
CANADA / JUDGMENT

S.A.T. v. D.I.T.

2022 BCSC 1176

COURT

Supreme Court of British Columbia

DECIDED

12 July 2022

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2022 BCSC 1176 S.A.T. v. D.I.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.A.T. v. D.I.T.,

2022 BCSC 1176

Date: 20220712

Docket: E181700

Registry: Vancouver

Between:

S.A.T

Claimant

And:

D.I.T

Respondent

Corrected Judgment: The text of the judgment was corrected on October 7, 2022.

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Claimant:

Peter T. Busch

Counsel for the Respondent:

Clare Ashclarke

Place and Dates of Trial/Hearing:

Vancouver, B.C.

January 6-10, 13-14, 16-17, 2020

November 16-20, 2020

December 14-18, 2020

January 5-8, 2021

April 6-9, 12-16, 2021

May 10-14, 2021

August 30-31, 2021

October 20-21, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 12, 2022

I. Introduction

- [1] This is a high conflict family matter involving the claimant's entitlement to spousal support and an unequal division of family property and debt. Also, at issue is the respondent's claim that various assets are excluded property which he earned and acquired before the marriage. In addition, the claimant, Ms. T, alleges family violence against the respondent, Mr. T, which informs the issues of spousal support and reapportionment; these allegations are largely contested by Mr. T.
- [2] The parties met in 2006 and started living together shortly thereafter. They were married approximately two years later in August 2008, separated in August 2017, and were divorced in 2018.
- [3] There are no children of the marriage, although, Ms. T has two children from a previous relationship. Her daughter, M, and her son, K, were children when the parties started living together and are now adults. There is no claim for any form of child support for M or K. At the time of trial, M was 25 and K was 23.
- [4] Ms. T was 53 years old at the time of trial and began living on disability assistance during the course of the trial. Mr. T was 70 years old at the time of the trial, has been unemployed since the parties separated in August 2017, and has been living on a modest pension income.

II. background Facts

- [5] Ms. T was born in Vietnam on December 5, 1967. She later moved to Taiwan. Although it is not clear how long she resided in Taiwan, it appears she lived there for between 15 and 18 years before moving to Canada in 2004. While she resided in Taiwan, Ms. T had a relationship with a Mr. S, who is the father of M and K. She described herself as the "second wife" or mistress to the father of M and K, which she explained is culturally accepted in Taiwan. She stated that as the "second wife", she was unhappy with the way she was treated.
- [6] Mr. T was born on January 3, 1951 in the UK. He immigrated to Canada in August 1993 with his previous wife, LT. He separated from LT in June 2006, after 33 years of marriage. Mr. T and LT had two children who were already independent adults at the time they separated.
- [7] Ms. T and her children first arrived in Canada on a visitor's visa in about November 2004. Ms. T left Taiwan without advising her children's father, Mr. S. She later married her first husband, Mr. D, who sponsored her and her children's immigration to Canada. Ms. T and Mr. D were married for approximately 1.5 years before they separated and later divorced.
- [8] Mr. T testified that Ms. T did not have much savings when he met her. He states Ms. T referred to Mr. D as her "paper husband" and that she had to pay him \$40,000 CAD in a series of installments in order to obtain her permanent residency status. Ms. T denies this is the case, and testified that she had substantial savings that she brought with her from Taiwan, including funds that she obtained from selling property and furniture there.
- [9] Despite court orders requiring disclosure of her bank accounts, Ms. T's financial disclosure was not transparent, candid, or complete. The parties kept separate bank accounts and there was no co-mingling. Ms. T's nondisclosure made it very difficult for the court to discern Ms. T's income and financial situation throughout the time she lived with Mr. T. I will address the implications of this nondisclosure later in these reasons.
- [10] Ms. T testified that she had her own funds when she arrived in Canada. However, she also testified that she separated from Mr. D (who she married shortly after arriving in Canada), because the couple did not have enough money and he did not approve of her working at a massage parlour. Ms. T testified that she first started working at the massage parlour as a cleaning lady. The owner of the premises then trained her to give massages. Ms. T was living on her own and separated from Mr. D when she met Mr. T at the massage parlour.
- [11] Ms. T acknowledged having sex and being paid for sex by Mr. T when he was a client of the massage parlour. She stated that "he was the only one" that paid for sex. Mr. T also stated that he had never paid for sex before meeting Ms. T. Mr. T was married at the time to LT. He testified that his wife was furious when she found out about Ms. T, and she insisted he leave the family home. He did so, and moved in with Ms. T.

- [12] Mr. T recounts that he visited Ms. T several times at the massage parlour and paid her in exchange for sexual services. He explained that his feelings for her developed, and he fell in love with her. The parties began living together, along with Ms. T's two children, in about June or July 2006. M and K were 10 and 8 years old at that time, respectively.
- [13] Mr. T testified that Ms. T also had her own massage service business on the side from approximately 2005, which she advertised in *The Courier News* and a Chinese newspaper. Mr. T explained he did not want her to continue with this business and, with his encouragement, she began a nanny business instead.
- [14] There is a dispute between the parties as to when the nanny business began. Mr. T testified that this business started in late 2006 and continued throughout her married life with Mr. T. He described the business as a full-time business. Mr. T also noted that Ms. T was very enterprising; she did some bookkeeping and exported collectable cookware that she bought on the internet and sold in Taiwan for a profit. Ms. T testified that the book-keeping and cookware enterprises earned relatively little income.
- [15] Ms. T testified that she began the nanny business in 2008. She testified that it was not really her business but that of Mr. T. Mr. T explained he was working at a demanding executive level job as a vice-president for a national organization in western Canada and did not have time to run the nanny business. He testified that it was Ms. T's idea to start the nanny business, and that she told him she had experience running a nanny business in Taiwan with Mr. S. Ms. T denies this was the case.
- [16] Having considered the evidence as a whole, I find that Ms. T did in fact run her own nanny business during the marriage, with some assistance from Mr. T from time to time. Ms. T admitted she began the nanny business in 2008, but I find it more likely than not that Mr. T's recollection of when Ms. T started earning income in this regard is more reliable, and that she began that business before 2008.
- [17] Mr. T was gainfully employed for the majority of the marriage, with the exception of two periods of unemployment. Mr. T candidly acknowledged that he drank alcohol excessively during his two periods of unemployment but he denied abusing alcohol throughout the marriage. He testified that he "consumed too much alcohol when [he] lost [his] job" in August 2012. He explained that there was significant downsizing within his organization due to the 2008 recession and the decline in housing starts. While he maintained his position longer than most employees at his organization, and was the last vice-president who worked at his organization in 2012, he eventually lost his job in May 2013.
- [18] Mr. T testified that, after losing this job, he became very depressed and started self-medicating with alcohol. He explained that this pattern of alcohol abuse continued until approximately December 2013, when he entered a residential rehabilitation facility. Mr. T recalled that Ms. T came to visit him there.

- [19] Mr. T further testified that after his rehabilitation treatment, he found another job and stopped abusing alcohol. However, he testified he started drinking excessively again in 2017 when he lost that job.
- [20] Mr. T testified that when he began to drink heavily again in 2017, he drank about a bottle of wine in the evenings. Ms. T, M, and K each testified that Mr. T drank heavily and liked to drink vodka, not just wine.
- [21] Mr. T testified that in 2018, after the parties separated, he made a New Year's resolution not to drink on a daily basis or by himself. He said he is not longer abusing alcohol. He acknowledged that when he was drinking, he had less patience and tended to argue.
- [22] Neither party has worked since their separation in 2017. Each party received a \$100,000 distribution from the net proceeds of the sale of their family home in 2018

A. History of these Proceedings prior to Trial

- [23] Ms. T commenced these proceedings on October 6, 2017. She also obtained a protection order and an ex parte order that prohibited Mr. T from disposing of property at that time. The order prohibiting Mr. T from disposing of property was varied and partially set aside by an order granted on December 22, 2017 by Master Caldwell (as he then was) ("2017 Caldwell Order").
- [24] On September 10, 2018, Justice Voith issued a consent order for the interim distribution of property from the net proceeds of sale of the former family home ("2018 Voith Order"). Each party received an interim payment of \$100,000. This order provided that Mr. T was to receive compensation on a without-prejudice basis for various family debts and expenses which he incurred after the parties separated in August 2017.
- [25] A divorce order was granted on October 23, 2018.
- [26] On May 30, 2019, the parties appeared before Justice Baker who granted an order in favour of Mr. T, requiring Ms. T to produce documents and dismissed her application for a new protection order against Mr. T. During the trial Ms. T was also ordered to produce various documents but her disclosure was incomplete.

B. Allegations of Family Violence and Summary of Findings

- [27] Ms. T alleges that she and her children were the victims of family violence and alcohol abuse throughout the marriage. Mr. T largely denies these allegations.
- [28] I have concluded that there were incidents of family violence in the home on repeated occasions. Set out below are those incidents where the evidence before me established, on a balance of probabilities, that incidents of family violence occurred.

[29] I have also set out incidents in 2013 and 2017 that led to assault charges against Mr. T which have not been proven, as well as an incident in September 2015 where Ms. T called the police to retrieve a laptop from Mr. T's vehicle.

[30] The summary of evidence below is not intended to be exhaustive. However, I assure the parties that I have carefully reviewed and considered all of the evidence tendered over the course of this lengthy trial.

1. The October 25, 2009 Incident

[31] Ms. T testified that the first incident of family violence occurred on October 25, 2009. That evening, Ms. T became upset at Mr. T; they had an argument after she accused him of breaking their home office printer. Ms. T testified that Mr. T threw a water bottle at her. The police were called.

[32] Ms. T agreed on cross-examination that she was not physically harmed by Mr. T and she acknowledged she told the police that Mr. T was a "good husband".

[33] Mr. T recalled this argument, noting that Ms. T had blamed him for breaking the printer. He acknowledged he had consumed alcohol that night but testified he was not intoxicated. He recalled that Ms. T had called the police, stating that he had sworn at her and that he had thrown a water bottle at her. Mr. T testified that he did not throw a water bottle at her and did not swear at her; however, he admitted calling her a prostitute.

[34] Four days after this incident, Mr. T apologized, in a handwritten letter, in which he wrote:

Dear [first name of Ms. T omitted]

I am very sorry that I hurt you. I promise that I will never remind you about anything in the past.

I promise that I will never hit you or hurt you.

I love you very much.

[35] Mr. T recalled speaking to the police about the incident. He testified he followed the police's advice to spend the night in a hotel, in order to allow the situation to settle down.

[36] While it is clear to me that the parties had heated exchanges that evening and likely on other evenings as well, calling Ms. T a prostitute in the manner in which Mr. T did was clearly intended to shame her and was emotionally hurtful. Such name calling is a form of family violence. To Mr. T's credit, he apologized on this occasion, and he was genuinely remorseful during his testimony. Nevertheless, he also admitted calling her a prostitute more than once (i.e., a "couple of times").

2. The May 31, 2013 Incident

- [37] The next incident in which the police were called was four years later on May 31, 2013, several months after Mr. T had lost his job as the vice-president of the national organization he had been employed with for many years.
- [38] Mr. T testified that on this evening, Ms. T's son, K, had not come home from school at his regular time and had not called Ms. T on his cellphone. As the evening unfolded, Ms. T became more and more agitated and concerned. Mr. T recalled that he told Ms. T that he thought she was too lenient and that her son needed more discipline, including learning to call home when he would be late. Mr. T testified that, at that point, Ms. T got very angry with him.
- [39] Mr. T testified he could not find his cell phone after this conversation and that Ms. T admitted to him she had hidden it. He stated that, at times, Ms. T would deliberately hide his belongings. Eventually, Mr. T used the home land-line phone to call his cell phone and found it hidden in the laundry hamper.
- [40] Ms. T denies she hid the phone in the laundry hamper.
- [41] Ms. T acknowledged on cross-examination that she called the police that evening because she was worried about K who had not returned home from school. She also testified that Mr. T was intoxicated and accused her of hiding his cell phone, when she had not done so. She testified she called the police because he followed her into the walk-in closet to get his cell phone away from her and had twisted her hand. Ms. T also testified that Mr. T choked her as she tried to get out of the closet.
- [42] Mr. T denied harming or choking Ms. T. He testified that later that evening, around midnight, K finally arrived home. Mr. T recalled that Ms. T walked into her son's bedroom, started yelling at him, and that she and K had a very loud argument. According to Mr. T, she then left K's room, walked over to Mr. T, and pointed at him and said: "now, I'll fix you" and phoned the police. When the police arrived, Ms. T told the police that Mr. T tried to choke her. Mr. T testified this was "totally untrue". He testified he did not harm Ms. T in any way.
- [43] Mr. T was charged with assault. The charges were later stayed.
- [44] I have reviewed and considered the conflicting and contradictory evidence before me in a effort to discern what actually happened that evening. Yet, I am unable to conclude, on a balance of probabilities, that Mr. T assaulted, choked, or harmed Ms. T. The factual matrix underpinning this incident provides an insufficient basis upon which to draw these conclusions.

3. The October 31, 2013 Incident

- [45] At this juncture, Mr. T had moved back home. He was still waiting for the disposition of his May 31, 2013 assault charge. Mr. and Ms. T acknowledged that Mr. T was prohibited from living with Ms. T under the terms of his bail, which arose from his earlier assault charge in May of that year.

- [46] Mr. T was still unemployed at this time and was looking for work. He asked Ms. T if he could come back home. Ms. T agreed. She said he needed to use the home office to apply for jobs.
- [47] Mr. T testified that, on the evening of October 31, 2013, he and Ms. T had an argument. He acknowledged that he "started the argument", stating that he could not find his razor; he thought Ms. T had purposely hidden it. During this argument, Ms. T went into her office and locked the glass door behind her. Mr. T testified that he "foolishly wanted to continue the argument" and so he took a butter knife to open the latch on the door to the home office. The children were in their bedrooms.
- [48] Ms. T testified that Mr. T was intoxicated and she locked herself in the office because she felt threatened. She saw he was trying to open the lock on the home office door with an 8-inch kitchen knife, not a butter knife. She testified she felt afraid for her life when she saw he was trying to get into the office. She started screaming and her daughter came out of her room and called the police. Ms. T testified that while in the home office, after Mr. T tried to open the locked door, she saw him put the knife down on the kitchen counter.
- [49] M testified that "there was one time" when she heard her mom scream and she saw Mr. T with a knife and he then put the knife down; she thought he put the knife on the counter or cardboard located next to the counter. She testified he was smiling when he walked away.
- [50] M was cross-examined on this evidence on the basis of the content of a police report, made on the evening of the incident, which stated that she told the investigating officer that she did not see the knife in Mr. T's hand. She also testified that on the evening of October 31, 2013, after the incident, she saw the knife sitting on the counter. M agreed that she did make these statements to the police on the night of October 31, 2013 and that she later gave a revised statement to the police. She admitted she changed her evidence four years later in 2017, when she told the police that she saw Mr. T holding the knife and then saw him put the knife down on the counter.
- [51] Mr. T denied threatening Ms. T with the knife. He acknowledged that he was "drunk" or "slightly inebriated" at the time. He testified he tried to slip the butter knife in the latch on the office door to unlock it but stated he did not threaten Ms. T with the knife.
- [52] Mr. T also testified that neither M nor Ms. T could have seen him put the knife on the kitchen counter. He testified that because of the way the office was set up, there were two very large and tall filing cabinets that blocked the view to the kitchen counter. There were also rails with pots and pans which blocked the sight line. Mr. T further explained that M could not have seen him with the knife, as she was in her bedroom at the time of the incident.
- [53] As a result of the October 31, 2013 incident, Mr. T was arrested and charged with assault with a weapon, as well as breaches of his terms of bail.

- [54] Ms. T testified that Mr. T urged her not to proceed with her allegations of assault with a knife and asked her not to testify against him. I accept her evidence in this regard.
- [55] Mr. T testified that the assault with a weapon charge was stayed; however, the court proceeded with the charges relating to his breaches of his terms of bail. Mr. T explained that the hearing regarding these breaches proceeded in January 2014, and that he received a conditional discharge and one year's probation.
- [56] While I am unable to discern on a balance of probabilities, given the inconsistent and conflicting evidence before me, whether Mr. T was carrying a butter knife or a kitchen knife in his hand when he was attempting to unlock the office door, I find he was intoxicated at the time and that his actions were aggressive and intimidating. Had he not attempted to force himself into the office, my conclusion may have been different. By his own account, however, he pursued the argument and attempted to break into the office even though Ms. T had locked herself inside it. In addition, I accept Ms. T's evidence that she was frightened by his actions. Accordingly, I find that Mr. T's actions were threatening, aggressive, and a form of family violence.
- [57] While no physical harm came to Ms. T during this incident, this is a clear instance of a subset of family violence contained within the Family Law Act, S.B.C. 2011, c. 25 [FLA] referred to as "psychological or emotional abuse"; the FLA lists some examples of this type of family violence, including "intimidation, harassment, coercion or threats".
- [58] Ms. T clearly indicated during the argument that evening that she no longer wanted to engage with Mr. T because he was intoxicated. Whether or not an eight-inch kitchen knife or a butter knife was used, it is clear on the evidence that Mr. T pursued her and tried to break into the locked office. This is an objectively threatening and intimidating scenario meeting the definition of family violence.

