bank obtained a judgment against her.

- [60] M.L. said he worked 16-18 hours a day to save the business and that he got through it by incredible hard work but at a high cost, "emotionally, financially, and spiritually".
- [61] Fortunately, following the Olympics, the Vancouver Canucks were in a playoff run. Canucks tickets were in high demand and commanded a premium. The team made it to the playoffs in May and June 2011. M.L. said he was able to recoup some of Showtime's Olympic losses.
- [62] Thereafter, changes in the ticket reselling industry made things more challenging for Showtime. Live Nation Entertainment, an event promotor, and Ticketmaster merged. Representing the National Association of Ticket Vendors, M.L. testified against the merger at a U.S. Senate hearing, fearing it would create a monopoly. At trial, he testified that that is exactly what happened. Ticketmaster now has its own resale arm, making it difficult for individuals or brokers to buy tickets for resale.
- [63] M.L. testified that, three years in a row, Showtime lost hundreds of thousands of dollars. It cut overhead and employees. It lost customers to online ticket resellers such as StubHub and Vivid Seats, two U.S. based online resellers that controlled the market and who were not required to collect or remit Goods and Services Taxes ("GST"). M.L. described Showtime as being like a small hardware store trying to compete against Home Depot.
- [64] M.L. testified that Showtime's business difficulties were followed by a Canada Revenue Agency ("CRA") GST audit. The CRA alleged that Showtime, and M.L. as its director, owed more than \$650,000 in GST. Showtime's bank account was frozen and it could no longer deposit credit card transactions. It was the CRA audit that led to the transfer of 353 Delta into R.L.'s name. That transfer will be discussed later in these reasons.
- [65] M.L. testified that the business could not survive these multiple challenges and M.L. let staff go. He informally wound Showtime down in 2013 and 2014.

Ticketworld Enterprises Inc. ("Ticketworld")

- [66] M.L. reconfigured his business model and started Ticketworld, incorporated on March 18, 2013. Ticketworld is leaner due to outsourcing and automating. For example, to keep wages down, his accounting is done in India at a much lower cost.
- [67] The Covid-19 lockdowns were a serious blow to Ticketworld as its business model was based on selling into the future. When the lockdowns occurred, customers sought ticket refunds for cancelled future events.

- [68] M.L. testified that he hopes the Ticketworld business will turn around. He said he took on massive debt and government loans from the Business Development Bank of Canada and from the Canada Emergency Business Account. Rising interest rates impacted the business and it has a number of balloon payments due in the next year.

Zenture Enterprises Corp. ("Zenture")

- [69] Zenture was incorporated in March 2013 under number BC0965348. It is a holding company that owns the Showtime brand and shares in a privately held technology company, Ronin8 Technologies Ltd. The Ronin8 shares were bought in 2016 for \$99,990.
- [70] Both Ticketworld and Zenture are listed as corporate respondents in this family action.

Real Estate Venture

- [71] M.L. testified that he was also involved in a real estate venture with a business partner, Joe Corea, whom he met through a small group business forum in the Entrepreneurs' Organization. The real estate venture started in 2000 or 2001. They were involved in the purchase, development, and resale of a number of properties in the Lower Mainland.
- [72] M.L. incorporated a number of corporate entities as part of the real estate venture, both individually and with Mr. Corea. These entities and their relevant assets are summarized below.

0651756 B.C. Ltd. ("651")

- [73] 651 was incorporated on or about July 25, 2002 by M.L. and Mr. Corea as the sole shareholders, officers, and directors. It was a real estate development company and it owned real property located at 2033/2035 East 2nd Avenue, Vancouver (the "East 2nd Properties").

0684268 BC Ltd. ("684")

- [74] 684 was incorporated on December 31, 2003. M.L. and Mr. Corea were its sole officers and directors. It was also a real estate development company and owned real property located at 1610 and 1628 Graveley Street, Vancouver (the "Graveley Properties").

Urban Heights Development Ltd. ("Urban Heights") and the Bare Trust Agreements

- [75] Urban Heights was incorporated under number BC0680221 on December 31, 2003, by M.L. and Mr. Corea. Each partner held their 50% interest in Urban Heights and the property it purchased through personal companies. In M.L.'s case, his interest was held by the respondent 0573506 B.C. Ltd., a holding company discussed below.
- [76] Although M.L. invested money in Urban Heights, he testified that he was a silent partner. Mr. Corea put in less cash but invested sweat equity and time. Mr. Corea controlled and managed the business.

- [77] Over a period of three years, Urban Heights bought six to eight single family homes in East Vancouver. Urban Heights refinanced, developed, and sold the properties over time. To qualify for mortgage financing, M.L. testified that the properties were registered in the names of M.L., M.L.'s father, Mr. Corea, or Mr. Corea's father. M.L. testified that while the properties were held in individual's names, they were subject to unregistered bare trust agreements in favour of Urban Heights.
- [78] No bare trust agreements relating to these properties were produced in this litigation despite R.L.'s requests for them. M.L. testified that he unsuccessfully attempted to obtain copies of the agreements from Mr. Corea. He did not produce any documents to support his efforts to obtain the copies. No application was brought seeking records from a third party and Mr. Corea did not testify at this trial.

0573506 B.C. Ltd. ("573") and Aventura Enterprises Corp. ("Aventura")

- [79] 573 was incorporated by M.L. in 1998 and was the holding company that held M.L.'s 50% interest in 651, 684, and other companies, including Urban Heights.
- [80] With the assistance of tax advice, a corporate structure was set up in which 573 owns Aventura Enterprises Corp., a holding company that was incorporated in 2018. Aventura owns shares of 684 which, in turn, owns the Graveley Properties.
- [81] I note that in the joint business valuation report obtained for this family dispute, referred to below, the author said that the corporate records were unclear about whether Aventura owns 50% or 100% of 684.

1099537 B.C. Ltd. ("109")

- [82] 109 was incorporated on December 8, 2016 and operates as a real estate company. 109 owns a property at 628 Citadel Parade (the "Citadel Property"), a zoned work/live townhouse in downtown Vancouver. Ticketworld operates from the Citadel Property.

Sale of Interest in Real Estate Venture

- [83] M.L. testified that, in 2012, when R.L. served her first notice of family claim, she registered certificates of pending litigation ("CPLs") against properties owned by Urban Heights. As a result, his relationship with Mr. Corea became strained. M.L. testified that Mr. Corea threatened to sue and tried to force him to sell his half of the business at 20% below market value. M.L. described this as a "corporate divorce".
- [84] After a 2016 mediation, M.L. and Mr. Corea discussed dividing up the properties then owned by Urban Heights
- [85] In May 2016, M.L. and Mr. Corea entered into settlement discussions to address and divide up their personal and corporate assets. These assets included the shares of 651, Urban Heights, 684, 573, and other related companies.

[86] The properties owned by 651 included the East 2nd Properties and a mortgage receivable. The assets owned by 684 included the Graveley Properties. The substance of the agreement was that, through their operating companies (573 for M.L.), M.L. would retain 684 and the Graveley Properties, Mr. Corea would retain 651 and Urban Heights, and M.L. would pay a cash adjustment to Mr. Corea to balance the property values. The 2016 agreement was updated in 2018 to reflect additional tax considerations, and further updated in May 2019. That matter is now resolved and 573 is the owner of the two Graveley Properties. R.L. signed the settlement agreement as a party.

Corporate Structure of the Various Business Entities

- [87] M.L. is a director of 684, 651, Ticketworld, and Urban Heights
- [88] D.L. is a director of 109, 573, and Zenture. It was clear in D.L.'s trial evidence, that she did not take an active role in any of these entities, all of which were managed by M.L. She was unable to answer any questions about the corporations in which she is a director and, as will be discussed below, unable to give any evidence about a share purchase agreement to which she was allegedly a party.
- [89] After Showtime failed, the [L] Family Trust was created. It was not clear on the evidence whether the [L] Family Trust is the same as the NASE Trust (the "Trust") discussed next. It appears probable that they are the same entity.
- [90] The current trustees of the Trust are D.L. and M.L.'s brother, N.L. The Trust was settled on March 15, 2013. M.L. is a discretionary beneficiary of the Trust. He has a residual power of appointment of trustees and of beneficiaries. As such, R.L. submits that M.L. effectively controls the Trust. The Trust is not as a named party in these proceedings. The shares of Ticketworld, Zenture, and 109 are owned by the Trust.

The Walters Report

[91] Because of the complex and interrelated nature of M.L.'s business interests, in January 2020, the parties retained Walters Financial Forensics and, in particular, Rosanne Walters ("Walters"). Walters was retained to prepare a joint Business Valuation Report with respect to the fair market value of M.L.'s business interests as of July 31, 2022 (the "Valuation Date") in: the Trust, including Ticketworld, Zenture and 109; and 573, including 684 and Aventura. In her July 11, 2023 report (the "Walters Report"), Walters referred to the Trust and the various companies as the "entities".

[92] For the purposes of the Walters Report, fair market value is defined as:

The highest price, expressed in terms of cash equivalents, as which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

- [93] In addition to the Business Valuation Report, Walters was asked to prepare a joint Guideline Income Report, a calculation of M.L.'s guideline income for 2019-2021.
- [94] Ms. Walters testified at trial.
- [95] Because it was a joint report, Walters was limited to obtaining information directly from M.L. and relying on that information and his comments. She did not audit the businesses.
- [96] In her evidence, Walters noted a number of discrepancies between the internal financial documents of M.L.'s business entities and the entities' tax documents. Due to the limits of her retainer, she chose not to explore or resolve the discrepancies and, instead, relied on the tax documents.
- [97] The Walters Report set the fair market value of Ticketworld at \$42,112.
- [98] Walters testified that Ticketworld showed gross revenue of \$1,415,613 (Schedule 3.1 in the Walters Report) for fiscal 2022. However, she opined that due to Covid-related lockdowns and a gradual re-opening of the economy, this amount was earned during the seven-month period of January 1, 2022 - July 31, 2022. As such, extrapolated over a 12-month period of returning to pre-Covid expectations, she said that the expected revenue of Ticketworld would have been in line with its pre-Covid revenue of approximately \$2.4M (2018 - \$2,364,423; 2019 - \$2,457,738).
- [99] Walters testified that, despite her opinion, M.L. repeatedly told her that he did not have confidence in Ticketworld returning to its pre-Covid revenues or even continuing in business. As a result, based on his comments and the fact that this was a joint report, she felt constrained to doing a valuation that did not factor in goodwill or a business that would continue to operate. She testified that if she had done a calculation of Ticketworld's value as a continuing business, with earnings before interest, taxes, depreciation and amortization ("EBITDA") factors and calculations, as a company with gross revenue approaching \$3 million, its value would be significantly higher than the \$42,112 set out in the Walters Report.
- [100] Finally, the Walters Report was limited to considering Ticketworld's revenue to July 31, 2022 and not beyond. Covid-19 restrictions have significantly lessened and the economy has reopened. People are attending events as they did before Covid-19.

[101] Based on the Walters Report, the fair market value of the various entities was as follows:

Entity

Low Range

High Range

Mid-Point

M.L.'s beneficial ownership in the Trust

\$40,000

\$130,000

\$85,000

M.L.'s beneficial ownership in 573

\$1,890,000

\$2,334,000

\$2,065,000

Due to M.L. from the Entities

\$340,299

\$340,299

\$340,299

Total

\$2,220,299

\$2,710,299

\$2,490,299

Credibility and Reliability Assessment

[102] As Justice Dillon set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013) [Bradshaw]:

[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.)).

[103] At para. 186 of *Bradshaw*, Dillon J. explained that the assessment of credibility first involves assessing a witness' evidence on a stand-alone basis by examining various factors, including:

- a) the witness' ability and opportunity to observe events;
- b) the witness' firmness of memory;
- c) the witness' ability to resist the influence to modify their recollection;
- d) whether the witness' evidence harmonizes with independent evidence that has been accepted;
- e) whether the witness changed their testimony during direct and cross-examination;

- f) whether the witness's testimony seems unreasonable, impossible, or unlikely;
- g) whether the witness had a motive to lie; and
- h) the witness' general demeanor.

[104] In the final analysis, if a trier of fact accepts a witness' evidence as being generally credible, the trier should then compare that evidence with the other evidence to determine whether it is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356, 1951 CanLII 252 (B.C.C.A.).

[105] Credibility assessments are more an "art than science" and are "particularly daunting where a judge must assess the credibility of two witnesses whose testimony is diametrically opposed": *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 128, 1997 CanLII 324 [S. (R.D.)]. The reasons for believing or disbelieving a witness may be difficult to articulate: *R. v. R.E.M.*, 2008 SCC 51 at para. 49; *R. v. Mohsenipour*, 2023 BCCA 6 at para. 210.

[106] In making credibility assessments, I am permitted to use common sense and the wisdom gained from observing the witness throughout the proceeding (*S. (R.D.)* at para. 129), provided that my assessment is not grounded in generalizations, issues not in evidence, emotional evaluations, stereotypes, or other impermissible forms of reasoning (*R.C.T. v. A.K.T.*, 2023 BCSC 654 at para. 11).

[107] There is a distinction between the credibility of a witness' evidence and its reliability. The distinction was discussed by Justice Doherty in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.), most recently cited by Justice Murray in *S.B.F. v. D.G.F.*, 2022 BCSC 2231 at paras. 28-37 [S.B.F.]. Justice Doherty distinguished veracity (credibility) and accuracy (reliability). He wrote:

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. ...

[108] In *Le v. Milburn*, [1987] B.C.J. 2690, 1987 CarswellBC 2936 (S.C.), Justice Southin, then a member of this Court, said:

[2] When a litigant practices to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame.

[109] Similar comments were made by Justice Funt in *Sidhu v. Sidhu*, 2019 BCSC 442 at paras. 147-148 with respect to the impact of the failure to make proper and complete financial disclosure on a reapportionment claim. He wrote, "[i]f the respondent is left feeling 'short-changed', she has herself to blame".

- [110] A witness' intense animosity towards the opposing party may adversely affect that witness' credibility: K.R. v. J.R., 2022 BCSC 1856 at para. 340 citing R. v. Boohhour, 2007 ONCA 716 at para. 10; and S.B.F. at paras. 32 and 37.

R.L.'s Credibility and Reliability

- [111] In this case, I accept both the credibility and reliability of R.L.'s evidence. She gave her evidence in a forthright and candid manner. Her answers were internally and externally consistent. When, in cross-examination, she was asked the same question in a different way, she gave relatively consistent answers. She did not appear to be motivated by animosity or anger towards M.L. In fact, she appeared saddened by the situation the parties find themselves in.
- [112] R.L. was frank about the fact that she has gained insight into the parties' relationship and its destructive impact on both her and M.L. through extensive post-separation counselling to deal with the breakdown of her marriage.
- [113] R.L. was emotional during her testimony, but not inappropriately so. Emotion is to be expected when repeating and reliving events in a volatile relationship. She displayed sadness not anger. She was particularly emotional when giving her evidence about the family violence and the things M.L. said to her. It was clear that her expectations of a lifetime of happiness with M.L. were shattered. She has worked hard to move forward.
- [114] At times, R.L. asked for questions to be repeated. Her requests were not, in my view, strategic. They were, in part, because of the way questions were put to her in the form of statements and, in part, because she needed to collect herself before answering. When then given, her answers were responsive to the questions asked.
- [115] R.L. did not take shots at M.L. or disparage him. She admitted things against her own interest, including using a credit card in the name of another person and saying terrible things to M.L. during their numerous arguments.

M.L.'s Credibility

- [116] I did not find M.L. to be a credible witness. His counsel described him as straightforward and transparent; I found him to be anything but.
- [117] M.L. was dishonest, evasive, and confrontational in cross-examination. He demonstrated a disturbing level of animosity towards R.L., to her counsel, and towards two lawyers who had earlier represented him in this litigation. He called R.L. a traitor and said she lacked integrity. He blamed his previous two counsel for things he was clearly responsible for. He took shots at R.L.'s counsel, questioning his motives for asking certain questions in cross-examination. He displayed palpable disdain for R.L.'s counsel who was doing his job.

