

CANADA / JUDGMENT

Sophonow v. Sophonow

2021 BCSC 1863

COURT

Supreme Court of British Columbia

DECIDED

23 September 2021

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2021 BCSC 1863 Sophonow v. Sophonow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sophonow v. Sophonow,

2021 BCSC 1863

Date: 20210923

Docket: E56522

Registry: New Westminster

Between:

Rebecca Ann Sophonow

Claimant

And

Thomas Sophonow

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

A. Kerslake

Counsel for the Respondent:

D. Stark

Place and Dates of Trial:

New Westminster, B.C.

April 12-14 and 30, 2021

Place and Date of Judgment:

New Westminster, B.C.

September 23, 2021

- [1] In this matrimonial proceeding, the principal issues are: what, if any, of the respondent's property is excluded property under s. 85 or the Family Law Act, S.B.C. 2011, c. 25 [FLA]; and, if a significant portion of the global estate is excluded, whether an equal division of family property would result in significant unfairness to the claimant or, alternatively, whether it would be significantly unfair to the respondent to divide some of the excluded property. The claimant also seeks both compensatory and non-compensatory spousal support based upon career interruptions she experienced spanning the parties' 28-year long relationship.
- [2] While child support was raised in the pleadings as an issue, both parties agree their children have now achieved independence such that each party has abandoned their claims in that regard.
- [3] The parties separated in 2018, although they remain living in the same house in separate areas. Each party seeks a divorce.

The Background

- [4] The claimant wife is 59 years old. The respondent husband is 68 years old. Since the commencement of the parties' cohabitation in 1990, the claimant has not worked extensively outside of the home. They married in 2000.
- [5] When the parties met, the claimant was working full-time as a fabricator for a company, making blinds. She previously worked as a receptionist, and on occasion following the commencement of cohabitation, provided daycare, and briefly did telephone solicitations for a disability association. For the most part, however, following the commencement of cohabitation, the claimant assumed the role of homemaker and mother to the parties' two biological children, Sarah and David, as well as her child from a previous relationship, Elizabeth.
- [6] The respondent is retired. He last worked in 2001, at which time, for reasons I will come to, he voluntarily resigned from his position as a machinist. He currently has health problems, specifically degenerative peripheral neuropathy, as well as PTSD. It is conceded by the claimant that the respondent is unlikely to re-enter the workforce.

- [7] Both parties were working when they met and commenced cohabitation in June 1990. It is acknowledged the respondent brought savings of approximately \$35,000 into the relationship, together with a Mustang and his coin collection, both of which he still owns. The claimant had no meaningful assets but claims an exclusion over a Royal Doulton figurine collection.
- [8] The claimant agrees to the exclusion of the Mustang and the respondent's coin collection from the division of property. The respondent agrees to exclude the figurines. For the purposes of this litigation, the claimant accepts that the respondent's \$35,000 in pre-cohabitation savings went towards the down payment made on the parties' first home in New Westminster, B.C. The respondent claims that amount as excluded property.
- [9] The claimant was laid off from her employment at the end of 1990 and, with the agreement of the respondent, tacit or express, she remained at home to be the primary caregiver for Elizabeth and, later, Sarah and David. All three children are now independent of their parents, although there is the prospect that one or both of the younger children might return to school for further education. In the result, the parties have agreed to retain the RESP established for their children's education until the youngest, David, attains the age where he is no longer entitled to draw on it and, then, to divide any remaining RESP proceeds equally as between them.
- [10] In 1990, a residence on Dawe Street in New Westminster ("Dawe Street") was purchased in the respondent's name alone using his savings of at least \$35,000 as the down payment. The property was registered in the parties' joint names later that year and remained the family residence until approximately 2005.
- [11] The respondent worked, more or less, steadily from the day he commenced cohabitation with the claimant until his resignation in 2001. I say "more or less" because there were periods his employment was interrupted as he pursued compensation for his wrongful conviction for murder; a matter that figures prominently in the acquisition of the parties' current assets.
- [12] The respondent has a certain notoriety in Canadian legal history, being one of a small number of persons wrongfully convicted and then incarcerated for murder. He spent over three years in prison in harsh conditions for a crime he did not commit. Ultimately, following lengthy proceedings both on a criminal and civil level, the respondent was fully exonerated of the murder for which he had been wrongfully convicted and, following a public inquiry, compensated by the Manitoba government, principally, for the time he spent incarcerated.

- [13] Following an inquiry that concluded in the early part of the millennium, the respondent was awarded a total of \$2,647,394, comprised of: \$1.75 million as non-pecuniary damages; \$100,000 for past wage loss (all incurred prior to the commencement of his relationship); and \$197,000 for counselling for the respondent, the claimant, and their children. In addition, court order interest was added to the award.
- [14] All of the settlement funds were received by the respondent in either 2001 or 2002, save for \$700,000 which was used by the province of Manitoba towards the purchase of an annuity for the respondent's benefit. It provides him with a monthly non-taxable amount of \$3,961.22. As noted by the claimant, when grossed up for the payment of income tax, it is the equivalent of \$56,000 annually. The respondent cannot access the annuity other than through his receipt of the monthly stipend which terminates upon his death. There is no survivor's benefit.
- [15] Of the remaining funds, \$595,175 went towards the purchase of the parties' second matrimonial home at 119 Royal Avenue in New Westminster ("Royal Avenue") in January 2003, and the remainder was directed into various financial investments overseen by the claimant's uncle, an investment advisor.
- [16] Royal Avenue is a sizable residence, comprising approximately 8,000 square-feet. The parties discussed operating it as a bed-and-breakfast after it was extensively renovated. Both parties were physically involved in the renovations. Royal Avenue was the family home from 2005 to date. It was never offered as a bed-and-breakfast, although the parties have made a rentable suite on the lower level of the property.
- [17] Originally, a line of credit was placed on the property allowing for the withdrawal of funds. The line of credit was drawn upon in the approximate amount of \$175,000, but has all been paid back. Presently, the only family debt is deferred taxes of \$41,800 (rounded). The agreed cost of the renovations, exclusive of grants because of the home's heritage designation, was \$446,949.50. The respondent suggests the whole of that sum is excluded from division alleging those funds originated from the settlement described earlier.
- [18] The claimant notes that the parties maintained a joint account into which the respondent's income, and then later his annuity payments, were deposited monthly. Family expenses were paid from the joint account. She also disputes that specific investments purchased with the respondent's settlement were liquidated and used toward the renovation costs for Royal Avenue, or that the renovations enhanced the value of Royal Avenue dollar-for-dollar, as suggested by the respondent.