4. The December 6, 2013 Incident

- [59] Ms. T, M, and K each testified about an incident that involved M's then boyfriend, E, on the evening of December 6, 2013. M testified that E was staying at the condo on the night of the incident and that they had been together as a couple for three years. She confirmed E would spend the night and sleep in her bedroom.
- [60] M testified that on that evening, she, E, and Ms. T were hiding in her bedroom. She testified that Mr. T would always come home from work sober but that, almost every night, he would go out again and return drunk. M testified that Mr. T "gets really, really scary when he drinks".

[61] M also testified that her mother hid and slept in her bedroom with her often, "like every other night". She explained that the bed in her room was a bunk bed. She also stated that sometimes her mother would sleep in the living room. She stated that, because her bedroom did not have a lock, she would barricade her door with an ironing board or other items. The evidence also established that M's room had a bunk bed to accommodate nannies, who Ms. T occasionally brought into Canada as part of her business.

[62] M testified that, on the night in question, Mr. T came home intoxicated. She says he started looking for the dog. He insisted on coming into her bedroom. She explained that because there was no lock on her door, E stood in front of the door to protect her, and tried to prevent Mr. T from entering. She said that E got a scratch on his face when Mr. T pushed his way into her bedroom:

When [Mr. T] gets really bad, my mother would hide in my room, and like we all just hide in our room because we know he's going to start trouble. And there's no lock on my door, so we would always put chairs up or ironing board to block the door from him, just in case, like, you know, he come in or something like that. And then at that time, my ex-boyfriend was staying with us, and [Mr. T] was trying to get -- get into my room because he was looking for the dog, and then my -- my ex-boyfriend was trying to protect me and my mother, at the time, and stood in front of the door. And then [Mr. T] reached in to attack him, and then my ex-boyfriend got scratches all -- a scratch across his face.

[63] K testified that earlier that evening, his mother and Mr. T had an argument. He said that Mr. T was "already drunk" and "so was a lot more aggressive". K stated that when Mr. T pushed open the door to M's bedroom, E was there, and "I believe scratched his face". K testified: "I can't recall if he did end up punching him or not. I know he was aggressive at that point".

[64] K said M had a chair against the door. When he heard the noise, he went into M's bedroom and gently shoved Mr. T aside to protect his mother who was also in the bedroom.

[65] Ms. T's evidence of the events was very different from that of her children. While she agreed that Mr. T was looking for the dog and that she told him that she had the dog in M's bedroom, she testified that Mr. T came into the bedroom and poked E's eyes and scratched his nose; she said he also grabbed E, and started choking him. She recalled that K then came out from his bedroom and that K tried to release E from the choke-hold. She testified she called the police to report the incident.

[66] On cross-examination, Ms. T changed her evidence. She testified that Mr. T did not choke E; rather, she said that he poked and scratched E's face.

[67] E did not testify.

[68] Mr. T testified that he did not have an argument with Ms. T on December 6, 2013 and that he did not strike or choke E, or attempt to scratch his face or gouge his face or eyes. He also stated that he had no intention of harming E or anyone else.

- [69] Mr. T testified that when he arrived home that evening, he did not see anyone at first and so he went to find the dog. He did not know how long the dog had been alone. He said that when he came home and the dog was alone, he would take the dog out for a walk.
- [70] Mr. T also testified that he did not know that he had hurt E when he opened the door to M's bedroom. He stated that E had never told him that he had harmed or hurt him when he opened the door.
- [71] Mr. T testified that M and E spent a lot of time in her bedroom, and that Ms. T would sit in there and chat with them sometimes. He stated that M did not barricade the bedroom door, that night or any other nights.
- [72] Based on the various testimonies at trial, I find it more probable than not that, when Mr. T pushed his way into M's bedroom, the bedroom door struck E in the face as E was pushing against the door to keep it shut. I also find Mr. T was likely intoxicated at the time and pushed the door open as E was trying to keep him out.
- [73] I do not accept Ms. T's testimony that Mr. T attempted to choke E or deliberately gouge his eyes. Nevertheless, I am of the view that, had Mr. T not been drinking alcohol that night, it is less likely he would have persisted in pushing the bedroom door open the way he did. I find that Mr. T forced his way into M's bedroom and that this was an intimidating, aggressive and unacceptable act.
- [74] As noted above, Mr. T attended a residential rehabilitation facility to address his excessive drinking shortly after this incident.
- [75] He started a new job approximately three months later, in March 2014.

5. The May 19, 2015 Incident

- [76] There is no evidence of police involvement with the parties in 2014 or until May 2015. During the morning of May 19, 2015, two witnesses called 9-1-1 and reported a physical dispute between the parties. The police report provides narrative context: two witnesses reported that a female was pushing, punching, and chasing a male, while trying to grab a set of car keys from him. Mr. T recalled this interaction with Ms. T. Not being aware that the police were called, Mr. T continued with his day and drove to his place of work before the police arrived at the scene.
- [77] Ms. T testified that she lost her keys. She claimed that Mr. T purposely took her keys from her. She stated that he insisted he had not taken her keys and so she suggested they go to the parking lot together and check whether her keys were in his car. Mr. T refused and said that her keys were not in his car. She testified that his refusal to cooperate made her suspect he must have had the keys. She said she put her hands in Mr. T's pockets to check if they were there but Mr. T resisted. She testified Mr. T grabbed her hand really hard and while she felt for her keys in his pocket. She says he twisted her thumb.

- [78] Ms. T testified she called the police. Ms. T was not, however, the person who reported the incident to the police.
- [79] Ms. T testified that when the police arrived and asked where Mr. T was, she did not tell the police officer that Mr. T had gone to work. She explained that she did not want the police to arrest Mr. T at his office.
- [80] On cross-examination, Ms. T agreed she pushed Mr. T and chased him during the incident but she denied punching him.
- [81] Mr. T testified that he did not hide Ms. T's keys and that it was not unusual for Ms. T to misplace her keys. He did not recall that Ms. T asked to search his car for the keys or that she had suggested to him that her keys were in his car. He only recalled that Ms. T accused him of hiding her keys.
- [82] Mr. T testified that Ms. T followed him out of their condo and on to the street and tried to twist the key fob and key from his hand. Mr. T testified that Ms. T started to hit and punch him but he did not hurt her. He recalls there were people around them who witnessed the incident.
- [83] Mr. T testified that he did not know there was a police record concerning this incident until it was disclosed during these proceedings.
- [84] Mr. T confirmed that the police did not come to speak to him about the incident and did not pursue the matter further.
- [85] I find that in this instance, Ms. T was the aggressor. I do not find her version of events credible or reliable. I accept that in this instance, Ms. T struck Mr. T, and that she was the aggressor.

6. The September 20, 2015 Incident

- [86] Ms. T testified that while she was out the evening of September 20, 2015 having dinner with M, she received a call from Mr. T. She testified he was upset that she was out having dinner with M and threatened to smash the home office. She testified that when she returned home, she was upset because she could not find her laptop, the desktop computer, or her printer; she said the office was a mess. She found Mr. T "passed out" in his bed. At approximately 10:30 p.m., M called the police on behalf of her mother.
- [87] The police attended the family home and found Mr. T sleeping. They did not wake him up or speak to him.
- [88] Ms. T agreed on cross-examination that the police helped her to retrieve her laptop from Mr. T's vehicle. She also said that she retrieved the desktop computer and printer from Mr. T's car as well. She claimed Mr. T broke the desktop computer. She said she retrieved each of these items with the police.

[89] The police report stated that: "[s]he had reported the incident to police only to have them assist her in retrieving it [i.e., her laptop] from his vehicle". This statement is consistent with Ms. T's evidence on cross-examination that she called the police so that she had "a witness" that Mr. T took her laptop.

[90] The police report also stated that:

When asked if there were safety concerns, [Ms. T] responded "No" and did not want police to remove [Mr. T]. She only wanted her laptop.

[91] The police report also stated that a police constable "explained to [Ms. T] that police could not assist in retrieving personal property but would assist if she was fearful of her safety or if there was any violence". In response to these statements in the police report, Ms. T testified on cross-examination that she was fearful for her safety.

[92] The police report stated that Ms. T "insisted" Mr. T "had not made threats towards her" and that "[s]he was comfortable with him spending the night as long as she got her laptop back." On cross-examination Ms. T admitted that Mr. T did not make threats to her personally that evening. She also admitted that she told the police that she was comfortable with him spending the night as long as she got her laptop back.

[93] Ms. T was cross-examined further on the following statement in the police report: "[t]he office space was intact and it appears only a stack of paper was knocked off the desk".

[94] Ms. T's evidence on this point was at points evasive and unresponsive. She stated repeatedly that she had "no comment". She also took issue with the accuracy of the police report; she testified that Mr. T destroyed the office. She referred to a photo on her cellphone that she said showed what actually happened; however, she confirmed that she had not disclosed the photograph in the course of the litigation. Counsel for the parties considered the disclosure issue and agreed it was not proper to permit disclosure of the photograph at that stage of the trial.

[95] Ms. T also relied on another photograph of the office, which was on the record, and taken at 12:13 a.m. on September 21, 2015. I am satisfied this photograph was taken after the police had arrived at the family home, and inspected the office. In any event, I am not able to draw any reasonable inferences or conclusions from this photograph. I am not aware of what the office looked like prior to this incident or whether it depicts what the police actually saw or recorded.

[96] Ms. T agreed on cross-examination that the police were called even though Mr. T was asleep when she got home. She also admitted she did not know whether Mr. T had been drinking that night.

[97] Ms. T admitted on cross-examination that when the police arrived she knew where Mr. T's car keys were, she retrieved them, and the police accompanied her down to Mr. T's car to retrieve the laptop. Ms. T was cross-examined on the question of whether the printer and

desktop were in Mr. T's vehicle. The police report repeatedly refers to the laptop, and the laptop being retrieved from Mr. T's vehicle but the report made no reference to a desktop computer or a printer. Ms. T insisted that Mr. T had also taken the desktop computer and printer and that all three items were retrieved from the vehicle.

- [98] Ms. T was cross-examined on a portion of the police report that stated that police had "determined the story had been exaggerated and [Ms. T] only needed assistance to retrieve her laptop from [Mr. T's] vehicle." Ms. T did not agree with this characterization.
- [99] The police nonetheless recommended that, based on the reported incident, Ms. T, M, and K spend the night elsewhere. She, M, and K spent the night at a hotel.
- [100] Ms. T acknowledged the police report provided that "PC's advised [Ms. T] to phone police tomorrow if she had any concerns about returning home". Ms. T stated she could not recall if she called the police the next day. There is no record Ms. T made a follow-up call to the police.
- [101] Mr. T confirmed he was not aware that the police were called that evening or that that they attended the family home. He testified that he did not make any threats or make a mess of the office or damage it. He denied he took the printer or desktop. Mr. T acknowledged, however, that he took Ms. T's laptop and that he told her he would return it after Ms. T replaced his iPad which she had broken. He testified that when he arrived home, he found his iPad was smashed and this was the second time this had happened. Mr. T added that on three prior occasions Ms. T had intentionally smashed his cell phones.
- [102] Mr. T stated he only had Ms. T's laptop in the trunk of his car. He testified that he did not take the desktop or printer.
- [103] No criminal charges were laid and this incident was not pursued by the police.
- [104] I am not satisfied, on a balance of probabilities, that Mr. T uttered threats or was violent, physically or otherwise, that evening. Nor does the evidence establish he was intoxicated that evening.

7. The August 21, 2017 Incident

- [105] The parties have categorically different versions of the events of August 21, 2017, save that they both agree the dispute between them occurred in the morning and they were the only ones in their condo at the time.
- [106] Both parties testified that Mr. T was asleep in his bed and Ms. T came into the bedroom to wake him up. Mr. T recalled that she was very angry because their dog had vomited during the night; Ms. T blamed Mr. T. Mr. T stated he told Ms. T that he would clean up the dog's vomit after he got up. Mr. T testified that Ms. T was so agitated that she hit him in the eye with a water bottle. He testified she also tried to hit him a second time and, when he tried to swipe the bottle away, he accidentally hit Ms. T. He stated that he then walked into the master suite bathroom, Ms. T followed him into the bathroom and continued yelling at

him. Mr. T then went back to bed.

[107] Ms. T called M and asked her to call the police, which M did.

[108] Mr. T recalled that, when the police arrived, they walked into the apartment and into the bedroom, handcuffed him, and moved him to the front room. He was taken to jail, charged with assault, and released the next day on bail, with terms prohibiting him from going to the family home or having any contact with Ms. T except to remove his belongings. Mr. T. moved out of the family residence and the parties permanently separated on that day.

[109] Ms. T testified that before the incident, she was sitting on the massage chair in the bedroom while he was in bed. She told Mr. T that their dog was sick because of what he was feeding it. She testified that Mr. T got upset with her, got out of bed and slapped her twice. She denies hitting him in the face with a water bottle.

[110] Ms. T also testified that she fell down after he slapped her and that Mr. T then kicked her buttocks as she was trying to get up. She testified she fell down a second time and then crawled to the living room to get her cell phone. She also testified that she ran out of their condo with Mr. T chasing her.

[111] On cross-examination at the trial before me, Ms. T was taken to the transcript of her evidence at Mr. T's provincial court assault trial held on January 29, 2018. During her evidence before the provincial court, Ms. T did not mention being kicked by Mr. T and testified that she did not crawl away after being slapped but ran to get her cellphone in the living room.

[112] Mr. T denies slapping Ms. T, or purposely hurting her in any way. He testified he did not chase her. He testified that Ms. T was the aggressor and that she had struck him on previous occasions.

[113] Ms. T testified on cross-examination that the police report was accurate when it said "observed a slight redness to the right side of [Ms. T's] face, and possibly a bit of swelling". During cross-examination, Ms. T added that her neck and shoulder area also hurt. There was no mention of a neck or shoulder injury in the police report. On cross-examination Ms. T confirmed those were the only injuries she sustained; when pressed further, she also stated that she could not remember whether Mr. T kicked her.

[114] Mr. T testified that he got a black-eye when Ms. T struck him with the water bottle that morning. He produced a photograph which he took of this injury at his lawyer's suggestion. He testified that he believed that Ms. T orchestrated this incident intentionally and that she had an exit plan to leave him within a couple of days of his severance pay running out. He stated he felt she left him when he was no longer of any use to her financially.

- [115] Having considered the evidence of both Ms. T and Mr. T at the hearing before me, I am unable to conclude on a balance of probabilities that Mr. T intentionally hit Ms. T that morning. Having regard to the evidence given by Ms. T under oath before the provincial court, I do not find Ms. T's testimony consistent or reliable in regard to what transpired between the parties that morning.
- [116] Mr. T stated that after Ms. T testified at the provincial court trial relating to his assault charge, after Ms. T's cross-examination, and during the lunch break that day, the crown prosecutor offered to resolve the matter by way of a Peace Bond. Mr. T explained he felt he was not guilty but "reluctantly" agreed to accept the Peace Bond, on his lawyer's advice, as it was a "guaranteed" outcome.
- [117] I should note that in each of the incidents summarized above, and as I discussed with counsel, the medical records or police reports were admitted as business records that provided narrative context, but were not admitted for the truth of their contents unless the content in question was accepted by a witness under oath. Where conflicting evidence obscured what actually occurred in regard to any given incident, I have considered the evidence as a whole in making my findings of fact. Admittedly, this was a very challenging task.

C. Other Allegations of Abuse and Intimidation

- [118] Both parties testified that there were additional incidents of abuse by the other.
- [119] Both M and K also testified that Mr. T physically abused their mother. They both said that they saw Mr. T hit Ms. T. When asked for examples, they referred to the police incidents and other incidents addressed in these Reasons but also testified that they witnessed other incidents as well.
1. The Alleged Murders in the UK
- [120] Ms. T testified that Mr. T told her that in the past he had chopped someone into pieces and hid the pieces in the woods. Ms. T also testified that Mr. T told her he killed people in England and that is the reason he immigrated to Canada.
- [121] Mr. T testified he has never killed anyone or done the acts alleged. Mr. T also testified he never told Ms. T or anyone that he killed or mutilated anyone, ever. He was understandably distraught about these allegations.
- [122] The evidence before me falls far short of establishing that Mr. T murdered anyone or performed the acts alleged. In addition, having carefully considered the matter, and all the evidence before me, I am not persuaded, on a balance of probabilities, that he told Ms. T or anyone else that he did such things, or that he said he did so for purposes of intimidating Ms. T.
2. The Alleged Gang Affiliations

[123] Ms. T and K testified about conversations they had about Mr. T's connections with gangsters.

[124] K gave one example of an interaction that served as the basis for his belief that Mr. T had gang involvement, though he was equivocal in his recollection:

A I remember one incidence where he mentioned he had connections towards gang members, I remember. I kind of remembered that incident where he was saying -- talking about his past. And then other than that that was the most -- that was, like, the one thing I remember the most.

[125] After being asked the following leading question, K then elaborated, stating Mr. T mentioned gang connections, not one time but "multiple times":

Q Did he tell you that -- that story more than once?

A Yes. Maybe that's why I remembered it. Yeah. He'd often bring up his connection towards gang stuff. I wasn't too sure if that was true or not. But yes, he's mentioned it multiple times.

Q Okay. Did he ever -- did he ever tell you or the family about an incident in England with a gang?

A Not that I really recall.

Q Okay. Did he -- did he ever tell you about something bad he did in England?

A Not really.

[126] Ms. T testified that Mr. T did not want to pay spousal support to his previous wife, LT, which he in fact did, and that he said he wanted to find a gangster to "finish her".