- [118] There was an observable difference between M.L.'s demeanor in direct and cross-examination. In direct, he appeared rehearsed. He gave long answers and expanded when it suited him, even when he was not responding to the question. In cross-examination, he was combative with R.L.'s counsel and, when pressed on a number of issues or when backed into a corner, said that he did not remember. Rather than responding to the questions asked, he often gave lengthy self-serving answers that were non-responsive and included both direct and thinly-veiled criticism of R.L. and of her counsel. M.L. questioned R.L.'s counsel's motives for a prior consent adjournment of this trial.
- [119] At one point, he questioned R.L.'s motives for marrying him, suggesting that she chose him over someone else she had been dating for financial gain.
- [120] On several occasions, I had to direct M.L. to answer a question in cross-examination. He refused to acknowledge obvious points in cross-examination. For example, M.L.'s counsel asked him about significant bank account transactions in November and December 2018. M.L. said that he could not explain them, he needed more time to do so, and if he had been asked prior to trial he would have been in a position to answer counsel's questions. M.L. was shown the transcript of his 2020 examination for discovery in which he was asked for information on these very transactions. A follow-up letter was sent to his then-counsel. M.L. refused to acknowledge receipt or awareness of the letter, refused to explain transactions over \$1,000, and why he did not comply with the disclosure requests. Instead, he questioned whether the requests were with respect to the same bank account and for the same timeframe. They clearly were. He did not want to answer where the money involved in transactions ranging from \$1,000 - \$75,000 went.
- [121] Significantly, M.L. purportedly signed a January 2, 2007 share purchase agreement, selling his 573 shares to his mother for \$10.00 and "love and affection" (the "Share Purchase Agreement"). He relied on the sale to disown his ownership of 573. In his evidence at trial, he testified that 573 was worth about \$2,000,000 at the time of the share sale. In the Marriage Agreement it was valued at \$3,000,000. When he was asked by R.L.'s counsel why he sold 573 at such an apparent undervalue, incredibly, he responded that it is difficult to put a value on "love and affection".
- [122] M.L. did not list 573 as a company belonging to him in his March 25, 2015 financial statement and did not attach any financial statements relating to it. 573 was also not listed as an asset on his 2018 financial statement, circulated in advance of a mediation.
- [123] Most significantly, M.L. specifically swore that he did not own 573 in a February 22, 2019 affidavit ("February Affidavit"), marked as Ex. 15 at trial. The February Affidavit was filed in response to R.L.'s application for a litigation advance under s. 89 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].

[124] At para. 8 of his February Affidavit, he said the following with respect to 573 and in response to paras. 7-10 of R.L.'s affidavit setting out part of the corporate structure of the other respondents to this proceeding:

To clarify I am neither an officer nor director of this company. It was incorporated in October 1998. The company's shares are wholly owned by my mother, [D.L.], pursuant to a Share Purchase Agreement dated January 2, 2007.

[125] He attached, as Ex. A to his February Affidavit, what he swore was the corporate summaries and the Central Securities Register for 573 and other companies. The Central Securities Register for 573 was attached to M.L.'s February Affidavit as an exhibit. It named D.L. as the President and Secretary and transferee of 100 shares from M.L.

[126] At para. 16, M.L. said that attached as Ex. D was "a more fulsome chronology" of the parties' relationship and corporate transactions. The chronology says that on January 2, 2007:

[M.L.] sells shares of 573BC to his mother for \$1.00

[127] It is of note that the \$1.00 amount does not reflect the terms of the Share Purchase Agreement.

[128] In her evidence, D.L. said that she did not recall signing the Share Purchase Agreement or owning 573. When shown a 2015 letter addressed to her and marked to her attention (Ex. 17, Tab 92), she said she had never seen it. She said, more than once, that she loved and trusted her son and would sign documents he put in front of her without reading them.

[129] The Central Securities Register produced at Ex. 17, Tab 86 does not have an "effective date", its author is unknown, and it lists D.L. as the president/secretary of 573, a role she did not hold until October 2011.

[130] A second Central Securities Register for 573 was in evidence at Ex. 17, Tab 88. It was prepared in September 2012 by John Skapski, the lawyer at 573's registered records office, in response to a request from R.L.'s former family lawyer. It has an "effective date" of January 15, 2007, a date after the alleged January 2, 2007 sale of the shares to D.L. Mr. Skapski's Central Securities Register records M.L. as the only shareholder in 573. Even if Mr. Skapski was unaware of the Share Purchase Agreement in January 2007, he should have been aware of it by September 2012.

[131] The Central Securities Register, attached to M.L.'s February Affidavit, does not track the content of the Central Securities Register produced by Mr. Skapski. In particular, the exhibited version refers to M.L. paying 573 consideration of \$1 a share. It also refers to a certificate #2 being registered in D.L.'s name as opposed to her receiving a transfer of certificate #1. Mr. Skapski's document refers to M.L. receiving his shares by way of an allotment from the treasury and a "n/a" under the column for price per share. If a new certificate was issued in D.L.'s name, certificate #1 would have been cancelled as only 100 common shares were issued by 573's treasury.

[132] In cross-examination, M.L. did not offer any credible explanation for the two different 573 Central Securities Registers.

[133] In his direct evidence at trial, M.L. testified that the Share Purchase Agreement "had not been executed" and he and D.L. had "decided not to go forward with the transfer". From a legal perspective, the Share Transfer Agreement was clearly signed and executed and if Ex. 17, Tab 86, is reliable, it was recorded for corporate purposes. To the extent M.L. used the term not "executed" to mean not "concluded", that is not what he said in his February Affidavit filed in response to R.L.'s application for a litigation advance.

[134] M.L. feigned not knowing that his February Affidavit was filed in response to R.L.'s application for a litigation advance. He was shown para. 71 of the February Affidavit to refresh his memory. In that paragraph he said:

At this time, there are insufficient resources to draw upon to facilitate the kind of advance the claimant seeks.

[135] M.L. testified that his memory was not refreshed because "over the years" he had responded to many documents. His evidence in that regard was not believable.

[136] At para. 48 of his February Affidavit, M.L. said, "[t]he shares of 573 are owned by my mother, [D.L.]."

[137] When it suited his purposes to reduce the assets that might be available to fund a litigation advance, M.L. said that he did not own 573. At trial, he said he always owned 573.

[138] When he was cross-examined about the preparation of his February Affidavit, M.L. agreed that it was drafted with the assistance of counsel. When it was put to him that he was not pressured into signing the February Affidavit, M.L. responded:

Pressured? I would say well there is pressure in all of these things and the [Affidavit] was put together by a counsel who I fired and who I took attempted to sue for negligence and incompetence and she put it together and I trusted it was accurate.

[139] M.L. then went on to talk about the numerous mistakes his former counsel made, including, to his "shock and dismay", agreeing that the parties' family dispute could be completed in a five-day trial. He was visibly angry during this exchange with R.L.'s counsel.

[140] When it was put to him in cross-examination that his counsel would have presumed that he read the February Affidavit before he signed it, M.L. agreed. When it was put to him that he knew it was prepared for court purposes and that he wanted it to be accurate, he responded, "I knew I wanted to be truthful in anything I put my name to." He described what he said in his February Affidavit as an "error".

- [141] M.L.'s evidence that his counsel was responsible for his dishonest and entirely misleading February Affidavit was not believable. Only M.L. could have provided his counsel with the Central Securities Register that was exhibited to it and only he could have prepared the chronology recording the share transfer.
- [142] While it is possible for there to be an error in an affidavit, the "error" in this case was repeated three different times, in three different parts of the February Affidavit. It was clearly an error in M.L.'s favour because it reduced the property M.L. owned for the purpose of the court's consideration of a litigation advance to R.L.
- [143] I conclude that the February Affidavit was deliberately misleading to R.L., her counsel, and this Court.
- [144] An agreement as to the litigation advance was reached. It resulted in a line of credit being registered on 353 Delta (the "Home Trust debt") and some of funds were used to pay outstanding property taxes owing on one of the Graveley Properties. M.L. directly benefited from his deception.
- [145] The February Affidavit, and M.L.'s evidence about it, severely damaged his credibility.
- [146] There were other issues with M.L.'s credibility. Throughout the litigation, M.L. did not disclose that Ticketworld employees were paid to manage properties that did not belong to it. In the opinion of Walters, "CRA would be all over this."
- [147] There are also a number of questionable business transactions engaged in by M.L. which lead me to conclude that he operates in grey areas and has not been transparent with his income and assets. These include:
- a) The purported sale of his shares in 573 to his mother for \$10 and love and affection as discussed in detail above;
 - b) A loan indebtedness agreement indicating that M.L. received \$1,049,421 on January 3, 2012, three months after the Marriage Agreement was signed.
 - c) A mortgage granted by M.L. to D.L. over his 2/3 interest in 342 Delta in an attempt to diminish R.L.'s entitlement to share in this asset;
 - d) In 2013 and 2014, M.L. pressured R.L. to remove CPLs she had registered on a property at 1907-1911 Kitchener Street, Vancouver (the "Kitchener Property") and on 342 Delta with threats that he would stop making household payments if she did not. Once the CPLs were removed, he quickly, and without R.L.'s consent, disposed of his interests in those properties for less than fair market value and to non-arms length parties. M.L.'s 50% interest in the Kitchener Property was transferred to Mr. Corea's father for \$476,000 on or about August 16, 2013. M.L. did not declare, on his 2013 income tax return, any capital gain on the disposition of his 50% interest (2015 F8 financial statement, p. 15). M.L. did not list corporate tax returns for 573 or 684 in his fourth amended list of documents (Ex. 6) so it is unclear whether either of those companies claimed the capital gain on the Kitchener Property. In the summer of

2016, M.L. received \$175,000 that had been held in a lawyer's trust account with respect to the sale. What happened to the difference of approximately \$300,000 remains unexplained.

- e) M.L. did not list the disposal of the Kitchener Property in his March 25, 2015 F8 financial statement despite it being disposed of within the preceding two years;
- f) In 2013, M.L. purported to transfer his 2/3 interest in 342 Delta to D.L. He did not declare capital gains on the disposition despite the fact that 342 Delta was never his principal residence. In addition, he completed a Property Transfer Tax ("PTT") form saying that the transfer was exempt from PTT because it was pursuant to a "separation agreement or court order", when it was not, and that it was his principal residence, when it was not. Although D.L. signed the PTT form, M.L. instructed with respect to it.
- g) In a June 10, 2014 "[l]family" email (Ex. 17, Tab 51), M.L. asked R.L. to contact her family lawyer and ask him to back-date a separation agreement to September 2012, a date prior to an October 24, 2012 CRA audit notice that he received. The "separation agreement" would transfer all of the equity in 353 Delta to R.L. for settlement of family property and spousal support. When asked, R.L. denied sending this email to herself, and, in light of my credibility findings, I conclude that M.L. sent the email as a part of a larger scheme to protect this asset from the CRA. It was apparent from R.L.'s evidence that she was not sophisticated about business matters and would not have planned the scheme to protect 353 Delta from the CRA.

In any event, M.L. admitted in cross-examination that he was motivated to protect assets from the CRA at the time. He also acknowledged in cross-examination that he "probably" sent the email to R.L. He said that he was involved in writing it, but they drafted it together. The email included a reference to the CRA audit notice of October 2012. It is referenced in the index to M.L.'s document binder (Ex. 16 for Tab B documents) but there is no document in the materials. It is clear that M.L. sent a separate email to R.L. on the same topic on the same date (Ex. 17, Tab 162) and that M.L. created the "[l]family" email address (Ex. 17, Tab 161).

- h) There is a discrepancy on M.L.'s F8 financial statements with respect to a personal loan he says his mother advanced to him. On his 2018 F8 financial statement under "Debts", he swore that his mother advanced him a personal loan of \$270,000. In his unfiled 2020 financial statement, sworn February 21, 2020, under "Debts", he listed the amount of the debt to his mother as \$43,000 and said in Footnote 11 that "the amount owing by me personally to my mother was incorrectly identified in my previous Form F8 Financial Statement". In his May 7, 2021 financial statement, he repeated that the amount owing to his mother was \$43,000. In his 2023 financial statement, under "Debts", the amount owing to D.L. is recorded as \$154,000 and he said that the date the debt was incurred was May 2021. No documents were provided to support the change in the amount of the debt or of any advances in May 2021.

- i) In 2013 and 2014, M.L. reported an income from all sources of \$0 and, accordingly, paid no income tax (see 2015 F8 financial statement). His explanation was he was living off shareholder loans (2020 Examination for Discovery, Ex. 5, p. 55, Q. 290-291).
- j) In 2015, M.L. breached an asset restraining order by disposing of the family travel trailer and in 2016, he breached the same order by disposing of a property located at 12156-210th Street, Maple Ridge, B.C (the "210 Street Property").

[148] Finally, I draw a negative inference with respect to M.L.'s credibility because he did not call his accountant, Chris Thurgood, as a witness. M.L. listed Mr. Thurgood as a witness he intended to call on his trial brief. In the transcript of his Examination for Discovery marked as Ex. 5, M.L. was asked at p. 53:

277 Q And you disposed of your interest in this property [342 Delta,] in 2014, so capital gains on this property would have been paid in 2014?

A I don't know if capital gains was due or payable. I would have to ask an accountant or lawyer how that works on a family transaction.

278 Q You are calling your accountant at the trial in this matter, correct?

A I believe he's on the list of witnesses, yes.

279 Q Was he your accountant at this time, in 2014?

A I believe so.

[149] And at page 69, M.L. was asked:

356 Q Do you recall signing an assignment of loan indebtedness between Showtime, you in your personal capacity and company 573?

A Yes.

359 Q On whose instruction was that document created?

A I believe that would have been the tax accountant.

360 Q And who was the tax accountant?

A Chris Thurgood

362 Q What was the purpose of that document?

A That's a question you would have to ask the tax lawyer to give you a detailed - I don't want to mess up the answer. It's a tax transaction. It's a transaction for tax planning, I believe.

375 Q Did 573 ever pay you \$1,049,421 after you signed this agreement?

A You have 573's financials, which outlines everything that has gone in and out of 573.

376 Q So what's the answer to my question?

A The answer to your question is you have the financial information required to determine that. I'm not going to speculate on how much money has been advanced.

377 Q So is your answer that some money was advanced? You just don't know?

A My answer is I don't know. I would have to check the financial records.

378 Q Did 573, after this agreement was signed, pay you any money of that \$1,049,421?

A I would have to check the financial records.

379 Q Did it pay you a dollar?

A I would have to check the financial records.

380 Q So it could have paid you anywhere from zero dollars to over a million dollars. You just don't know?

A I would have to check the financial records. I don't recall precisely what has or what hasn't been paid.

[150] Although there is no obligation on a party to call a particular witness, Mr. Thurgood was a witness who could have provided answers to questions about M.L.'s obligation to pay capital gains tax, the purpose of the more than a million-dollar loan assignment agreement, whether M.L. received financial compensation flowing from this transaction, and whether M.L. registered with the Provincial Land Owner Transparency Registry by November 30, 2022 as required for any person who is a beneficiary under a bare trust agreement on property in BC. In the absence of any evidence on these issues, and in light of my credibility findings against M.L., I draw a negative inference from his failure to call Mr. Thurgood.

[151] For all of the foregoing reasons, I treat all of M.L.'s evidence with caution and only accept it where it is corroborated by independent evidence.

Rule in Browne v. Dunn

[152] If counsel is going to challenge the credibility of a witness by calling contradictory evidence, fundamental fairness requires that the witness be given a chance to address the contradictory evidence in cross-examination while in the witness box: see *Browne v. Dunn* (1893), 6 R. 67, 1893 CanLII 65 (FOREP) (U.K.H.L.); see also *R. v. Lyttle*, 2004 SCC 5.

[153] In his evidence, M.L. testified that he had a conversation with R.L. about her returning to work as a mortgage broker/real estate agent. R.L. was not asked about that conversation.

[154] In addition, as discussed above, when testifying about the volatile nature of their relationship, M.L. stated that R.L. had trust issues that were hard for him to overcome. He said that R.L. had experienced past trauma resulting in her deep distrust of him and her

allegations that he was unfaithful to her. Similarly, M.L. alleged that on one occasion, R.L. opened the basement window and soaked him with water. He said that R.L. attacked him physically and that she was "far from the innocent lamb she portrays." Implicitly or perhaps explicitly, M.L. was suggesting that the volatility in their relationship was R.L.'s fault.

[155] As the claimant was not asked about any of this evidence in cross-examination, M.L.'s evidence on the matters can be given no weight.

Financial Disclosure

[156] Pursuant to the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules], parties to a family law dispute are required to make full financial disclosure. Rule 5-1 requires that any person who is claiming, or against whom a claim is made for child support and/or spousal support under the FLA, must complete financial disclosure by filing a sworn Form F8 financial statement. In addition, Rule 9-1 requires the parties to prepare a list of documents that includes all documents that could be used by any party at trial to prove or disprove a material fact and which are or have been in the party's possession or control. The parties must also list any documents they intend to refer to at trial.

[157] In *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93, 1994 CanLII 3195 (S.C.), Justice Fraser called financial non-disclosure "the cancer of matrimonial property litigation": at para. 9. He noted that non-disclosure "discourages settlement, increases the time and expense of litigation [and] has a tendency to deprive children of proper support": at para. 9. His statements were cited with approval by the Supreme Court of Canada in *Leskun v. Leskun*, 2006 SCC 25 at para. 34, and, more recently, in *Michel v. Graydon*, 2020 SCC 24 at para. 33.