- [19] The claimant acknowledges the respondent is able to trace the settlement funds into the initial down payment of Royal Avenue and, but for the subsequent transfer of title into joint names, the down payment would be excluded from the division of family property. As well, she acknowledges the annuity is excluded property and that certain parts of the investment funds originally purchased with the respondent's settlement remain in tact, albeit in their joint names.
- [20] Of the remaining sum received by the respondent in excess of that used for the purchase of the annuity and Royal Avenue following the inquiry, approximately \$1.29 million was invested in the name of the respondent alone with an investment advisor, Nigel Potts, into several different investment accounts.
- [21] Those accounts remained in his name alone in various forms until 2007 when, after speaking with his accountant, the respondent added the claimant's name to the investments. Thereafter, they split the income derived from the investments with the result less tax was payable.
- [22] The respondent did not discuss with the claimant the rationale for the transfer of Dawe Street into their joint names after its acquisition nor the investment accounts which he transferred into joint names in 2007.
- [23] There is no question but that, throughout the whole of the period of cohabitation, regardless of in whose names the accounts were registered, the respondent oversaw the management of the investments. In 2008, concerned about the worldwide economic crisis, he instructed his financial advisor to place \$822,000 into a joint term deposit at Westminster Savings Credit Union ("WSCU").
- [24] The annuity, presumably, has diminished in value over time with each withdrawal (although such may not be the case given current discount rates), but the real property has grown in value. While the total investments currently (or at separation) in the combined name of the parties is greater than the original investment made with the settlement proceeds, the respondent concedes that one of the funds (a joint term deposit at WSCU) is comprised of the sale proceeds of Dawe Street, two insurance claims, and the sale of a jointly-owned motor home.
- [25] The respondent argues that the excluded property consists of his annuity, the entirety of the \$1,947,364 traceable from his wrongful conviction settlement, \$10,000 traceable from an earlier "gift" from the Manitoba government used to enhance Dawe Street, and the \$35,000 savings used to make the down payment on Dawe Street.
- [26] Thereafter, he argues the remaining family property (less debt) ought to be divided equally once adjustments are made for what has been distributed to the parties pre-trial by agreement.

- [27] In total, the respondent advances an excluded property claim of \$1,992,364 together with the unknown value of the annuity. With the exception of the annuity, the majority of the investments are in joint names. Each of the parties has a TFSA account and RRSP in their name alone. By agreement, each has encroached on the funds in their TFSAs since separation.
- [28] The parties have agreed the claimant's Royal Doulton figurine collection is excluded property as is the respondent's Mustang automobile and his coin collection. There are other minor items of equipment associated with a business operated by the respondent after separation, but the claimant is not seeking an interest in them.
- [29] It is unclear, at least to me, whether the parties have agreed to the division of the contents of Royal Avenue as both continued to reside there at the time of trial.
- [30] Dawe Street was purchased shortly after the parties' commenced cohabitation, for \$80,000. The purchase price was made up of the respondent's down payment and a mortgage for the balance. The property was originally placed in the respondent's name alone, but was placed in joint names shortly after its acquisition. It remained the family home until the acquisition of Royal Avenue in 2003.
- [31] The respondent immediately moved into Royal Avenue for security reasons while the claimant and the three children remained in Dawe Street until approximately 2005. The claimant and three children moved in with the respondent once the renovations had been substantially completed.
- [32] Dawe Street was rented for a time after the parties vacated it. Dawe Street was eventually sold and the net sale proceeds of \$384,000 were placed in one of the WSCU term deposits in joint names. The respondent testified the sale proceeds were blended with other acknowledged family property, specifically: \$47,000 from a house insurance claim; \$58,000 from the sale of a jointly-owned motor home; and \$100,000 received from another house insurance claim, for a total of \$589,000.
- [33] The term deposit was in the parties' joint names. Following separation, \$100,000 was withdrawn and disbursed equally between the parties by agreement. What remains of this term deposit appears to be slightly over \$395,000, according to the respondent's Form 8.
- [34] The respondent's wrongful conviction led to a number of consequences affecting not only himself, but also his family. While the parties resided at Dawe Street, the home was set on fire while the family was inside. Both parties believe it was a result of publicity surrounding the inquiry into the respondent's wrongful conviction. All family members were traumatized by the event.

- [35] The process leading to the respondent's exoneration and eventual compensation was long and arduous and involved the efforts of both the respondent and the claimant, albeit the respondent participated in the majority of hearings. He later became an advocate and speaker at various wrongful conviction seminars to raise awareness about the frequency of wrongful convictions and their impact.
- [36] He resigned from his employment in 2001 because a fellow worker, without the respondent's knowledge, had affixed a sign to the back of his work clothing saying "murderer". He has not worked since.
- [37] It is not challenged that the respondent suffers emotionally from the events surrounding his arrest, trials, and incarceration, and that it has greatly impacted him and, by implication, the claimant and the parties' children. The respondent's assertion that he suffers from PTSD related to his wrongful conviction is not contested.
- [38] Throughout, the claimant supported the respondent in his pursuit of both his exoneration and eventual civil settlement. For the most part, she was the person attending to the care of the children. She worked only briefly during the cohabitation to supplement the parties' expenses when the respondent was not working prior to receipt by him of the compensation for his wrongful incarceration.
- [39] Since the parties' separation in 2018, the claimant has taken residence in the basement suite of Royal Avenue. The respondent has been responsible for its upkeep. No support has been paid post-separation, but the parties agreed to equally share the investment return or interest income received from the various term deposits.
- [40] As well, interim distributions have been made from the investment accounts. For the most part, the distributions have been equal. One of the jointly-owned term deposits, valued at \$75,000, was split unequally with the claimant receiving \$30,000 and the respondent \$45,000. The respondent has continued to receive the annuity payment.
- [41] The claimant brought a Notice of Application seeking spousal support, but it was adjourned to the trial when agreement was reached to split the investment income.
- [42] At the time the parties separated into separate quarters at Royal Avenue, all of the major assets in dispute in these proceedings were owned jointly, save for the parties' individual TFSAs, their respective RRSPs, and their vehicles.
- [43] The claimant has earned a modest income doing deliveries for DoorDash since 2019 or 2020.
- [44] In addition, after separation, the respondent received a settlement from ICBC of \$9,500 for the total loss of his vehicle. He concedes such is family property.

- [45] While the claimant has not advanced an excluded property claim, she testified she used slightly over \$30,000 received from her father's estate to pay family expenses during a period the respondent was off work and argues, implicitly, that it would be unfair to see her modest inheritance subsumed in the mix of family property while leaving the respondent with the whole of his settlement from the wrongful conviction intact.

Issues

- [46] The principal issue is the treatment to be afforded the respondent's compensation award from his wrongful conviction. He argues that he is entitled to an exclusion of the whole of the funds received following the inquiry, \$10,000 of a \$75,000 gratuitous payment from the Manitoba government prior to the inquiry, and \$35,000 representing the savings he brought into the relationship which were used to make the down payment on Dawe Street.
- [47] The claimant argues that the transfer of Royal Avenue and the investment accounts into joint names constitutes a gift to her of what would otherwise have been excluded property. If that property, or some portion of it, is excluded, the claimant argues such would be significantly unfair warranting an unequal division of the admitted family property in her favour. Alternatively, she argues that some of the respondent's excluded property should be included in the division.
- [48] The claimant acknowledges the annuity is excluded property, but argues that the disparity in the parties' lifestyles following separation after a marriage of 28 years warrants an award of spousal support outside of the Spousal Support Advisory Guidelines [SSAG]. She suggests a lump sum of \$100,000 for past and prospective spousal support so as to achieve the objectives of the applicable legislation, whether it be the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] or the FLA, which cannot be achieved if the respondent retains all of what he characterizes as excluded property and pays nothing meaningful to redress the financial imbalance created by their disparate capital positions.