[127] Mr. T testified that he was never a gang member, had no connections to gang members, and never had conversations to this effect with Ms. T or K. Once again, the evidence before me falls short of establishing, on a balance of probabilities that Mr. T was ever a gang member, was connected to gang related activity. Having reviewed the totality of the evidence, I am not persuaded he ever expressed to Ms. T, K, or M that he was.

[128] There were points during the trial where some, but certainly not all, of the allegations leveled against Mr. T did not have the ring of truth and lacked an air of reality. The allegation of murders in the UK and gang involvement is an example. This is not to say that I have not taken the testimony of Ms. T seriously; as discussed in these reasons, I have accepted Ms. T's evidence and that of K and M, in regard to other allegations against Mr. T.

3. The Alleged Threats in Canada

[129] M testified that she heard Mr. T say that he wanted to kill someone when they were living together in Vancouver but said that Mr. T did not specify who he was going to kill. As mentioned, she also testified that Mr. T "gets really, really scary when he drinks."

[130] Both Ms. T and K testified that Mr. T threatened to kill K. These threats were not reported to the police.

[131] K testified as follows:

A When me and my mom -- when my mom and [Mr. T] were together, he has threatened me on numerous occasions.

Q With what?

A He said he'd kick me out of the house. He also threatened to kill me. Those are the two that I know that has happened for sure.

Q So why wouldn't you report that to the police if it actually happened? I mean, even if you didn't report it at the time, you said that the police attended at your house and talked to you multiple times to check if you were okay.

A Yes, but --

Q So --

A -- the first report with the police I made was in 2013. Multiple incidences happened even before 2013 where my mom would not let us call the police just because she was afraid that she did not have the financial support from my stepdad.

Q But your mom had over a hundred thousand dollars in support from your biological dad and she needed to stay with Mr. [T]?

A Support for my education.

Q Mr. [T], I put it to you that a hundred thousand dollars was more than enough money to pay the rent and leave if there was a death threat going on.

A I don't know the exact amount that was in my bank account. I don't check it consistently. I knew that he had money for -- for me, for furthering education, and my mom did not want to spend any of the money in there because she wanted to leave it for my education for whatever I needed. It wasn't even meant to be spent for groceries, but it was due to the fact that [Mr. T] would not -- later down the relationship, [Mr. T] would not support us financially.

Q My apologies. Your mom's already admitted on the witness stand that Mr. [T] paid for virtually everything, so what are you referring to?

CNSL P. BUSCH: That's -- that's a mischaracterization of the evidence, My Lady.

THE COURT: Well, the evidence is mixed on that. Perhaps rephrase your question, counsel.

CNSL C. ASHCLARKE: Okay.

Q Your mom has admitted that Mr. [T] at the time they got married was paying for the rent and giving her 25 -- 2,100, 2,200 a month to cover most of the bills, so -- and then later down the line he's -- she's admitted that he was paying the mortgage, the strata, the car insurance.

A And she also had to pay for him when his step-wife threw away all his clothes and she had to pay for all of his new clothing at the start of the relationship.

Q Have you been prepped to tell -- say specific things? Has your mom talked to you about your evidence prior to today?

A No. I just remember certain things because certain things were impactful in my life.

Q So how would you have knowledge about something that happened when you're eight?

A Because that was brought up during an argument, and I overheard it.

Q So how do you know it's true?

A Because they were arguing it -- arguing over it.

[132] K agreed on cross-examination that he had gone out for dinner with Mr. T on numerous occasions, including in 2017 when Ms. T was on an overseas trip for a number of weeks on her own. In response to the question of whether he was afraid of Mr. T, K admitted he was mainly afraid for his family, rather than himself. He stated by "family", he meant his mother and sister.

[133] M testified that Mr. T put a knife to her fingers when she used to lie, and said he was going to "chop-off my fingers". She could not remember when this happened and did not provide other details but said this frightened her. Mr. T testified that he did not ever put a knife to M's finger and threaten to cut her fingers off.

[134] The evidence before me establishes that there were times when Mr. T's behaviour was aggressive, intimidating, or both. I accept this would have been frightening to Ms. T, M, and K. However, the evidence before me is not clear, consistent, or sufficient enough to persuade me that Mr. T ever intended to actually kill K, or threaten to cut-off M's fingers off.

[135] Ms. T testified that Mr. T threatened to kill her, chop her into pieces, and bury her in the woods. She did not say when this occurred. She stated that Mr. T told her it was easy to kill people in Canada because there were lots of forests and no one would be able to find her. This threat was not reported to the police. Mr. T testified that he did not ever threaten to kill Ms. T.

[136] In the context of the evidence as a whole, I am unable to accept Ms. T's evidence in this regard. Nor am I able to accept her evidence that she did not report this death threat because she was afraid of Mr. T and because she was financially dependent on him. I am very mindful that there are situations where financial coercion and fear prevent spouses from reporting violence and threats of violence; that is not the situation in this case. Ms. T had no difficulty contacting the police on a number of occasions throughout the course of their marriage once the allegations of abuse began. The evidence before me does not support the reasonable conclusion that this death threat was made.

4. The Alleged Physical or Emotional Abuse of K and M

[137] Ms. T testified on cross-examination that Mr. T had never physically hurt K. She also testified that, other than the occasion on which Mr. T pulled M's ponytail, he had never physically hurt M. M also acknowledged Mr. T apologized for the hair-pulling incident and testified that "he never hurt [her] again".

[138] K testified that he was physically disciplined by both his mom and Mr. T "when [he] was younger". He testified his mother would break wooden spoons over his back. He recalled one occasion when she took a hammer and smashed one of his video game toys. He did not specify what form of physical discipline Mr. T used but testified:

Q Did he ever get physical with you?

A Physical. When I was a lot younger he would.

Q Okay.

A But when I grew -- grew up it was less frequent.

Q And can you give the court some examples.

A It was more like punishment where, like, he would -- where he would hit me if I, like, misbehaved. It wasn't that -- it was just, like, more of, like, a punishment thing.

Q Like discipline?

A Yes.

Q Parental discipline?

A Yes.

[139] Physical discipline of children is no longer acceptable. As a society, we have witnessed a welcome shift away from the type of discipline K described. I find that both parties engaged in this behaviour with K.

[140] There is evidence from both M and K that Mr. T said demeaning things to them and also was verbally abusive towards Ms. T in front of M and K. K testified:

A He would often degrade me, like my achievements and my grades and also he would often have strict policies within the house, like, you can't eat after dinner or, like, he had certain things where he would be really against it for unknown reasons and he would get pretty upset over it.

Q Okay. And did he -- could you just describe for the court the degrading way he treated you. Did he --

A Degrading --

Q Did he use specific words?

A Degrading, he would often call me, like, a C-minus student. He would often belittle me and my accomplishments in school. Like, for instance, if I didn't get, like, a good enough grade he would tell -- say that, like, I'm a failure, stuff like that. Yeah.

Q Did he use other words in regards to you?

A In regards --

Q Specifically directed at you. So he's talking to you or telling you, was he using specific language other than what you've already mentioned?

A Probably, but I cannot really recall right now.

Q Okay.

A Yeah.

Q That's okay. What about when he's talking in general to the family? What kind of words is he using?

A If he's upset, he would use vulgar words.

Q Okay.

A Yeah. Towards the family, he said a lot of bad things towards my mom especially.

Q Okay. And -- and how often would -- would you hear that?

A I would say it was close to a weekly basis.

Q Okay. And are you comfortable telling the court what those words were? Or could you tell the court.

A Towards my mom or towards me?

Q To the -- to the family, to your mom.

A To the family.

Q So to your family, like, what -- what kind of words would he use?

A He's called her a whore before.

Q Okay.

A He's also -- like, he would also call her "bitch." As of towards me, obviously "C-minus student" or, like, a failure. Or, like, I know "idiot" was another thing.

Q And what about to your sister that you heard?

A To my sister. I could not recall anything that he said to my sister, unfortunately.

[141] In response, Mr. T denied making degrading comments towards M and K.

- [142] Mr. T acknowledged that the parties "certainly have said bad things to each other during arguments". He stated he did not recall calling Ms. T a bitch and, as noted earlier in these reasons, admitted calling her a prostitute. He testified that Ms. T frequently called him names as well, and that "mother fucker" was "one of her favourites".
- [143] However, having considered K's evidence about hearing Mr. T say derogatory or degrading words to his mother, I am satisfied on a balance of probabilities that this did happen. Mr. T testified that "when [Ms. T] shouts at me, I shout back" and that when Ms. T called him names, "I called her names back". I also accept M's evidence that Mr. T was very frightening when he was drunk and angry.
- [144] When children witness psychological or emotional abuse, including intimidation, harassment, or threats, by one parent towards another, that constitutes family violence. When a parent is intoxicated and forces himself or tries to force himself into a room, that is family violence. Such behaviour is harmful to the children, to the parent who is the subject of the verbal abuse and/or threat, and to the family. Such behaviour is unacceptable.
- [145] Both M and K also testified that Mr. T physically struck their mother. When asked for examples, they referred to the police incidents and other incidents addressed in these Reasons but also testified that they witnessed other incidents including incidents when Mr. T threw small objects at Ms. T. As I conclude later in these reasons, I find that Mr. T was physically and verbally abusive when he was drinking.

5. Additional Allegations of Abuse by Mr. T

- [146] As referenced above, Mr. T testified that in addition to being hit with a water bottle on August 21, 2017, he was struck by Ms. T on other occasions. He recalled an incident when Ms. T hit him hard with a hand-held portable vacuum cleaner. On another occasion, she hit him with a meat tenderizer. Mr. T also testified that Ms. T slashed his back with scissors when he was shaving. Mr. T provided photographs of some of his injuries. Mr. T's evidence was not shaken on cross-examination. Ms. T testified that she never hit Mr. T.
- [147] K testified that he did not witness his mother hit Mr. T or call him names, although he agreed that his mother yelled and screamed at him and threw "small objects at him."
- [148] The evidence establishes that the relationship between the parties was at times volatile and acrimonious. The evidence also establishes that both parties had tempers that they did not control and expressed through physical and verbal aggression. I accept Mr. T's evidence that Ms. T hit him during the marriage and this was not an isolated incident but, rather, happened on repeated occasions. This was also a form of family violence perpetrated, in this instance, by Ms. T.

D. Conclusion Regarding Findings of Family Violence

- [149] FLA defines family violence broadly as follows:

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[150] Given the contradictory evidence of the parties and witnesses, and the at times unreliable nature of the evidence adduced by both Ms. T and Mr. T, it is difficult to determine the extent of family violence perpetrated by either spouse. Nevertheless, given the entirety of the evidence before me, I find that there were times when Mr. T was drinking heavily, and was verbally and physically abusive towards Ms. T. While Ms. T also lashed out verbally and physically at times, I find that the threat and negative impact of Mr. T's behaviour was greater. The detrimental impact of Mr. T's excessive drinking on Ms. T and her children, particularly when accompanied with acts of aggression, cannot be overlooked or minimized.

[151] Counsel for both parties at various times characterized the relationship between their clients as toxic; this is not an unreasonable characterization in light of the evidence before me. Mr. T testified that Ms. T had an "argumentative personality" and was volatile at times; based on her reactive behaviour on the witnesses stand, including the sometimes disrespectful, argumentative, and prolix nature of her responses to various questions, this too does not seem to be an unreasonable characterization. Nevertheless, Mr. T candidly testified he was less likely to pursue an argument with Ms. T if he was not drinking, and I find the opposite is also true. The evidence before me establishes that he was more inclined to escalate or pursue arguments with Ms. T if he was drinking, as was the case, for example, when he attempted to open the office door with a knife during the argument in 2013 after Ms. T had locked herself in the home office. It is clear that adding excessive drinking to the particular dynamic of the parties' relationship caused significant turmoil.

III. family assets and debts

[152] Two key issues in this case are reapportionment of property and spousal support. Both are integrally intertwined and involve consideration of the above-detailed allegations of family violence. Before dealing with either issue, I address the issue of what property and debt are subject to division.

[153] The parties' principal asset is the proceeds of the sale of the family residence. There is no doubt that this constitutes family property, though the parties dispute whether or not it should be divided equally and whether some of those proceeds are derived from, and remain, excluded property.

[154] The parties have a number of assets, the characterization of which is disputed. I will first address the excluded property claims, then discuss family property and debts.

A. Excluded Property

[155] Pursuant to s. 81 of the FLA, each spouse is presumptively entitled to an undivided half interest in family property upon separation. Section 81 provides:

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

[156] Family property is defined in the FLA in part, as follows:

Family property

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;

[]

[157] Section 85 of the FLA excludes property that would otherwise be subject to division. It provides that property, which was acquired by a spouse before the relationship between the spouses began, constitutes excluded property.

[158] Excluded property may, however, lose its excluded character. In *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 74, the Court of Appeal clarified that the FLA does not oust the common law rules of property. In *Baryla v. Baryla*, 2019 BCCA 22 at para. 33, the Court of Appeal reasoned that "excluded property, or the proceeds thereof, that is gratuitously transferred between spouses during the course of a relationship may lose excluded status unless the presumption of advancement is rebutted."

[159] I will address each submission advanced by the parties on the issue of excluded property.

1. \$50,000 in Ms. T's TD Account in 2004

[160] Ms. T seeks an order that a sum of \$50,000 which she deposited into her TD Account in December 2004 and had in her possession when she met Mr. T is excluded property within the meaning of s. 85(1)(a) of the FLA. She stated that these funds were derived from the sale of her real property in Taiwan. In support of her claim, Ms. T produced three pages of a bank book for her TD Account. The bank book shows a deposit of \$54,990.00 on December 30, 2004. The balance in the account was \$48,510.07 on January 31, 2005, which is the last entry on the last produced page of the bank book.

[161] Multiple court orders directed Ms. T to produce the entirety of her bank book or bank statements evidencing her bank balance at the commencement of the parties' relationship; however, she did not do so. Ms. T submitted that she was unable to produce copies of statements because TD Canada Trust no longer had the records. This evidence is problematic because Ms. T chose to only produce a portion of the bank book, rather than its entirety, prior to the commencement of the trial of this matter; further, the relevant bank statements that were produced were incomplete and showed that the bank actually provided records to Ms. T for the period retroactive to 2004. At the top of the bank statements is a header that reads:

FROM DATE: 2004-01-01

TO DATE: 2018-11-09

However, the first entry in the produced portion of the statements dates from January 2, 2007.

[162] Mr. T states that Ms. T did not have \$50,000 in her bank accounts when their relationship commenced in June 2006. He testified that Ms. T advised him that she paid \$40,000 to Mr. D, whom she called her "paper husband", in installments after her arrival in Canada in exchange for which he sponsored her immigration and also that of M and K.

[163] Mr. T produced copies of a printout of Ms. T's TD Account which he obtained previously through a document production application on May 30, 2019. The first page of the printout shows that Ms. T only had a balance of \$5,278.65 on January 2, 2007. Mr. T recalled that the parties started cohabitating in June 2006, and stated that Ms. T did not spend \$45,000 from June to January for living expenses. Further, he stated he initially paid Ms. T \$2,180 per month to help her with her living expenses. He testified that he also contributed to her

finances before they started living together so that she would not continue with her massage work, although he could not remember the amounts he gave her.

[164] The spouse claiming that property is excluded property bears the onus of proving that fact on a balance of probabilities: FLA, s. 85(2); Shih v. Shih, 2017 BCCA 37 at paras. 42-44. The evidence before me does not establish, on a balance of probabilities, that Ms. T had approximately \$50,000 in savings when she first started living with Mr. T. There is no bank account information confirming this was the case. Also, on her own evidence, Ms. T stated that the marriage difficulties with Mr. D. were in part financial; for this reason, it is not likely that Ms. T would have kept \$50,000 in her savings for the brief duration of her marriage with Mr. D.

[165] In sum, I am unable to conclude that the amount of \$50,000 should be excluded from family property and be deducted for Mr. T's share of family property. Ms. T has not met her burden of proof.

2. UK Merchant Navy Pension

[166] Prior to immigrating to Canada in 1993, Mr. T earned a pension in the UK. He began receiving these pension benefits sometime in 2016.

[167] On or about October 14, 2016, Mr. T elected to receive a lump sum payment of £43,461.95 for a portion of his UK Navy Pension. These funds took several months to be processed and on March 3, 2017, Mr. T received \$70,525.71. Mr. T used these funds to pay a family debt of \$34,358.34 to his CIBC Visa on March 6, 2017. In addition, he paid a further family debt of \$43,000 owing on his CIBC personal line of credit on June 14, 2017.

[168] Mr. T submits that, when determining whether to equally divide the family property and debt, it would be significantly unfair for the court to disregard the source of these payments to family debts, particularly in light of the fact that the parties' separated a few months later.

[169] I have no doubt that the UK Navy Pension is an excluded asset. All Mr. T's pension credits were earned well before his relationship with Ms. T began. Section 85(1)(a) operates to bar division of pre-relationship pensions: see, for example, Bryan v. Bryan, 2019 BCSC 248 at paras. 85-86. Notably, Ms. T is not seeking any portion of Mr. T's UK Navy Pension.

3. Mr. T's RRSPs

[170] Mr. T testified that he contributed to three RRSPs prior to the commencement of his relationship with Ms. T. He stated that he made no further contribution during their relationship. Having reviewed the parties' debt obligations, income, and spending patterns during their relationship, I have no doubt that this is the case.

[171] Accordingly, Mr. T asserts that the following RRSPs are his excluded property:

- a) Holliswealth (formerly Invesco) RRSPs;

- b) Manulife RRSPs; and
- c) CIBC RRSPs.