[158] In this case, a number of documents were requested from M.L. and not provided. These include:

- a. Beneficial trust ownership documents for various properties, including the Kitchener, 210 Street, and the Victoria Drive properties;
- b. His solicitor's file for the January 2007 573 Share Purchase Agreement; and
- c. His solicitor's file for the 2013 mortgage and June 2014 transfer to his mother of his 2/3 interest in 342 Delta.

[159] M.L. said he tried to obtain the documents, but his solicitor is retired. There was no evidence of a written request for the documents, of when his solicitor retired, or any effort to follow up with the Law Society of BC to access his former solicitor's files.

[160] M.L. did not disclose any documents concerning the alleged bare trust agreements with respect to the 210 Street Property, the Kitchener Property, and other properties in which he and Mr. Corea invested. M.L. blamed Mr. Corea for withholding the trust agreements but Mr. Corea was not involved in the 210 Street Property and, as I have said, there was no evidence of written requests made to Mr. Corea or other steps taken to obtain them.

[161] This non-disclosure affected R.L.'s ability to make her case and for the Court to make factual findings. It negatively affects M.L.'s credibility.

The Issues

[162] The issues before me for determination are:

1. Did the parties commence cohabitation in the summer or the fall of 2006?
2. Did the parties separate in the summer of 2012, on January 18, 2017, or in June 2017?
3. M.L.'s obligation to pay child support, including determining:
 - a) his income in each year from 2017 to date;
 - b) R.L.'s income from January 1, 2021 to date;
 - c) outstanding retroactive child support, if any, from 2017 to date;
 - d) prospective child support; and
 - e) other outstanding child support issues.
4. M.L.'s obligation to pay spousal support, including determining:
 - a) M.L.'s income from 2017 to present;
 - b) R.L.'s income from January 1, 2021 to present;
 - c) retroactive spousal support for 2017 to present; and
 - d) the amount and duration of prospective spousal support from M.L. to R.L.
5. Property division pursuant to the Marriage Agreement, including:
 - a) the impact of the Marriage Agreement on the assets and debts, in particular:
 - i. the impact of M.L. transferring 353 North Delta Ave., Burnaby into R.L.'s name;
 - ii. how to calculate the 2% per year to which R.L. is entitled under the Marriage Agreement including:
 - 1) how to calculate the increase in value of Class A Assets, including determining:
 - a. the impact of the 343 Delta Property Transfer; and
 - b. the increase in value of 573;
 - 2) how to calculate the 2% on "other assets"; and
 - 3) how to calculate the 2% on the exchanged assets;
 - iii. the impact of non-disclosed assets, including the Kitchener Property Transfer;

- iv. how to calculate joint entitlement, including assessing the impact of M.L.'s alleged breaches of the Asset Restraining Order, if found; and
- v. how to allocate the parties' debts; and
- b) the fairness of the Marriage Agreement.
- 6. Costs, including special costs.

Issue 1: Did the parties commence cohabitation in the summer or fall of 2006?

[163] For the reasons set out in para. 14 above, I conclude that the parties began living together in the summer of 2006.

Issue 2: Did the parties separate in the summer of 2012, January 18, 2017 or June 2017?

[164] For the reasons set out in paras. 28-32 above, I conclude that the parties separated in June 2017.

Issue 3: Child Support

[165] Child support was not dealt with in the Marriage Agreement. As the parties were married, child support is to be addressed under the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [DA].

[166] The parties have had various parenting schedules since their separation. For the most part, R.L. was the primary caregiver for the Children until September 2020 when the parties agreed to shared parenting. From July 2017 to September 2020, R.L. had all the parenting time except Tuesdays overnight to Wednesday morning, Saturday through Sunday morning, and every second Sunday morning through Sunday evening. During this period, s. 9 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] would not apply. Although there was equal parenting time from September 2020 to the end of December 2020, s. 9 does not apply because over the course of the year 2020, M.L. exercised less than 40% of the parenting time.

[167] From 2021 onward, s. 9 of the Guidelines applies.

M.L.'s Income from 2017 - Current

[168] M.L. swore five financial statements during this proceeding.

[169] On March 15, 2015, he swore that his income was \$80,000, his annual expenses were \$144,336, his assets were \$1,049,373, and his debts were \$1,224,753.

[170] On August 22, 2018, he swore, for the purposes of a mediation, that his income was \$79,200, his annual expenses were \$140,773, his assets were \$1,749,000, and his debts were \$2,101,764.

[171] On February 21, 2020, he swore that his income was \$79,200, his annual expenses were \$137,837, his assets were \$1,543,789, and his debts were \$3,678,335.

- [172] On May 7, 2021, and again on January 25, 2023, he swore that his income was \$36,120, his annual expenses were \$97,685, his assets were \$1,582,348, and his debts were \$2,902,099.
- [173] Based on these financial statements, between 2015 and 2020, M.L.'s annual expenses appear to have been between \$137,000 and \$144,000. During this time, in addition to his expenses, M.L. received a number of benefits from one or all of his corporations, including paid vacations to the British Virgin Islands, Arizona, Hawaii, and Las Vegas. Some of these trips were to attend meetings of the Entrepreneurs' Organization.
- [174] Ticketworld contributes 20% of his rent, 100% of his cellphone costs of about \$60 a month, and 100% of his transportation costs. 684 pays him a property management fee of \$2,000 a month.
- [175] Because of the difficulty in calculating M.L.'s income for support purposes, the parties commissioned Walters to prepare a joint Guideline Income Report for 2019-2021. Walters testified at trial and her report was marked as Ex. 13. She concluded that M.L.'s income was \$163,475 for 2019, \$108,227 for 2020, and \$107,452 for 2021 (Ex. 13, p. 7). The income figures reported by M.L. in his financial statements for 2019-2021 were significantly below the amounts calculated in the Walters Report.
- [176] Although Ms. Walters did not opine on M.L.'s income for 2017-2018, I accept that, on a balance of probabilities, M.L.'s income was at least the same as he was projected to earn in 2019-2022.
- [177] I also note that the report was prospective and, as a result, Walters removed one-time, non-recurring corporate expenses. Had she not done so, those expenses would have been included in M.L.'s income in that year. The income available to M.L. would have included \$519,590 from 573 in 2019. In addition, certain expenses such as \$42,269 for legal fees would otherwise have been available to M.L. for inclusion in the calculation of his 2019 income. From Zenture, an additional amount of \$26,332, paid for a one-time expense, would have been available in 2019. From Ticketworld, an additional amount of \$77,879, paid for a one-time expense, would have been available for inclusion in the calculation of M.L.'s income in 2019.
- [178] Finally, there was additional pre-tax income available from Ticketworld in 2020 (\$131,248) and 2021 (\$105,161).
- [179] In 2019, Walter's income calculation did not include a one-time management fee of \$239,000 paid from 573 to Ticketworld. She wrote that M.L. told her that the management fee did not go to him but went to his employees. She did not review any documents to support this. She simply took M.L. at his word although expressing some reservations in her evidence.

Rental Property and Barter Transaction Income

- [180] Walter's income determinations did not include any potential profits earned from rental properties in the Brentlawn area of Burnaby (the "Brentlawn Property"), Kelowna, or Canmore.
- [181] M.L. testified that the Kelowna and Canmore rental properties were beneficially owned by D.L. although title was registered in 109, one of his companies.
- [182] Ms. Konsmo was responsible for managing the short-term rentals of the Brentlawn, Kelowna, and Canmore properties.
- [183] Her salary for managing the rental properties was originally paid by Ticketworld but, at some point, she was paid by 684 and other companies by direct deposit or e-transfer. Ms. Konsmo testified that in about 2018, during her employment relationship with M.L., instead of giving her a raise he purchased a used car for her at a cost of about \$5,000. He did so through one of his numbered companies. M.L. did not refute this evidence. It was not clear how this was accounted for in the business records.
- [184] With respect to the Canmore properties, Ms. Konsmo set up the bank accounts into which short-term rental companies with whom she registered the properties (Airbnb, VRBP and FlipKey) deposited the rental revenues. Ms. Konsmo testified that, on M.L.'s instructions, the payments were initially made to C.'s bank account. She was later directed to deposit them to C's. or D.L.'s accounts.
- [185] In her evidence, C. denied receiving any of the payments but, overall, her trial evidence seemed rehearsed. D.L. gave no meaningful evidence in this regard. I accept Ms. Konsmo's evidence; she had no reason to mislead the court about what she was asked to do and was very confident in her answers.
- [186] With respect to the Brentlawn Property, Ms. Konsmo testified that it was a three-unit home that had one unit upstairs and two in the basement. Ms. Konsmo was responsible for listing the units on the short-term rental websites. The revenue that M.L. generated through short term rentals exceeded the rent M.L. paid for the property. It was not clear how the rental income was accounted for.
- [187] Ms. Konsmo testified that M.L. also rented a Kelowna condominium for the purpose of listing it on Airbnb. She testified that it was doing very well but the landlord terminated the lease for breach of its terms.
- [188] When M.L. moved out of 353 Delta, he rented a property on Eton Street in North Burnaby. He kept it after the parties reconciled. The basement suite was initially rented to long term tenants but, Ms. Konsmo testified that, for about a year, the upstairs was used for short-term rentals. After a time, the basement was also used for short-term rentals. M.L. then placed a travel trailer in the back yard and it too was rented. Ms. Konsmo testified that it was a profitable endeavour. The landlord terminated the lease after he was fined by the City

of Burnaby.

- [189] Ms. Konsmo also testified about M.L. and his companies being involved in barter transactions. They posted unsold tickets on an online barter network and exchanged them for barter dollars that could, in turn, be exchanged for goods and services like property renovations.
- [190] The evidence was not at all clear about whether the short-term rental income and the barter transactions were accounted for and it was not specifically addressed in the Guideline Income Report.

R.L.'s Income for 2021 to present

- [191] R.L.'s income is only relevant to a proportional sharing of s. 7 expenses or as part of a set off analysis pursuant to s. 9 of the Guidelines. As I found, the s. 9 analysis is only relevant starting in January 1, 2021.
- [192] M.L. testified about the parties having a general discussion about R.L. returning to work. R.L. denied any such discussion. M.L. testified about the possibility of R.L. working in real estate or as a mortgage broker. However, this discussion was not put to R.L. in cross examination and, in accordance with the rule in *Brown v. Dunne* and my general credibility findings, I give M.L.'s evidence on this matter no weight.
- [193] R.L. swore three financial statements in these proceedings. In her financial statement of July 20, 2018, she swore her employment income was \$0, she received annual universal child tax benefits of approximately \$18,000, her annual expenses were \$108,373, her assets were \$1,761,900, and her debts were \$1,279,148.
- [194] In R.L.'s financial statement of February 19, 2020, she swore her employment income was \$0, she received annual universal child tax benefits of approximately \$18,500, her annual expenses were \$39,370, her assets were \$1,581,500, and her debts were \$782,656.45. I note there was a math error on the F8 that was subsequently corrected.
- [195] In 2021, R.L. had no employment income. In 2022, her income tax return showed she had \$1,179.28 in employment income and \$4,519.71 in rental income.
- [196] In R.L.'s financial statement of February 3, 2023, she swore her employment income as an education assistant, after deduction of union dues, was expected to be \$35,544.32, she received annual universal child tax benefits of approximately \$21,633, her annual expenses were \$48,359.16, her assets were approximately \$2,000,000, and her debts were approximately \$900,000.
- [197] R.L. was a traditional, stay-at-home parent. Until the end of 2020, she was the primary care parent for the Children who ranged in age from five to ten. She only recently became employed outside the home. Between 2017 and 2021, she had no employment income. She had a limited work history and dated employment skills. Any income she earned would

have been minimal and, in all probability, the cost of her working would have far exceeded the benefit of her doing so. She could not have returned to hospitality marketing as it required significant travel. It had been more than eight years since she had any contact with the International Woodworks of Canada (since the birth of the parties' second daughter in February 2009).

[198] Although M.L. is critical of R.L. for not seeking paid employment soon after they separated, I conclude that it is not unusual or unreasonable for there to be a transition period back to the workforce.

[199] In addition, R.L. testified that the family violence she experienced affected her after separation. She testified about being bullied, yelled at, demeaned and emotionally abused. She said she felt "broken". Her self esteem and confidence were affected and she went to counselling for a lengthy period of time to "rebuild" herself. I accept her evidence in that regard.

[200] R.L. was not challenged or cross-examined about the path she took in returning to the workforce. In the absence of any evidence to the contrary, I accept that R.L.'s path to returning to the workforce was reasonable and I do not impute any income to her before she started earning an income in 2023. She is now engaged in employment that she enjoys and allows her to be available for the Children when they are in her care.

What retroactive child support is owing from 2017 to date?

The Applicable Law

[201] D.B.S. v. S.R.G., 2006 SCC 37 [D.B.S.] is the leading authority with respect to claims for retroactive child support. At para. 133, Justice Bastarache identified four factors a court should consider when determining whether to make a retroactive child support award:

- a) whether the recipient parent has supplied a reasonable excuse for the delay in seeking retroactive support;
- b) the conduct of the payor parent;
- c) the circumstances of the child(ren); and
- d) the hardship that might be caused by a retroactive award.

[202] In D.B.S., Bastarache J. discussed retroactive support awards in the absence of a pre-existing child support order:

5.2.2.3 Awarding Retroactive Support Where There Has Not Already Been a Court Order for Child Support to Be Paid

- [80] the status quo does not involve any existing payment of child support. This fact immediately differentiates the present context in a very important way: absent special circumstances (e.g., hardship or ad hoc sharing of expenses with the custodial parent), it becomes unreasonable for the non-custodial parent to believe [they were] acquitting [themselves] of [their] obligations towards [their] children. The non-custodial parent's interest in certainty is generally not very compelling here.
- [81] Jurisdiction to award retroactive child support in this circumstance is found in s. 15.1 of the Divorce Act [I]n the Divorce Act, Parliament allows a court to make "an order requiring a spouse to pay for the support of any or all children of the marriage": s. 15.1(1). There is therefore no restriction as to the date from which the court may order that the award take effect.
- [82] the legislatures left it open for courts to enforce obligations that predate the order itself. This interpretation is consistent with the Guidelines, which are meant to "establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation" (s. 1(a)). So long as the court is only enforcing an obligation that existed at the relevant time, and is therefore not making a retroactive order in the true sense, I see no reason why courts should be denied the option of making this sort of award.
- [83] It is true that the term "retroactively" is absent from s. 15.1 of the Divorce Act, while Parliament used this explicit wording to demonstrate its intention in s. 17. But I believe this drafting choice can be explained based on my reasoning above. Neither in the case of a retroactive variation order nor in the case of a retroactive original order is the court creating a new obligation for the payor parent and applying it after the fact. However, in the case of a retroactive variation order, the original order itself is indeed being varied retroactively: in the strictest, literal sense, the court order that stated a certain amount was due on a certain date is now being altered - after that date has passed - to state that a greater amount was due. The obligation to pay the greater amount was always present, but the original order had to be changed to reflect that. This feature is not present in the case of retroactive original orders. It is for this reason that I believe Parliament felt it unnecessary to resort to language permitting retroactivity.
- [203] In *Michel v. Graydon*, 2020 SCC 24 at para. 10, the Supreme Court of Canada restated the D.B.S. principles governing child support orders:
- Child support is the right of the child, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents (para. 38);
 - Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together (para. 38);
 - The child support owed will vary based upon the income of the payor parent, and is not confined to furnishing the "necessities of life" (paras. 38-45).

- Retroactive awards are not truly "retroactive", since they merely hold payors to the legal obligation they always had to pay support commensurate with their income (para. 2);
- Retroactive awards are not confined to "exceptional circumstances" or "rare cases" (para. 5); and
- In determining whether to make a retroactive award, the payor parent's interest in certainty in his/her obligations must be balanced with the need for "fairness and ... flexibility". A court should consider whether the recipient parent's delay in seeking retroactive support was reasonable in the circumstances, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail (para. 133).

[204] In this case, I find that family violence affected R.L.'s ability to earn an income and become self-sufficient immediately after the final separation. I take this into account, and considering the evidence as a whole, I find that it is appropriate to order retroactive child support from 2017 to date. R.L. commenced this action in 2017, not long after the parties finally separated and she claimed retroactive child support. Two trial dates were adjourned for reasons beyond R.L.'s control (Covid-19 in 2020 and the unavailability of a trial judge in early 2023). In addition, there is blameworthy conduct on the part of M.L. and M.L has the ability to pay a retroactive award.

[205] In a chart set out in R.L.'s written submissions, she calculates retroactive child support based on an imputed income to M.L. equivalent to his annual expenses in his various F8 financial statements as follows:

Year
Respondent's Income
Claimant's Income
Guideline Amount (incl. set-off)
Amount Paid1
Difference (all underpayments)
20172
\$163,4753
\$254.47
\$3,012/mo.
\$21,084/yr.
\$18,900
\$2,184
2018

\$163,4754

\$0.005

\$3,012/mo.

