

CANADA / JUDGMENT

Verbonac v. Thompson

2025 BCSC 96

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 96 Verbonac v. Thompson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Verbonac v. Thompson,

2025 BCSC 96

Date: 20250123

Docket: E49981

Registry: New Westminster

Between:

Garth Stephen John Verbonac

Claimant

And

Jennifer Carla Thompson

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

K. Dhahan

A. Mihailovic

Counsel for the Respondent:

M. Witzman

Place and Dates of Trial:

Abbotsford, B.C.

April 15-19, 22-26

August 19-21 and 23, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 23, 2025

Introduction

- [1] This is a high conflict matrimonial proceeding. The parties, who never married, commenced cohabitation with one another in 2006. The month they began living together is in dispute. It is relevant only to the issue of excluded property assuming the respondent is entitled to relief under the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [2] In either April or June of 2006, the parties, together with the respondent's son, Austin, moved into a residence located at 2941-212 Street, Langley, British Columbia (the "property"). They remained living together under the same roof until November 22, 2015.
- [3] The property was purchased in the names of the claimant and his mother, Elizabeth Verbonac, as joint tenants. The purchase price was paid in full, with the combined funds of the claimant and his mother. The respondent made no financial contribution to its acquisition.
- [4] Following their move to the property, the parties had two children together - a daughter, Brooklyn, and a son, Kyle. Currently, neither have a relationship with the claimant. They are 18 and 16, respectively. Austin, the respondent's biological child, is an adult but remains living on the property with his mother and siblings. He, too, has no contact with the claimant.
- [5] While there is no question the parties resided together in a marriage-like relationship for a period in excess of two years, the overarching issue in this litigation is the date the parties ended their marriage-like relationship.
- [6] If, as now submitted by the respondent, their marriage-like relationship ended in November 2015, the respondent is entitled to relief under the FLA. However, if the relationship ended in December 2012, or no later than August 2013, as submitted by the claimant, the respondent's claims under the FLA are outside of the two-year limitation period set out in s. 198(2) of the FLA and therefore statute-barred.

- [7] In their original pleadings, each asserted a date of separation in excess of two years prior to the commencement of proceedings. The claimant alleged the parties separated in December 2012; the respondent alleged August 2013. All five individuals, the parties and three children, remained at the property until November 2015.
- [8] An altercation (the "alleged assault") occurred on November 22, 2015, resulting in the claimant being removed by police from the property. The respondent says she was assaulted by the claimant that day. The claimant acknowledges an altercation but says same was initiated by the respondent. Charges against the claimant were stayed sometime in 2016. As part of her counterclaim, the respondent seeks damages for the alleged assault.
- [9] At issue, presuming the respondent's claim is not barred by the effluxion of time, is her entitlement under the FLA to an interest in the property; an interest in the claimant's personal service corporation through which he operates his medical practice; an interest in a condominium in the names of the claimant and his daughter, Laura Cole (although alleged by the respondent to be beneficially owned entirely by the claimant); investments and RRSPs in the name of the claimant; and spousal support.
- [10] There is no issue as to entitlement of both Brooklyn and Kyle to ongoing child support. The claimant has been paying support for both since a Judicial Case Conference ("JCC") held in 2016. The amount, based upon his Line 150 income for 2014, has not changed despite significant increases in the claimant's income. The respondent seeks to vary the without prejudice order made at the JCC to reflect not only the changes to the claimant's income since the order's pronouncement but also to impute further income to him based on his alleged under-employment and under-utilization of assets to produce income.
- [11] Since physical separation in 2015, the respondent and all three children have continued to reside at the property.
- [12] The claimant seeks occupational rent for the respondent's ongoing use of the property, noting the trial of this matter was adjourned seven or eight times before finally beginning in April 2024. He, for the most part, has maintained the taxes and insurance on the property since 2015.
- [13] The respondent also advanced a claim in trust as against the claimant's property.