[172] Each of these RRSP investments are noted in a court order dated January 15, 2009 in the divorce proceedings between Mr. T and his first wife, LT.

- a) Holliswealth RRSPs

[173] Mr. T testified that the Holliswealth RRSPs were a "basket of investments". He produced documents which established that he invested two \$5,000 tranches in the Holliswealth RRSPs before commencing his relationship with Ms. T.

[174] Mr. T is seeking an order for the return of his original \$10,000 Holliswealth RRSP investments as excluded property, as well as half of the increase in the value of his Holliswealth RRSPs. He provided documents which showed this investment increased in value by \$4,397 during the relationship to \$14,396.85.

[175] The parties agree that Ms. T is entitled to half the increase in the value of this investment, which is \$2,198.42. He submits that Ms. T could receive these funds via spousal rollover to avoid tax consequences.

[176] I agree that Ms. T is entitled to 50% of the increase in value of this investment during the course of the marriage: FLA, s. 84(2)(g); Kuhberg v. Hall, 2015 BCSC 2230 at paras. 122 and 124. Indeed, Ms. T has not asked for a reapportionment of any of Mr. T's RRSP investments.

[177] However, I do not agree that Ms. T is entitled to half of the total this RRSP investment as the initial investment is excluded property: FLA, s. 85(1)(a); Appleby v. Marshman, 2018 BCSC 212 at para. 93.

- b) Manulife RRSPs

[178] Mr. T's evidence and supporting documents establish that this RRSP began as part of his employment benefits before he met Ms. T; his employer contributed to this Manulife RRSP on his behalf. He began his employment and receiving these RRSP benefits in 1999.

[179] A Manulife document for the period of July 1, 2006 to September 30, 2006 states that the "opening value on July 1, 2006" was \$51,165.91. Mr. T submits this sum ought to be excluded property. He asserts that the parties began cohabitating in late June 2006 and, accordingly, he is seeking an order that this opening value is excluded property. I agree.

[180] Mr. T was very transparent in regard to his pension and investments. He produced various updated Manulife statements, including one for the period of January 1 to December 31, 2020 showing that the Manulife RRSP was valued at \$142,819.09 as at December 31, 2020. In this light, he is seeking an order for half of the increase in value of the investment; that is, \$45,826.59 $(\$142,819.09 - \$51,165.91) \div 2$. As such, Ms. T's share of the Manulife RRSPs would be \$45,826.59. Again, Ms. T would be entitled to a spousal rollover.

[181] I find that Ms. T is entitled to half the increase in the value of the RRSPs. The evidence before me establishes this amount at \$45,826.59.

c) CIBC RRSPs

[182] The evidence established that all of Mr. T's CIBC RRSPs were spent prior to the time the parties separated.

[183] Mr. T testified that he withdrew his remaining CIBC RRSPs sometime in 2014 to 2015 to pay credit card debts owed by both parties. He also used these savings to purchase a replacement Rolex watch after his first Rolex "disappeared during a police incident". He stated that he acquired the Rolex during his first marriage prior to meeting Ms. T.

[184] The documentary evidence establishes that the CIBC RRSP account existed before the parties started to cohabit. The records also show that Mr. T deposited \$19,992.35 and \$11,419.60 into his CIBC chequing account on March 4, 2015 and that the final remaining balance of \$8,768.48 was withdrawn on June 30, 2015 for a total value of \$40,180.43.

[185] As noted earlier in these reasons, Mr. T testified that he did not contribute towards any of his investments during his relationship with Ms. T. He is seeking a determination that these CIBC RRSPs are excluded property, as is the \$7,000 Rolex watch which he purchased from these funds.

[186] Mr. T's CIBC chequing account bank statements show a withdrawal of \$10,677.17 on April 7, 2014 which he paid to his CIBC Aerogold Visa as shown on his March 23 to April 24, 2014 Visa statement, as well as a withdrawal of \$13,000 on May 26, 2014 which he paid to Ms. T's Visa debt as evidenced by her visa statement for the period of May 26 to June 25, 2014.

[187] Mr. T bears the burden of proving that the CIBC RRSP funds should be deemed excluded property despite the fact that these monies were spent to pay family debts prior to the parties' separation. I have concluded that the RRSP funds were excluded property but that they lost that status as excluded property once they were spent to pay family debt: Baryla at para. 33. These debts were paid before the parties were contemplating separation. Mr. T has not adduced evidence of statements made, or circumstances that point to, an intention to keep these funds separate. As a result, he has not met his burden of proving he intended that these funds remain excluded property. Nevertheless, I am of the view that the CIBC RRSP monies that were spent to pay off family debts should be considered as a matter of fairness when I consider the reapportionment of family assets claim advanced by Ms. T: Venables v. Venables, 2019 BCCA 281 at para. 110.

[188] With respect to the Rolex, I accept Mr. T's evidence that he purchased the watch prior to the marriage and used his own pre-relationship savings to replace his missing watch. As such it remains excluded property pursuant to FLA, s. 85(1)(g), having been derived from excluded property.

4. Mr. T's Personal Belongings

[189] Mr. T is seeking the return of the following personal belongings that he says Ms. T did not pack-up when he collected his items:

- a) a picture of his grandmother in a fox fur coat; and
- b) a Burke's Peerage book of [Mr. T's] family ancestors.

[190] These are clearly excluded items that ought to be returned to Mr. T.

5. Down-payment of \$96,500 on Former Family Home

[191] As noted earlier, s. 85 of the FLA identifies various categories of assets that are excluded from family property, including property acquired by a spouse before the relationship between the spouses began (s. 85(1)(a)).

[192] When Mr. T divorced his first wife, LT, he received \$175,000, representing his half-share of the net proceeds of sale of his former family residence. He then took \$96,500 of this amount and used it to pay the 10% down-payment on a condo in 2010. This then became his family residence with Ms. T and her children. Mr. T is seeking the return of these funds as an excluded asset.

[193] Ms. T testified that the parties bought their former family home in 2010 as a joint asset; both their names were on the purchase and sale agreement, the mortgage and on title as joint tenants. Ms. T acknowledged that Mr. T paid the down payment for their new condo from the partial proceeds of the sale of his former family home from his previous marriage and that she did not make any mortgage payments, although she did make some strata fee payments during the first three years of owning the condo.

[194] Counsel for Mr. T underscored that Ms. T did not make any direct contributions to the preservation, maintenance, improvement, operation, or management of the property, except for some strata fee payments for the first three years. Mr. T also underscores that the parties kept separate bank accounts.

[195] In support of his position, counsel for Mr. T relies on the decisions of *Kalmiakov v. Shylova*, 2016 BCSC 2095, and *Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143. In *Kalmiakov*, the court concluded that Ms. Shylova was entitled to \$10,000 of excluded property for the funds that were used to purchase the former family home, as these funds were readily traceable and capable of mathematic certainty. Similarly, in *Lahdekorpi*, a \$30,000 inheritance was traced to the purchase of family property such that it did not lose its character as excluded property. More specifically, the court reasoned that it was "not persuaded that the respondent could reasonably be said to have intended to gift her inheritance to the claimant."

[196] The case law is clear that it is not simply a matter of whether excluded property can be traced to the purchase of family property but also whether, when such monies are used to purchase family property, a donative intent is established on a balance of probabilities. In *Venables*, our Court of Appeal reasoned that the key to determining whether property

transferred from one spouse to another remains excluded property or becomes family property is to assess and determine the intention of the spouse transferring ownership: para. 95; *Pisarski v. Piesik*, 2019 BCCA 129; *Namdarpour v. Vahman*, 2019 BCCA 153.

- [197] There is no evidence that the parties in this case discussed whether the \$96,500 down-payment was a gift or an excluded asset. That is, there is no direct evidence of intention to gift or not. Accordingly, the analysis must turn on the surrounding circumstances and context and whether a donative intent may be reasonably inferred on a balance of probabilities. Put differently, there is no question that when Mr. T received the net proceeds from the sale of his matrimonial residence, arising from his first marriage, that these monies were excluded property. The question that arises, however, is whether these monies lost their excluded character when they were used to purchase Mr. T and Ms. T's former family home.
- [198] On the issue of donative intent, the reasons in *World v. World*, 2021 BCSC 1177 are of considerable assistance. The issue in that case was whether the down-payment used to purchase the family home was excluded because it was an inheritance received by the respondent from his parents. The family home had been in joint tenancy since it was purchased. The court noted that the family would not have been able to afford the house without using the down payment but reasoned, at para. 18, that the key issue was whether the respondent intended to pool the excluded asset with the claimant's assets as a family:
- [18] Whether or not the Down Payment should be treated as an excluded asset depends on whether the respondent intended to pool it with the claimant's assets as a family. There is no evidence that the claimant contributed money to the purchase of the family home. However, a pooling of purchase monies is not essential. The critical question is whether by purchasing the family residence, the parties intended to own the family home in combination, as a pooled resource of their marriage: *Pisarski; Dunn v. Cashin*, 2021 BCSC 1000 at para. 89. That is, by contributing the Down Payment from the Inheritance, did the respondent intend it as a "gift" to the couple's marriage as an entity to which both parties belonged: *Pisarski*, at para. 45.
- [199] The court concluded there was an intention to "gift" the down payment to the couple's marriage as an entity and, as such, the down payment lost its status as excluded property at the time the family home was purchased: see also *Namdarpour* at para. 46.
- [200] In *Andersen v. Anderson*, 2021 BCSC 2598, Justice Sharma cites *World* and observes:
- [50] In *World [v. World]*, 2021 BCSC 1177, Mr. Justice G.P. Weatherill stated that there was no compelling evidence before him that the respondent provided the down payment without the intention to gift it for the purpose of the parties' marriage because he took no steps to keep it separate or to document that the down payment was kept as a separate asset. Instead, he said the evidence persuaded him that the respondent intended to pool their assets and purchase a home together with the claimant, each putting in what they could to contribute over time. []

[201] I have also considered the reasons of Justice Horsman (as she then was) in *Small v. Small*, 2020 BCSC 707 at para. 108, where she interpreted the authorities to stand for the proposition that if a party "makes no attempt to keep excluded property separate, this supports an intention to gift the property to the other spouse": citing *Pisarski* at para. 48; *Wickstrom v. Ng*, 2019 BCSC 1685 at paras. 160-161.

[202] In this case, Mr. T made no attempt to keep his excluded property separate. He did not testify that he did not intend to pool or gift the \$96,500 into the condo as a family asset. However, he acknowledged during his testimony that "when we purchased the condo, initially [Ms. T] was paying the utilities and condominium fees and I was paying the mortgage". He added:

Okay. So we -- we bought the Melville apartment, and prior to going into that, because it's a big financial decision, we discussed the finances for it. And I was paying spousal [support] to my first wife, so I had to watch our finances carefully. So [Ms. T] agreed that if I paid the mortgage she would pay the condo fees and the utilities. That way we could afford to purchase the Melville Street condo.

[203] While counsel for Mr. T argues there was no pooling of assets, this evidence points to an intermingling of assets and expenses, and a combining of mutual resources, to purchase their condo. For example, Mr. T acknowledged that Ms. T paid the "the children's expenses, the private schools, that kind of thing, and food and things like that".

[204] The evidence before me establishes that, at the time the parties bought their family home, Mr. T was committed to building a life together with Ms. T, sharing expenses and incomes, and contributing or gifting his efforts to the family as a unit or "entity". Ms. T recalled that at that time of the purchase, the family was in need of a three-bedroom condo; M was "more than 13" and the children needed separate bedrooms. The parties worked towards finding a condo that accommodated their needs as a family. Mr. T did not contradict this evidence, and repeatedly affirmed his love of Ms. T, K, and M, and his dedication to her and the children throughout their marriage, even up to the time Ms. T left. On the evidence as a whole, it is clear that Mr. T was a generous man.

[205] Having carefully considered the entirety of the evidence before me, I am satisfied that when the parties bought their home in 2010, Mr. T intended to purchase the family home and use his down payment for the benefit of the family, as a gift and pooled resource of the marriage. As such, I find that the down payment lost its status as excluded property at the time the family home was purchased. As discussed later in these reasons, however, Mr. T's significant contribution to the family home in this regard is a factor I consider in reapportioning family property.

B. Other Family Assets

[206] The parties had various family assets at the time of their separation on August 21, 2017 that are subject to division. These are set out below.

1. Bank Accounts and Insurance Policy

[207] At the time of the parties' separation, Ms. T had the following bank and PayPal accounts:

- a) TD Account: -\$927.79;
- b) TD Every Day Savings account: \$52.99;
- c) TD account under "Golden Home International Labour and

Nanny": \$122.87; and

- d) PayPal account no balance but with withdrawal of \$6,000 on August 28, 2017

[208] The apparent net value of Ms. T's bank and Paypal accounts is \$5,248.07 at the time of separation.

[209] Mr. T had a single bank account at CIBC with a balance of \$816.96 at the time of separation.

[210] Ms. T had a Canada Life insurance policy with a cash surrender value of \$1,606.24. Case law indicates the surrender value of a life insurance policy is divisible family property: *Higgs v. Lear*, 2020 BCSC 194 at para. 249(i); *Krczizanowski v. Fieseler*, 2018 BCSC 1545 at para. 62; *M.T. v. J.S.*, 2020 BCSC 203 at para. 168; *Kumagai v. Campbell Estate*, 2016 BCSC 450 at para. 143.

[211] Mr. T earned Canada Pension Plan credits during the parties' relationship. These have already been split equally by the government as set out in a May 12, 2021 letter to Mr. T from Service Canada. As such, Ms. T has no further entitlement to Mr. T's CPP benefits.

2. Vehicles

[212] During the parties' relationship, there were two vehicles registered under Mr. T's name. He was the primary driver of a 2015 Nissan Murano that was leased. There was no equity in the vehicle to share between the parties and the lease was terminated prematurely in December 2017 because the parties did not have the funds to pay for the lease.

[213] Ms. T was not legally permitted to drive a vehicle; she did not have a BC driver's license. Nevertheless, she was the primary driver of a 2015 Nissan Rogue which Mr. T purchased with a car loan. After the parties' separation, Ms. T initially refused to return the Nissan Rogue to Mr. T but eventually did so. The current value of the Nissan Rogue is approximately \$11,000. Mr. T made car loan payments of \$546.22 per month from August 2017, approximately 49 months at the time of trial, totalling \$26,764.78.

[214] Mr. T points out that Ms. T made no contributions to the car payments. However, the FLA makes it very clear that contributing to the purchase of an item during the marriage is not necessary for the item to constitute a family asset: FLA, s. 81(a); *Salman v. Astifan*, 2021 BCSC 1395 at para. 65. I will address the issue of reapportionment later in these reasons.

3. Household Goods

[215] Mr. T submits that, after the parties' separation, Ms. T retained most of the household goods, including the furniture and kitchen items. Mr. T is seeking the value of half of the cutlery, pots and pans, including half of the vintage cast iron collection. He estimates that the value of these items to be \$3,000.

[216] The onus is on Mr. T to particularize and value these goods. His estimate and rather vague description do not allow me to assess the validity or value of his claim for division.

4. Tax Refund

[217] Ms. T is seeking a division of Mr. T's tax refund. Specifically, Ms. T argued that Mr. T received a tax refund of \$23,662.00 in 2018 for the 2017 taxation year and that this should be equally divided. Mr. T asserts that Ms. T has incorrectly understood the facts.

[218] Mr. T's 2017 Notice of Assessment shows that he has a tax debt owing of \$4,274.12. Pursuant to the 2018 Voith Order, Mr. T received a sum of money from the sale of the parties' former family home to pay his 2015, 2016 and 2017 income tax debts. There was no refund amount arising from the 2017 taxation year which was paid to Mr. T in 2018.

[219] In 2018, the Respondent received a tax refund of \$751.60 which did not arise from the 2017 taxation year and which is not divisible family property.

[220] The record substantiates Mr. T's assertions. There is no tax refund to divide.

5. The UK Property

[221] At trial, Ms. T raised a new claim to the effect that Mr. T had an ownership interest in his late mother's house located in Dorset, UK ("UK Property"). Ms. T alleges that Mr. T obtained a £90,000 payment for the sale of the property in February 2020 by his children from a previous marriage. However, the record before me does not establish this allegation.

[222] Mr. T produced a copy of his mother's will dated March 9, 2009. The will bequeathed her UK Property to Mr. T's son and daughter from his first marriage. Mr. T testified that his mother left her property to his children because he had already received an early inheritance in 1993 when his mother gave him funds to purchase a property in Ontario with LT.

- [223] In addition, Mr. T testified that while his mother had transferred a portion of the UK Property to him while she was still alive for financial planning purposes, he had transferred this share to his children from his first marriage. Mr. T produced a copy of a transfer document establishing that he transferred his share of his mother's UK Property to his children from his first marriage on June 1, 2007, well before the date of parties' separation.
- [224] The evidence before me does not establish on a balance of probabilities that Mr. T owns a direct or beneficial interest in the UK Property or that he received any proceeds from a transaction by his children in 2020 that suggests they borrowed monies in 2020, based on their equity in the UK Property.
- [225] Mr. T produced all of his bank records. Counsel for Mr. T submits that since the parties only began cohabitating in June 2006, it is highly unlikely that Mr. T would have transferred his share of the UK Property to his children on June 1, 2007 as a fraudulent conveyance, as alleged, to prevent Ms. T from receiving a share. There was no evidence as at June 1, 2007 that the parties contemplated separating, furthermore, they were not married at the time and had been cohabitating for less than a year.
- [226] On the evidence before me, I am unable to find that Mr. T has interest in the UK property of any kind.