\$36,144/yr.

\$30,699

\$5,445

2019

\$163,475

\$0.006

\$3,012/mo.

\$36,144/yr.

\$27,520

\$8,624

2020

\$108,227

\$0.007

\$2,122/mo.

\$25,464/yr.

\$17,535

\$7,929

2021

\$107,452

\$0.00

\$2,109/mo.

\$25,308/yr.

\$7,752

\$17,556

2022

\$131,4528

\$5,698.999

\$2,504/mo.

\$30,048/yr.

\$0

\$30,048

202310

\$131,45211

\$35,544.32

\$1,735/mo. net

\$12,145/yr. net

\$0

\$12,145

TOTAL =

\$83,931

[206] There are various footnotes that explain how some of the amounts are arrived at:

- Footnote 1 explains that the amounts M.L. actually paid to R.L., regardless of how those payments were characterized, were the subject of a November 29, 2022 Notice to Admit indicating that M.L. made a series of payments to R.L. either personally or through a closely held corporation. The payments were not classified as debt, child support, or spousal support payments. These facts were admitted by M.L.;
- Footnote 2 explains that the amount reflects June 1, 2017 onward;
- Footnote 3 explains that M.L.'s income figures for 2017 and 2018 are based on imputed numbers and do not reflect M.L.'s stated income on his income tax returns for those years. M.L.'s income tax return indicated income in both years of \$79,200;
- Footnotes 5, 6 and 7 explain that although R.L.'s income tax return reflected an income of \$10,000 in 2018, \$19,520 in 2019, and \$14,812.60 in 2020, the source of that income was cashed-in RRSPs, not employment;
- Footnote 8 explains that M.L.'s income for 2021 includes \$24,000 in management fees not recorded on his income tax return;

- Footnote 9 explains that R.L.'s income is derived from \$1,179.28 in employment income and \$4,519.71 in rental income;
- Footnote 10 explains that the figures for 2023 are only until July 30, 2023; and
- Footnote 11 explains that M.L.'s income for that year is based on his 2021 income and an additional \$24,000 in management fees.

[207] In all, R.L. calculates that M.L. owes retroactive child support to July 30, 2023 in the total amount of \$83,931.

[208] However, R.L. submits that if M.L.'s income was \$400,000 in 2019, considering the amounts that were unaccounted for in the Walters Report as discussed above, the Guideline child support would be \$80,424 for 2019, increasing the total arrears by \$44,280.

[209] While it is possible that M.L.'s 2019 income exceeded the amount set out in the chart above, I cannot find on the evidentiary record that it is probable it did so.

[210] On the evidence, I conclude that M.L. owes R.L. the sum of \$83,931 for retroactive child support.

What is the prospective child support amount?

[211] Based on three children in a shared parenting arrangement, on a with spousal support formula, and applying s. 9 of the Guidelines with a set-off calculation, with R.L. having an income of \$35,544.32 and M.L. having an income of \$131,452 (based on his 2021 income plus \$2,000 per month in management fees), the resulting Guidelines calculation is:

- a) M.L. ought to pay R.L. child support of \$2,504/month; and
- b) R.L. ought to pay M.L. child support of \$769/month.

[212] The net amount payable by M.L. to R.L. is \$1,735 a month.

[213] I order child support in this amount payable under the DA on the first day of each month commencing the 1st day of January 2024 and payable on the first day of every month thereafter until S. is no longer a child of the marriage or the amount is varied by agreement or court order.

[214] After S. is no longer a child of the marriage, child support shall be payable by M.L. to R.L. on a set off shared parenting basis for two children of the marriage. Child support will continue at that amount until M. is no longer a child of the marriage.

[215] After M. is no longer a child of the marriage, child support shall be payable by M.L. to R.L. on a set off shared parenting basis for one child of the marriage.

Outstanding Child Related Issues

[216] The parties did not speak to annual reviews of their incomes for child support purposes. I have made no order in that regard as determining M.L.'s true income will, I expect, continue to be a challenging exercise. If the parties wish to speak to this issue they may seek leave to reappear for this purpose.

[217] I also heard no submissions about retroactive or prospective s. 7 expenses for any of the Children. I understand that the parties' parenting coordinator has been dealing with special expense issues. Ongoingly, s. 7 expenses should be proportionately share based on the parties' respective incomes.

Issue 4: Spousal Support

[218] The Marriage Agreement does not deal with spousal support. As the parties are married, I will consider spousal support under the DA.

[219] Section 15.2(4) of the DA provides:

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[220] The objectives of spousal support are addressed in s. 15.2(6) of the DA:

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[221] In this case, R.L. claims both compensatory and non-compensatory support. In *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC ref'd, 33002 (28 May 2009), the Court addressed the principles to be applied when considering compensatory and non-compensatory support:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39).

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts.

[52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement...As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

[11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough

equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims.

- [54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.
- [55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 1995 CanLII 2274 (BC CA), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

- [57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown. In *Yemchuk*, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive"
- [222] R.L. claims compensatory support on the bases that her economic position has been disadvantaged by the marriage including the sacrifices she made in assuming primary childcare and household responsibilities resulting in a lower earning potential after separation. In addition, she submits that M.L. was economically advantaged by her assumption of these responsibilities, freeing him to focus on his business ventures.
- [223] Although disputed, I accept that R.L. also expended some efforts to support M.L.'s various businesses and that, comparatively, her standard of living post-separation is significantly less than it was during the marriage and than the standard M.L. still enjoys.

- [224] I am satisfied that R.L., who is 54-years-old and was not actively involved in the workforce since the birth of the parties' second child in 2009, has had limited opportunities to establish herself in a better paying full-time position. Since separation, she trained and was hired as an educational assistant with a school district, a job she seems uniquely qualified for having raised three daughters.
- [225] As I said, during the marriage, M.L. worked long hours in a business that operated outside normal business hours and was unpredictably demanding. R.L. was unable to work even in a part time capacity. I found that her assumption of the majority of the household and parenting responsibilities freed M.L. to pursue his business interests. I also accept that R.L.'s self-esteem and self-confidence were shaken by the breakdown of the parties' relationship and the physical and emotional abuse that occurred within it.
- [226] R.L. also claims non-compensatory support because the parties' relationship was of medium length and she depended financially on M.L. After separation, the standard of living that she enjoyed declined. She cashed in her limited RRSP savings to live on. Although not listed as her asset in the Marriage Agreement, at separation she had RRSP savings in her name upwards of \$40,000. Since separation, these accounts have been fully exhausted. In 2018-2019, she redeemed approximately \$25,000 for living expenses. In 2020-2021, she redeemed \$16,376 for living expenses.
- [227] A comparison of the parties' post-separation vacations indicates the disparity in their standards of living. R.L.'s evidence is that she did not go on any vacations post-separation, with the exception of taking the Children to Osoyoos immediately after the separation, going camping locally, and taking their youngest daughter to Nevada to a family member's house while M.L. was in Croatia with his other daughters. In addition to that trip to Croatia, after the separation, M.L. travelled to: Arizona for the NFL Superbowl, Russia for the FIFA World Cup final, Maui, and Costa Rica. While I accept that some of M.L.'s travel related to his involvement in the Entrepreneurs' Organization and his ticket reselling ventures, it was nonetheless travel funded by him or his corporate interests and he gained a personal benefit from it. In contrast, R.L. testified that post-separation she went from being able to buy her daughters anything to having to figure out how to clothe and feed them.
- [228] I find that R.L. is entitled to spousal support on a compensatory and non-compensatory basis.
- [229] For the purposes of spousal support, I rely on the incomes of the parties during the relevant years as set out above in the child support section of these reasons.

What retroactive spousal support is R.L. entitled to for 2017- Current?

- [230] In *Kerr v. Baranow*, 2011 SCC Justice Cromwell endorsed applying the principles from D.B.S. dealing with retroactive child support to claims for retroactive spousal support, keeping in mind the different legal foundations for the two types of support: at paras. 207-208.

- [231] M.L. has been credited for the payments he made since separation as against his obligation to pay retroactive child support. As a result, there is no credit towards retroactive spousal support payments.
- [232] In this case, the Spousal Support Advisory Guidelines (Ottawa: Department of Justice, 2008) [SSAG] midpoint is appropriate given that there is both a compensatory and a non-compensatory basis for the claim.
- [233] R.L. set out her calculations for retroactive spousal support in the following chart. The incomes set out are the same as set out in the chart at para. 206 with respect to child support and the same footnotes apply:

Year

Respondent's Income

Claimant's Income

SSAG Low

SSAG Mid

SSAG High

2017

\$163,475

\$254.47

\$1,846/mo.

\$12,922/yr.

\$2,200/mo.

\$15,400/yr.

\$2,602/mo.

\$18,214/yr.

2018

\$163,475

\$0.00

\$1,853/mo.

\$22,236/yr.

\$2,201/mo.

\$26,412/yr.

\$2,594/mo.

\$31,128/yr.

2019

\$163,475

\$0.00

\$1,838/mo.

\$22,056/yr.

\$2,176/mo.

\$26,112/yr.

\$2,564/mo.

\$30,768/yr.

2020

\$108,227

\$0.00

\$767/mo.

\$9,204/yr.

\$1,007/mo.

\$12,084/yr.

\$1,246/mo.

\$14,952/yr.

2021

\$107,452

\$0.00

\$1,113/mo.

\$13,356/yr.

\$1,832/mo.

\$21,984/yr.

\$2,072/mo.

\$24,864/yr.

2022

\$131,452

\$5,698.99

\$1,008/mo.

\$12,096/yr.

\$1,926/mo.

\$23,112/yr.

\$2,308/mo.

\$27,696/yr.

2023

\$131,452

\$35,544.32

\$794/mo.

\$5,558/yr.

\$1,251/mo.

\$8,757/yr.

\$1,717/mo.

\$12,019/yr.

TOTAL (from July 1, 2017 to July 31, 2023) =

\$97,428

\$133,861

\$159,641

[234] In total, the midpoint lump sum, on an after-tax basis is \$104,486. R.L. could, but does not, seek interest on this amount.

[235] For the reasons set out above with respect to child support, I am satisfied based on the D.B.S. factors that retroactive spousal support is appropriate in this case. M.L. had notice of R.L.'s claim since the notice of family claim was served. The trial was delayed through no fault of R.L.'s and M.L. has the ability to pay the arrears.

[236] Turning to the duration of spousal support, based on my findings this was an 11-year relationship. The parties' youngest daughter, J., was four-and-half-years-old at the date of separation. The duration would be for a minimum of 5.5 to a maximum of 14 years when J. would finish high school. The mid-point of the SSAG ranges is 9.75 years. Accordingly, even after addressing retroactive spousal support for 2017-2023, there remains 3.75 years of prospective ongoing spousal support.

What is the ongoing spousal support amount?

[237] R.L. seeks ongoing spousal support of \$1,251 per month based on:

- M.L.'s income of \$131,452; and
- R.L.'s employment income of \$35,544.

[238] This works out to a gross lump sum of \$52,542 based on the mid-range of 42 months. The tax-deducted midpoint is \$34,608.

[239] I conclude that R.L. is entitled to \$139,094 in total, lump sum, after-tax spousal support.

Should spousal support be lump sum or periodic?

[240] Clearly, retroactive support should be paid in a lump sum. R.L. submits that prospective spousal support should also be paid as a lump sum.

[241] The advantages and disadvantages of lump sum spousal support were discussed in *Davis v. Crawford*, 2011 ONCA 294 [Davis]:

[67] The advantages of making [a lump sum] 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 dependent 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.

See also *Parton v. Parton*, 2018 BCCA 273 at para. 27 and *Robinson v. Robinson*, 2011 BCSC 1489, aff'd 2012 BCCA 497.

[242] In *Davis*, the Ontario Court of Appeal went on to discuss the four practical reasons why most spousal support orders will be for periodic payments rather than lump sum amounts: see paras. 70-74. Those reasons are: the inability to fund a lump sum; property equalization payments may obviate the need for transitional capital to be available to a dependent spouse; there may not be any considerations favouring a lump sum from the perspective of either spouse; and the general exigencies of life, including the possibility that a parties' means and needs will change, may outweigh the considerations favouring a lump sum award.

[243] Recently in *Zilic v. Zilic*, 2021 BCCA 107, the Court of Appeal accepted the analysis in *Davis* and upheld a lump sum award, noting that such an award is appropriate where, amongst other reasons, there is a real risk of non-payment should monthly support be ordered and there is a need for the recipient spouse to become self-sufficient and a lump sum may better assist in that regard: see paras. 24, 207-209. Specifically, the Court stated:

[207] A number of factors were relevant in this case: the need for the recipient spouse to become self-sufficient and the ability of a lump sum to better assist in that regard; the ability of the payor spouse to use capital to pay the award; a high-conflict relationship; and the real risk of non-payment in the future should monthly support be ordered, given the track record of the payor spouse.

[208] Dealing with the latter two points, it cannot be forgotten that litigating the question of Mr. Zilic's actual income for support purposes was very difficult given his use of Spot to pay personal expenses, his poor record keeping, his apparently poor memory, and his lack of motivation to earn a living as the matter approached trial. He had shown himself highly resentful and resistant to paying ongoing support. The litigation between these parties has been unusually prolonged and hence costly, both financially and emotionally. A lump-sum award assists each party in making a clean break from the other.

[209] The judge cannot be said to be clearly wrong in considering it more reasonable to order a lump-sum spousal support award, based on a limited duration, rather than to leave open the likelihood of future ongoing litigation about support payments. This is especially so where the lump-sum amount, while significant to the parties, could easily be exceeded by legal fees if there was ongoing litigation. The historical power dynamics between the two parties, where Mr. Zilic had the benefit of more income to fund legal fees and more

incentive to be difficult in revealing the details of his actual self-employment income, also made a lump-sum award appropriate.

[244] In this case, there is a risk that M.L. will not pay monthly support. In the past, he unilaterally stopped paying and also used the threat to do so to coerce R.L. to remove CPLs. In addition, M.L. is a poor record keeper with a tendency to make documents fit his narrative. Calculating his income for support purposes was not possible without a guideline income report which would be prohibitively expensive on an ongoing basis. This will make future spousal support adjustments difficult.

[245] The advantages of a lump sum award are that it would provide certainty to the parties and provide R.L. with the funds to meet her needs. I am satisfied that M.L. either has the ability to pay it either or he has assets available to satisfy it.

Issue 5: What is the impact of the Marriage Agreement on assets and debts?

Circumstances of the Marriage Agreement

[246] Both parties agree that, from the outset, M.L. told R.L. that for them to marry she needed to sign a marriage agreement. As the date of their wedding approached, the necessity for a marriage agreement became more pressing from M.L.'s perspective. M.L. retained his family lawyer, Jon Lazar, to draft the Marriage Agreement and instructed R.L. to find a lawyer to represent her interests.

[247] R.L. testified that she had difficulty finding a lawyer who could do the work in the time available. However, she was able to retain John Paul Boyd to advise her with respect to it. Mr. Boyd did not sign a certificate of independent legal advice and was not present with R.L. when she signed the Marriage Agreement.

[248] She was advised that a marriage agreement could be signed after the wedding and told M.L. of the advice she received. Nevertheless, M.L. insisted that the Marriage Agreement be signed or he would not get married. He was asked in cross-examination whether he told her, on the night before they left for Hawaii, that he would not go to Hawaii if she did not sign the Marriage Agreement, but despite repeated attempts by counsel to get a clear answer, he repeated that he would not get married without it. I accept that R.L. was told that the Marriage Agreement had to be signed or they would not be going to Hawaii.

[249] The Marriage Agreement was drafted in the first instance by Mr. Lazar, and drafts were exchanged with Mr. Boyd before the final version was signed on October 3, 2011.

[250] On the date it was signed, the parties had been living together for at least four years and had two children together.

- [251] Although in this case, there were issues about the circumstances under which the Marriage Agreement was signed including potential issues of duress, inadequate financial disclosure, insufficient independent legal advice, and unconscionability, the parties do not seek to set it aside. Both seek to have the Marriage Agreement applied. The question becomes how and whether it applies to all property and debts.
- [252] In his response to R.L.'s second amended family claim filed on January 12, 2023, M.L. says, with respect to Other Orders in Schedule 5, "All claims are opposed with the exception that the respondent [M.L.] seeks to uphold the agreement or claims that there be an unequal division of property in his favour "
- [253] In his counterclaim, filed November 9, 2018, M.L. says with respect to Schedule 5-Other Orders "the following orders under the Family Relations Act: 1. A declaration that the marriage agreement dated October 3, 2011 is valid and enforceable in all respects." (Emphasis added.)
- [254] Despite his pleadings, in his submissions M.L. said that there was no meeting of minds with respect to the Marriage Agreement and, as a result, there was no agreement. In the alternative, he argues that the Marriage Agreement is unfair. It was far too late in this litigation for M.L. to change what had been his consistent position throughout.