History of the Proceedings

- [14] Each of the parties filed separate Notices of Family Claim ("NOFC") on December 8, 2015, shortly following the claimant's removal from the property. The proceeding commenced by the claimant has continued; the respondent's NOFC was, presumably, discontinued. The respondent's Response and Counterclaim was filed in January 2016. In it, as in her original NOFC, she alleged August 2013 as the date of separation.

- [15] The assets in issue, briefly summarized earlier, are all in the name of the claimant. They include the property, an alleged interest in a North Vancouver condominium registered primarily in the name of the claimant's daughter, savings, RRSPs and the claimant's interest in a personal services corporation through which he provides services to the clinic where he practices family medicine.
- [16] The respondent brought little by way of monetary value into the relationship and has little of value in her own name now.
- [17] Since the commencement of these proceedings and after the parties' physical separation from one another in 2015, Elizabeth Verbonac passed away and her joint interest in the property passed to the claimant.
- [18] By order of Justice Majawa, made February 23, 2024, the issues of property division and spousal support were bifurcated from the issue of parenting time so as to accommodate the earliest possible date on which the trial could begin so as to deal with outstanding financial claims.
- [19] Nine years have passed since the parties' physical separation. In that time, and during the respondent's occupancy, along with the children, the property has increased significantly in value.
- [20] Pursuant to an order made by consent at a JCC in early 2016, the claimant has paid support for the respondent and, initially, three children: Austin, Brooklyn and Kyle. Shortly after Austin reached 19, the claimant ceased paying support for all three children; the amount payable was adjusted to reflect two children. Save for this downward variation, the amount of support, despite the claimant's increased income, has not been revisited.
- [21] The support paid under the consent order from the JCC was \$1,384 monthly for the children and \$709 monthly for the respondent. The claimant's income, as set out in the order, was \$69,766.
- [22] In addition to the support paid to the respondent, the claimant has maintained the majority of expenses connected with maintaining the property, including property taxes, insurance (until recently) and various repairs. The total expenses paid, according to the claimant, exceed \$100,000. He has also paid extraordinary expenses for the children, including tuition, extracurricular activities and medical expenses which, according to the claimant's evidence, are in excess of \$150,000. The respondent did not dispute either assertion.
- [23] In the nine years since the commencement of the proceeding, the matter has been scheduled for trial on eight occasions. All have been adjourned; some at the instance of the respondent for want of legal assistance and some because of valuation/disclosure issues.

- [24] Each blames the other for the adjournments. The claimant notes the respondent, the two children of the relationship, together with Austin, continue to live rent free at the property. It is acknowledged by the respondent there is no scenario in which she could retain the property (assuming an interest in it) given its value now exceeds \$3 million. The excluded portion of the property is a contentious issue but, at a minimum, it is the 2006 purchase price of approximately \$1.2 million.
- [25] Since the commencement of the current proceeding, each has made substantive amendments to their pleadings. The claimant has remained steadfast in his position that the marriage-like relationship, which forms the basis for the respondent's entitlement to relief under the FLA, ended in December 2012; approximately three years before the commencement of this proceeding.
- [26] In his original NOFC, the claimant sought a determination of family property, an unequal division of the family property and parenting time with the children. As a result of an amendment sought and granted by Justice Majawa, the claimant now argues the respondent's claims are statute-barred pursuant to s. 198(2) of the FLA, given the proceedings were not commenced within two years of separation (regardless whether such occurred in December 2012 or August 2013).
- [27] At the commencement of the trial, the respondent was granted leave to amend her pleadings to allege the separation occurred November 22, 2015.