C. FAMILY AND OTHER DEBTS

1. Ms. T's CIBC Visa Debts

- [227] At the time the parties separated, Ms. T had a CIBC Select Visa with a balance of \$21,145.88 ("Ms. T's CIBC Visa").
- [228] Mr. T asserts that expenses totalling \$4,989.03 were identified as being incurred on Ms. T's CIBC Visa for her sole benefit in relation a trip to Asia in early 2017 ("Asia Trip Expenses"). He asserts that the Asia Trip Expenses, which included passport fees, flights, hotels, and restaurant expenses as well as various miscellaneous expenses incurred in Hong Kong and Vietnam, were not family debt which should be shared between the parties. He submits that the family debt portion of Ms. T's CIBC Visa bill debt is \$16,156.85 (\$21,145.88 - \$4,989.03).
- [229] I am satisfied, however, that the entire balance on Ms. T's CIBC Visa was a family debt within the meaning of FLA, s. 86. While Ms. T testified she took the trip to avoid Mr. T and not for work, the evidence before me establishes these expenses constitute a family debt. Ms. T's text messages to Mr. T during March 2017 make it abundantly clear that there was a business component to this trip; accordingly, her expenditures related to her business as a family asset. I also find that there was a vacation component to the trip, which Mr. T clearly supported. This type of expenditure also falls within definition of family debt in the FLA.

[230] In her submissions, Ms. T claimed that she had a second Visa credit card with a balance of \$21,261.41 on the date of the parties' separation. The evidence before me does not establish this additional Visa debt.

2. Ms. T's CIBC Line of Credit

[231] Ms. T also had a personal CIBC line of credit with a balance of \$9,045.22 on August 21, 2017 ("Ms. T Line of Credit Debt"). Mr. T does not take issue with this existence or division of this debt.

3. Debts Listed in Ms. T's 2019 Financial Statement

[232] Ms. T claims various other debts which she lists in her 2019 Financial Statement. She did not provide supporting documentation to trace the source of these debts, or when they were incurred. Simply put, Ms. T did not establish their existence in a credible manner on a balance of probabilities.

4. Alleged Cheque Debt

[233] Ms. T claims that Mr. T owes her \$30,000. At trial, she produced a \$30,000 uncashed cheque made out to her credit that was dated June 20, 2009. Ms. T testified that Mr. T owed her these funds which she spent on the parties' wedding and on household expenses. She claimed that these monies came from her excluded property from the sale of her property in Taiwan. Again, no documents were tendered to confirm this statement.

[234] Ms. T stated that the wedding expenses included food, liquor and a wedding photographer. She also said that she paid for travel expenses for her out of town guests. Ms. T also stated that the household expenses included in the \$30,000 sum included funds which she contributed to household expenses, such as Mr. T's clothing that she paid for from her personal funds.

[235] Mr. T produced his bank statements that showed he paid Ms. T's HSBC credit card from his bank account during this time period. Furthermore, during this time, both parties acknowledged that Mr. T was paying Ms. T an allowance of approximately \$2,180 per month, over and above paying for the parties' rental expenses. Documents supporting such payments were also produced.

[236] In this light, it is not surprising that Mr. T adamantly disputes that he owes or owed Ms. T these funds. He testified that their wedding was inexpensive and that while he did not pay for any of the wedding expenses, Ms. T retained all of the cash gifted to the parties. He explained that giving cash gifts to the couple is an Asian wedding custom and the cash gifts would have covered the cost of the wedding.

- [237] Mr. T testified that while he did write the \$30,000 cheque to Ms. T, he did so as a mere gesture when she was complaining that she was performing housekeeping without assistance and without being paid. Mr. T testified that there were never sufficient funds in his bank account for her to cash the cheque and in fact, Ms. T never cashed the cheque and it became stale-dated.
- [238] Ms. T gave inconsistent evidence regarding the circumstances surrounding the cheque. She testified that she tried to cash the cheque but it bounced. Later, she stated that she had accidentally found the cheque in Mr. T's suit jacket when she packed up his belongings after their separation. She claimed that he had deliberately hidden the cheque from her so that she could not cash it. Counsel for Mr. T argues this evidence is highly improbable as Mr. T could simply have discarded the cheque and not carried it in a pocket for several years if he did not want her to cash it.
- [239] Quite apart from the over-eight-year gap between the time the cheque was written and Ms. T's claim for \$30,000, the evidence before me does not establish on a balance of probabilities that Mr. T owes a \$30,000 debt that must be paid. Not only was there an intermingling of expenses and assets between the parties during their marriage but the evidentiary foundation and documentation before me did not support a reasonable conclusion that this amount was owed to Ms. T. Furthermore, Ms. T's testimony was less than persuasive on this issue.

IV. REAPPORTIONMENT

A. Guiding Authorities on Reapportionment

- [240] Section 81 of the FLA provides that parties are presumptively entitled to an equal division of family property and are equally responsible for family debt, regardless of their respective use or contribution. However, s. 95 of the FLA also contemplates unequal division where equal division of assets and/or debts would be "significantly unfair."
- [241] Section 95 guides the exercise of the court's discretion in assessing whether it would be significantly unfair to divide family property equally by setting out a number of factors which inform this assessment. The salient part of s. 95 in the context of this case provides as follows:

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

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

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

[...]

(c) a spouse's contribution to the career or career potential of the other spouse;

(d) whether family debt was incurred in the normal course of the relationship between the spouses;

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

[...]

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

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

[242] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, our Court of Appeal discussed the meaning of "significant unfairness" as follows:

[41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.

[243] In *Singh v. Singh*, 2020 BCCA 21, Justice Garson underscores the high threshold that must be met in reapportioning family property and specifically considered s. 95(2)(i) of the FLA. She reasoned that this subsection is subject to the ejusdem generis ("of the same kind") principle of statutory construction; that is, the provision's apparent generality is circumscribed by the more constrained factors that precede it. She held that the significant unfairness under this general provision must relate to a limited class of considerations, namely "the economic characteristics of a spousal relationship": at para. 138.

[244] In *Nanara v. Nanara*, 2017 BCSC 1447 at para. 63, the court reasoned that, before deciding whether equal division would be significantly unfair, the court must go through the "notional exercise" of equally dividing family property and debt, and then consider if the equal division would lead to significant unfairness. The property/debt breakdown is as follows:

Description	Value
Remaining proceeds of sale of family home held in trust	\$514,148.08
Increase in value of Holliswealth RRSP	\$4,397
Increase in value of Manulife RRSPs	\$91,653.18
Net value of Ms. T's bank and Paypal accounts	\$5,248.07
Ms. T's Canada Life insurance policy	\$1,606.24
Nissan Rogue	\$11,000
Mr. T's CIBC account	\$816.96
Ms. T's CIBC Select Visa	(\$21,145.88)
Ms. T's CIBC line of credit	(\$9,045.22)
Divisible total	\$598,678.43

B. Positions of the Parties

- [245] Mr. T is seeking an equal division of all family property. In the alternative, if the court finds that he is not entitled to the return of his excluded property, he is seeking a reapportionment of the family property after taking into consideration the source of the assets, his advanced age and the need for assets to fund his retirement given his inability to secure new employment in the past 4.5 years.
- [246] The facts before me present unique difficulties in terms of how to proceed with the analysis. Ms. T claims she is entitled a 70% reapportionment of the net proceeds from the sale of the former family home and a 50% interest in Mr. T's RRSPs. The basis of her reapportionment claim rests essentially on the mental and physical abuse she has suffered as result of Mr. T's misconduct. Of course, this is not one of the enumerated bases under s. 95(2) which would militate in favour of a finding of significant unfairness. However, family violence has still factored into the reapportionment analysis where it has had a "connection to the economic characteristics of the spousal relationship": *Chang v. Chang*, 2020 BCSC 1783 at paras. 121-122; *Salman* at para. 122.
- [247] Ms. T also claims an entitlement to spousal support on largely the same basis; that is, that the consequences of the family violence have prevented or delayed her from becoming economically self-sufficient.
- [248] The issues of spousal support and reapportionment are often intertwined; the scheme of the FLA makes this clear. In certain circumstances, the court must consider the two issues together: *Poon v. Yuen*, 2021 BCSC 1809 at para. 33. In doing so, however, the court must be careful to avoid the danger of double recovery: *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1 (C.A.) at para. 59.
- [249] This Court typically approaches the issue of property division in advance of spousal support: *Parton v. Parton*, 2016 BCSC 1528 at para. 18, rev'd in part 2018 BCCA 273. However, s. 95(3) provides that, if a spousal support order would fail to meet the statutory objectives of spousal support, the court may consider "the extent to which the financial means and earning capacity of [the claimant] have been affected by the responsibilities and other circumstances of the relationship between the spouses". As a result, determining whether there ought to be reapportionment in favour of Ms. T requires determining whether she is entitled to spousal support and whether an order for spousal support can meet the statutory objectives.
- [250] My consideration of the spousal support issue informs the question of reapportionment as follows.

C. Spousal Support and s. 95(3) of the FLA

1. Legislative Framework and Applicable Principles

- [251] When determining whether a claimant is entitled to spousal support, the court must consider the objectives that underlie spousal support awards, as enumerated in s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. A spousal support order 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.
- [252] As noted, there are no children of the marriage and so subsection (b) is not relevant to my analysis.
- [253] Sections 160 to 162 of the FLA also provide direction. As noted by Griffin J.A. in *Zilic v. Zilic*, 2021 BCCA 107 at para. 21, these sections largely overlap with those in the DA; the conceptual bases underlying both statutes are the same.
- [254] The case law further informs the bases on which entitlement may be established. These are summarized in *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 25-27:
- [25] Canadian courts have recognized three distinct bases upon which a spouse may be entitled to an award of spousal support: compensatory, non-compensatory, and contractual.
- [26] Compensatory entitlement will arise where, as a result of the parties' roles during the marriage, one spouse has suffered economic disadvantage or has conferred economic advantages on the other. Most often, such entitlement will arise where one spouse has sacrificed career opportunities in order to take on more of the family's household or child-rearing responsibilities. Upon the dissolution of the marriage, the spouse who has given up opportunities may be entitled to spousal support, either to compensate for diminished earning capacity, or to share in the augmented earning capacity of the other spouse. The main goal of compensatory spousal support is to provide for an equitable sharing of the economic consequences of the marriage (see *Moge v. Moge*, [1992] 3 S.C.R. 813 at 858-66).
- [27] Non-compensatory support entitlement focuses on the needs of the spouses and on their respective means. It is based on the idea that spouses, by virtue of marriage, have some ongoing responsibility to care for one another. The degree to which non-compensatory principles will apply will depend on a close examination of not only the means and needs of the spouses, but also of the nature of the marital relationship and its duration (see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, particularly at para. 53).

- [255] In this instance, Ms. T does not assert a contractual entitlement to spousal support but asserts entitlement on both compensatory and non-compensatory grounds.
- [256] I am mindful that self-sufficiency is only one factor to be considered in assessing entitlement to spousal support and that no single objective is paramount: Moge at 852. I have considered all the circumstances including the Ms. T's age, gender, skills, education and opportunity for retraining, including her realistic job opportunities: Tedham v. Tedham, 2005 BCCA 502 at para. 33.
- [257] As mentioned, Ms. T's claim largely hinges on the assertion that her current state of diminished physical and mental health is attributable to the incidents of family violence discussed above. She says that because these incidents have reduced her post-relationship capacity to earn income, she is entitled to spousal support. For this reason, it is crucial to note that the legislation enshrines a conduct-neutral approach to spousal support entitlement. Section 15.2(5) of the DA provides as follows:

Spousal misconduct

- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
- [258] Subsequent case law has added an important gloss to the concept of conduct neutrality. In Leskun v. Leskun, 2006 SCC 25, the Court held as follows:
- [21] There is, of course, a distinction between the emotional consequences of misconduct and the misconduct itself. The consequences are not rendered irrelevant because of their genesis in the other spouse's misconduct. If, for example, spousal abuse triggered a depression so serious as to make a claimant spouse unemployable, the consequences of the misconduct would be highly relevant (as here) to the factors which must be considered in determining the right to support, its duration and its amount. The policy of the 1985 Act however, is to focus on the consequences of the spousal misconduct not the attribution of fault.
- [259] In B.S.D. v. S.K.D., 2021 BCSC 2327 at para. 340, Justice Schultes noted that s. 166 of the FLA, which precludes consideration of spousal misconduct except where it "arbitrarily or unreasonably...causes, prolongs or aggravates the need for spousal support...", is a "legislative reflection" of the principle from Leskun. Justice Schultes helpfully expands on how findings of family violence impact the spousal support entitlement analysis at para. 353:
- [353] [...]. However deplorable family violence may be (and there is no question that it is a serious stain on society), it is essential to keep in mind that family law legislation does not make it a free-standing basis for compensation to the victim. That would be accomplished by a civil action based on the assaults themselves. Rather, the relevance of such conduct is to one of the existing bases for spousal support under the DA. That is why actions by a

spouse that causes, prolongs or aggravates the need for support is admitted as an exception to the general prohibition on consideration of the parties' conduct. Put simply, family violence does not offer a basis in itself to order support.

Section 166 of the FLA is analogous to s. 15.2(5) of the DA.

[260] I have concluded that Ms. T is not entitled to spousal support on a compensatory basis but is entitled to spousal support on a non-compensatory basis.

2. Compensatory Spousal Support

[261] Ms. T asserts that she was economically disadvantaged and suffered financial consequences as a result of the marriage and its breakdown. The difficulty with this submission is that parties did not have a traditional marriage where Ms. T stayed home with the children and sacrificed career opportunities. Further, Mr. T had been unemployed for several months before the parties separated; he was economically disadvantaged at the time of the separation and he continues to be unemployed to this day. He is now 71 years old and I have accepted his evidence that he has not been able to find gainful employment, despite applying for numerous jobs. I find he is unlikely to be an active member of the workforce now or in the future.

[262] I have carefully reviewed the evidence and am simply unable to conclude that Ms. T's career aspirations or income earning potential were compromised by her roles and responsibilities while married to Mr. T. I am satisfied that Ms. T grew her nanny business during the marriage and that she earned an income well beyond what she asserted or reported on her income tax returns. Furthermore, despite her state of health as reflected in her "Persons With Disabilities Designation Application" which was sent to the Ministry in July of 2020 ("Disability Application"), she testified she intends to return to the work force, and her health has improved since 2020.

[263] As noted earlier in these reasons, Ms. T was a single parent when the parties met and her children were in elementary school. While Mr. T supported her financially early in the relationship so that she would leave the massage business, she was enterprising and transitioned into the nanny business within a couple of years.

[264] I find there was no economic hardship or financial disadvantage arising from the marriage and its breakdown that was not also suffered by Mr. T. I am mindful that the dissolution of the marriage has been very difficult on both parties; however, these economic and financial consequences do not establish an entitlement to compensatory spousal support as contemplated by the DA or the FLA.

3. Entitlement to Non-compensatory Spousal Support, and Ms. T's State of Health

[265] In *Chutter v. Chutter*, 2008 BCCA 507 leave to appeal ref'd [2009] S.C.C.A. no. 41, the court reasoned at para. 54 that:

- [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.
- [266] I am mindful that a spouse's entitlement to non-compensatory spousal support should not be based on an unduly restricted definition of "need" or confined to the spouse's ability to meet their expenses; further, "need" must be considered with reference to the marital standard of living and the payor spouse's post-separation standard of living: Chutter at paras. 57-61, 88; Ouellette v. Ouellette, 2012 BCCA 145 at para. 43; Marquez v. Zapiola, 2013 BCCA 433 at para. 34; Lee v. Lee, 2014 BCCA 383 at para. 59.
- [267] I address "the needs and means of the spouses upon marital breakdown" in light of these authorities and those cited earlier in these Reasons. Central to the means and needs of the parties is Ms. T's capacity to be economically self-sufficient both during, and after, the marriage. The evidence concerning her career running a nanny business, the extent to which the business was actually run by her, and other business opportunities she may have been pursuing, is contested. For this reason, I review the evidence and make findings of fact about Ms. T's ability to earn an income before and after the marriage.
- a) Ms. T's Trip to Vietnam and Hong Kong in 2017 and her work-life thereafter
- [268] Ms. T's entrepreneurial spirit was evident when she took a six week long trip to Vietnam and Hong Kong in March 2017, a few months before the parties separated. While she testified that she took this trip to get away from Mr. T, her text communications do not bear this out. Her text messages to Mr. T indicate that she was searching for and found an office overseas and hired staff for a new business enterprise that involved bringing foreign students to Canada for their further education. Similarly, when further text messages that she sent to Mr. T were put to her on cross-examination, she confirmed that she had done work in Hong Kong to address an issue for a foreign nanny applying for work in Canada.
- [269] Ms. T's text messages to Mr. T stated that she had hired employees and rented office space for her business; she sent pictures of the office space. Ms. T testified that she only arranged for employees in the event the work was available but the text messages do not say so. Ms. T also testified that this was only a "virtual office"; however, her text messages include photographs of the physical office which she texted she had rented. The text messages were frequent, and alternated between discussion of business and affectionate exchanges.
- [270] Ms. T also testified that Mr. T made her do this work. Mr. T testified this was not the case and that this was Ms. T's business initiative.