The Law

- [49] The division of property is governed by the FLA, which at s. 95(1) provides for an equal division of family property and family debt unless such a division results in significant unfairness to either of the parties.
- [50] Excluded property is defined in s. 85 of the FLA. In the circumstances before me, I must first determine what of the parties' assets, if any, are excluded from the division before determining whether an equal division of family property and debt results in significant unfairness. The relevant portion of s. 85 reads:

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;

- (b.1) gifts to a spouse from a third party;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
- (i) loss to both spouses, or
- (ii) lost income of a spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.
- [51] Operative here is s. 85(1)(a) and (c), regarding money brought into the relationship by the respondent and, more significantly, a settlement of damages for loss to the respondent suffered prior to the period of cohabitation. As part of the settlement, \$197,000 was awarded to the respondent and his family for counselling and medication. The respondent has attended counselling, although the details and expenses are not clear, but the claimant has not. Prima facie, however, given no breakdown was provided in the counselling/medication award, the award is to both the parties and their children. The evidence leaves me with no doubt all were affected, in one way or another, by the injustice that befell the respondent.
- [52] Despite that, the respondent claims the whole of the settlement paid to him by the Manitoba government is excluded. He says the payments can be traced directly into Royal Avenue and its renovation costs, the remaining investments in the parties' joint names, and the annuity purchased on his behalf directly by the Manitoba government. He also testified \$10,000 of a \$75,000 "gift" from the Manitoba government, as well as his \$35,000 down payment, can be traced into Dawe Street because the \$10,000 was used to renovate Dawe Street.
- [53] The parties agree only as to the exclusion of the previously mentioned chattels and the annuity. The claimant nonetheless argues receipt of the annuity payment by the respondent should be taken into account in assessing the quantum of spousal support. Further, while acknowledging that the respondent was originally entitled to an exclusion over the following property, the claimant argues the exclusion was lost when the respondent transferred into joint names: (1) Royal Avenue; (2) Dawe Street; and (3) the various investments derived from the remainder of the settlement funds.

The Assets

- [54] The respondent seeks a dollar-for-dollar exclusion of the settlement funds, together with the down payment he made on Dawe Street and \$10,000 from the gift from the Manitoba government used to remodel the Dawe Street kitchen.
- [55] He acknowledges that Dawe Street was placed into joint names following its purchase by him alone and sold prior to separation resulting in net proceeds of \$384,000. Thereafter, it was blended with other family property into a term deposit under joint names at WSCU.
- [56] Another joint term deposit of \$75,000 was disbursed by agreement, as follows: \$30,000 to the claimant; and \$45,000 to the respondent.
- [57] Each of the parties has encroached on their TFSA accounts since separation. The claimant's account of approximately \$50,000 at separation has been reduced to approximately \$22,500. The respondent's TFSA account of \$53,500 at separation has been reduced to \$19,000.
- [58] The respondent received insurance proceeds post-separation from ICBC of approximately \$9,500 for the total loss of a Kia vehicle.
- [59] The remaining assets, still existing, are as follows:
- a) Royal Avenue;
 - b) The remainder of the term deposits at WSCU;
 - c) Mutual funds in joint names at WSCU;
 - d) A CIBC non-registered investment account;
 - e) A CIBC account (#810-27085) in joint names;
 - f) The RESP, which the parties agree should remain for the benefit of the children and, if unused at the termination of the youngest child's ability to use the funds, be split equally thereafter;
 - g) The annuity held for the benefit of the respondent;
 - h) The respondent's RRSP with CIBC;
 - i) The claimant's RRSP with CIBC; and
 - j) The funds remaining in each of the parties' TFSA accounts.
- [60] The respondent opened bank accounts in his own name following separation. The claimant has not advanced a claim against them, but notes the disparity in the parties' incomes following separation and the ability of the respondent to have paid his legal expenses as incurred while still saving money.
- [61] The only family debt is the deferred taxes on Royal Avenue, at \$41,800.

[62] The assets agreed to be excluded are not included in the considerations I need to make. Nor have I addressed the insurance policy (without cash value) that the parties agree should be maintained by them for the benefit of their children.

The Excluded Property Claim

The Annuity

[63] It is clear from the authorities, notably *L.F. v. C.G.C.*, 2014 BCSC 1069 at para. 57 and *Ross v. Ross*, 2013 BCSC 1716 at para. 23, that an annuity, such as that purchased by the Manitoba government on behalf of the respondent as part of a settlement, is neither family property nor can the income derived from it be used for the purposes of determining income under the Federal Child Support Guidelines, or SSAG, whether for child support or spousal support.

[64] The same result accrued under the former legislation, the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. In *Drean v. Drean*, [1997] B.C.J. No. 737 (S.C.) at para. 8, the Court stated:

The first issue to be addressed is whether or not the annuity received by the husband is a family asset within the meaning of s. 45(3)(d) of the Family Relations Act, "a right of a spouse under an annuity or a pension, home ownership or retirement savings plan, or ...". Although the legislation refers to an annuity, the authorities, in my view, lead to the conclusion that an annuity which has been created as a result of settlement of a personal injury claim does not fall within the language of s. 45(3)(d).

[65] It is common ground that the source of the funding for the annuity was a portion of the award for damages to the respondent for his wrongful conviction. The annuity remains for his benefit alone and, as such, is excluded from the division of family property.

The Respondent's Savings Pre-cohabitation

[66] Section 85(1)(a) of the FLA makes clear that property acquired by a spouse before the relationship began is excluded property, thus substantiating the respondent's claim that the \$35,000 he brought into the relationship and used to purchase Dawe Street would, but for the claimant's argument as to the subsequent registration of Dawe Street into their joint names, result in the \$35,000 being excluded property. The sale proceeds of Dawe Street, including the excluded \$35,000, can be traced into the deposit at WSCU in the parties' joint names.

[67] It was not disputed by the claimant that a portion of the funds "gifted" by the Manitoba government prior to the compensation award went for home improvements to Dawe Street. However, the house was sold for land value such that it is impossible to conclude the \$10,000 suggested by the respondent is excluded, survived and formed part of the sale proceeds subsequently used to buy a term deposit.

[68] Hence, prior to considering the effect of the transfer of Dawe Street into the parties' joint names, only the \$35,000, which was brought into the relationship by the respondent and traceable into Dawe Street, would be excluded from division.

[69] I shall come to the effect of the transfer on the exclusion shortly.

The Settlement Paid to the Respondent Post-cohabitation

[70] Section 85(1)(c) provides that a settlement or an award of damages to a spouse's compensation for injury or loss is excluded, unless the settlement or award represents compensation for loss to both spouses or lost income of the spouse.

[71] Here, with the limited exception of the allowance provided for joint counselling to the parties and their family, the whole of the award to the respondent is for either non-pecuniary loss which is individual to the respondent or for lost income prior to the parties' cohabitation. The award provided nothing for loss of capacity into the future and, as such, would otherwise be excluded property.