Issues

- [28] A major issue is the date upon which the parties' marriage-like relationship ended and the impact of s. 198(2) of the FLA if, as alleged, the marriage-like relationship ended in December 2012 or August 2013. Both dates are more than two years prior to the commencement of proceedings.
- [29] Assuming the respondent's claims are statute-barred, the claimant, in addition to a dismissal of the respondent's claims under the FLA, seeks occupational rent, reimbursement for expenses he paid on account of the property while the respondent and children were in occupation, return of personal items he claims were left behind when he was removed by police from the property in 2015 (despite returning several times to collect his items), an order that the respondent and children vacate the property, costs including fees for experts both in respect of property valuation and the s. 211 reports prepared by Dr. Aube, and a dismissal of the claim for damages.
- [30] Even if successful in respect of those issues, the claimant acknowledges underpayment of child support from the original consent order given the increases in his income from 2015 to present.

- [31] If the respondent's action is not statute-barred, the claimant seeks calculation of the excluded property brought into the relationship by him and an unequal division of the family property in his favour. He submits his income for both spousal and child support be determined by averaging his actual income from 2016 to 2020 and then imputing an income to the respondent from 2020 onward.
- [32] He seeks termination of spousal support as of April 2024.
- [33] The respondent, provided her claim is not statute-barred, seeks an equal division of family property after identification of the excluded property.
- [34] In addition, she seeks retroactive adjustment to both spousal and child support based not on what the claimant has earned, but rather on an imputed income calculated on the basis of what the respondent classifies as full-time employment for a doctor practising family medicine.
- [35] The respondent alleges the claimant beneficially owns a condominium in North Vancouver, although such is registered 99% in the name of his daughter, Laura Cole, and 1% in the name of the claimant. The respondent seeks to impute income to the claimant in respect of rent he ought to be receiving in respect of his ownership of the condominium.
- [36] She, too, seeks costs of the proceeding to date.
- [37] The respondent's pleadings also contain a claim for equitable relief under trust principles but, at the trial's conclusion, no submissions were offered by the respondent on the trust-related claim.

Background

The Pleadings

- [38] From the date they were filed on December 8, 2015, until the amendment granted by Justice Majawa in 2023, the claimant's pleadings remained constant. He alleged the parties commenced cohabitation in June 2006 and separated in December 2012. The pleadings made no reference to s. 198(2) of the FLA. He claimed an unequal division of family property.
- [39] On the same day as the claimant, December 8, 2015, the respondent issued a NOFC out of the New Westminster court registry, in which she asserted the parties commenced cohabitation in April 2006 and separated in August 2013, while noting the parties continued to reside under the same roof until November 22, 2015. The respondent sought orders regarding property division, parenting, and spousal and child support.
- [40] The action proceeded under the claimant's NOFC and the respondent filed a Response and Counterclaim in late January 2016.

[41] In both the original NOFC and later Response and Counterclaim, the respondent, fully aware of the dates asserted by the claimant in his pleadings, repeated the dates of cohabitation as commencing April 2006 and separation as August 2013. The Response states:

The Parties began to live together in a marriage-like relationship on or around April 2006 not June of 2006.

The Parties (separated) in August 2013, and (sic) not on or about December of 2012, although continued (sic) to reside under the same roof but sleeping in separate quarters until November 22, 2015. There was a police incident on November 22, 2015 as a result of the Claimant becoming violent towards the Respondent in the presence of the Children in the Family Home. The RCMP attended the Family Home, and arrested the Claimant, and he was charged with at least one count of assault, contrary to section 266 of the Criminal Code. The Respondent and the Children continue to reside in the Family Home, and while the Claimant has undertaken not to attend the Family Home of (sic) communicate with the Claimant or Children, an Order for sole occupancy, protection orders, and support order under the Family Law Act will be necessary.