- [271] I find Ms. T's evidence concerning the reason for her trip to Vietnam and Hong Kong lacks credibility. Her testimony was inconsistent with her own text messages. I find that, while there may have been a holiday component to the trip, she was engaged in actively implementing an additional business opportunity. Furthermore, the text messages clearly indicate that she was very excited and enthusiastic about it.
- [272] Both parties testified that Ms. T spoke to Mr. T after their separation about the nanny business and she renewed the business licence for the nanny business on July 12, 2018. Ms. T had rented an office downtown for her nanny business which she eventually replaced with a virtual office with a business mailing address. Counsel for Mr. T notes that long after the parties' separation, on February 5, 2019, Ms. T received an email stating that a package was delivered by International Language Academy of Canada ("ILAC") to her office address on West Pender Street in Vancouver with a package tracking number showing that it was intentionally ordered. ILAC was involved in Ms. T's business with international students.
- [273] Ms. T testified that it was Mr. T who had dealings ILAC. Mr. T testified that it was Ms. T who approached this company during their relationship for purposes of building a business relationship to bring foreign students to Canada. Mr. T testified that he had reviewed a business contract between Ms. T and ILAC on Ms. T's behalf. He asserts that he assisted Ms. T from time to time on such matters but he did not actively engage in this enterprise for his own purposes or as a viable business for him. I accept this evidence.
- [274] I should note that while the parties were together, Mr. T did some limited immigration consulting, under the name Golden Land Immigration and he had an associated email address. Mr. T indicated that he did this work, essentially to assist Ms. T with her nanny business. In any event, his consulting business was short-lived, due to regulatory reform and restrictions that precluded him from continuing to do this work; in addition, his executive level, full-time work meant he could not devote much time to this endeavor. As a result, his consulting work yielded little income. The evidence establishes that Ms. T continued to use Mr. T's Golden Land Immigration email address after their separation, although she testified that she did not perform immigration consulting work.
- [275] Having considered the evidence, I find, on a balance of probabilities, that Ms. T worked during the marriage and also continued to work after the parties separated, or was able to work, although to a lesser degree. The correspondence with ILAC is consistent with her business dealings during her trip to Asia in March 2017. While I am satisfied that she was working during the marriage, the more difficult question to assess, is what her level of income was, and to what degree she worked, or could work, after the parties separated. This assessment was made all the more difficult by Ms. T's incomplete disclosure.
- b) Ms. T's Evidence Regarding her State of Health

- [276] Ms. T testified that her current state of health is poor and is a result of Mr. T's abuse. She testified that she is "sick" as a result of Mr. T striking her on August 21, 2017 when he "hurt [her] head". She testified that she still has a pain in her neck and shoulders today as a result of that incident, although she admitted on cross-examination that she did not know where her neck pain, headaches and hip pain originated.
- [277] Ms. T also asserted she experiences post-traumatic stress disorder ("PTSD"), depression, and anxiety resulting from Mr. T's abuse.
- [278] No expert report was tendered at trial which assessed Ms. T's mental health, or which diagnosed PTSD, depression, or anxiety. M testified that her mother left Taiwan with her and her brother and came to Canada because her mother was abused by Mr. S, M's biological father. During her cross-examination, Ms. T was taken to Disability Application from July 2020. The text under the heading "Health History" in this application was filled out by Ms. T's family doctor, and provides that Ms. T suffered from PTSD and anxiety from her relationship with her children's biological father which ended in 2004, as well as from her abusive relationship with Mr. T. Ms. T did not agree that she told her family doctor that she was abused by the biological father of her children, although she acknowledged she felt she was treated unfairly by him. Ms. T also stated that she had not read what the doctor wrote.
- [279] I find it likely that Ms. T suffered from some anxiety and depression while married to Mr. T. While I do not have before me any expert report that discusses the causes of Ms. T's anxiety and depression, I find there is a sufficient enough evidentiary base to draw a reasonable inference that these conditions would be at least exacerbated by Mr. T's drinking and violent behaviour.
- [280] Ms. Ginny Wong, who started counselling Ms. T on January 28, 2017, testified she counselled Ms. T for 48 sessions. Ms. T was referred to her through the Victims Service Program. Ms. Wong testified that she disclosed her counselling records to Ms. T, who then redacted them before they were tendered. Ms. Wong provided opinions on Ms. T's mental health but her qualifications were not tendered and a formal report was not filed.
- [281] Ms. Wong testified that, when the counselling sessions started, Ms. T did not want to take depression medication. Ms. Wong stated that it took a few sessions to convince Ms. T to take the medication; she could not remember when she started taking the medication. Ms. Wong's counselling sessions covered a number of topics beyond Mr. T's abusive behaviour, such as difficulties with K and coping strategies. Ms. Wong testified that Ms. T gave her the impression that Ms. T had "exaggerated negative beliefs" and anxieties about running into her friends and Mr. T, thinking her friends thought she was not good, and blaming herself.

[282] Based on the evidence before me, I am not able to conclude that Ms. T's state of health was so severe during the marriage that she was physically or mentally disabled to the extent that not able to work either full-time or part-time. Certainly, her successful nanny business, which paid for both her children's private school education and holidays abroad, particularly when coupled with her trip in 2017 to Vietnam and Hong Kong to hire employees and rent office space, suggest otherwise.

[283] I have carefully considered the issue of whether Ms. T suffers from PTSD currently or at earlier times. This is a highly specialized diagnosis which I have difficulty assessing on the evidence before me. Also, any statements in medical records or Ms. T's Disability Application were not subjected to cross-examination and were not the subject of an expert report.

[284] Accordingly, I respectfully find that I am unable to draw conclusions, on the balance of probabilities, that Ms. T suffers from PTSD or was unable to work during the marriage.

c) Ms. T's Disability Application

[285] During cross-examination, Ms. T was taken to a portion of the Disability Application that described her mental and physical health. She confirmed her handwritten note in the application that stated: "[m]y disabling condition is severe and it makes it difficult for me to do the following daily activities..." The Disability Application form set out a checklist of "Daily Living Activities". Ms. T checked-off various boxes under the checklist showing which activities her disability made it difficult for her to do. Ms. T testified that the checklist was accurate and that an advocate from North Shore Disability explained each item to her line-by-line.

[286] According to the Disability Application checklist that Ms. T filled out, it is difficult for her to perform basic activities such as:

- getting in and out of the shower;
- washing herself;
- remembering or having the motivation to do at least basic hygiene daily;
- preparing food;
- remembering to take food off the stove or out of the oven;
- remembering to eat regular meals and healthy foods;
- taking medications and getting prescriptions re-filled;
- doing dishes and laundry;
- cleaning her home;
- remembering or having the motivation to keep her home clean;

- shopping;
- going up and down stairs or ramps;
- bending to pick up things off the floor;
- kneeling and getting up from a kneeling position;
- taking public transportation, including remembering to get off at her stop;
- understanding bus or train schedules;
- remembering to pay bills on time; budgeting; and
- stopping herself from buying things that she does not need.

[287] The Disability Application form also stated that she needed K to help her to remember to throw out expired or "gone off" foods and to pick up items from shelves while shopping, placing the items in a basket, taking them out of a basket and putting them onto a cashier's desk. Ms. T, also checked-off boxes relating to her mental health, indicating that she experiences difficulty making decisions and planning ahead, completing tasks, making rational choices, remembering information, and interacting with others, amongst other difficulties. Ms. T also stated that she has difficulty "understanding what others say to me, understanding what I read, and hearing what others say to me in person or on the phone", amongst other communication issues.

[288] I have reviewed the evidence as a whole and it patently does not support the conclusion that the symptoms, as described in the Disability Application, were present prior to the time the parties separated.

[289] Counsel for Mr. T argued that the statements in the Disability Application are exaggerated or untrue. For example, she noted that K confirmed during his testimony that he did not live with his mother when the Application was submitted and so could not have been providing her the constant care that Ms. T testified she needed. Counsel for Mr. T also submitted that K's testimony showed he does not and did not help her on a daily basis, yet the Disability Application states that he did; rather, K testified he visited his mother approximately every two weeks or so. Ms. T did not receive assistance from her daughter in this regard as M lives in Toronto.

[290] Counsel for Mr. T submits that Ms. T could not need the continual daily care which she stated she needed in the Disability Application. Indeed, Ms. T admitted on cross-examination that she did not need continual care.

[291] Counsel for Mr. T also underscored the evidence that Ms. T took transit each day to court by herself, and flew on her own from Vancouver to Ontario in September 2020 to visit her daughter and her newborn granddaughter. Counsel asserted that not only is Ms. T physically capable, she exhibited mental fortitude in giving testimony, and preparing evidence and documents for her counsel which required concentration and detailed

analyses of Mr. T's financial transactions. She submitted that Ms. T's efforts indicate that she was not as ill as she represented in her Disability Application.

- [292] Counsel for Mr. T also noted that there is no argument in Ms. T's closing submissions stating that she remains as physically impaired as stated in her Disability Application. Counsel adds that Ms. T's closing submissions refer to, and are restricted to, assertions of mental impairment. Counsel also pointed out that she had no opportunity to cross-examine the doctor who filled out the "Medical History" portion of the Disability Application wherein reference is made to various diagnoses.
- [293] While Ms. T's Disability Application was originally rejected on August 17, 2020, on the basis that she "did not meet the eligibility criteria", Ms. T successfully appealed that decision. Ms. T prepared a letter dated September 9, 2020 to support her appeal, which states that: she has physical impairments that require "continuous assistance" with social functioning; she requires daily supervision to plan and cook healthy meals; she avoids going to stores and so "[she] require[s] her son to do most of [her] weekly shopping for her". She also stated that "if [she has to] go out in the community for an appointment, [she] need[s] [her] son to [go] with her for emotional support". Again, this health profile is of a different order and kind altogether than my assessment of Ms. T's health, physical, or mental, before and at the time the parties separated, based on the evidence before me.
- [294] I agree with counsel for Mr. T that the content of the Disability Application presents a categorically different perspective on Ms. T's ability and competency than what can be discerned from the evidence relating to the period prior to the parties' separation. I also agree that there is no expert evidence which concludes Ms. T's health was severely impacted by Mr. T's misconduct during the marriage.
- [295] I find, based on her own admission, that Ms. T does not need continual at home care. I also find, based on my observations of Ms. T as a witness for numerous days, that her health is better than it was portrayed to be in her Disability Application in 2020. Indeed, Ms. T's counsel submitted that the apparent improvement in her health and her admission in this regard does not undermine the conclusion that the statements in the Disability Application were true at the time the application was filled-out.
- [296] I accept that the incidents of family violence did have a painful mental and emotional impact on Ms. T. While the evidence does not establish that these incidents resulted in an inability to be economically self-sufficient during the marriage, Ms. T's viva voce evidence made plain that these incidents have had lasting effects on her. While her condition may not be as serious as it was portrayed in the Disability Application, I am prepared to accept that the consequences of the incidents of family violence have had an adverse impact on Ms. T's post-relationship ability to become economically self-sufficient. On her own evidence, it is clear the impact is abating, and that she hopes to be able to return to the workforce soon.

d) Mr. T's Financial Ability to Pay

[297] One factor to consider in the entitlement analysis (as well as determination of quantum) is the payor spouse's ability to pay: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 60.

[298] In this case, both parties assert that they have minimal post-separation income, approaching or below the amount below which spousal support will not be payable. This amount, or "the floor", is discussed in the Spousal Support Advisory Guidelines [SSAG]) at 11.2:

There should generally not be any amount of spousal support payable until the payor's gross income exceeds \$20,000 per year. A minimum wage or poverty line income would be too low for a floor, providing too little incentive for the payor to continue working, given prevailing tax rates. A review of the case law suggests that judges almost never order spousal support where payors make less than \$20,000, or even slightly more. According to child support database information, where dependent children are involved, if the payor's income is below \$20,000 gross annually, spousal support is only ordered or agreed upon in less than 2 percent of cases and the percentages for incomes of \$20,000 to \$29,000 are only about 2.5 percent.

[299] The SSAG at 11.4 also discuss the applicability of the formulae where the payor is making just above the floor (i.e., between \$20,000 and \$30,000):

There is a second related concern for those payors whose incomes are more than \$20,000 but less than \$30,000. For these payors, assuming entitlement, consideration should be given to the percentages sought under the applicable formula, the net disposable income left to the payor spouse, and the impact of a spousal support payment upon the work incentives and marginal gains of the payor. For example, under the without child support formula, a shorter marriage would mean a smaller percentage and hence a smaller bite of the payor's income, in contrast to our 25-year marriage examples above. Or, to take another example, for a payor with an income in this \$20,000 to \$30,000 region and whose shifts, overtime hours or seasonal work are changeable, there are realistic concerns about disincentives to work. This flexibility will also avoid a "cliff effect" for payors just above the \$20,000 floor, where a payor would suddenly go from zero spousal support to a formula amount simply because of making a few dollars more per year.

As these cases are just above the income floor, these are situations that could be treated as "exceptions" to the operation of the formulas, unlike those cases where the payor's income is below the floor. But the concerns in these two situations both arise from the operation of the floor, so we have dealt with them here together.

[300] More recently, in *Nadim v. Hakim*, 2018 BCSC 1999, Justice Myers found no support was payable where the payor earned roughly \$20,500 annually and held that, given that the \$20,000 floor dates to 2008 and the fact of inflation, the "suggested floor of \$20,000 may therefore be viewed as a conservative figure": para. 46.

[301] While Mr. T's financial circumstances are seriously straitened, so too are Ms. T's. This factor does not go so far as to negate entitlement, but weighs heavily in my determination of quantum and duration, and whether the objectives of spousal support can be better met through reapportionment, rather than a periodic or lump sum order.

e) Conclusions Regarding Ms. T's Entitlement to Non-compensatory Spousal Support

[302] The FLA and DA each direct that all objectives of spousal support must be considered in determining entitlement. Here, neither party is currently working. Not all objectives are here relevant, including compensation for the financial consequences of childcare or economic advantages and disadvantages arising from the relationship or its breakdown. The claimant's argument is, essentially, that the lingering impacts of family violence have impacted her ability to become economically self-sufficient and, as a result, the economic self-sufficiency factor takes some priority here.

[303] I have accepted that Ms. T's health has impacted her ability to secure employment. I have also accepted Mr. T's detailed and persuasive evidence concerning his multiple job applications across a broad spectrum of jobs. Despite his concerted efforts, he has not found employment, likely due in large part to his age.

[304] In addition, as noted above, I have also considered that while Ms. T currently has a PWD designation, she has asserted that she intends to get back into the labour force. This outcome is understandable since she is considerably younger than Mr. T; further, her health has clearly improved since she filled out the Disability Application.

[305] I have considered the evidence before me in light of the principle that spouses, by virtue of marriage, have some ongoing responsibility to care for one another, and also the court's direction in *Zacharias* to closely examine not only the means and needs of the spouses, but also of the nature of the marital relationship and its duration.

[306] The parties' marital relationship was 11 years in duration. This is a significant period of time that informs both entitlement to spousal support and its duration.

[307] As to the nature of the marital relationship, I have already found that Ms. T was financially independent, enterprising and working both before the marriage and also for most of the 11 years of marriage. However, I have also found that she was the subject of some family violence during periods when Mr. T was drinking excessively, and further that there was a power imbalance in their relationship. These incidents of family violence have had serious consequences for Ms. T.

[308] The evidence in this case leads to the reasonable inference that Ms. T's mental health was negatively impacted by family violence. It is also evident that her health deteriorated to the point that she received a Persons with Disabilities ("PWD") designation. While I accept that medical evidence speaking to the impact of family violence on Ms. T's mental health would have been helpful, such evidence is not essential: *Leskun* at para. 28.

[309] I have also considered Mr. T's financial ability to pay. While his income is now much less than it was before he lost his job in 2017, he has a shared entitlement to net proceeds of the monies held in trust from the proceeds of the sale of the former family home.

[310] Given the evidence before me, the guiding authorities, and my reasons discussed above, I find that Ms. T is entitled to spousal support.

4. Assessment of Quantum of Spousal Support

[311] At issue is the quantum of spousal support payable to Ms. T from 2017 to date. Ms. T is not seeking a monthly spousal support order. Rather, she is seeking a lump sum award "with the ability to review the spousal support from time to time if Mr. T has found employment". Counsel for Ms. T asserts that Mr. T has "no income and so no ability to pay spousal support from month to month but the court could award a lump sum" that may be drawn from his remaining share of the former family home. Ms. T asserts she has been incapable of working and that her income has been nil since the parties separated.

[312] Mr. T submits that if the court should find she is entitled to spousal support, some income should be imputed to her, noting that persons receiving disability income are permitted to earn up to \$15,000 annually without losing their benefits. The evidence before me bears this out; Ms. T is able to earn \$15,000 a year and still maintain her disability benefit income assistance.

a) Mr. T's Guideline Income

[313] In determining Mr. T's Guideline income, I have considered not simply what Mr. T actually earned, but also his capacity to earn income: see *Marquez* at para. 37; *Van Gool v. Van Gool* (1998), 64 B.C.L.R. (3d) 94 (C.A.); *Barker v. Barker*, 2005 BCCA 177 at para. 19. If Mr. T is intentionally underemployed (i.e., not employed in a position commensurate with his earning capacity), it will be appropriate to impute income for the purposes of a spousal support order.

[314] The reasons of this court in *Hanson v. Hanson* (1999), 92 A.C.W.S. (3d) 1024 (B.C.S.C.), are also of assistance in discerning whether income should be imputed. In that case, the legal principles set out by Madam Justice Martinson relating to imputing income may be summarized as follows:

- i. Section 19(1) of the Guidelines allows the court to impute such amount of income to a spouse as it considers appropriate in the circumstances.
- ii. Imputing income is the way in which the court gives effect to the legal requirement that a spouse must earn what the spouse is capable of earning.
- iii. The court must consider not only the amount of income a spouse actually earns, but "the amount of income a spouse could earn if working to capacity."

iv. Bad faith is not required. The spouse required to pay is intentionally under-employed if that spouse chooses to earn less than he or she is capable of earning.

v. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the spouse are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.