Applicable Law

- [255] Although by agreement, the parties could have agreed to have their issues determined under the FLA, they did not do. So, as both wish, the provisions of the FRA apply to their dispute.

Definition of "marriage agreement"

- [256] The term "marriage agreement" is defined in s. 61 of the FRA. That is the starting point for the analysis in this case:

61 (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after March 31, 1979.

- (2) A marriage agreement is an agreement entered into by 2 people before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
- (a) management of family assets or other property during marriage, or
- (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

- (3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.

[257] I am satisfied that the Marriage Agreement entered into between M.L. and R.L. meets the definition of a marriage agreement in s. 61 of the FRA. It was entered into by two people, before their marriage, to take effect on the date it was executed. The Marriage Agreement deals with family property, it was in writing, signed by both parties, and witnessed.

Impact of Marriage Agreements on the Division of Family Assets under the FRA

[258] Section 56 of the FRA sets out the parties' respective entitlement to share in family assets:

56 (1) Subject to this Part each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
- (3) An interest under subsection (1) is subject to
 - (a) an order under this Part or Part 6, or
 - (b) a marriage agreement or a separation agreement.
- (4) This section applies to a marriage entered into before or after March 31, 1979.

[Emphasis added.]

[259] Although s. 56 of the FRA provides for a prima facie equal entitlement to all family assets on the occurrence of a triggering event (as that term was defined in the FRA), s. 56(3) provides that an interest under s. 56(1) is subject to an order under Part 5 or Part 6 of the FRA, a separation agreement or a marriage agreement.

[260] Section 57 of the FRA addresses the triggering event:

57. On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

[261] As I have said, the triggering event in this case was Fitzpatrick J.'s declaratory judgment on June 7, 2023.

Judicial Power to Vary an Unfair Marriage Agreement

[262] Section 65(1) of the FRA (formerly s. 51 of the Family Relations Act, R.S.B.C. 1979, c. 121) allows for judicial reapportionment in certain circumstances. Specifically, s. 65(1) allows the court to vary an unfair division of property under a "marriage agreement" as defined by the FRA:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

[263] Section 65(1) allows the court to reapportion the entitlement to property in an agreement, not to set it aside: see *Clarke v. Clarke* (1991), 55 B.C.L.R. (2d) 273, 1991 CanLII 885 (C.A.), leave to appeal to SCC ref'd, [1991] S.C.C.A. No. 251; and *Schlenker v. Schlenker* (1999), 72 B.C.L.R. (3d) 203 at para. 4, 1999 CanLII 3658 (S.C.). The discretion to reapportion property under s. 65(1) is restricted to the circumstances set out in subsections (a) to (f): *DeRosa v. DeRosa* (1983), 53 B.C.L.R. 259 at paras. 9-11, 1983 CanLII 709 (C.A.).

The Hartshorne Analysis

[264] *Hartshorne v. Hartshorne*, 2004 SCC 22 is the seminal decision on the enforcement or variation of marriage agreements under the FRA. The Court discussed the distinction between marriage and separation agreements:

[39] Marriage agreements define the parties' expectations from the outset, usually before any rights are vested and before any entitlement arises. Often, perhaps most often, a desire to protect pre-acquired assets or an anticipated inheritance for children of a previous marriage will be the impetus for such an agreement. Separation agreements, by contrast, purport to

deal with existing or vested rights and obligations, with the aggrieved party claiming he or she had given up something to which he or she was already entitled with an unfair result. In other cases, however, marriage agreements may be accorded less deference than separation agreements. The reason for this is that marriage agreements are anticipatory and may not fairly take into account the financial means, needs or other circumstances of the parties at the time of marriage breakdown.

- [265] In *Hartshorne*, the Supreme Court of Canada recognized that, while on the one hand marriage agreements deserve deference because they represent the parties' choice to deal with property, on the other, they require a flexible approach because they anticipate future events.
- [266] I agree with Justice Armstrong's comments in *McLaughlan v. Nestor*, 2018 BCSC 86 at para. 53 [*McLaughlan*], echoing Justice Bastarache's comments at para. 67 of *Hartshorne*, that courts should be reluctant to second-guess arrangements made by parties, setting out their personal financial responsibilities upon the dissolution of a relationship, particularly when both have received independent legal advice with respect to the content and execution of a marriage agreement. In *Johnstone v. Wright*, 2005 BCCA 254, Justice Donald wrote that *Hartshorne* "upholds the integrity of private arrangements and permits interference only when things did not turn out the way the parties expected": at para. 27.
- [267] *Hartshorne* sets out the analytical framework for determining whether a marriage agreement operates unfairly. Justice Bastarache wrote:
- [47] [I]n determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on the one hand, and assurance of an equitable result, on the other.
- [268] The first step in determining whether a marriage agreement operates fairly is to apply the agreement and assess the financial entitlements provided to each spouse under it and other financial entitlements such as spousal or child support.

[269] Then, considering the factors in s. 65(1), the court determines whether the agreement operates unfairly. At para. 43 of Hartshorne, the Court set out the essential questions in determining fairness as:

1. whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed; and, if so,
2. whether at the time of the agreement's formation the parties made adequate arrangements in response to these anticipated circumstances.

[270] Central to the analysis is whether:

1. the parties predicted accurately, at the time of contract formation, their actual circumstances at the time of distribution;
2. the parties considered the impact of their decision; and
3. the parties adjusted the agreement during the marriage to deal with different situations than expected, either because the circumstances were different or simply because implications were inadequately addressed or proved to be unrealistic:

Hartshorne at para. 44.

[271] Although the Hartshorne analysis is often described as a two-step inquiry, the second step, being the fairness assessment, was broken down into two questions (or steps) in Santelli v. Trinetti, 2019 BCCA 319 [Santelli] and the three-step approach has been adopted in subsequent caselaw. Based on the analytical framework in Santelli, the Court described the second step as requiring the court to "ask whether the Marriage Agreement accurately contemplates the circumstances in which the parties now find themselves at separation and the s. 57 declaration": Press v. Reid, 2021 BCSC 2224 at para. 299 [Press]. The third step is to apply the factors in s.65(1) of the FRA to determine whether the marriage agreement operates in an unfair manner: Press at para. 310.

[272] In assessing fairness, the court is to consider the parties' personal and financial circumstances and how these circumstances evolved over time. Where current circumstances were contemplated by the parties when forming the agreement and the agreement reflected a response to these circumstances, the burden to prove unfairness is heavy. The agreement can be varied only if a consideration of the s. 65(1) factors revealed that the economic consequences of marriage breakdown were not shared equitably. As explained in Hartshorne, this approach accords with the underlying principal of s. 65 of the FRA, striking a balance between deference to the parties' intentions and assurance of an equitable result: at para. 47.

- [273] Unfairness might result in a reapportionment, but unfairness is not established only because the division of property under a marriage agreement differs from an equal division of property pursuant to s. 65 of the FRA in cases where there is no agreement: McLaughlan at para. 54.
- [274] As applied, the cases recognize the tension between the competing interests inherent in a marriage agreement, being deference to the parties' intentions and assuring an equitable result, and the need to strike an appropriate balance between them.
- [275] In *Kopelow v. Warkentin*, 2005 BCCA 551, the Court enforced a marriage agreement that left one party with substantially more assets after 12 years of marriage. The Court found that the circumstances at the time of the triggering event were within the parties' reasonable contemplation when the agreement was made and the parties financial and domestic arrangements were unfolding in accordance with the parties' expectations. Although the husband left the relationship with assets of more than \$4 million and the wife left with assets of \$1 million, the Court found that the economic disadvantage to the wife was intended to be redressed by spousal support.
- [276] In *Press*, applying the three step Hartshorne analysis, the court upheld a marriage agreement. At step one, the agreement resulted in the wife retaining substantially more property than the husband after a 14-year relationship. At step two, the Court determined that the circumstances at the time of separation were within the reasonable contemplation of the parties at the time they entered the marriage agreement. At step three, a holistic consideration of the factors under s. 65(1), in the context of the evidence, led to a finding that the agreement did not operate unfairly.
- [277] With these principles in mind, I turn to examining the Marriage Agreement pursuant to the Hartshorne analysis. I first interpret and apply the Marriage Agreement and assess the financial entitlements provided to M.L. and R.L. under it. I then undertake a fairness assessment of the agreement. Ultimately, I find that the agreement does operate unfairly with respect to the CIBC mortgage on 353 Delta.

[278]

Important Terms of the Marriage Agreement

[279] Because of its importance to this dispute, I set out the following important terms:

G. [M.L.] is [a] self-employed businessman , and for the purposes of this agreement has approximately \$85,000 made available to him per annum.

H. [R.L.] is not presently employed. She has been a 'stay-at-home' mother since the birth of [S.].

I. [M.L.'s] main assets and liabilities are set out in Schedule "A" to this Agreement.

J. [R.L.'s] main assets and liabilities are set out in Schedule "B" to this Agreement.

K. The Parties separately acknowledge that this Agreement is intended to provide certainty and protection over four different classes of real and/or personal property:

Class A. The current value of [M.L.'s] interests in the equity of 'Showtime Tickets Inc.', "573508 B.C. Ltd.", "Urban Heights Development", "342 Delta Avenue, Burnaby, B.C." (aka "[M.L.'s] Protected Asset Value");

Class B. All of the other assets listed in Schedule A. plus any increase in the value of [M.L.'s] Protected Asset Value and any asset acquired with the use of or in exchange for any increase in the value of [M.L.'s] Protected Asset Value;

Class C. The assets listed in Schedule B; and

Class D. The Parties' joint assets.

L. The Parties separately acknowledge that the intention of this agreement is to provide for a division of assets between them, in the unlikely event of the breakdown of their marriage, on the following terms:

- (i) [M.L.'s] Protected Asset Value (Class A), will always remain [M.L.'s] separate property, at the present equity in these assets, and, as set out herein, shall be his separate properly value going forward, with no future claim thereto by [R.L.] to said value;
- (ii) Over time, as set out herein, [R.L.] will acquire an interest in the difference in value of the Class B Assets and Class C Assets (equal to 2% per year, for a period of 25-years);
- (iii) [M.L.] will remain the owner of the Class B Assets and [R.L.] will remain the owner of the Class C Assets; and
- (iv) The joint assets, plus all assets acquired after the date of marriage, not listed in Classes A, B or C, or assets purchased with income derived from (not a sale of) assets listed in Classes A, B or C, (i.e. not from a sale of those assets), will be shared between the Parties.

M. For the purposes of this Agreement as set out in Schedule A, [M.L.] estimates that the current equity in '[M.L.'s] Protected Assets' are as follows:

- (i) "Showtime Tickets Inc." - \$3,000,000
- (ii) "573506 B.C. Ltd." - \$3,000,000
- (iii) "Urban Heights Development" - (no value)
- (iv) "342 Delta Avenue, Burnaby, B.C." (\$550,000 - where C. and her mother reside and C. has a beneficial interest).

N. The Family Residence was purchased by [M.L.] in 2000 and is registered solely in [M.L.'s] name. There is a mortgage(s) registered against the title to the Family Residence. [M.L.] and [R.L.] intend to:

- (i) continue to reside in the Family Residence after the Date of Marriage;
- (ii) put [R.L.] on title of the Family Residence as an equal, joint tenant with a true right of survivorship within 12-months of the Date of Marriage and
- (iii) will not further re-finance or encumber the Family Residence without the written consent of the other.

O. The Parties separately acknowledge that over the course of their past relationship each of them conferred benefits upon the other, however the benefits conferred by one upon the other in the past were gifts, and the making of these gifts does not result in an unjust enrichment of the recipient to the detriment of the donor.

P. The Parties separately acknowledge that neither Party intends to share legal and/or beneficial ownership of his or her separate property, owned before or acquired after the making of this Agreement, except where the Parties in writing expressly so agree herein, and neither Party shall rely upon the oral expression, or conduct which may suggest the expression, of an intention by one Party to hold property or a portion of property in trust for the other Party.

R. [M.L.] and [R.L.] are entering into this Agreement to resolve ownership and management of all property, real or personal, communal or otherwise owned by either of them now or in the future, and to resolve ownership in and division of family assets and other property on the occurrence of any of the events enumerated in Section 56 of Family Relations Act and amendments thereto (the "Triggering Event").

S. Each Party has sufficient knowledge of the financial affairs of the other such that neither requires the other to prepare a comprehensive statement setting out his or her financial affairs.

1. General

1.1 The Parties warrant and represent that the statements of fact contained in the recitals are accurate and true as of the date of this Agreement and are intended to form part of this Agreement.

1.2 It is a condition precedent to this agreement that the statements of fact contained in the recitals are accurate and true as of the date of this Agreement.

2. Management of the Family Residence

2.1. At present, [M.L.] shall continue to pay the mortgage payments, interest property taxes, all expenses required to maintain the Family Residence, and pay for all renovations, repairs and improvements to the Family Residence.

3. Ownership and Division of Property

3.1 Unless otherwise provided herein, each Party shall keep his or her own monies (except income derived from his or her employment or self-employment), savings, investments, insurance proceeds or coverage, business interests, corporate interests, real property interests, registered retirement savings plans, pensions, including Canada Pension Plan personal credits and benefits, and the like, free from any claim from the other Party in the event of a Triggering Event.

3.2. Unless otherwise provided herein, all property, both real and personal, purchased, inherited or otherwise acquired by either Party before the Date of Marriage, shall continue to be his or her sole property during the period that the Parties continue to live together or remain married and shall remain his or her sole property thereafter notwithstanding the occurrence of a Triggering Event.

3.5. If any property, whether real or personal, is placed by one of the Parties in the name of the other, that transaction shall constitute a gift to the other and that property shall be the sole property of the other during the marriage and shall remain such notwithstanding the occurrence of a Triggering Event.

3.6. Specifically, but without limiting the generality of the foregoing clauses in this section:

3.6.1. [M.L.'s] Protected Asset Value (Class A), will always remain [M.L.'s] separate property with no future claim thereto by [R.L.];

3.6.2. [R.L.] will acquire an interest in the difference in value of the Class B Assets and Class C Assets. equal to 2% per year, for a period of 25-years, to a maximum of 50% in due course;

3.6.3. [M.L.] will remain the owner of the Class B Assets and [R.L.] will remain the owner of the Class C Assets; and

3.6.4. The Class D Assets, plus all assets acquired after the date of marriage, not listed in Classes A, B and/or C, will be shared equally between the parties.

3.7. Specifically, but without limiting the generality of the foregoing clauses in this section, the Family Residence (which was purchased by [M.L.] in 2000, is registered solely in [M.L.'s] name and has a mortgage), shall be dealt with as follows:

- (i) [M.L.] will put [R.L.] on title of the family home, as an equal, joint tenant with a true right of survivorship within 12-months of the Date of Marriage. This transfer is to compensate [R.L.] for her waiver of claims against an interest in [M.L.'s] Protected Asset Value (Class A), and
- (ii) Neither [M.L.], or [M.L.] and [R.L.], will further re-finance or encumber the Family Residence without the written consent of the other.

3.8. All property, whether real or personal, purchased or otherwise acquired by one of the Parties to this Agreement and given to the other as a gift shall remain the sole property of the other, notwithstanding the occurrence of a Triggering Event.

4. Liabilities

4.1. Neither Party shall be responsible for any present or future debt and/or liability of the other, shall not pledge the credit of the other, nor bind the other for debt.

4.2. Each Party shall save harmless and indemnify the other with respect to this section.

4.3. Each Party shall be liable for one-half of any debt or liability incurred jointly.

12. Legal Advice and Disclosure and Fair Agreement

12.1. Each Party acknowledges that he or she:

- (a) understands his or her respective rights and obligations under this Agreement
- (b) is signing this Agreement voluntarily, without any undue influence or coercion by the other;
- (c) has had the opportunity to receive independent legal advice and, whether or not such advice has been obtained, each party is fully aware of the effect, purpose and intent of the provisions of this Agreement; and
- (d) believes that the provisions of this Agreement adequately discharge the present and future responsibilities of the parties to one another and that the Agreement will not result in circumstances that are unconscionable or unfair to either Party.

[280] Schedule A, attached to the Marriage Agreement, set out M.L.'s assets and liabilities as follows:

Assets & Liabilities of [M.L.]

Assets

Full or partial ownership/interest in the following:

Est. Value/Equity

Class A Items:

- (a) Showtime Tickets Inc.

\$3,000,000

- (b) 573506 BC Ltd.