[42] The Counterclaim was more fulsome in its description of the parties' separation as follows:

While the Claimant and the Respondent resided together in a marriage like relationship, the Respondent assumed the primary care for the Children. The Parties separated in August 2013, although they have remained living in the Family Home, they sleep in separate quarters. Since the separation of the Parties, the Children of the relationship have also been in the Family Home but are in the actual care and control of the Respondent and the Respondent proposed (sic) that the situation remain the same with the Claimant to exercise limited and supervised parenting time, subject to the wishes of the Children. The Claimant has been physically as well as verbally abusive towards the Respondent and the Children throughout the Parties' relationship. The Claimant has wielded economic power over the Respondent and has oppressed her through the control of resources, by withholding access to family funds, restricting the use of finances, as well as by concealing family assets, in order to limit the Respondent's entitlement and access to them.

[43] On August 24, 2017, the respondent filed an Amended Counterclaim adding Elizabeth Verbonac, the claimant's mother, and then co-owner of the property, as a party. The dates she asserted regarding both the commencement of cohabitation and separation remained unchanged.

[44] Trial dates were set but never proceeded. Both parties have changed counsel throughout the course of the litigation on more than one occasion. At times, the respondent has been self-represented, although all of the pleadings filed on her behalf appear to have been prepared by counsel.

- [45] Examinations for discovery of both parties took place based upon the pleadings as they stood. On August 11, 2021, the respondent, through her then counsel, Matthew Brandon, served the claimant with a Notice to Admit asserting, for the first time, that the date of separation was November 22, 2015.
- [46] On September 6, 2021, 12 days beyond the time prescribed in the Supreme Court Family Rules, the claimant's then counsel served a Reply to Notice to Admit, reasserting the date of cohabitation was June 2006, and the date of separation was 2012. A trial date was scheduled to commence shortly after the Reply was filed but did not proceed.
- [47] On July 10, 2023, in her 10th affidavit filed, the respondent, for the first time under oath, swore that the date of separation was November 22, 2015. In earlier affidavits, and in answers given at her examination for discovery, she maintained separation occurred in August 2013 but that the parties lived separately at the property until the claimant's removal by police on November 22, 2015.
- [48] On July 17, 2023, the claimant filed a Notice of Application seeking to withdraw all deemed admissions in the respondent's Notice to Admit dated August 11, 2021, an extension of time to reply to a September 7, 2021 Notice to Admit, and to amend the Notice of Family Claim and Reply to Counterclaim so as to plead s. 198(2) of the FLA asserting the counterclaim was out of time. The respondent opposed all the relief sought. She responded with her own application seeking an advance from the claimant to pay legal expenses.
- [49] Following a two-day hearing before Justice Majawa in February 2024, an order was made granting the relief sought by the claimant, including the proposed amendment to raise, in both the NOFC and Response to Counterclaim, for the first time, the limitation defence to the respondent's claims for property division and spousal support under the FLA.
- [50] That order was not appealed. Both the NOFC and Response were amended.
- [51] Justice Majawa also allowed the respondent's application for a litigation advance of \$125,000 to fund the respondent's legal expenses.
- [52] Finally, to accommodate the trial proceeding in April 2024, given the unlikelihood of a judge being available for the scheduled 25 days, Justice Majawa ordered that the trial be bifurcated to deal, firstly, with financial matters, then, after an adjournment, a continuation to deal with matters pertaining to parenting issues. The continuation date is scheduled for two weeks in April 2025.
- [53] On the first day of trial, the respondent successfully applied before me to amend her pleadings to assert the date of separation as November 22, 2015.

- [54] As mentioned above, each of the parties has had different representation during the course of the proceedings. I note this because of the respondent's evidence that the date of separation referenced in her earlier pleadings and affidavits were prepared under a mistaken belief that the separation, as the term is legally understood, occurred when she removed herself from the same bedroom as the claimant.
- [55] The trial was scheduled on numerous occasions. The first trial was scheduled to commence January 28, 2019, for 14 days. Thereafter, it was scheduled to commence in February 2019, then in January 2020, then in May 2020, then in April 2021, then in September 2021, then in October 2022, then in March 2023. The matter has been adjourned eight times.
- [56] The claimant has not seen his two biological children for a considerable period of time. They are currently 18 and 16. Brooklyn will reach the age of majority in August 2025 and, as has been noted to the parties, the court will lose jurisdiction over her. Kyle will be 17 when the trial continues.