[72] I conclude that the settlement amount, less that portion for counselling for the entire family was, at the time of receipt, excluded property. However, the onus rests on the respondent to show the current assets he seeks to exclude were derived from the settlement funds.

[73] As can be seen from what follows, I do not find the respondent has discharged his onus with respect to the entirety of the renovation costs he claims for Royal Avenue, the RRSPs, or the TFSA accounts.

[74] The respondent relies on *Shih v. Shih*, 2017 BCCA 37 [Shih] at paras. 40-44 for the proposition that, in proving that "property derived from property" is excluded, it is sufficient to demonstrate the assets originally excluded are exceeded by the present value of the current assets. In *Shih*, the Court noted the following:

[40] The flaw I see in the Asselin analysis adopted by the judge is that it rests on the assumption that the FLA demands "precision" or "mathematical certainty". I can see nothing in the Act that demands "precision" or "mathematical certainty" in the standard of proof for establishing a claim to excluded property.

[41] The inherent challenge which confronts litigants under the FLA is that in many relationships of any significant length, documents will have been destroyed and memories dimmed. A legal standard that demands mathematical certainty or precision risks defeating legitimate claims.

[42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.

- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [75] Given that all of the assets into which the settlement funds were deposited have grown beyond their original value, the respondent argues that the whole of the settlement is preserved. Hence, he argues that the excluded portion of the joint assets is \$1.992 million (rounded), together with the annuity, his Mustang, and coin and figurine collection, as agreed.
- [76] As noted above, I find the amount would be reduced by the \$197,000 designated as funding for counselling for the family. The mere fact such has not been used to date does not, in my view, change its character as an award to the entire family as opposed to the respondent only and, thus, is not excluded regardless of in whose name it was placed.
- [77] No evidence was led by either of the parties as to their respective TFSAs and RRSPs, such that I could conclude the respondent has demonstrated funds from his settlement were deposited into those accounts. Accordingly, it cannot be said those assets were derived from otherwise excluded property.
- [78] Prior to the settlement, the respondent earned income over a number of years and his income from employment more likely provided the source of contributions into the parties' RRSPs.
- [79] Post-settlement, the respondent had the tax-free annuity and income from the investments. There is evidence the parties maintained a joint account for their expenses. While the annuity and the investments, in capital form, retained their exclusion as they remained in the respondent's name alone, the income from those capital assets did not.
- [80] Given the complete absence of evidence pertaining to the origins and the growth of the parties' TFSA accounts and RRSPs, I find the respondent has failed to discharge his burden that those particular assets constitute property derived from property or the disposition of property referred to in any of paragraphs 85(1)(a) to (f) of the FLA.
- [81] As to the respondent's assertion that the agreed net cost of the renovations can be traced into the value of Royal Avenue, I disagree. I adopt the submission of the claimant that it is impossible, on the evidence available, to determine whether the whole of the monies or money used for renovations increased the value of the property equal to the value of the investment, or whether market forces have overtaken the value of the renovations resulting in the enhanced value of Royal Avenue.

- [82] As noted in the cost approach taken in the appraisal offered in evidence, structures depreciate rather than appreciate. Further, the source of funds for the renovations has not been traced to the liquidation or withdrawal of funds from the various investment accounts originally purchased by the respondent with the settlement funds. That said, it is a reasonable inference that some of the renovations performed on Royal Avenue were withdrawn from settlement funds, as opposed to the income derived from the investments and the monthly annuity payments. Further, some, if not all the cost of the renovations, enhanced the value of Royal Avenue and are represented in the agreed value of Royal Avenue as a whole; structure and property. Accordingly, I conclude one-half the renovations costs, being \$225,000 (rounded), remain excluded property save for the claimant's assertion the exclusion was lost when the respondent placed the title of Royal Avenue into joint names.
- [83] In arriving at this conclusion, I am cognizant and pay heed to the following passage from *C.P. v. K.W.A.*, 2018 BCSC 332, specifically paras. 99-100, where Madam Justice Choi noted:
- [99] Tracing excluded property can be a relatively simple exercise when excluded property co-mingles with other property in an asset that appreciates in value. In such cases, the value of the excluded property at cohabitation can often be deducted in full from the value of the currently held property. However, the tracing exercise is more difficult when excluded property co-mingles with other property, and the value of the asset depreciates. In that case, the party claiming an exclusion may not be able to claim the full value of the excluded property at cohabitation.
- [100] Further, the FLA limits a spouse's interest in excluded property to the value of the property at cohabitation or the date it was received; it does not provide an interest in that specific value if the property has depreciated or been dissipated: *Remmem v. Remmem*, 2014 BCSC 1552, at paras. 30, 42; *Asselin v. Roy*, 2013 BCSC 1681 at para. 222. In *Remmem* at para. 29, Butler J. states, "where excluded property has depreciated in value since one party brought it into the relationship, that party has no ability to look to other family property to make up the loss in value."
- [84] However, given my conclusion there was likely more than one source of the funds used to renovate Royal Avenue, I decline to find the entirety of the costs were derived from excluded property. Further, the structure itself has depreciated and it is the land, not the improvements, which have substantially increased in value.
- [85] The claimant conceded in cross-examination that she did not dispute that the original down payment for Royal Avenue, together with the surviving investments at CIBC and/or WSCU, would be excluded from division save for the decision by the respondent to put all of the real property and investments into the parties' joint names.

- [86] The term deposit with WCSU created from the deposit of the Dawe Street proceeds, the insurance proceeds, and motorhome sale proceeds are not excluded save, possibly, for the \$35,000 brought into the relationship by the respondent. Hence, the remainder of that deposit, irrespective of the treatment afforded to the down payment, is family property.
- [87] The respondent did not seek to exclude the RESP and led no evidence as to its origins. Nor did he expressly seek an exclusion for the RRSPs or TFSAs (which I dealt with earlier). He simply seeks a dollar-for-dollar payment from the parties' global estate representing his original settlement award.
- [88] The claimant notes, even were I persuaded that the renovation cost, or some of it, is traceable into Royal Avenue and the remaining investments are sufficient to restore the whole of the settlement and leave it as the respondent's sole property, the respondent lost the exclusion on all of the settlement proceeds, save for the annuity, by placing the assets in question into the parties' joint names.

The Effect of the Transfer into Joint Names

- [89] As against the proposition that the settlement funds, or what remains of them as identified above, retain their excluded character is the decision of the B.C. Court of Appeal in *V.J.F. v. S.K.W.*, 2016 BCCA 186 [V.J.F.].
- [90] In *V.J.F.*, the B.C. Court of Appeal noted that the FLA does not eliminate common law and equitable principles relating to property but, rather, builds on those principles by preserving concepts such as gifts and trusts and evidentiary presumptions. In short, the Court in *V.J.F.* held that the presumption of advancement between spouses continues. Further, the FLA does not prohibit gifts as between spouses and, given the presumption of advancement remains an evidentiary presumption, a finding of gift is the default position in the event the evidence surrounding the transfer of an asset is unclear or equivocal.
- [91] In a subsequent decision, *Venables v. Venables*, 2019 BCCA 281, the B.C. Court of Appeal determined at para. 95:

the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property.