\$3,000,000

- (c) 12156 - 210th street, Maple Ridge, B.C. (equity)

\$100,000

- (d) 342 Delta Avenue, Burnaby, B.C. (equity)

\$550,000

(e) Urban Heights Developments (no assets)

(not valued)

Class B Items:

(f) 353 North Delta Avenue, Burnaby, B.C. (equity)

\$350,000

(g) 2002 Lexus LX470

(not valued)

(h) 1999 21' SEA RAY Boat

(not valued)

(i) RRSPs

\$10,000 - \$20,000

(j) Various properties in Croatia (from [M.L.'s] father's Estate)

(not valued)

Liabilities

(a) Mortgage(s), loan(s), guarantee(s), et al., as may be secured by the assets above.

[281] Schedule B, that was to set out R.L.'s assets and liabilities, is blank, reflecting that she had neither.

[282] Briefly, there are other relevant provisions in the Marriage Agreement. Clause 6 provided that it was to be reviewed in three years and every five years thereafter. No review ever occurred.

[283] Based on the terms of the Marriage Agreement, R.L.'s entitlement to 2% per year for up to 25 years is arrived at based on reading the Marriage Agreement as a whole including reading together:

a) Preambles K, L, M, and R;

b) Schedules A and B; and

c) Clause 3.6.2.

[284] Pursuant to the Marriage Agreement, it is the difference between Class B and Class C assets that is subject to the 2% calculation. Pursuant to the definition in Preamble K, Class C assets are those listed in Schedule B. There are no assets listed in Schedule B and, therefore no Class C assets. As a result, the difference between Class B and Class C assets, and subject to the 2% calculation, will always be the value of the Class B assets.

[285] Class B assets are defined in Preamble K to be "all other assets listed in Schedule A, plus any increase in the value of M.L.'s Protected Asset Value and any asset acquired with the use of or in exchange for any increase in the value of M.L.'s Protected Asset Value". As a result, there are three subcategories of Class B assets:

- a) The increase in value of "[M.L.'s] Protected Asset Value", also known as the Class A assets;
- b) Apart from "[M.L.'s] Protected Asset Value", any other assets listed in Schedule A; and
- c) Assets acquired with the use of or in exchange for the increase value of "[M.L.'s] Protected Asset Value".

[286] With respect to the first subcategory, "[M.L.'s] Protected Asset Value" is defined in Preamble K as Class A assets and specifically consists of four assets or entities:

- a) The equity in Showtime;
- b) 573;
- c) Urban Heights; and
- d) 342 Delta.

[287] It is only the increase in value of those four individual assets or entities that forms part of R.L.'s entitlement to the 2% per year. Under the Marriage Agreement, specifically Preamble M and Schedule A, the estimated values of those Class B assets in October 2011 were, respectively: \$3 million, \$3 million, no value, and \$550,000.

[288] With respect to the second subcategory, R.L. is entitled to 2% per year on the value of "all other assets listed in Schedule A". Those other assets include:

- a) The 210 Street Property, listed in Schedule A but not part of the Class A assets in Preamble K;
- b) Various other assets listed under "Class B items" in Schedule A, in particular:
 - i. The Family Home at 353 Delta, with estimated equity of \$350,000;
 - ii. a 2002 Lexus, that was not valued;
 - iii. a 1999 21' SEA RAY boat, that was not valued;
 - iv. RRSPs, valued at \$10,000-\$20,000; and
 - v. "various properties in Croatia (from [M.L.'s] Father's Estate), that were not valued.

[289] I accept that there is some ambiguity in the Marriage Agreement because the 210 Street Property is listed in Schedule A under the heading "Class A Items", potentially supporting an argument that it should be included as part of "[M.L.'s] Protected Asset Value". However, "Class A Items" is not a defined term in the Marriage Agreement and on reviewing a prior draft of the Marriage Agreement, found at Ex. 17, Tab 181, it is clear that the 210 Street Property was initially included as part of [M.L.'s] Protected Asset Value, defined within the

body of the Marriage Agreement, but was later removed. As such, any ambiguity was removed and the 210 Street Property would objectively be included in "All other assets listed in Schedule A".

- [290] Of the above, R.L. is entitled to 2% per year. The Marriage Agreement does not say that the 2% is limited to the growth in value of the "other assets".
- [291] With respect to the third subcategory, R.L. is entitled to 2% a year of any asset acquired with the use/exchange of any increase in value of "[M.L.'s] Protected Asset Value", being the equity in Showtime, 573, Urban Heights and 342 Delta. There are no assets fall into this subcategory given that the only asset that was exchanged was Showtime which did not increase in value.
- [292] I note that although Clause 3.7 contemplated that M.L. would put R.L. on title to 353 Delta within 12 months of the marriage date and that the consideration for him doing so was her foregoing any claim to an increase in the value of "[M.L.'s] Protected Asset Value" between the 2006 date of cohabitation and the 2011 date of marriage, M.L. did not follow through with this.

What is the impact of M.L. transferring 353 Delta into R.L.'s name?

- [293] In June 2014, M.L. transferred his legal interest in 353 Delta to R.L., making her the sole legal owner. He did so when the CRA was pursuing him and Showtime for a GST debt.
- [294] M.L. testified that the transfer of 353 Delta into R.L.'s name was done at her suggestion. I find this not to be credible and I do not accept this evidence. It was M.L. who received the CRA notice about the GST claim and I have accepted that R.L. was not actively involved in the family finances or M.L.'s business decisions.
- [295] On May 9, 2014, M.L. set up a new email address for the parties use for "keeping all loyalty points in one place" and "other reasons" that he was sure would come up.
- [296] On June 10, 2014, M.L. used the new email address to send an email with the subject line "burns meet". "Burns" is a reference to Darrel Burns, R.L.'s then family lawyer. The email set out a script for R.L. She was to tell Mr. Burns that the parties had separated in September 2012 and drafted their own separation agreement, but they now wanted it legally drafted. The separation agreement needed to be dated before October 24, 2012 as that was the date on which M.L. received the CRA audit notice. The email said, in part:

[M.L.] is being pursued by the CRA for Directors Liability for a gst debt assessed against showtime tickets inc and will likely be forced into bankruptcy.

I want to assert my maximum interest against [M.L.] and in the process secure the family residence and its contents for the children and I to live in forever.

objective is to transfer 100% of title of family residence immediately.

[M.L.] and [R.L.] agreed that [R.L.] buys [M.L.'s] share at fair market value as lump sum support/settlement in lieu of cash.

342 delta being transferred to [M.L.'s] mom to pay back the mortgage loan she has secured on this property long ago. (this needs to get removed right away)

[297] The content of the email was not true. The parties had not separated in 2012, nor had they drafted their own separation agreement.

[298] On the second page of the June 10, 2014 email, there were a number of questions for Mr. Burns regarding whether the Children or the parties' neighbours could be summoned to testify about whether the separation was legitimate.

[299] R.L. denied having any part in writing the email suggesting that her lawyer back date a separation agreement to a date before M.L. received the notice from the CRA. She testified that M.L. told her that he needed to put title to 353 Delta in her name to protect the house and that if she wanted a house to live in she had to put it in her name.

[300] R.L. never sent the email to Mr. Burns.

[301] In fact, on June 9, 2014, a transfer of 353 Delta into R.L.'s name was registered on title. The consideration was said to be \$1.00 and the transfer was said to be under a separation agreement or a court order. R.L. signed the transfer but M.L.'s telephone number was recorded on it. At the time, there was no separation agreement or court order dealing with 353 Delta.

[302] R.L. argues that M.L. lost any claim to that asset when the property was transferred to her. M.L. argues that the property transfer was not a gift, but rather, M.L. holds his 50% interest in 535 Delta in trust for him, pursuant to a declaration of bare trust and agency agreement, signed by R.L. with respect to 353 Delta, dated June 27, 2014.

[303] R.L. did sign the bare trust and agency agreement but testified that M.L.'s lawyer had the agreement with him when she met him at a coffee shop. She received no independent legal advice before signing it. M.L. told her that although 353 Delta would be fully in her name, it would only be half hers. Although M.L.'s brother purported to be a witness to R.L.'s signature, he did not do so. She signed it without a witness. His signature appears to have been added afterwards.

[304] I find that a result of Clause 3.5 and Clause 3.8 of the Marriage Agreement, 353 Delta became R.L.'s sole and separate property when it was placed in her name and M.L. has no further claim to it. In my view this is the result of a plain reading of the Marriage Agreement.

[305] Contractual interpretation principles require that the words in a contract are given their plain and ordinary meaning. It is only when there is uncertainty or ambiguity in the contractual terms, that the trier of fact can consider circumstances surrounding the making of the contract to assist in its interpretation: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47-48.

[306] The relevant clauses state:

3.5 If any property, whether real or personal, is placed by one of the Parties in the name of the other, that transaction shall constitute a gift to the other and that property shall be the sole property of the other during the marriage and shall remain such notwithstanding the occurrence of a Triggering Event.

.

3.8. All property, whether real or personal, purchased or otherwise acquired by one of the Parties to this Agreement and given to the other as a gift shall remain the sole property of the other, notwithstanding the occurrence of a Triggering Event.

[307] I do not find there to be ambiguity or uncertainty inherent in the contractual terms above.

[308] Pursuant to Clause 3.8 of the Marriage Agreement, if the transfer of 353 Delta was a gratuitous transfer, in other words if it was given as a gift, the property would therefore be R.L.'s sole property.

[309] I note that the bare trust and agency agreement, dated June 27, 2014, states:

A. [R.L.] will acquire 100% legal title to the lands and premises (the "Property") located at 353 Delta Avenue, Burnaby, British Columbia

B. 100% legal title to the Property will be registered in the name of the Nominee in the Land Title Office, who will hold an undivided 50% interest, in joint tenancy, of the Property, as nominee, agent and bare trustee for the sole benefit and account of [R.L.] as principal and beneficial owner, in accordance with this Agreement.

[310] M.L. cannot have it both ways. At the time of the transfer of 353 Delta to R.L., he was seeking to shield it from the CRA. A bare trust agreement would not have protected his half interest from the CRA. He cannot now say that because he resolved his dispute with the CRA, the asset was not R.L.'s pursuant to the bare trust agreement and that he is entitled to the property back: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 52.

[311] Further, all that is required for a gift under Clause 3.5 of the Marriage Agreement, is that "property, whether real or personal" be "placed by one of the Parties in the name of the other". That transaction "shall constitute a gift to the other and that property shall be the sole property of the other during the marriage and shall remain such notwithstanding the occurrence of a Triggering Event". Pursuant to a plain reading of Clause 3.5 of the Marriage Agreement, the transfer of the property into R.L.'s name on June 8, 2014 constitutes a gift to

R.L. and it would thereafter be her sole property, despite the bare trust agreement.

[312] I also note that had M.L. complied with his obligation under Clause 3.7(i) of the Marriage Agreement, to transfer a 50% interest to R.L. within one year of their marriage, she would have been a 50% owner of 353 Delta in any event and her share of the family home would have been protected against a potential CRA debt. M.L. testified that the transfer was never made because R.L. filed her first claim within one year of the Marriage Agreement being signed. That does not explain why it was not done in the years that followed and after the parties reconciled.

[313] Pursuant to the Marriage Agreement, I find that 353 Delta is the sole property of R.L.

How to calculate the 2% per year?

[314] Clause 3.6.2 of the Marriage Agreement provides:

3.6.2. [R.L.] will acquire an interest in the difference in value of the Class B Assets and Class C Assets. equal to 2% per year, for a period of 25-years, to a maximum of 50% in due course;

[315] The calculation under the Marriage Agreement is 2% per year up to a maximum of 25 years, with the result being that R.L.'s maximum entitlement is capped at 50%.

[316] The start of R.L.'s 2% entitlement is when the Marriage Agreement was signed, October 3, 2011. The end of her 2% entitlement, pursuant Preamble R, is the date of a triggering event, in this case June 7, 2023. The period between those dates is 140 months or 11.66 years. At 2% a year, she is entitled to 23.32% of the difference in value between Class B and Class C assets.

[317] As set out in Preamble K, Class C assets are defined as those listed in Schedule B. As no assets were listed in Schedule B, the difference between Class B and Class C assets will always be the value of the Class B Assets.

[318] Preamble K defines Class B Assets to be "all other assets listed in Schedule A, plus any increase in the value of [M.L.]'s Protected Asset Value, also known as the Class A assets, and any asset acquired with the use of or in exchange for any increase in value of [M.L.]'s Protected Asset Value". In the circumstances, R.L.'s 23.32% entitlement is applied to those three different classes of assets.

[319] Accordingly, R.L. is also entitled to 23.32% per year of:

- a) the increase in value of the Class A assets (M.L.'s Protected Asset Value) including, specifically, 573, which owns the two Graveley Properties and 342 Delta;
- b) the value of the "other assets" in Schedule A, including specifically the 210 Street Property, the 2002 Lexus LX470, the 1999 21' Sea Ray boat, M.L.'s RRSPs, and his interest in various undisclosed and unvalued properties in Croatia; and

- c) the value of assets acquired with the use of or in exchange for the increase in value of M.L.'s Protected Asset Value. There are no assets to which this provision applies.

Increase in Value of Class A Assets

[320] With respect to the Class A assets (M.L.'s Protected Asset Value), R.L. is entitled to 23.32% of any increase in the value of Showtime Tickets, 573, Urban Heights and/or 342 Delta. The estimated value of those assets on the date of the agreement was \$3 million, \$3 million, no value, and \$550,000 respectively.

[321] As there was no increase in the value of Showtime Tickets or Urban Heights, R.L. receives nothing with respect to those assets. The increases in value for 573 and 342 Delta are more complicated.

342 Delta

[322] Starting with 342 Delta, it was purchased in 2000 or 2001 after C.'s mother and M.L. separated. Title was held 1/3 by C.'s mother and 2/3 by M.L. Although the Marriage Agreement refers to C. having a beneficial interest in 342 Delta, there was no evidence about the nature of that interest.

[323] In 2013, after R.L. removed her CPL on 342 Delta, on August 27, 2013, M.L. granted an on-demand mortgage to his mother, D.L., for \$550,000. In 2012, 342 Delta was already encumbered by a mortgage in favour of CIBC securing a principal amount of \$325,000 as a mortgage and secured line of credit. As a result, the mortgage to D.L. ranked second in priority to the CIBC mortgage. On June 19, 2014, M.L. transferred his 2/3 interest in 342 Delta to D.L. for \$1 and love and affection. At the time, the market value shown was \$613,066.66. On March 15, 2015, the mortgage in favour of D.L. was cancelled.

[324] Although M.L. testified that the transfer to D.L. was made to pay off debts he owed to her, no property transfer tax was paid as the transfer was between family members. Further, an exemption for property transfer tax was claimed on the basis of 342 Delta being M.L.'s principal residence. On the evidence it is clear that he never lived there. Further still, the transfer was recorded as part of a "separation agreement or court order" but neither existed. M.L. does not appear to have paid any capital gains tax with respect to the transfer which would be consistent with him claiming 342 Delta as his principal residence. In her trial evidence, and not surprisingly, D.L. was clear that there was no separation agreement or court order between her and her son but she did not pay any property transfer tax.

[325] The mortgage on 342 Delta in favour of D.L., and the eventual transfer of M.L.'s 2/3 interest in the property are allegedly related to loans that D.L. made to Showtime, not to M.L. personally. None of the loans were specifically listed in the Marriage Agreement in October 2011 as liabilities.

- [326] On July 30, 2008, approximately two years before the parties began living together, D.L. purportedly signed a demand loan agreement between herself and Showtime. M.L. signed on behalf of Showtime.
- [327] R.L. alleges that it is probable that the loan agreement was back dated. I agree. There are significant concerns about the loan agreement. It documented a loan of "up to \$300,000" at a 15% interest rate. M.L. produced a summary of purported advances and payments under the loan agreement. The first advance was in the amount of \$100,000 and was made out to M.L. personally and not to Showtime. The summary is undated and it refers to a "Loan @ 10% on closing balance". This does not reflect the loan agreement terms. Many of the advances are not supported by cheques attached to the summary. One of the cheques from D.L. attached to the summary is in the amount of \$80,000 and was purportedly advanced in May 2012 when in fact, it bears a date that appears to be 2018. Finally, the balance outstanding on the loan, as of July 2014 was \$581,778, far in excess of the terms of the loan agreement.
- [328] From the summary, the first loan advance of \$100,000 was purportedly made on July 30, 2008. In total, the summary reads as if \$763,000 was advanced between July 30, 2008 and July 2014, that \$308,900 was repaid between December 31, 2008 and December 31, 2013, and that the difference plus interest (at 10%) was \$581,778.00 as of June 2014. The last loaned amounts were \$50,000 on April 11, 2013 and \$265,000 in July 2013, and the last repaid amount was December 31, 2013.
- [329] From the evidence, Showtime was wound down in 2013 or 2014 and the Showtime brand was sold to Zenture for \$75,000 in April 15, 2013.
- [330] Finally, in the email M.L. wrote in June 2014 for R.L. to take to Mr. Burns, he referred to 342 being transferred to D.L. to "pay back the mortgage loan" she secured on the property "long ago". That was clearly untrue as the mortgage was not registered until August 27, 2013 and the transfer to D.L. was signed on June 21, 2014.
- [331] All of this was being done with the CRA audit in the background.
- [332] There is also an assignment of loan indebtedness agreement made as of January 3, 2012. The signatories to the agreement were Showtime, M.L. and 573. In the agreement, Showtime agreed that it owed M.L. \$1,049,421 and 573 agreed it owed Showtime the same amount. Pursuant to the assignment, M.L. agreed to receive from 573 the sum of \$1,040,421 to satisfy his debt owing from Showtime. According to M.L.'s evidence at discovery, Showtime did owe him approximately \$1 million and 573 did owe that amount to Showtime.