The Parties

- [57] The claimant, Dr. Garth Verbonac, is 73. He continues to work in a clinic as a family doctor. He draws income through a personal services corporation. He sees patients part time, that is less than five days per week, as has been the case since the relationship between him and the respondent began. Since turning 70, he has reduced his office visits to two and a half days weekly.
- [58] In addition to his employment income, whether through dividend or salary, the claimant, since turning 65, also receives Canada Pension benefits.
- [59] The respondent, Ms. Jennifer Thompson, is 49. She is presently employed part time as a security guard for Trinity Western University. Prior to the trial she took time away from work as a result of stress.
- [60] The parties' two children, Brooklyn and Kyle are ages 18 and 16, respectively.
- [61] Following the birth of Brooklyn in 2006, the respondent didn't work outside of the home. When Brooklyn reached school age, the respondent's failure to return to work became a source of contention between the parties.
- [62] Since separation, the children have resided solely with Ms. Thompson. According to whose evidence I accept, the children are either estranged from the claimant, the respondent's view, or they have been alienated from the claimant by the respondent's actions, the claimant's view.

- [63] Section 211 reports were prepared by order of the court and paid for by the claimant. They were not exhibited in the trial given the bifurcation of financial matters from parenting issues. Thus, the evidence respecting the children was minimal. However, I am aware that the parties and children attended a "family reunification" program run by Alison Jones following recommendations contained in s. 211 report(s).
- [64] Ms. Thompson has another child from a previous relationship, Austin McCuskey, born June 11, 1999. Austin is now 25. Austin had no contact with his biological father throughout the course of the parties' relationship and the respondent never received child support on Austin's behalf from his biological father. Austin, too, has no contact with the claimant.
- [65] The claimant acted as a stepparent to Austin during the parties' relationship. Austin is over the age of majority and no longer a child as defined by the FLA. However, he was still a child at the time of the parties' separation and included in the initial calculation of child support payable. He has resided at the property from 2006 to date.
- [66] There is no issue that Austin achieved economic independence shortly after reaching 19. The child support was reduced from \$1,384 monthly to \$1,072.

The Parties' Evidence

- [67] The parties met through the doctor-patient relationship and began dating in 2005. It is unclear when the doctor-patient relationship ended but such does not inform the outcome of any of the major issues in this litigation.
- [68] When their relationship commenced, each had separate residences. The respondent resided in a townhouse on 16th Avenue, White Rock, BC. The claimant lived in a house in Panorama Heights in Surrey. He owned his residence. The respondent's home was owned by her stepfather. While she occupied it, she paid the outstanding monthly mortgage payment in lieu of rent. When the property was sold in June 2006, her stepfather returned the mortgage payments she made; approximately \$15,000.
- [69] As the relationship matured, the parties began discussing cohabitation. The claimant, given their disparate ages and financial situations, wanted a cohabitation or prenuptial agreement. He had his solicitor prepare one and presented it to the respondent.
- [70] The respondent took the proposed agreement to a lawyer and was advised against signing. According to the respondent, the lawyer, Mr. Hambrook, advised her it provided her with no rights. She declined to sign it. She testified the lawyer tried to work out something more balanced but the claimant would not agree.