- [92] On its face, that statement appears somewhat disingenuous as it relates to transfers, such is the case here, which occurred before the enactment of the FLA. The concept of excluded property was unknown to the law under the FRA and the mere usage of an asset for family purposes converted the asset to a family asset regardless of ownership. The division of such an asset was subject to judicial discretion, which was dependent upon a number of enumerated factors set out in s. 65(1) of the FRA, including the extent to which the asset had been acquired through gift or inheritance or, such as here, an award for damages.

- [93] In short, legal title played no role in the determination of what was a family asset and what was not under the former legislation. Thus, transfers between spouses for tax purposes or creditor protection played no role in the ultimate determination of the division.
- [94] The respondent argues V.J.F. is distinguishable because it did not refer to the tracing provisions of s. 85(1)(g) and, in V.J.F., unlike here, the property being considered was transferred solely into the name of the wife for the purpose of protecting the property from potential creditors.
- [95] At the trial level in V.J.F., the trial judge found the husband donor could not argue that, as between him and potential creditors, the transfer was a gift, but, at the same time, as between him and his wife, it was subject to a resulting trust in his favour.
- [96] Hence, it was determined, and later affirmed in the Court of Appeal, that gifts as between spouses were contemplated under the FLA and, depending on the transferor's intention, if the transfer was a gift, then the exclusion otherwise available is lost. In the case of a transfer from husband to wife, as is the case here, the onus lies upon the donor to establish no gift was intended.
- [97] Neither party referred me to the decision of Voith J. in H.C.F. v. D.T.F., 2017 BCSC 1226 [H.C.F.]. In a carefully considered analysis contained therein at paras. 115-174, Mr. Justice Voith, carefully, eloquently, and, in my view, correctly, provided a eulogy for the presumption of advancement.
- [98] For brevity's sake, I have not included his analysis in these reasons, but I adopt them and rely upon them for my conclusion.
- [99] H.C.F. was considered in Namdarpour v. Vahman, 2019 BCCA 153 [Namdarpour], where the Court of Appeal, ameliorated, or attempted to, the impact of V.J.F. in the following passage at paras. 32-33, where Justice Savage noted:
- [32] Since V.J.F. was decided, some judges have remained reluctant to apply the presumption of advancement to issues of family property division. While some cases have cited V.J.F. with approval (see e.g. K.A.L. v. K.J.L., 2017 BCSC 651), other cases have distinguished or confined the case. One case, H.C.F. v. D.T.F., 2017 BCSC 1226, held that V.J.F. could be revisited and found the presumption of advancement has no ongoing application under the FLA.
- [33] Although the presumption of advancement continues to apply under the FLA, I would not overemphasize the role of evidentiary presumptions in the current property division scheme for a number of reasons, including the apparent context in which the presumption has its origins (the sometimes anachronistic notions of economic dependence), in contrast to contemporary circumstances.
- [100] H.C.F. was not disapproved of as misstating the law but, instead, Savage J.A. carried on at para. 40 to say, presumably to ameliorate the impact of V.J.F.:

- [40] These decisions emphasize that evidentiary presumptions operate only where the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer. In my view, the following principles can be discerned from the case law: (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those circumstances include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.
- [101] With respect, that is not how I read H.C.F. In H.C.F. at paras. 173-174, the following conclusion was reached:
- [173] Part 5 of the FLA created several significant changes to the property division regime in this province. These changes, individually and in combination, were intended to acknowledge the face of contemporary society.
- [174] In F. (V.J.) the court, at para. 77, observed that perhaps, at some point, the presumption of advancement would be extended to gifts from women to men or to common law relationships. Respectfully that is not consistent with the direction or evolution of the presumption or with its underlying conceptual basis. Instead, the influence of the presumption is waning; see Waters at 414. More importantly the narrow issue before me is whether the presumption of advancement can exist or co-exist, at this time, within Part 5 of the FLA. I do not consider that it can do so in a way that is coherent or harmonious or consistent with both the stated and the intended objects of Part 5 of the Act.
- [102] H.C.F. has been followed in this court in *McManus v. McManus*, 2019 BCSC 123; *Thornett v. Thornett*, 2018 BCSC 2312; *A.J.E. v. T.B.W.*, 2017 BCSC 1657; and *C.J.B. v. A.R.B.*, 2017 BCSC 1682.
- [103] In my view, the presumption of advancement has no place as a consideration under the FLA for the reasons given in H.C.F.
- [104] Absent the presumption of advancement, the applicable presumption for a gratuitous transfer is that of resulting trust: *Pecore v. Pecore*, 2007 SCC 17. Such is also a rebuttable presumption, depending on evidence of an intention to gift.
- [105] It is through this lens that I have assessed the respondent's claims for exclusions; not the presumption of advancement.
- [106] However, with the expectation these reasons may come under review at some time in the future, I will assess the outcome of the transfers of property derived from the initial settlement as if the presumption of advancement applied in the first instance.

- [107] In support of his contention that no gift was intended in respect of Dawe Street, Royal Avenue, and the investment vehicles now in joint names, the respondent argues that a combination of the direct and indirect evidence support his contention that no gift was intended with respect to any of the transfers.
- [108] I disagree.
- [109] With respect to Dawe Street, the respondent offered no explanation underlying the transfer into joint names after its purchase such that it can be said he rebutted the presumption of advancement if such remains the law.
- [110] As to the notion advanced through counsel that the claimant was not part of any discussion or conversation as to why any of the assets were transferred into the parties' joint names, that, alone, hardly goes to evidence of the respondent's intention. Clearly, he did not state his intention to make a gift, but the intention is gleaned from "all the circumstances": Namdarpour at para. 40.
- [111] Where there is no evidence as to what caused the transfer from husband to wife, as is the case with Dawe Street, the presumption of advancement is not rebutted.
- [112] As to Royal Avenue, the respondent testified the transfer was to make sure that his three children were financially secure should anything happen to him.
- [113] This, alone, is insufficient to lead me to conclude the respondent expected to retain the beneficial interest in the claimant's one-half interest or that she would re-convey her interest to him on demand.
- [114] At its highest and best, the respondent's evidence concerning Royal Avenue is that he thought the transfer would secure the asset for the family, specifically the children, upon his death. That is as far as it goes. As such, it falls far short of rebutting the presumption. The transfer, if for the stated purpose of providing for the children in the event of his demise, could have and should have been accomplished in a different fashion.
- [115] Transfer of each property into the joint names of the parties meant, and I accept this would have been explained to the respondent, that if he predeceased the claimant, the entire property would vest in the claimant's name, not the children's. There was no evidence of any discussion between the parties that the claimant would, in the event the respondent predeceased her, hold the property for the benefit of children.
- [116] As to the transfer of the investments, he testified that the Nigel Potts advised him to put assets into joint names. Thereafter, the parties began to split the income derived from the investments resulting, I infer, in tax savings for the family.
- [117] With respect to the non-registered investments and their transfer into the joint names of the parties, there was a paucity of evidence as to the respondent's intention. The only meaningful evidence is that the transfer followed the advice of his financial advisor and/or accountant. I am satisfied that circumstantially I can conclude that the motive underlying

the transfer was to avail the family of the favourable tax implications of sharing the stream of income derived from the investments. The respondent offered no evidence from which to infer an intention he was to retain the beneficial interest in the property.