[315] In *Marquez*, at para. 38, our Court of Appeal reasoned that the test for imputing income for under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of age, education, health, work history and work availability.

[316] I wish to make clear that I have employed these principles in reaching the conclusion that it would be neither reasonable nor fair to impute income to Mr. T above the amount he actually has received in unemployment and pension income.

[317] Ms. T asserts that Mr. T is capable of earning income well above "floor" as set out in the SSAG. She asserts I should impute an income of approximately \$107,173 annually following separation. She bases this figure on his 2017 Notice of Assessment. Counsel submits that "My Support Calculator.ca" indicates that Mr. T should pay Ms. T between \$1474 to \$1975 per month for 5.5 to 11 years based on Mr. T's imputed income of \$107,173.

[318] Accordingly, Ms. T seeks a lump sum award of spousal support, ranging from \$97,284 to \$260,700. She submits that this amount ought to be taken from the remaining funds held in trust from the sale of the former family property. There is currently \$514,148.08 remaining in trust from the sale of the former family home. Counsel relies on the decision of *Parton v. Parton*, 2018 BCCA 273 at paras. 23 and 78, in submitting that the lump sum can be paid out of this sum.

[319] Counsel for Mr. T asserts that the figure of \$107,173 is entirely unreasonable. She asserts that there is no realistic likelihood of Mr. T obtaining employment or replicating his prior income. As indicated above, from my review of his evidence, including his numerous and repeated attempts to find employment since the parties separated, I agree that imputing an income of \$107,173 would be both unrealistic and unfair. Nor am I persuaded that Mr. T is likely to be employed into the future. In light of the evidence before me, I am of the view that income should not be imputed to Mr. T.

[320] I have assessed Mr. T's guideline income year by year from 2017 onward. While Mr. T earned \$107,173 in 2017, the parties shared most of that income while living together. I find that the fairest and most accurate assessment of Mr. T's income for spousal support purposes is to consider what Mr. T earned after the parties separated in August of that year. The evidence before me indicates that Mr. T earned \$24,873 during that period in the form of pension and employment insurance income.

[321] Mr. T earned the following pension income from 2018 to 2020:

2018:

\$28,618

2019:

\$21,269

2020:

\$28,795

[322] At the time of trial, Mr. T anticipated a yearly income for 2021 of \$31,798.04 based on his monthly pension income of \$2,584.67 (i.e., \$933.16 per month UK Merchant Navy Pension, plus \$487.21 monthly CPP, plus \$1,164.30 Old Age Security and Guaranteed Income Supplement).

[323] Mr. T's income for each of 2018, 2019, 2020, and 2021 was limited to a pension income.

[324] I now address Ms. T's ability to earn income and her likely Guideline income.

b) Ms. T's Capacity to Earn Income

[325] As noted above, I have found that Ms. T was operating a nanny business at the time the parties separated, that she is much younger than Mr. T, and that she is capable of running a business. However, Ms. T testified that she made little if any income from the nanny business both before and after the separation and that it was Mr. T who ran the business. Ms. T also testified that she did not work after the separation due to the effects of the family violence she experienced.

[326] While I accept that Mr. T assisted Ms. T in a limited capacity from time to time with the nanny business, I do not accept Ms. T's evidence that it was Mr. T who ran this business and not her. As noted earlier, Mr. T was a busy executive and I accept his evidence that this business was run by Ms. T.

[327] Mr. T testified that Ms. T proposed opening a nanny business in 2006 because she had formerly had a nanny business in Taiwan. He explained he did not know anyone in the nanny business and that he could only speak, write, and read English, while Ms. T was fluent in Cantonese, Mandarin, Taiwanese, and Vietnamese. He testified this put her at a competitive advantage in the Vancouver marketplace in operating the nanny business, as she was able to deal easily with overseas nanny agencies when placing nannies in Vancouver. He added that Ms. T could also converse with a diverse group of prospective employers in Canada, as well as the foreign nannies themselves.

- [328] Ms. T testified that she did not have the business skills to run a business. However, her own evidence suggests otherwise. A text message to Mr. T while she was overseas in March 2017 suggests she had her own business in Taiwan before immigrating to Canada. The text states that she would be meeting with "my ex-staff" and that her "ex-staff" picked her at the airport.
- [329] Ms. T denied on cross-examination that her ex-staff were her former employees. She testified that these persons were the employees of her children's biological father, Mr. S, and that she happened to be meeting with them at his request. There is no mention of Mr. S in the text messages in which the "ex-staff" were mentioned. I do not find her explanation plausible.
- [330] TL, a family friend, also testified that Ms. T told him that she ran a nanny agency in Taiwan. On cross-examination, Ms. T denied she told Mr. T and TL that she ran a nanny agency in Taiwan. In any event, I find that Ms. T ran some form of business with employees in Taiwan, and that she had the business skills and acumen to run a nanny business while married to Mr. T.
- [331] While Ms. T denied she ran the nanny business, she also admitted on cross-examination that she advertised in local Asian newspapers offering her services to assist Canadian employers to find foreign nannies. She acknowledged she deducted these advertising expenses on her income tax returns. Further, the "Statement of Business Activities" in her income tax returns state that she was the 100% owner of the nanny business.
- [332] Ms. T testified that she would meet with prospective employers looking for foreign nannies, find out what they were looking for in a nanny, and assist them with the government's foreign employee forms. She also testified that she liaised with foreign nanny agencies in order to find foreign nannies for local employers. However, later during testimony she stated that the scope of her involvement in the nanny placement process was very limited and she denied she had any involvement in the hiring of foreign nannies for employers; she stated that employers were left to do so on their own.
- [333] When Ms. T testified at the provincial court hearing in January 2018, she gave the name of the Taiwanese nanny agency. The claimant was cross-examined on the transcript of her evidence at that trial and she admitted that she had a "partnership" with the Taiwanese nanny agency.
- [334] Ms. T testified that the nanny business collapsed in 2016; however, as noted earlier in these reasons, she renewed her business licence for the nanny business after the parties separated in 2018.
- [335] In light of the above, I am satisfied that Ms. T operated a nanny agency during the marriage and that she had the skill to do so after the parties separated. However, I accept that her income earning ability was detrimentally affected by her compromised health. The challenging question is to what degree.

c) Ms. T's Guideline Income

[336] Ms. T argued in her closing submissions that Mr. T provided no evidence of her income from the nanny agency. Counsel for Mr. T submitted that this was not a shortcoming in Mr. T's case but rather a direct result of Ms. T's breach of multiple court orders requiring her to produce this evidence. Mr. T submits that an adverse inference should be drawn against Ms. T in imputing her income as a consequence of her failure to produce records that are material and relevant to the issues to be tried in this matter.

i. Ms. T's failure to disclose

[337] In her May 30, 2019 order, Justice Baker ordered that Ms. T disclose a large number of documents and awarded Mr. T the costs of his application. The disclosure order included that Ms. T was to produce "all documentation regarding her nanny business including documents relating to expenses and profits of that business for the period of January 1, 2015 to the present". The claimant did not produce these documents. Instead, she claimed that she did not have any documents in her possession relating to the income from the nanny business because it was Mr. T's nanny business and also because he took the documents away when they separated.

[338] I have already found that Ms. T operated the nanny business. Further, the evidence is clear that when the parties separated on August 21, 2017, Mr. T was arrested and escorted out the former family home, such that he did not have an opportunity to take any documents with him. Mr. T returned to the former family home after their separation on one brief occasion, with a police escort, to obtain a few personal belongings. He testified that any documents which he had were given to him by Ms. T who packed them up and left them in his car in the parking garage. These did not contain documents relating to the income and expense of the nanny business.

[339] I find that Ms. T had sole possession of all documents relating to the nanny business and that she failed to disclose documents that would disclose her profits. Accordingly, it is appropriate that I assess her income earning ability with this in mind.

[340] Ms. T also gave contradictory evidence about how much she received in income for each nanny placement. She initially testified that she received \$1,500 to \$2,000 from each Canadian employer that she placed a nanny with. She then altered her testimony and testified she received \$600 per nanny from Canadian employers and that over time this amount went up to \$1,000 per nanny.

[341] Mr. T testified that Ms. T advised him that each nanny paid \$7,000 to the Taiwanese nanny agency which partnered with Ms. T to find them Canadian employment positions for their nannies. He testified that Ms. T told him that she received half that amount (\$3,500) for each nanny she placed as compensation for her services. Ms. T denied this was the case and denied telling Mr. T this was the case.

- [342] There is also a discrepancy in the evidence regarding the number of nannies that Ms. T would place per year. Ms. T claimed that she only successfully placed two to three nannies per year and that she did not receive any income from the foreign nanny agency for finding and placing the nanny with a Canadian employer. She testified she was only paid by the Canadian employer.
- [343] Mr. T testified, based on his direct observations, that Ms. T would pick up an average of one to two and sometimes three nannies from the airport per month. The nannies would often stay with them for a week of "training" before going to their new employer. The nannies that stayed with them slept in M's bedroom in the bunkbed or in the living room. On two occasions, he directly witnessed the nanny handing Ms. T envelopes, after she had picked them up from the airport. He says Ms. T opened the envelopes, and that they contained cash.
- [344] Mr. T also testified that Ms. T disclosed to him that she was using her children's bank accounts to conceal money received from the nanny business, so that she did not have to pay taxes on it. Mr. T testified Ms. T intended to tell the Canada Revenue Agency that the funds placed in the bank accounts were child support from her children's biological father. Ms. T denied this was what she did. However, she did not produce statements from the children's bank accounts or produce documents confirming the amount of child support she received from the children's biological father.
- [345] During the period that Ms. T was operating her nanny business, she received a significant number of large transfers to her TD Trust Account ending in the number 576 ("TD Account"). These various deposits yield the following totals, year by year:
- a) 2008:
\$70,426.78
 - b) 2009:
\$75,059.60
 - c) 2010:
67,434.34
 - d) 2011: from January 1 to April 20, 2011 at a total of \$24,317 plus from June 20 to December 31 at a total \$21,990
\$46,307.00
 - e) 2012:
\$49,873.49
 - f) 2013:

\$36,883.12

g) 2014:

\$31,180.00

h) 2015:

\$45,123.00

i) 2016:

\$40,529.10

j) 2017:

\$30,057.00

[346] In 2018, Ms. T received total deposits of \$73,734.31; however, this included a transfer of \$61,382 from the interim distribution of \$100,000 that each party received that year from the sale of the former family home.

[347] Ms. T submits that a significant portion of these deposits represents child support payments from the children's biological father. In the May 2019 Order of Justice Baker, Ms. T was ordered to produce documentation which confirmed what amounts of child support she received from her children's father. Ms. T did not honour this order; no such disclosure followed.

[348] Mr. T testified that during their marriage Ms. T. frequently complained that the children's biological father, was not paying any child support. He also testified that Ms. T told him that the Taiwanese nanny agencies were depositing funds to the children's accounts, again as a method of not paying income tax. In her May 2019 order, Justice Baker ordered that the children's bank statements be disclosed. Again, Ms. T breached her court order and did not disclose the children's bank statements. We do not know how much money is in these accounts.

[349] Counsel for Mr. T argues that because Ms. T admitted that she left Taiwan with her children without the biological father's knowledge or consent, and since the evidence is that the children did not have a close relationship with their father afterwards, it is unlikely that their biological father provided any support, or in any event that it was not as generous as Ms. T alleges.

[350] There is some evidence that K and M's biological father, Mr. S, came to Canada when M was a teenager, and met the parties and M during a time when M was having emotional difficulties. While the evidence does not establish the children have a close connection with their biological father, there is nonetheless some evidence that the father remained at least somewhat involved in their lives. Counsel maintains the connection between the children and the father was weak and that this was an isolated instance. She also points to

when K decided to visit Asia for several months but chose not to stay with his father.

- [351] Counsel for Ms. T submits that the timing of the "child support" deposits matches the years that she was self-employed with her nanny business. She also notes that the medical log of her family doctor from 2011 states that Ms. T reported she was "beaten" by the children's biological father. However, Ms. T testified this was not the case; again, she stated that she felt that the biological father was not fair or respectful but not that she was beaten by him.
- [352] Notwithstanding this unsubstantiated doctor's note, counsel for Mr. T points to Ms. T's Disability Application, and that her own Application refers to Ms. T suffering from PTSD arising from her abusive relationship with the biological father. She asserts that if this statement was untrue it was incumbent upon Ms. T to correct the error and she did not.
- [353] In light of the whole of the evidence before me, while I am prepared to accept that Ms. T may have received some nominal child support from the children's biological father, I am simply unable to draw a reasonable inference, that most or a substantial proportion of the monies deposited into her bank account were child support payments from the biological father. Notably, there was no specific or consistent amount deposited each month, no discernable pattern to the amounts deposited or consistency in the frequency of deposits into Ms. T's account.
- [354] Rather, in light of her non-disclosure, I have drawn an adverse inference that a small percentage of the deposits into Ms. T's account were child support payments and that the remainder was income received through her nanny business. Moreover, I also find that monies from the nanny business were also, more likely than not, diverted into the children's accounts. It would have been a simple matter for Ms. T to disclose these accounts but she chose not to do so, in the face of a court order requiring her to do so.
- [355] As to Ms. T's likely monthly income during the marriage, Mr. T testified that Ms. T placed one to two, and sometimes up to three, nannies per month, and that these placements continued in 2017. Counsel for Mr. T submits that, in light of Mr. T's evidence, even if Ms. T placed just 15 nannies with Canadian employers per year (an average of 1.25 nannies per month) and she received \$1,000 from each employer plus \$3,500 from each nanny or the Taiwanese agency directly, then Ms. T could have earned a gross income of \$67,500 per year. Counsel submits that this was likely her minimum annual income, as her business expenses (home office, stationary and occasional travel to employer's residence) were fairly minimal.
- [356] Ms. T acknowledged that she did not claim much income from the nanny business on her income tax returns. When asked why she did not declare this income, she said it was on the advice of Mr. T. Mr. T denied that he told Ms. T to do this in his testimony. In any event, Ms. T declared losses on her nanny business over repeated years.

- [357] Ms. T also testified that she did not receive any funds from nannies because it was illegal in Canada for a nanny to pay someone to find them an employment position. Counsel for Mr. T argued that this evidence is inconsequential since Ms. T was being paid in cash and through a third party's bank account.
- [358] I have no difficulty concluding that Ms. T underreported her annual earnings. I also find that it is reasonable, on the evidence before me, to conclude that Ms. T earned at least \$60,000 net per year or approximately \$5,000 per month net while the parties were married, although not during those periods of turmoil in the household when Mr. T was unemployed and abusing alcohol. Specifically, I accept the evidence that Mr. T stopped abusing alcohol after going through his residential rehabilitation, but also find that when he lost his job in 2017 he relapsed, and this negatively impacted Ms. T's productivity and earning capacity.
- [359] There is also the difficult question of what she earned and was capable of earning in the years following the parties' separation. This question is made all the more challenging to assess given that Ms. T's income earning potential was affected by the family violence she experienced. Further complicating my assessment is that I have found Ms. T's evidence was unreliable or not credible on a number of issues before me, as I have already articulated in these Reasons. Specifically, I find that she has not been candid or credible in reporting her actual income both before and after her separation.
- [360] I have assessed Ms. T's income in 2017 from the time the parties separated until the end of the year, as I did for Mr. T. Mr. T asserts that I should impute income to Ms. T of \$20,319. I have already found that the evidence before me does not support the conclusion that Ms. T's state of health was so severe during the marriage that she was physically or mentally disabled to the extent that she was not able to work either full-time or part-time. Nevertheless, I am of the view that Mr. T's excessive drinking over the years, his misconduct, and the separation likely exacerbated Ms. T's anxiety and depression, such that she would likely not be as productive in her business following the parties' separation. This, in turn, would have resulted in a lower income earning capacity. I have already found that Ms. T had the ability to earn about \$60,000 net per year, or \$5,000 per month, in her nanny business. A little over four months remained in the calendar year at the time of separation, which would have yielded about \$20,000. However, given my finding that Ms. T would likely not have been as productive in her business during or around the time of her separation, I find that imputing the sum of \$7,000 is fair in light of all the facts before me.
- [361] I have considered the evidence of Ms. T that she has been unable to work at all since 2017. Ms. T also testified that her nanny business collapsed in 2016. I do not accept her evidence that she has been unable to earn any income at all since the parties separated. She renewed her nanny licence in 2018 and claimed business expenses in 2018 although she reported an overall loss to Canada Revenue authorities. She also admitted not reporting all her income in her income tax returns. Further, she has not adhered to court orders that would have assisted the court in assessing her income and income earning capacity.