- [333] Based on my assessment of M.L.'s credibility, I do not accept the validity of either the loan agreement with D.L. or the assignment of loan indebtedness agreement. Even if I have incorrectly assessed this evidence, M.L. has no one to blame but himself. As Justice Southin in *Le v. Milburn* said, "If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame": at para. 2.
- [334] R.L.'s entitlement to share in 342 Delta is not limited to the value when this asset was disposed of by M.L; the Marriage Agreement does not provide that. Pursuant to Preamble R, the value is upon the "triggering event".
- [335] Based on the 2023 BC Assessment of 342 Delta, its value as of July 1, 2022 is \$2,102,300. As a result, the increase in value from the \$550,000 assigned to 342 Delta in the Marriage Agreement is \$1,552,300. M.L.'s 2/3 share amounts to \$1,034,866 and R.L.'s 23.32% of the increase in value amounts to \$241,330.75.

573

- [336] The value assigned to 573 in the Marriage Agreement is \$3 million. According to the Walter's Report, its value is \$2,721,823. As such, there is no increase in the value of 573.
- [337] That there was no increase in value is difficult to accept because 573 is a holding company that owned real property in the Vancouver area, including the Graveley Properties. It seems unlikely that the properties held by 573 did not increase in value in the more than 11 years between October 2011, the date of the Marriage Agreement, and June 2023, the date of the triggering event. Nonetheless, I do not have sufficient evidence record on which to conclude that there was, in fact, an increase in the value of 573.

The "other assets" Listed in Schedule A

- [338] There is a potential ambiguity in the Marriage Agreement about whether the 210 Street Property is included in M.L.'s Protected Asset Value because it is listed in Schedule A under the heading "Class A Items"; however, it is not specifically listed in the definition of "Class A" at Preamble K or the definition of M.L.'s "Protected Assets" in Preamble M. If the 210 Street Property is not included in M.L.'s Protected Asset value, then it forms part of the "all of the other assets listed in Schedule A".
- [339] M.L. was the sole legal owner of the 210 Street Property, although he argues that 573 was the beneficial owner. This asset was clearly listed in the Marriage Agreement as separate from 573 and, according to M.L.'s examination for discovery transcript, no bare trust agreement with respect to the 210 Street Property was available or later disclosed.

- [340] As I said above, under the principles of contractual interpretation, in the face of ambiguity in a contract, the trier of fact can look to other circumstances to assist in the interpretation. The prior draft of the Marriage Agreement appears in Ex. 17 at Tab 181. It specifically includes the 210 Street Property as part of M.L.'s Protected Asset Value. It was removed from the definition in the final executed version of the Marriage Agreement. This suggests that it should be included in "all of the other assets listed in Schedule A".
- [341] In August 2012, R.L. filed a CPL against the 210 Street Property. M.L. and R.L. had not finally separated when M.L. asked R.L. to remove the CPL. At the time, R.L. was assisting M.L. with renovations at the 210 Street Property. Although Mr. Burns drafted R.L.'s notice of family claim in the First Action and arranged for the CPL filing, R.L. did not go him for this purpose. Instead, M.L. arranged for R.L. to go to a lawyer in Burnaby to sign the documents. M.L. paid for the lawyer.
- [342] Once the CPL was removed, the 210 Street Property was sold for \$657,000 on or about November 10, 2016. The net proceeds of sale were \$372,371.97 and all of the proceeds were deposited to a 573 bank account on November 17, 2016. In his evidence, M.L. says that after the proceeds were deposited, approximately \$220,000 can be traced into the purchase of the Citadel Property by 109. The balance of approximately \$152,000 is unaccounted for. On the same day, an unexplained cash withdrawal of \$75,000 was made, which may have been from the balance.
- [343] R.L. is entitled to 23.32% of the value of the 210 Street Property as it was an "other asset" or through tracing part of this amount into an exchanged asset, the Citadel Property or 109. She is prepared to use the 2016 sale proceeds as the value of the 210 Street Property despite the fact that, pursuant to the Marriage Agreement, she could have relied on its value as of the date of the triggering event in 2023.
- [344] As a result, for the "other assets" clause in the Marriage Agreement, R.L. is entitled to:
- a) for the 210 Street Property, 23.32% of the net proceeds amounts to \$86,837.14;
 - b) for the 2002 Lexus LX470 valued at \$4,000 in M.L.'s 2023 F8 financial statement, 23.32% amounts to \$932.80;
 - c) for the 1999 21' Sea Ray boat valued at \$10,000 in M.L.'s F8 financial statement, 23.32% amounts to \$2,332; and
 - d) for M.L.'s RRSPs valued at \$26,742.62 in M.L.'s F8 financial statement, 23.32% amounts to \$6,236.38. To ameliorate tax issues arising from cashing in the RRSP, this could be achieved by a tax-free spousal rollover.
- [345] For the properties in Croatia received from M.L.'s father's estate, there is no information whatsoever about the value of these properties. During cross-examination, M.L. said that he did not own any such properties. Clearly, the Marriage Agreement included them and that information could only have come from M.L.

- [346] It is not credible that the Marriage Agreement would include Croatian properties in the list of M.L.'s Class B items and specifically refer to them coming from M.L.'s father's estate, if they did not exist. That information can only have been provided by M.L. to his lawyer for the purposes of the draft. In the absence of evidence, and in light of my credibility findings, I draw a negative inference against M.L.
- [347] In submissions, R.L. suggests that the Croatian properties would be worth at least \$200,000 CAD and seeks the sum of \$46,640 as her 23.32%. When asked about the Croatian properties, R.L. said she did not know anything about them, their addresses, or their value. R.L.'s suggested value appears to be entirely without foundation. Nonetheless, in light of my credibility findings, and of M.L.'s failure to provide any information about these properties, I have valued the properties at approximately \$85,000 on an necessarily arbitrary basis. As a result, R.L. is entitled to \$20,000 in respect of the Croatian properties. M.L. took the risk of a finding against him in this regard when he misled the Court on other matters.

What is the impact on assets not included in the Class A-D Assets, including R.L.'s RRSPs, the parties' CPP credits, and the Kitchener Property transfer?

- [348] Clauses 3.1 and 3.2 deal with assets that are not otherwise provided for in the Marriage Agreement. Clause 3.1 provides that "Unless otherwise provided herein, each Party shall keep his or her own monies (except income derived from his or her employment or self-employment), savings, investments, insurance proceeds or coverage, business interests, corporate interests, real property interests, registered retirement savings plans, pensions, including Canada Pension Plan personal credits and benefits, and the like, free from any claim from the other Party in the event of a Triggering Event." Clause 3.2 provides that "Unless otherwise provided herein, all property, both real and personal, purchased, inherited or otherwise acquired by either Party before the Date of Marriage, shall continue to be his or her sole property during the period that the Parties continue to live together or remain married and shall remain his or her sole property thereafter notwithstanding the occurrence of a Triggering Event." I note that Clause 3.2 specifies that it applies to property acquired before the date of marriage, whereas Clause 3.1 does not.
- [349] I find that the other provisions of the Marriage Agreement do not contemplate the Kitchener Property, R.L.'s RRSPs, or the parties' CPP credits. As such, the division of these assets under the Marriage Agreement is done pursuant to Clauses 3.1 and/or 3.2.

The Kitchener Property Transfer

- [350] The Kitchener Property was not listed in Schedule A of the Marriage Agreement and it was not a joint asset. R.L.'s submission is that the reference in Preamble I to M.L.'s "main assets and liabilities in Schedule A", infers that he had other assets that he did not consider to be "main". She argued that the Kitchener Property is best characterized as an "other asset" and that M.L. should not be able to benefit from non-disclosed assets in his legal name. If it is treated as an "other asset", she would be entitled to 23.32% of the value of his interest in the

Kitchener Property. I do not agree it should be treated that way.

- [351] M.L. was on legal title to the Kitchener Property as to 50% when the parties began cohabiting and at the time the Marriage Agreement was signed in October 2011. He was also on the covenant of an associated mortgage. Although M.L. says that the Kitchener Property was beneficially owned by another company, no bare trust agreement or any other documents supporting a beneficial ownership were disclosed to support this. It is possible that there was a bare trust agreement with respect to the Kitchener Property and that it formed part of the assets of Urban Heights; however, I note that M.L. had the burden of proving this and he failed to do so.
- [352] R.L. filed a CPL against the Kitchener Property in conjunction with her first notice of family claim, on or about August 29, 2012. In the summer of 2013, M.L. demanded that she remove the CPLs she registered against the Kitchener Property and 342 Delta or he would cease providing support to her and their children. R.L. testified that she also received threats from Mr. Corea, M.L.'s business partner. M.L.'s evidence confirmed this to some extent.
- [353] R.L. acceded to the demand and removed the CPL on the Kitchener Property. There was no asset restraining order in place at the time.
- [354] After the CPL was removed, and on or about August 16, 2013, M.L. transferred his 50% interest in the Kitchener Property to Mr. Corea's father for \$476,000. The transfer to Mr. Corea Sr. was registered on October 21, 2013 and at the same time RBC released their mortgage and a new mortgage in favour of the Bank of Nova Scotia was registered on title.
- [355] M.L. did not declare capital gains on the disposition of his interest in the Kitchener Property on his 2013 income tax return.
- [356] Within two years of the purchase by Mr. Corea Sr., on May 29, 2015, the Kitchener Property was sold to an arms length purchaser. It appears that \$175,000 from that sale was held back in a lawyer's trust account and then disbursed to M.L. in the summer of 2016. The evidence in that regard is murky. It is unclear why M.L. received the funds, what he did with them, what happened to the difference of approximately \$300,000, and whether the \$175,000 held in trust related to the Kitchener Property or some other property that was sold.
- [357] In any event, given the wording of Clauses 3.1 and 3.2 of the Marriage Agreement, I am unable to find that the Kitchener Property should be classified as an "other asset", such that it would be considered a Class B asset. Under the Marriage Agreement, R.L. is not entitled to any of the funds received from the Kitchener Property transfer.

R.L.'s RRSPs

- [358] R.L. entered the marriage with RRSPs. The exact value of her RRSPs at the time the parties began cohabitating and at the time the Marriage Agreement was signed is unclear. However, I note that she was no longer employed after the birth of their second child,

before the Marriage Agreement was signed. In 2018, an email with a screenshot of her account statement shows a value of \$38,686. The Walters Report explains that R.L. withdrew upwards of \$40,000 between 2018-2020 to cover her living expenses. While the value of M.L.'s RRSPs are specifically included in Schedule A, R.L.'s RRSPs are not listed in Schedule B. I find that this consistent with the purpose of the Marriage Agreement, which was for M.L. to protect his assets. As they are not provided for elsewhere, Clause 3.1 applies and M.L. has no claim to their value. In any event, the RRSPs have been depleted.

CPP Credits

[359] Clause 3.1 specifically deals with the parties' CPP credits. As they are not otherwise dealt with under other provisions of the Marriage Agreement, the parties' CPP credits fall within the scope of Clause 3.1 and as such, neither party has entitlement to the CPP credits of the other.

How to calculate joint entitlement to family assets, including assessing the impact of the asset restraining order breaches, if any, by M.L.?

[360] Assets that meet the definition in Clause 3.3 of the Marriage Agreement (assets acquired after the date of marriage but not with the use of or in exchange for Class A and C assets), are Class D assets to be divided equally between them. They include a travel trailer and Ticketworld.

[361] With respect to the travel trailer, according to M.L.'s 2018 financial statement, he sold the travel trailer for \$4,600 in July 2018. He did so in breach of the asset restraining order issued on September 24, 2015, before a Master of the Court (the "2015 Asset Restraining Order"). Half of the sale proceeds, in the amount of \$2,300, is owed to R.L.

[362] With respect to Ticketworld, it was incorporated on March 18, 2013, after the parties' marriage. It was not started with the use of any pre-existing assets. It therefore meets the definition of a joint asset. According to the Walters Report, which was not contested by M.L., it is worth \$42,112. R.L.'s half share is \$21,056. It is important to note Walters expressed her opinion that had she valued Ticketworld considering EBITDA factors, its value would have been higher.

How to allocate the parties' debts?

[363] Clause 4.3 of the Marriage Agreement says, "Each Party shall be liable for one-half of any debt or liability incurred jointly." The only joint debt is the Home Trust debt, which was taken out against 353 Delta, at least in part, to fund this litigation. It is approximately \$250,000. M.L. and R.L. have a joint 50/50 liability for this debt.

[364] Clause 4.1 of the Marriage Agreement says, "Neither Party shall be responsible for any present or future debt and/or liability of the other, shall not pledge the credit of the other, nor bind the other for debt." As a result, R.L. says that she is not responsible for the mortgage on 353 Delta, as the mortgage is solely in M.L.'s name. Nor is she responsible for

any other debt in M.L.'s name. I agree that, pursuant to the Marriage Agreement, the mortgage registered against 353 Delta is the sole debt of M.L. I will deal with the mortgage in considering the overall fairness of the Marriage Agreement.

[365] I reach a different conclusion with respect to the RBC credit card debt of approximately \$28,000. Despite being in R.L.'s name, the debt was incurred on behalf of M.L. and Showtime. M.L. required R.L. to use a credit card in her name to purchase tickets on behalf of Showtime. He did so in breach of part of Clause 4.1 of the Marriage Agreement, which provides that the parties "shall not pledge the credit of another". As such, I find that the preceding part of Clause 4.1, which provides that "Neither Party shall be responsible for any present or future debt of the other", does not apply. R.L. testified that M.L. told her he would pay the credit card off. This is corroborated by emails between the parties in which M.L. tells her he will pay the debt. He did not do so and the debt remains outstanding. I find that in light of the evidence that M.L. leveraged R.L.'s credit for his corporate purposes and assured her he would pay the card off, M.L. is responsible for the RBC debt.

Summary of Entitlements Under the Marriage Agreement

[366] If the entitlements and debts are apportioned according to the Marriage Agreement, the parties are entitled to the following:

- R.L. is entitled to a total of approximately \$375,000 for her share in the value of assets covered by the Marriage Agreement, in addition to full legal title of the family home at 353 Delta. She is also responsible for 50% of the Home Trust debt.
- With the exception of 353 Delta, M.L. retains the properties and businesses covered by the Marriage Agreement. After accounting for R.L.'s entitlements as set out above, I calculate the value of these assets to be at least \$4.2 million. He also retains his CPP credits. With respect to liabilities, he is responsible for: 50% of the Home Trust debt; 100% of the RBC credit card debt in R.L.'s name; and 100% of the CIBC mortgage for 353 Delta.

[367] The exact breakdown of the entitlements and liabilities can be found in the orders at the end of these reasons.

[368] I note the live possibility that the value of the assets retained by M.L. may be much higher than \$4.2 million, which was reached on the basis of the valuations in the Walters Report. As I noted above, the Walters Report was not a forensic report, but a joint report. As such, Walters was required to take M.L. at his word regarding the prospects of Ticketworld. Walters expressed doubt about the valuation and testified that if she had been able to calculate Ticketworld's value as a continuing business, with EBITDA factors and calculations, as a company with gross revenue approaching \$3 million, its value would be significantly higher than she reported. I also note the uncertainty surrounding the value of the Croatian properties to which I have assigned an arbitrary value. I find that M.L. included them in the Marriage Agreement for a reason; they are not valueless. Given the lack of evidence on the properties and my findings regarding M.L.'s credibility, the

Croatian Properties may be worth considerably more than accounted for.

- [369] Finally, I note that income was coming into M.L.'s businesses from his ventures in the short-term rental market that do not appear to have been appropriately accounted for in the financial records and there is no record of how the barter transactions were accounted for, if at all. As a result, revenue may be higher and expenses reduced thereby affecting the value of some or all of his businesses.

Overall Fairness of the Marriage Agreement

- [370] At trial, M.L. took the position that, on the evidence, there was no meeting of the minds with respect to the Marriage Agreement and thus no valid contract formed. This position is inconsistent with his pleadings and his position throughout the litigation.