- [118] Given evidence of an intention other than an outright gift to the claimant, I would have concluded the remaining investments in the parties' joint names, save the term deposit into which the proceeds of Dawe Street and other joint assets were deposited, were excluded but for the decisions in *Venables* and *H.C.F.*
- [119] In *Venables v. Venables*, 2018 BCSC 1736, the Court canvassed a similar situation at paras. 62-68.
- [62] [In *H.C.F.*,] the husband could not "have it both ways". By choosing to place a portion of the proceeds of the sale into the wife's name for tax or income-splitting purposes, the entirety of the proceeds appears to have lost its character as excluded property. Voith J. did not attempt to determine how much of the husband's book related to his pre-relationship employment or consider whether the husband's remaining portion of his book was excluded property.
- [65] Though the different approaches are difficult to reconcile, one principle seems clear. If one spouse transfers property to the other to derive a benefit such as creditor protection or a tax reduction, the property transferred becomes family property. This appears to be so whether the property is transferred into the sole name of the recipient spouse (as in *V.J.F.*) or not (as with the proceeds from the sale of the husband's book in *H.C.F.*).
- [67] At the time of the transfer, Mr. Venables thought the relationship with Ms. Venables would last. He did not foresee a future separation. He made the transfer to simplify estate administration if a tragedy were to occur and to derive a financial benefit for the couple by way of reduced property taxes when Ms. Venables turned 65.
- [68] Respectfully, as was the case in *V.J.F.* and *H.C.F.*, Mr. Venables cannot have it both ways. Mr. Venables cannot have been prepared to say to the property taxation authority that he had given an interest in the property to Ms. Venables but maintain on separation that, really, that is not what happened.
- [120] I note that in *Tucker Estate v. Gillis*, 1988 CanLII 5626 (N.B.C.A.) a similar result accrued where the husband registered an asset in his child's name to avoid sales tax, upon the advice of a financial professional. The Court, in finding it was a gift, said that it was immaterial that the husband sought professional financial advice.
- [121] While I express some doubt as to the rationale offered in instances of tax planning (as here) as opposed to avoidance of creditors (*V.J.F.*), I consider myself bound by the same logic. Tax efficiency, I infer, motivated the respondent's transfer of the financial assets into the parties' joint names and leads me to conclude the assets so transferred lost their exclusion regardless of which presumption is applied given the result in *H.C.F.* and *Venables*.

- [122] Given, as noted above, I find the presumption of resulting trust is the proper evidentiary presumption, I conclude the claimant has not rebutted the presumption in respect to either the initial down payment for either Royal Avenue or Dawe Street nor has she rebutted the presumption in respect of what I found to be the enhancement of Royal Avenue through the renovations.
- [123] The \$35,000 exclusion from the Dawe Street purchase survived the transfer from the claimant's name alone into joint names but not the conversion of the Dawe Street sale proceeds when mixed with other joint property into a joint term deposit.
- [124] Accordingly, the respondent is entitled to an exclusion of \$820,000 in respect of his contribution of otherwise excluded property into Royal Avenue and over the annuity.
- [125] The remaining financial assets listed above are all family property subject, in the first instance, to equal division. In addition, there is the insurance claim for the family automobile received solely by the claimant; \$9,500. Adjustment for that sum will be necessary in the final accounting as between the parties.
- [126] The disparate distribution of the \$75,000 term deposit will also need to be adjusted for in the final division of assets.
- [127] Each of the parties offered up different values for some of the assets in their respective Form 8s. Given the respondent likely receives the statements in respect of the jointly held investments, his description of value is likely more accurate. However, values of the investments likely fluctuate to reflect market conditions, so what follows is an estimate only to determine whether an equal division of the family property is unfair to either after deduction of the excluded value above.

Value of Family Property

- [128] The following values are taken from the claimant's March 15, 2021 Form 8 Financial Statement. Values for investments, in particular, may be fluctuating such that these values are used for the purposes of determining the fairness of the net family property and should not be considered to be determinative of the values.

Form 8 Value

Excluded Portion

Net Value

119 Royal Avenue

\$1,675,000.00

\$820,000.00

\$855,000

Westminster Savings Account 34601 - Term Deposit

\$395,519.37

(after distribution of \$50,000 each)

\$395,519.37

Westminster Savings Account 34601 - Mutual Funds

\$336,544.30

\$336,544.30

CIBC Investment Account 810-27085

\$484,242.00

\$484,242.00

CIBC TFSA Account 691-58978 (respondent)

\$19,027.57

\$19,027.57, claimant to account for withdrawals since separation, original balance at separation approx. \$53,590

CIBC RESP Account 556-36334

\$88,619.58

\$88,619.58

CIBC RRSP Account 552-58024 (respondent)

\$159,429

\$159,429

CIBC RRSP Account 552-58025 (claimant)

\$18,092.41

\$18,092.41

Westminster Savings/Credential Mutual Funds

\$297,964.00

\$297,964.00

Westminster Savings Terms (divided pre trial)

\$75,000

\$30,000 to Respondent;

\$45,000 to Claimant

CIBC TFSA Respondent

\$50,159.15 (prior to distribution by R.)

\$18,178.11 Respondent to account for distribution post-separation)

Kia Insurance Proceeds

\$9,500.00

\$9,500.00

Annuity

Unknown

Excluded

TOTAL

\$3,609,097.38

\$820,000.00

\$2,757,116.34

[129] The parties are at liberty to re-attend following receipt by them of these reasons for judgment to speak to the various valuations and to the adjustments necessary to effect the division of family property contained in these reasons.

The Family Property

[130] The total value of the family property using the agreed upon valuation for Royal Avenue, estimating the values the Form 8s provided in the trial record, and adding back in distributions made pre-trial, is approximately \$2.7 million after allowing for payment of the deferred taxes (depending on the current value of investment assets). I have not included the RESP as part of the estate although each of the parties may benefit from it in the future if not utilized by the children.

[131] An equal sharing of family property factoring in an adjustment for the claimant's receipt of the \$80,000 advanced pre-trial and the dissipation of approximately \$30,000 from her TFSA, results in the claimant's share of family property totalling approximately \$1.35 million. These are estimates only because of fluctuating values and different estimates taken from the parties' respective Form 8s.

- [132] The respondent's estate, (both one half the family property and the excluded property) absent considerations of an unequal division of family property or support, would be approximately \$2,225,000 exclusive of the annuity. Again, these figures do not account for pre-trial distributions.
- [133] The respondent proposes to buy the claimant's interest in Royal Avenue, thus depleting his liquid assets by the \$427,500 necessary to do so. The effect would be to leave the respondent with the home equity, a small investment portfolio, and one-half of the global RRSPs.
- [134] Neither party identified tax issues which might impact the net distribution. Presumably, such consequences, if any, can be factored into the division of the assets that have experienced capital appreciation.
- [135] To avoid tax consequences surrounding the RRSPs, they should be divided equally using the spousal rollover provisions in the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp).