- [362] I have considered the authorities and factors cited earlier that guide the court in exercising its discretion when imputing income. I am satisfied on the evidence before me that Ms. T currently does have the capacity to work given, among other things, her business acumen and her age, as well as her intention to work. However, I also accept that her income earning ability was significantly compromised by her state of health at or around the time of her separation.
- [363] Although challenging to assess, based on the whole of the evidence before me, I conclude that Ms. T has the capacity to earn at least \$15,000 net each year from 2018 to present. This level of income is in my view reasonable, as it takes into account both Ms. T's health challenges and a reduced part-time work schedule. It is a conservative estimate based on part-time work schedule, at a minimum wage or close to it.
- [364] Ms. T did not receive any disability income until 2020. Accordingly, I have imputed an income to her of \$15,000 for 2018 and 2019.
- [365] In 2020, Ms. T received \$12,235 in disability income. Together with an imputed income of \$15,000, Ms. T received a total Guideline income of \$27,235 for 2020.
- [366] In 2021, Ms. T received \$16,824.96 in disability income. Together with her imputed income of \$15,000, her total Guideline income for 2021 was 31,824.96.

5. Conclusion concerning Spousal Support and Reapportionment

- [367] The challenge with Ms. T's income level is that it comes very near to that of Mr. T. Section 7 of the SSAG provides that, for couples without children, the quantum of spousal support should be 1.5 to 2% of the difference between the spouses' incomes for each year of marriage. Some support would be payable for the years 2017 to 2020, while Ms. T was not in receipt of disability benefits. Shortly thereafter, however, the parties' incomes would roughly equalize and no support would be payable. The DivorceMate calculations are as follows:

2017: \$235/month x 12 months

\$2,820

2018: \$179/month x 12 months

\$2,148

2019: \$82/month x 12 months

\$984

2020: \$20/month x 12 months

\$240

2021:

\$0

2022:

\$0

Total:

\$6,192

[368] I am of the view that this rather nominal amount of spousal support is not sufficient to meet the objectives of spousal support and, when considered along with the other factors addressed below in light of s. 95(3) of the FLA, weighs in favour of reappportionment in favour of Ms. T.

[369] The following other factors also inform the question of reappportionment.

[370] The incidents of family violence instigated by Mr. T are "weighty, meaningful, and compelling": *Jaszczevska v. Kostanski* at para. 41. They also support a reappportionment of family assets because I have found that the family violence detrimentally effected Ms. T's ability to become economically self-sufficient to some extent following the parties' separation.

[371] I have also considered the parties' health and ages, as well as their relatively long 11-year relationship. If Mr. T was not in his 70s, I would be more inclined toward a larger degree of reappportionment, particularly considering Ms. T's current health and ability to work. However, Ms. T has affirmed her intention to re-enter the work force, she is much younger than Mr. T, and I have found that she is currently able to work part-time and is likely to have the capacity to work full-time again, although it is not clear when. On balance, these specific factors also weigh in favour of reappportioning family property in favour of Ms. T.

[372] A factor militating against a larger degree of reappportionment is the origins of the parties' family property. Mr. T's \$96,500 down-payment on the former family home were excluded funds that Ms. T had no role in generating. The same is true for the excluded lump sum monies of \$70,525.71 from Mr. T's UK Merchant Navy Pension, which Mr. T used to pay off family debts before the parties separated. These are important factors to consider. The Court of Appeal in *Venables* at para. 110, has affirmed that such factors are also appropriate to consider in reappportioning family property.

[373] Having regard to these factors and the evidence as a whole, I find that dividing the proceeds from the sale of the family residence equally would be significantly unfair to Ms. T. Accordingly, with the exceptions of the items discussed below, I reappportion the family property 60% in favour of Ms. T and reappportion the family debt such that Ms. T will only be responsible for 40% of it.

D. Assets and Debts Not Subject to Reappportionment

1. Pensions and RRSPs

[374] There is no need to re-apportion Mr. T's RRSPs because Ms. T only seeks a 50% division of these assets.

[375] Mr. T has already split his CPP pension in half.

[376] I have determined, earlier in these reasons, that Mr. T's RRSP investments are excluded assets except for those funds that represent their increase in value during the time the parties lived together. Accordingly, Ms. T is entitled to an equal division of this increased value in these funds. That is, Ms. T is entitled to: a) \$45,826.59 of the Manulife RRSP; and b) \$2,198.42 of Holliswealth RRSP.

2. Mr. T's \$20,843.69 Debt Payment in 2018 From Sale Proceeds

[377] Mr. T's severance pay terminated on August 24, 2017. The parties had separated and significant mortgage, mortgage arrears and strata fees on the family home needed to be paid. These obligations fell into arrears in part because Mr. T's CIBC line of credit and Visa card were frozen as a result of the ex parte court order obtained by Ms. T's former counsel. The parties agreed to lift the prohibition on the use of the Mr. T's CIBC line of credit, Visa card and bank accounts on the condition that Mr. T pay the mortgage, mortgage arrears, strata fees, minor repairs on the family residence, interest on the CIBC line of credit and "any other expenses to which the parties may agree in writing or further court order."

[378] On December 22, 2017, Master Caldwell (as he then was) issued a consent order that reflected this agreement that also contained the following term:

4. BY CONSENT. The Respondent [], shall be at liberty to seek a reapportionment of the CIBC Line of Credit debt and Home Expenses from the Claimant , following the sale of the Family Residence.

[]

10. BY CONSENT. Following the sale of the Family Residence, the notary or lawyer conducting the conveyance of the Family Residence shall use the sale proceeds to pay the portion of the CIBC Line of Credit for which the Respondent , provides written proof was incurred during the parties' marriage and/or after their separation for the payment of the Home Expenses, such amount to be agreed upon by the parties or determined by further court order.

11. BY CONSENT. The parties shall not seek a distribution of the net sale proceeds from the Family Residence until the costs of the sale of the Family Residence, the amount of the mortgage on the Family Residence, any arrears of strata fees and interest thereto, deferred property taxes, any unpaid municipal utility amounts and any CIBC Line of Credit debt that is documented in accordance with paragraph 10 of this Order are paid.

[]

- [379] Mr. T paid the costs contemplated in the above order, which totalled \$20,843.69. Once the former family home was sold, Mr. T provided the necessary proof of payment and was reimbursed.
- [380] The 2018 Voith Order followed the 2017 Caldwell Order; it not only provided for the consent distribution to each party of \$100,000 as an interim distribution but also stated:
2. BY CONSENT. On a without prejudice bases, within seven days of being served with this order, the David Lee Notary Corporation shall advance the sum of \$27,288.30 from the Trust Funds [the net proceeds held in trust from the sale of their former family residence] as payment towards the family debt held by the Respondent [Mr. T] in accordance with the order of Master Caldwell made on December 22, 2017 and the order of the Honourable Mr. Justice Bernard made on May 22, 2018 in these proceedings.
 3. BY CONSENT. On a without prejudice basis, [w]ithin seven days of being served with this order, the David Lee Notary Corporation shall advance \$20,843.69 as an interim distribution to the Respondent from the Claimant's share of the Trust Proceeds [net proceeds held in trust from the sale of their former family residence] as compensation for the mortgage and strata fee payments made by the Respondent on the Claimant's behalf following their separation in accordance with the order of Master Caldwell made on December 22, 2018 and the order of the Honourable Mr. Justice Bernard made on May 22, 2018 in these proceedings.
- [381] The order of Justice Bernard was that Ms. T "pay fixed costs thrown away of \$1000" to Mr. T "in any event of the cause".
- [382] Mr. T underscores that Ms. T continued to live in the former family home after the parties separated, while he "was forced to pay for his own 1 bedroom rental accommodations in a shared house while paying expenses on behalf of the Claimant despite [his] exceedingly limited income". Ms. T had the benefit of living in the family residence from August 21, 2017 (the date of the parties' separation) and April 26, 2018 when the sale of the property was completed.
- [383] Mr. T submits that it would be significantly unfair if the \$20,843.69 was reapportioned in Ms. T's favour. He notes that the court should take into account that he chose not to proceed with his claim for occupational rent. Further, he submits that the amount of \$20,843.69 constitutes a very reasonable and conservative rental cost for the eight month period in which Ms. T lived at the condo before it was sold. He notes that, amortized over eight months, the cost of living at the condo prior to its sale was \$2,605.46 per month. Further, he points out that in her Financial Statement sworn on December 24, 2019, Ms. T stated she paid rent of \$2,100 per month living on her own on the north shore of Vancouver, where rent is less expensive than in the downtown core.
- [384] Having considered the entirety of the surrounding circumstances, as well as the without prejudice nature of the order, I am of the view that the \$20,843.69 distribution to Mr. T should not be clawed back in Ms. T's favour as she submits or reapportioned. At the time

these orders were made in 2018, the mortgage arrears were a serious problem. Mr. T was living on a very modest income and living in modest rental accommodations, yet he took on the responsibility for financing the cost of maintaining the family residence that Ms. T was living in. The consent order reflects an arrangement that benefitted both parties in reducing the risk of foreclosure. Further, had Mr. T not agreed to finance the monthly mortgage and strata payments, Ms. T would not have had the benefit of living in a stylish condo downtown for eight months prior to its sale in the spring of 2018. I do not see that the facts warrant a variation of the 2018 Voith Order. Furthermore, considering the facts as a whole, I do not see how an equal apportionment of these particular debts would be significantly unfair.

3. Nissan Rogue

[385] Mr. T submits that because the amount he paid for the car loan for the Nissan Rogue far exceeds the current market value, he should not be required to divide the current market value of the vehicle with Ms. T. While I appreciate that Mr. T paid significantly more for this vehicle than it is currently worth, it is nevertheless family property. However, I am satisfied, having regard to the enumerated factors in s. 95 of the FLA, that it would not be significantly unfair in these circumstances to equally divide this asset. Accordingly, the value of this asset will be divided equally at \$5,500, and Ms. T is entitled to this sum.

4. The Termination Fee of the Leased Vehicle

[386] After the parties separated, Mr. T could not afford to pay for both the vehicle loan on their 2015 Nissan Rogue and the 2015 Nissan Murano. As the Nissan Murano did not have any equity as a leased vehicle, he chose to terminate the lease early. Mr. T testified, and the documents establish, that he was charged a \$6,000 termination fee on the Nissan Murano for terminating the lease early. His CIBC Visa statements for December 2017 show a corresponding \$6,000 payment.

[387] Mr. T asserts that this early termination fee is family debt which should be shared equally between the parties. He notes that neither party was able to pay for this vehicle lease.

[388] Mr. T received reimbursement for the termination fee under the 2018 Voith Order from the proceeds of the sale of the former family home. He argues that Ms. T's submission that there ought to be a reapportionment of the termination fee is without merit.

[389] Both parties were in financial distress following their separation and at the time the debt arose. I am satisfied that the termination of the lease of the Nissan Murano was a necessary and prudent course of action following the parties' separation. I see no principled basis upon which I should reapportion this debt in Ms. T's favour or to Mr. T's detriment. That is, in light of the parties' circumstances, I am not able to conclude that it would be significantly unfair to equally apportion this past debt.

5. Mr. T's Tax Debt

[390] Mr. T incurred personal tax debts during the marriage. He owed \$4,274.12 of income tax debt at the time of separation ("Tax Debt"). This debt was documented in his income tax returns and notices of assessment. Under the 2018 Voith Order, Mr. T received reimbursement for this debt from the proceeds of the sale of the former family home. Ms. T is seeking to have this Tax Debt reimbursement clawed-back and added to the remaining proceeds of sale of the remaining family home before these are re-apportioned in her favour. Mr. T takes the position that this would be significantly unfair.

[391] I am of the view that the Tax Debt should also be equally divided. I do not see how it would be significantly unfair to equally divide this debt. Again, the year following the parties' separation was a challenging one for both of them. Mr. T stepped up to the plate to attend to and manage family debts that would have been problematic for both parties if not paid. The tax debt was a family debt. I am unable to conclude that this debt ought to be reapportioned as I am of the view that its equal division is not significantly unfair to Ms. T.

6. Notary's Administration Fees and Disbursements

[392] The notary, David Watts Notary Corporation, incurred administration fees and disbursements of \$1,516.15 following the interim distributions made pursuant to the 2018 Voith Order. This amount was also deducted from net proceeds of sale of the former family residence.

[393] Mr. T submits that this is family debt for which both parties should be equally responsible.

[394] Counsel for Mr. T noted that, based on the calculations of the deductions made by the notary from proceeds the sale of the former family home that there is an additional notary fee or disbursement of approximately \$687.34, although the notary has yet to document of this amount. This amount will need to be verified by counsel but it is clear it constitutes a family debt.

[395] Again, I see no principled basis upon which I ought to re-apportion this debt. I am unable to conclude that it would be significantly unfair to equally divide this debt.

[396] In summary, the reapportionment of family assets and debts are as follows:

Description

Value

Ms. T's share

Mr. T's share

Remaining proceeds of sale of family home held in trust:

\$514,148.08

\$308,488.85

\$205,659.23

Mr. T's CIBC account:

\$816.96

\$490.18

\$326.78

Increase in value of Holliswealth RRSP:

\$4,397

\$2,198.50

\$2,198.50

Increase in value of Manulife RRSPs:

\$91,653.18

\$45,826.59

\$45,826.59

Net value of Ms. T's bank and Paypal accounts:

\$5,248.07

\$3,148.84

\$2,099.23

Ms. T's Canada Life insurance policy:

\$1,606.24

\$963.74

\$642.50

Nissan Rogue:

\$11,000

\$5,500

\$5,500

Ms. T's CIBC Select Visa:

(\$21,145.88)

(\$8,458.35)

(\$12,687.53)

Ms. T's CIBC line of credit:

(\$9,045.22)

(\$3,618.09)

(\$5,427.13)

Divisible total

\$598,678.43

\$354,540.26

\$244,138.17

V. Conduct Order

[397] Ms. T initially sought a court order restraining Mr. T from harassing, stalking, cyber-stalking and from otherwise intimidating and bullying her. During submissions, counsel for Ms. T advised the Court that Ms. T acknowledged that "there were no recent incidents" and that Ms. T is now seeking a "mutual good conduct order".

[398] Mr. T questions the necessity for such an order. His counsel notes there has not been any contact or communication between the parties for years, with the exception of the trial itself. She submits it would be entirely redundant and could be misinterpreted to mean that such an order is warranted by poor behaviour.

[399] There is no evidence that Mr. T has harassed, threatened, or even contacted Ms. T in years. The evidence establishes that the parties no longer have any contact with each other or any reason to communicate with each other. Mr. T has clearly stated he has no desire or inclination to do so. I no longer see any basis for imposing a conduct order of any kind.

VI. Initializing the parties' names

[400] Initially, both parties sought an order that the parties and witnesses be referred to by their initials in this judgment to protect their respective privacy interests. Mr. T is also requests that there be no identifying information in these Reasons for Judgment. Ms. T no longer agrees to this approach.

[401] While I recognized that the Court must administer justice in public, I am also mindful of the sensitive and inflammatory nature of the subject matter of this case, as well as the fact that children have been involved in the narrative of events: *T.L.L. v. J.J.J.L.*, 2016 BCSC 1353 at para. 1. I am of the view that a proper balance can be struck in this case by protecting the privacy of the parties and witnesses while also articulating the narrative in these reasons. I have also concluded that, in the circumstances of this case, justice and fairness can best be achieved in this way. As such I have initialized the parties' and witnesses' names and

deleted facts that may identify the parties.

VII. DISPOSITION

[402] Mr. T is entitled to the return of the following personal belongings:

- a) a picture of his grandmother in a fox fur coat; and
- b) a Burke's Peerage book of Mr. T's family ancestors.

[403] In light of the circumstances before me, I conclude that Mr. T's \$96,500, which he received from the proceeds of sale of the family home from his first marriage, lost its excluded status when he used these monies for the down payment on the parties' former family home.

[404] The following assets are family property subject to division:

- a) the remaining proceeds from the sale of the family home, totalling \$514,148.08;
- b) the net value of Ms. T's bank and PayPal accounts is \$5,248.07 at the time of separation;
- c) Mr. T's CIBC bank balance of \$816.96 at the time of separation;
- d) the surrender value of Ms. T's Canada Life insurance policy, being \$1,606.24;
- e) the increase in value of Mr. T's Manulife RRSP, being \$91,653.18;
- f) the increase in value of Mr. T's Holliswealth RRSP, being \$4,397; and
- g) Mr. T's Nissan Rogue valued at \$11,000.

[405] The following family debts are subject to division:

- a) Ms. T's \$21,145.88 Visa Debt;
- b) Ms. T's CIBC Line of Credit Debt of \$9,045.22.

[406] In light of various factors that I have addressed above that inform the reapportionment of family assets, including but not limited to Ms. T's entitlement to spousal support, I have determined that it would be significantly unfair to equally divide various assets and debts. Ms. T is entitled to 60% of family property and will be responsible for a reduced proportion of family debt at 40%, with the following exceptions:

- a) Ms. T is seeking an equal division, and not a reapportionment of, Mr. T's RRSPs. I find she is entitled to 50% of the increase in value of the Holliswealth and Manulife RRSP's since the parties started living together. That is, Ms. T is entitled to: a) \$45,826.59 of the Manulife RRSP; and b) \$2,198.42 of Holliswealth RRSP;
- b) I am not able to conclude that it would be significantly unfair to equally apportion the following past debts:

- i. the sum of \$20,843.69 which Ms. T paid for her portion of family debts under the 2018 Voith Order;
- ii. the Nissan Murano lease termination fee that was paid under the Voith Order;
- iii. Mr. T's tax debt; and
- iv. the notary administration fees and disbursements paid under the 2018 Voith Order.

[407] The anticipated cost of future notary administration fees shall will not be reapportioned. Again, an equal division of this debt would not be significantly unfair.

[408] The reapportionment of family assets and debts are quantified at paragraph 396.

[409] Given that success has been divided between the parties, the parties will bear their own costs.

"MORELLATO J."

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