- [71] It is not clear whether the subject of an agreement was ever revived once the parties were cohabiting but, regardless, there is no agreement, written or otherwise, governing the parties' rights. An unsigned draft with handwritten additions was exhibited at trial but, having never been signed or agreed to verbally, it is evidence only of failed discussion to define the rights of each in the event of a breakdown in the relationship at some future date.
- [72] In December 2005, the respondent learned she was pregnant with Brooklyn. It is a source of contention as to whether the pregnancy was planned but, once again, other than how the divergent evidence impacts the assessment of credibility, whether the pregnancy was planned or not the parties moved forward to cohabitation.
- [73] Sometime at or near the commencement of cohabitation, the parties exchanged "promise rings". The respondent wore hers but admittedly returned it to the claimant. They disagree as to the timing and circumstances of its return. Marriage was discussed but no wedding ever took place.
- [74] As to the promise rings, the claimant testified that the respondent threw it at his feet sometime in late 2012 or early 2013 saying: "Stick it up your ass." That scenario was never specifically put to the respondent in cross examination but, instead, she was presented with the more benign suggestion she returned the promise ring to him in either 2012 or 2013.
- [75] The respondent originally testified he, the claimant, took the ring from her, but she was unsure of the timing and circumstances surrounding the event. She later acknowledged returning it to him voluntarily but could not recall when or the circumstances under which it was returned.
- [76] Although present throughout the claimant's testimony detailing his recall of the ring's return, the respondent never specifically denied the claimant's version of events or the words he says accompanied the ring's return.
- [77] When it was suggested to her by claimant's counsel that after leaving the bedroom, the marriage-like relationship ended, the respondent replied that it "deteriorated" and added "I wanted to leave but I had no place to go" because of "no money." She also said that she didn't leave because she didn't want to leave the kids and the animals.
- [78] In January 2006, the claimant, together with his mother, purchased the property, which became the family home for the parties. Both the claimant and his mother were registered on title as joint tenants.
- [79] The respondent admittedly contributed nothing towards the acquisition of the property. The purchase price was \$1,190,000 and paid in cash. The claimant testified he paid the deposit of approximately \$100,000 and closing costs and his mother the remainder.

- [80] The respondent testified that the claimant told her his mother paid in "a bit" of the purchase price but never mentioned the approximate \$1,000,000 he testified was her contribution. The respondent was unaware Elizabeth Verbonac was on title and said she would not have commenced living with the claimant had she been aware of the joint ownership.
- [81] She became aware of Elizabeth's ownership two years after the litigation was commenced and proceeded to join Ms. Verbonac as a party.
- [82] The property is acreage in Langley with outbuildings and stables for boarding horses. The respondent says she played a role in the improvements done to the property after the sale closed but was not specific save for evidence regarding her role in painting and installing flooring after closing in late March or early April 2006.
- [83] The parties disagree as to when they began living together at the property as a couple. The claimant testified repairs, including new flooring and painting, were required necessitating delay in bringing the respondent and Austin to live there. He acknowledges they may have spent a night or two there sleeping on a mattress but denies either of them moved in until late June 2006. The respondent says they moved in together in April 2006.
- [84] Both had separate residences which sold either in late June (the respondent) or in July (the claimant). Austin continued to attend school in White Rock until the completion of the 2006 school year.
- [85] Regardless of the date both took occupancy (together with Austin), the property was purchased with the intention they would reside together in a marriage-like relationship and, once moved in, they did so until separation, another date they cannot agree on.
- [86] The respondent viewed the property in advance of its purchase. It had acreage which facilitated the respondent's love of horses.
- [87] The property contained a suite downstairs. The claimant's daughter, Laura, and a friend rented the downstairs suite for a period of time. The claimant's mother would visit from Kelowna and stay at the property
- [88] The parties, Austin, Brooklyn and Kyle resided together at the property until 2009, when they were joined by the claimant's mother, who came to reside with them permanently in the self-contained suite. She remained living there until she was placed into care in March 2011. She died in November 2018, long after the parties' physical separation.
- [89] One of the many sources of contention between the parties prior to their separation, whatever date that might be, was an incident involving the claimant's mother's health. Ms. Verbonac was diabetic. The claimant testified as to events leading to his mother's departure from the property into care when, in the claimant's view, the respondent neglected to properly monitor Ms. Verbonac, resulting in her going into a diabetic coma and requiring her, ultimately, to move from the suite to premises with medical oversight.