Would an Equal Division of Family Property be Significantly Unfair to Either Party?

- [136] The family property, net of debt, has an approximate value of \$2,700,000 prior to the pre-trial withdrawals made by agreement from the term deposits and the withdrawals from the parties' separate TFSAs.
- [137] The only family debt is the deferred amount owing in respect of property tax on Royal Avenue.
- [138] Given my conclusion that a significant portion of the global assets is excluded property, the claimant seeks an unequal division of the family property relying upon s. 95 of the FLA, which reads 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;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;

- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

[139] The respondent relies on s. 95(2)(a)-(d) and (f)-(i), as well as s. 95(3) of the FLA, thus raising the question: is the prima facie equal division of family property mandated significantly unfair having regard to the fact such a division would leave the respondent in a far better financial position after 28 years of cohabitation?

[140] Venables makes clear the court retains the discretion to unequally divide family property where an equal division is found to be significantly unfair. In Venables, the situation was the reverse of what is before me. What would otherwise have been excluded property was found to be family property by way of conversion of an excluded asset into family property via joint tenancy. However, given the brevity of the marriage, the property was unequally divided in favour of the party who gifted the otherwise excluded property to his wife.

[141] In addressing the interaction between a finding of excluded property and its impact on the otherwise equal distribution of family property, Justice Griffin in Venables noted the following, beginning at para. 86:

- [86] The category of "excluded property", established by s. 85 of the FLA, carves out certain types of property from the family property category. It is meant to cover property a spouse acquired to which the other spouse did not contribute, because either the property was acquired before the relationship or it came about by inheritance or certain other specified means (gifts from a third party, settlement of a claim, insurance proceeds, discretionary trusts and property derived from excluded property).
- [87] The excluded property regime reflects the reality that many modern relationships do not last a lifetime and the perspective that, since the other, non-acquiring spouse had nothing to do with the acquisition of the excluded property, it is presumptively fair that the non-acquiring spouse should not share in the other's excluded property upon the relationship ending.
- [142] Then, as to the ability of the trial judge to divide family property other than equally, Griffin J.A. continued at para. 90:
- [90] While striving for more certainty and less litigation in property division, the FLA did not get rid of all flexibility. The FLA provides for judicial discretion, allowing for judicial reapportionment of either category of property, family property or excluded property, if to not do so would be "significantly unfair": FLA, ss. 95 and 96, respectively.
- [91] The "significantly unfair" language requires a higher threshold of unfairness before judicial discretion to reapportion is engaged, as compared to the discretion that existed under the predecessor FRA, which allowed for reapportionment in the case of "unfairness". Generally this will require "something objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 41-42.
- [143] The Court went on to reject the notion "once a gift, always a gift" and upheld the trial judge's unequal division of the property found to be the subject of a gift: paras. 103-104. Here, the claimant says the converse applies because the exclusion results in significantly disparate financial positions between herself and the respondent going forward.
- [144] While I determined there remains significant excluded property, I also concluded the respondent gifted a significant portion of his settlement, thus greatly advantaging the claimant. Further, she benefitted from the savings within both parties' TFSA and RRSPs which likely, in some measure, were accumulated with the assistance, direct or indirect, of the settlement funds. By indirect, I refer to the accretion to the original investment vehicles by way of interest or dividends and the monthly annuity payment received and deposited into the parties' joint account.
- [145] As it is, the prima facie equal division of family property provided for in the FLA, provides the claimant with much of the accretion on assets brought into the relationship or received by the respondent as compensation for his wrongful incarceration.
- [146] Though the claimant relies in the pleadings on a multitude of factors within s. 95(2) and (3), her argument boils down to the assertion that an equal division of the assets I have found to be family property would be significantly unfair because of: s. 95(2)(a), relating to the

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

[147] To be clear, for reasons I shall come to, the claimant has established entitlement to support.

[148] Section 161 of the FLA, regarding the objectives of spousal support, reads:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[149] In *Venables*, the relative brevity of the relationship led the trial judge to unequally divide the family property in favour of the spouse who had gifted the otherwise excluded property to his wife. An equal division would have left him with an estate worth little more than what he had brought into the marriage and the wife would have a financial windfall from the accretion.

[150] That is not the case here. An equal division would leave the claimant enjoying substantially more of the accretion to the global estate such that, were the claim for unequal division based solely on the years of cohabitation, I would not accede to the claimant's submission that she is entitled to something more than half the family property.

[151] I appreciate counsel did not have available to them the Court of Appeal decision in *Cook v. Cook*, 2021 BCCA 194 [Cook] when this matter was argued. Cook makes clear that the FLA starts with the proposition that it is presumptively fair that excluded assets are not to be subject to division (para. 44).

[152] In *Cook*, the relationship between the parties was longer than here, but the inheritance found to be excluded from the division of property came much later in the parties' relationship.

[153] Further, in *Cook*, beginning at para. 48, Justice Willcock noted:

- [48] The principle that animated the judgment of this Court in Pasch is still valid. We ought not to find unfairness in the outcome contemplated by the legislation and that is, therefore, presumptively fair. Under the current Family Law Act regime, "[t]he starting point in the division of property analysis already applies significant exclusions": V.J.F. at para. 10, citing *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 60. An unequal starting point suggests that an unequal end point is similarly contemplated by the statutory regime.
- [49] As noted above, the factors that may be considered in order to identify "significant unfairness" in an equal division of property include "any other factor that may lead to significant unfairness", other than insufficient compensatory spousal support, which is specifically addressed in s. 95(3). While this confers considerable discretion on a trial judge, the discretion must be exercised judicially, and it has been narrowly defined by this Court. In *Singh v. Singh*, 2020 BCCA 21, Justice Garson observed, at para. 136, that the general provision referring to "any other factor" was preceded by a list of specific items, and applied the rule of statutory construction that limits the general term "to the genus of the narrow enumeration that precedes it". She held:
- [138] [If] the rule applies, the class cannot be any factor "that may lead to significant unfairness" as this would violate the second requirement as set out by Sullivan. The other factors enumerated in s. 95(2) suggest consideration of aspects of the relationship between the spouses, including its duration, the terms of any agreement, as well as the characteristics of family assets and debt and how the spouses have influenced their value. One of the considerations in s. 95(2)(g) includes an analysis of a spouse's good faith or motive. These factors are broad. Nevertheless, in my view, they all relate to a limited class, namely, the economic characteristics of a spousal relationship.
- [Emphasis in original.]
- [154] Here, where the unfairness that arises from the disparate financial circumstances of the parties capable of being addressed through periodic support payments, the resulting disparity would be in keeping with the intention of the legislature.
- [155] Based upon the outcome in *Cook*, I am unable to find significant unfairness based on the duration of the relationship alone, but the wording of s. 95(3) has to be afforded some meaning. In *Cook*, the trial judge's finding that the wife was entitled to compensatory support was overturned given she had worked, albeit part-time, throughout much of the marriage and the parties had bought back her pension entitlement lost while she was out of the workforce raising the parties' children.
- [156] Absent a compensatory claim, the Court found, save for the difference afforded by the greater capital base of the appellant husband, the parties had similar incomes from their pensions, etc. Equally, Wilcock J.A. noted there was no evidence that the husband was enjoying a higher standard of living owing to the retention of the excluded property "of which he had made little personal use": para. 54.