- [371] I do not accept this position and I have found the Marriage Agreement to be valid. In the alternative, he seeks to rely on the Marriage Agreement, albeit on an interpretation which would have led to a different outcome than the one which I find to be correct. He did not raise specific arguments with respect to the factors in s. 65(1) of the FRA about the unfairness of the outcome of the Marriage Agreement according to the interpretation I accepted above.

- [372] At trial and in her amended pleadings, R.L. did not argue that the Marriage Agreement is unfair, despite earlier drafts of her pleadings arguing unfairness. She asks the Court to uphold the Marriage Agreement.

- [373] In *Gershkovitch v. Bailey*, 2021 BCSC 2065, Justice Veenstra helpfully described the onus to demonstrate unfairness and the starting point for the analysis at para. 270:

The burden is on the respondent to establish the unfairness of the Marriage Agreement: *Dobson v. Dobson*, 2016 BCSC 1874 at para. 44; *H.S.S. v. S.H.D.*, 2018 BCCA 199 at para. 57. The analysis does not start from a presumption that equal division of family assets would be fair, but from a presumption that the division under the Marriage Agreement is fair, unless otherwise shown: *Dhaliwal* at para. 23; *H.S.S.* at para. 71. Ultimately, the goal is to strike an appropriate balance between deference to the parties' intentions and the assurance of an equitable result: *Hartshorne* at para. 47; *H.S.S.* at para. 57; *Dhaliwal* at para. 27.

- [374] As a result, such, as the party seeking reapportionment, the onus is on M.L. rebut the presumption that the Marriage Agreement operates fairly.

Did the Marriage Agreement accurately contemplate the current circumstances?

- [375] The first stage of the fairness assessment involves consideration of the extent to which the parties' current circumstances were within the range of their contemplation at the time the Marriage Agreement was made. At para. 43, the Court in *Hartshorne* explained the relevant standard for foreseeability through reference to its prior decision in *Miglin v. Miglin*, 2003 SCC 24. In *Miglin*, the Court stated:

- [88] We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.
- [89] We stress that a certain degree of change is foreseeable most of the time. ... The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.
- [376] It is not disputed that when the parties signed the Marriage Agreement, M.L. had accumulated significant assets through his business ventures and R.L. did not have any assets of notable value. Indeed, M.L. insisted on the agreement to safeguard his assets and prevent them from being treated as family property in the case of a breakdown of the marriage. He entered into the Marriage Agreement as a sophisticated business person with independent legal advice.
- [377] As drafted, the Marriage Agreement contemplated that R.L.'s entitlement to share in M.L.'s protected assets would increase the longer the marriage lasted up to a maximum of 50% after 25 years. It was M.L. who sought to protect his previously owned business assets from R.L.'s claims in the event the marriage was of short duration. The Marriage Agreement was signed at his insistence.
- [378] Despite some volatility in the relationship, the parties' personal circumstances remained fairly consistent throughout the marriage. At the time the Marriage Agreement was negotiated and signed, the parties had two children together and were cohabitating. R.L. filled the role of the primary caregiver and did not work outside the home. M.L. was the primary financial provider. These circumstances did not change meaningfully throughout the marriage.
- [379] There were, however, changes in the parties' financial circumstances that must be considered, namely: the substantial devaluation of M.L.'s ticket reselling venture, the corporate divorce with Mr. Corea, and transfer of 353 Delta into R.L.'s name to shield it from the CRA. The question is whether these are significant changes in circumstances from what could reasonably be anticipated by the parties at the time of negotiation, such that the Marriage Agreement no longer reflects the parties' intentions at the time of execution and the objectives of the FRA: Hartshorne at para. 43; citing Miglin at paras. 88-89.

- [380] I begin with the devaluation of M.L.'s ticket reselling venture. At the time of the Marriage Agreement, Showtime was a profitable, growing business with a self-declared value of \$3 million. By the time the marriage finally broke down, Showtime had been wound down and the Walters Report set the fair market value of Ticketworld at approximately \$42,000. This substantial devaluation is largely attributable to the Showtime's supplier defaulting before the 2010 Olympics, shifts in the global ticket reselling industry, and the impacts of the Covid-19 pandemic. For the following reasons, I am not prepared to find this devaluation, while significant, was unforeseeable such that the parties' original intent is not reflected in the outcome upon distribution.
- [381] M.L. is a savvy entrepreneur and the evidence supports that Showtime was an emerging business, seeking to disrupt the ticket reselling industry with new practices and levels of transparency. I am satisfied that the disruptions to the supply chain experienced during the Olympics and the broader shifts in the industry were within the degree of change that would have been objectively foreseeable when the Marriage Agreement was signed. Further, the provisions of the Marriage Agreement itself support that the parties actually contemplated the possibility of devaluation as it provides that R.L. would only receive a percentage of the increase of value of Showtime. Pursuant to the agreement, should the company fail to increase in value, or devalue as it did, R.L. was not be entitled to anything.
- [382] Conversely, I acknowledge that the Covid-19 pandemic, and its impact on the business, falls outside the degree of change that was foreseeable by the parties. However, as R.L. is not entitled to any value deriving from the ticket reselling ventures, I find this change has no impact on burden of proof in the fairness assessment.
- [383] With respect to the breakdown of the relationship with Mr. Corea and the subsequent division of real estate assets pursuant to the settlement agreement, I also am not persuaded that this could not have been anticipated. Changes to the real estate market and the division of assets with his business partner are circumstances that M.L. could have reasonably anticipated were a possibility. As I found regarding the ticket reselling venture, I find that the Marriage Agreement contemplated the possibility that the value of M.L.'s real estate assets would devalue, as R.L. was only entitled to a percentage of the increase in value, which is nothing.
- [384] Regarding the ticket selling and real estate ventures, the parties accurately anticipated the circumstances at the time of distribution and accounted for them in the Marriage Agreement. The intention was primarily to prevent M.L.'s assets, acquired before the marriage, from being treated as family property and to have R.L.'s sacrifices and efforts be compensated through gradual entitlement to certain assets or increases in asset value. As regards the businesses, the parties were living out their intention to keep M.L.'s existing assets separate. With the exception of some involvement in renovations, R.L. remained uninvolved in the finances of the ticket reselling and property ventures.

- [385] As regards the family home at 353 Delta and the associated mortgage, the circumstances at the time of distribution raise doubt as to whether the parties anticipated and accounted for how their situation would evolve over time. The Marriage Agreement provides that M.L. will "put [R.L.] on title of the family home, as an equal, joint tenant with a true right of survivorship within 12-months of the Date of Marriage". I accept that the parties' intention at the time of signing the Marriage Agreement, was that R.L. would become entitled to 50% of 353 Delta within one year.
- [386] In June 2014, approximately two and a half years after the Marriage Agreement was signed, M.L. transferred 353 Delta into R.L.'s name in order to shield it from the CRA. I found that, pursuant to Clauses 3.5 and 3.8 of the Marriage Agreement, this transfer constitutes a gift, such that 353 Delta became the sole and separate property of R.L. While a bare trust agreement was executed, the terms of which provided that R.L. was to be entitled to 50% of the property and that the remaining 50% was held by her in trust for M.L., I found that M.L. could not rely on this bare trust agreement given its purpose, being to ensure he could both deny ownership when it suited him, and reclaim it when the CRA threat had passed.
- [387] I agree that the transfer of full legal title of the family residence into R.L.'s name resulted in a change of circumstances that is contrary to the parties' original intention. They parties did not amend the Marriage Agreement, despite the terms providing for revision; rather, M.L. relied on the bare trust agreement in attempt to prevent Clauses 3.5 and 3.8 from applying to the home. However, M.L. was the sole cause of this change in circumstances and he did so to improperly shield an asset from creditors. As such, I do not find this change in circumstances alleviates his burden to demonstrate unfairness to any meaningful extent.

Considering the factors enumerated in s. 65(1) of the FRA, does the Marriage Agreement operate unfairly?

- [388] Moving to the second stage, pursuant to Hartshorne, I can only vary the agreement if, in considering the s. 65(1) factors, I determine that the economic consequences of marriage breakdown were not equitably shared.
- [389] Turning to the factors set out in s. 65(1)(a)-(d) of the FRA, I conclude that:
- a) The relationship was of moderate length - between 10 and 11 years long;
 - b) The parties have lived separate and apart since June 2017, which was approximately six years at the time of the trial. During this period of time, R.L. lived at 353 Delta while M.L. paid the mortgage payments;
 - c) The majority of the assets subject to the Marriage Agreement belonged to M.L. prior to the marriage. The key asset at issue in this fairness assessment, being 353 Delta, predates the parties' relationship as it was purchased by M.L. in 2000; and

- d) The properties subject to the Marriage Agreement were not acquired through gift or inheritance.

[390] I turn now to address the considerations set out in s. 65(1)(a) of the FRA. M.L. is financially independent and economically self-sufficient; he has been through the entirety of the parties' relationship. He entered the marriage with considerable assets, which he sought to protect through the Marriage Agreement. I am satisfied that M.L. will be able to maintain economic self-sufficiency, despite the property division and R.L.'s child and spousal support entitlements.

[391] As discussed above, R.L. entered the marriage with no assets and became almost entirely financially dependent on M.L. as the primary, full-time caregiver for the Children. R.L. has taken meaningful steps to regain financial self-sufficiency since the separation; however, this does not diminish the fact that her earning capacity is limited given her age and her time away from the workforce. I considered this limited capacity in awarding \$139,094 in spousal support and I am mindful of preventing double recovery on this basis. The awards of retroactive and prospective child support, pursuant to the DA, also recognize that the onus for parenting the Children has been, and continues to be, primarily on R.L. My awards in these areas address the need of R.L. to become economically self-sufficient; however, I find this factor weighs slightly against reapportionment.

[392] The factors set out in s. 65(1)(f) of the FRA are those relating to the acquisition, preservation, maintenance, improvement or use of the properties or the capacity or liabilities of a spouse.

[393] I do not find there are any relevant considerations with respect to the parties' "capacity".

[394] I consider that R.L. has been living in the family home with the Children since separation, while M.L. has been making the mortgage payments. The outcome of the Marriage Agreement, being that M.L. remains responsible for the mortgage on 353 Delta, while R.L. is entitled to full legal title, is concerning to me. In my view, it is inequitable that M.L. should be responsible for paying off the entirety of the mortgage on 353 Delta, despite R.L. retaining full legal title. He continued to make mortgage payments for the past six years. Had he paid spousal support instead, he could have deducted the support payments for tax purposes.

[395] In my view, this is not a fair outcome. In my view, balance between the intention of the parties and the objectives of the FRA is achieved through an order that each party be responsible for 50% of the mortgage encumbering 353 Delta. M.L. is to pay off 50% of the mortgage within 90 days of this order, unless otherwise agreed to by the parties.

[396] Looking at the impact of the Marriage Agreement as a whole, it undoubtably results in an unequal distribution of property and debt. M.L. is leaving the marriage with substantially less than he came into it with. Given his business hardships, this is hardly unsurprising. R.L. entered the marriage without any notable assets and, thus, unsurprisingly, is leaving

the marriage with more than she came into it with. However, she sacrificed her involvement in the workforce to care for the parties' children and to support M.L. business interests. Considering the factors in s. 65(1), I decline to exercise my discretion to reapportion any property; however, I reapportion the CIBC mortgage of approximately \$444,000, to 50/50 liability between the parties.

[397] In reaching my decision, I considered the impact of the Marriage Agreement together with my findings regarding child and spousal support being that R.L. is entitled to: monthly child support payments of \$1,735 from M.L. while all three daughters are children of the marriage; a lump sum of \$83,931 for retroactive child support; and a lump sum payment of \$139,094 for spousal support under the DA. It is my view that, despite the reappointed and existing liabilities, the combined entitlements will set R.L. on a path to financial self-sufficiency, while providing deference to the parties' intentions and without creating inequity between them.

Costs

[398] I understand that R.L. seeks special costs, or perhaps uplift costs, against M.L. as a result of his reprehensible behaviour in this family litigation including:

- a) swearing a false affidavit in 2019 to oppose her claim for a litigation advance, in which he misled R.L. and the Court about his ownership of 573;
- b) breaching the 2015 Asset Restraining Order;
- c) pressuring R.L. to release CPLs from title to certain property and then disposing of his interests in that property; and
- d) failing to provide proper financial disclosure, intentional obscuring his income, and diverting revenue from various companies to fund his start-up property management business.

[399] Special costs are "intended to express the court's disapproval of a party's conduct": *Hu v. Dickson*, 2015 BCSC 218 at para. 47 [Hu]. The Court must, however, "exercise restraint in awarding special costs and as such the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order": *Hu* at para. 48, citing *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.

[400] Cost were not fully argued.

[401] If the parties are unable to agree on a cost order, they may file written submissions, not to exceed ten pages each. R.L. shall file her submissions within 30 days after the release of these reasons and M.L. shall file his responsive submissions within 15 days thereafter. R.L. shall have a right of reply not to exceed three pages to be filed within five days after M.L.'s responsive submissions.

Conclusion

[402] Based on the foregoing reasons, and unless a payment arrangement is otherwise made by the parties, I make the following orders:

Divorce

- a) The parties are divorced from each other to take effect 31 days from this order.

Child Support

- b) That, pursuant to s. 9 of the Guidelines:
 - i. M.L., based on an income of \$131,452, pay to R.L. the sum of \$2,504/month on a prospective basis; and
 - ii. R.L., based on an annual income of \$35,544.32, pay to the respondent the sum of \$769/month on a prospective basis.
- c) That M.L. pay a retroactive child support payment of \$83,931.00 payable forthwith from the funds held in trust with GVR Law.

Spousal Support

- d) M.L. shall pay a lump sum spousal support award of \$139,094.00, covering all retroactive and prospective spousal support, payable within 30 days of this order or on such other date as the parties agree.

Asset Division

- e) R.L. shall retain 353 Delta as her sole and separate property.
- f) That M.L. shall pay a total compensation to R.L. of \$374,788.69 within 60 days of this order or on such other date as the parties agree. This sum is comprised of:
 - i. \$241,330.75 for 342 Delta;
 - ii. \$86,837.14 for the 210 Street property;
 - iii. \$932.80 for the Lexus;
 - iv. \$2,332 for the Sea Ray boat;
 - v. \$20,000 for the Croatian properties;
 - vi. \$2,300 for the travel trailer; and
 - vii. \$21,056 for Ticketworld.
- g) M.L. shall do a tax-free spousal rollover of \$6,236.38 to R.L. within 30 days of the date of this order, and shall retain the remainder of his RRSPs thereafter.

- h) That, other than the above, the parties shall retain all other assets that they legally or beneficially own.

Debt Division

- i) Each party shall have a joint 50/50 liability for the secured CIBC mortgage on 353 Delta. M.L. shall pay off his 50% liability within 90 days of this order or on such other date as the parties agree.
- j) Each party shall have a joint 50/50 liability for the secured Home Trust debt of approximately \$250,000, or approximately \$125,000 each. R.L.'s \$125,000 will be set off against amounts owing by M.L. under this order.
- k) From the close of trial until judgment, the secured Home Trust arrears are to be brought up to date and ongoing monthly payments made from the funds held in trust with GVR Law.
- l) M.L. shall retain responsibility for any debts to CRA in his name or owing by any of the corporate entities and shall indemnify and save R.L. harmless for any such debt.
- m) M.L. is responsible for R.L.'s credit card debt to the RBC in the approximate amount of \$28,000. He shall take such steps as are necessary to pay the debt and ensure that the judgment registered against R.L. is removed.
- n) That, other than the above, the parties shall retain all other debts in their name and shall indemnify the other.

Other

- o) Payment of the Parenting Coordinator's retainer will be made from the funds held in trust with M.L.'s counsel.

[403] Given the complexity and lack of clarity surrounding M.L.'s financial and corporate arrangements, the logistics of how the above orders will be complied with are not clear to me. In particular, I am concerned about how the CIBC mortgage in M.L.'s name will be discharged given that both parties are now jointly liable for the outstanding debt. Presumably, R.L. will need to refinance 353 Delta. There are various possible ways this may be achieved. For example, M.L. could pay off the mortgage in full, including R.L.'s share of the liability pursuant to the order (approximately \$222,000 as of June 2023), in exchange for R.L.'s waiver of the lump sum spousal support award and the arrears of child support (\$223,025).

[404] I encourage the parties, through their counsel, to attempt to negotiate an arrangement by which the above debt and payments will be satisfied in compliance with my rulings. If the parties are unable to reach an agreement as to how and when M.L. will satisfy his payment obligations and how the mortgage will be dealt with, the parties have leave to appear before me to discuss this further.

"MacNaughton J."

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Prepared on 28 October 2026 · Esheria