- [157] The circumstances before me are very different. Here, the respondent, based upon the significant disparity created by the retention by him of the excluded property, is able to continue living in an 8,000-square-foot home while enjoying the fruits of the excluded assets by way of dividend and interest accumulation from the remaining financial investments and the tax-free \$4,000 payment from the annuity.
- [158] The excluded property, and its use during the marriage from its receipt onward, informed many of the parties' economic decisions. The respondent left his employment early. Their reasonably affluent lifestyle for those years following receipt of the settlement was funded by the annuity plus return on the investments, and savings that might otherwise have been achieved through the joint efforts of the parties through employment were foregone owing to the lack of perceived need.
- [159] In short, the parties here are very much distinct from the parties in Cook.
- [160] Based on my finding that the respondent's 'income' from his annuity constitutes the only meaningful difference in the parties' prospective income earning capacities and that it is excluded from consideration in the calculation of support under the SSAG, the claimant would receive little to nothing by way of prospective support.
- [161] As a result, I note pursuant to s. 95(3) of the FLA, that the objectives of spousal support would not be achieved. Therefore, upon considering the significantly longer marriage in this case (28 years), and the fact that reliance on a spousal support award would fail to adequately compensate the claimant and recognize her financial disadvantage, I determine that it would be significantly unfair to equally divide family property.
- [162] In the result, I conclude that Royal Avenue, less the exclusion of \$820,000 and the deferred taxes of \$41,000 should be divided unequally in favour of the respondent as follows: 60% to the claimant and 40% to the respondent.
- [163] The net effect is an increase in the claimant's capital position by approximately \$81,500; the amount suggested (approximately) as the lump sum spousal support by the claimant's counsel.
- [164] Such a division, in my view, properly addresses the unfairness which would otherwise result from an equal division of the family property while, at the same time, providing for a significant disparity in the parties' capital positions following separation to reflect the legislature's intention in the creation of an excluded property regime.
- [165] In addition to the annuity, the value of which is unknown, the respondent will be left with an estate in excess of \$2,000,000 without regard to the monthly sum received from the annuity.

Spousal Support

- [166] While I have addressed the issue above, the unequal division of property premised upon the claimant having established an entitlement to spousal support. I note that the considerations under the FLA and the DA are virtually identical, although the leading authorities and principles produced below are decided under the DA. I will make reference to both pieces of legislation as both were argued in the claimant's pleadings.
- [167] I first consider s. 161 of the FLA (and s. 15(6) of the DA), regarding the objectives spousal support, which I have produced elsewhere.
- [168] There are three types of entitlement to spousal support: compensatory (economic advantage and/or disadvantage); non-compensatory (needs-based); and contractual: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [Bracklow] at paras. 15 and 49. The court must consider all of the objectives of spousal support, none of which are paramount: *Bracklow* at paras. 35-37; *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge] at pp. 850-852.
- [169] On the facts of this case, I find that the claimant, unlike in *Cook*, has established compensatory entitlement. As stated earlier, I find that, throughout, the claimant supported the respondent in his pursuit of both his exoneration and eventual civil settlement. For the most part, she was the person attending to the care of the children, taking on the role of homemaker and parent. She worked only briefly during the cohabitation to supplement the parties' expenses when the respondent was not working, but otherwise, has only taken up temporary and transitional employment. I also consider that the parties had a 28-year-long relationship, which supports a claim for compensatory support: *Bracklow* at paras. 34 and 39.
- [170] I also find that there is likely a basis for non-compensatory support.
- [171] I consider that, in the absence of an unequal division of the family property, the parties would have faced disparate standards of living going forward. Such would flow from the roles each assumed during their 28-year relationship.
- [172] The respondent will have an 8,000-square-foot house and can enjoy the income from his annuity and the returns from the remainder of his investment portfolio and his RRSP without the need to work. Suffice it to say, the claimant's standard of living would be lower even assuming she is able to work full time. Here, I note the respondent conceded full time employment for the claimant might be an overreach.
- [173] I also note that the parties lived a reasonably affluent lifestyle following the settlement, which would only be carried on by the respondent save for the property division award.
- [174] Next, I consider the quantum and duration of support and whether the objectives of support have been satisfied by the property division. I must also consider the factors of spousal support, stated in s. 162 of the FLA (and s. 15(4) of the DA). In *Moge*, the Court stated that the equitable distribution of the economic consequences of a relationship can be

satisfied by way of a division of property. However, the Court in *Parton v. Parton*, 2018 BCCA 273 at para. 42 clarifies that full satisfaction of a claimant's support claim will only be met if the objectives of spousal support are met.

[175] Here, I find that the property division, specifically an unequal division of the non-excluded portion of Royal Avenue, addresses any economic disadvantage faced by the claimant and promotes self-sufficiency between the parties. In fact, the \$81,500 increase in the claimant's position due to the unequal division of property, is roughly equal to the amount sought by the claimant as past and prospective spousal support. Thus, in light of *Moge* and the objectives of spousal support, I find that the claimant's entitlement to spousal support, both past and prospective, is satisfied by the order respecting the unequal division of family property.

Other Orders

[176] It is agreed the respondent will be able to purchase the claimant's interest in Royal Avenue. Its agreed value of \$1,675,000 should be reduced by the unpaid deferred taxes as at the transfer date and 60% of the remaining value shall be paid to the claimant by the respondent within 45 days from the date of these reasons. If the respondent is unable or unwilling to buy out the claimant's interest, the property is to be sold with the net proceeds after payment of all costs associated with its sale, including payment of deferred taxes, divided 60/40 in favour of the claimant.

[177] Upon payment to the claimant of her share of the value of Royal Avenue, she will surrender possession of the suite she occupies.

[178] The parties shall maintain the RESP for the benefit of the children still eligible to access it and, when there is no longer an eligible child able to use the fund for educational purposes, the remainder shall be divided equally.

[179] The parties shall make adjustments in the distribution of the remaining assets for the disparate withdrawals from family property, the term deposit of \$75,000, and the disparate encroachment on their TFSA accounts. The respondent shall pay the claimant one-half the amount of the insurance claim for the Kia automobile.

[180] The RRSPs are to be divided equally in specie.

[181] The parties are to jointly maintain the insurance policy of their joint lives for the benefit of the children. During their joint life, they will equally pay the premiums. It was not made clear to me the obligation of the survivor of them and the parties have liberty to apply in the event of disagreement over the terms of the order.

[182] The parties shall divide the chattels situated in Royal Avenue save for the agreed exclusions: the Mustang; the coin collection; and the Royal Doulton figurines; by agreement or, failing agreement, there will be liberty to apply.

[183] There will be an order for divorce subject to s. 12 of the DA.

Costs

[184] Subject to offers to settle which might affect my conclusion, success has been mixed and the parties should each bear their own costs of the proceeding. In the event either party wishes to make submissions on costs based upon an offer to settle, they should advise the Registry within 30 days of these reasons and arrange a mutually convenient date.

"Harvey J."

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