- [90] Other sources of contention between them were mutual claims of mental abuse, financial control by the claimant over the respondent, and alcohol and drug use alleged by the claimant.
- [91] The claimant testified he reported two incidents of the respondent's inappropriate action to police; one when she purportedly slapped him and another when she allegedly threatened to harm a female sales representative she suspected he was having an affair with. The claimant said no action was taken in respect of either report.
- [92] The respondent denied threatening anyone but could only say she did not recall slapping the claimant as he alleged.
- [93] Another property in issue in this proceeding was purchased in November 2011; a condominium located at 100-889 Harbourside Drive, North Vancouver, BC.
- [94] The purchase price was \$250,000. The claimant testified he put down \$90,000 of the purchase price and his mother the remainder. There is no mortgage on the property. The sale completed on January 25, 2012. Title was placed into the name of the claimant as to 1% and 99% to his adult daughter, Laura Cole.
- [95] The claimant referenced a document in the exhibits noting a \$90,000 redemption of deposit certificate, which he explained was the source of his share of the purchase price.
- [96] The claimant said his share of the purchase price of the condo was withdrawn from his business account and repaid within two years. He testified the purchase was intended as a gift from both himself and his mother to Laura. The claimant testified his 1% interest on title was only done to protect Laura from claims by partners, not to give him any actual ownership in the property.
- [97] The respondent was unaware of the purchase. She disputes both the origins of the funds used to buy the condo and its beneficial ownership, although there is nothing by way of documentation or reference to conversations between her and the claimant giving rise to her challenge to the claimant's evidence of a gift.
- [98] The respondent argues the condo is family property but has never added Laura Cole as a party. She seeks a compensation payment in lieu of an interest in the condominium. The respondent also seeks to attribute income to the claimant for the rental of the condo.
- [99] Laura Cole has lived in the condo since its acquisition. It is undisputed Laura made no financial contribution towards its purchase. She does not pay the claimant rent for its use. There is no evidence to suggest the claimant has paid anything towards the upkeep or maintenance of the condo since it was acquired.

- [100] Throughout the period the parties, the children and the claimant's mother resided at the property, the claimant continued to work as a family practitioner in a clinic. He worked part time, two and a half, sometimes three office days a week, just as he did before the parties commenced cohabitation.
- [101] Prior to changes in the financial arrangements between family doctors and the government, the claimant testified he spent a significant number of unpaid hours completing patient charts and/or planning patient care. He only received income in respect of office visits.
- [102] The arrangement between family practitioners the Medical Services Plan changed such that previously unpaid work such as charting was recognized as a billable service, resulting in a corresponding increase in the amount of fees charged by the claimant to the government. That change in remuneration was confirmed by other witnesses, the office manager and Dr. Brits, who heads the clinic at which the claimant currently practices.
- [103] The respondent was a homemaker and mother to the three children during most of the time the parties occupied the property. In the later stages of cohabitation, she took up volunteer work as an auxiliary constable.
- [104] The parties never shared banking facilities or discussed finances between themselves. Other than the child tax credit for the three children, throughout the period of cohabitation, the claimant was the sole source of income for the family. He provided cash, credit facilities and, later, gift cards, to provide the respondent with funds to maintain the household.
- [105] She said he would ask for receipts if he gave her cash to buy things but, when asked, she couldn't in the first instance recall why. She later conceded the reason was his suspicion she spent funds on drugs and alcohol as opposed to the purpose for which they were advanced. It is clear, given the evidence of Dr. Davies, a witness called by the respondent whose evidence I shall come to, that the respondent experienced issues with alcohol at least by the time Dr. Davies was consulted.
- [106] The respondent alleges the claimant was controlling and manipulative regarding finances. She also says he was abusive to her throughout the relationship, verbally and, ultimately, physically.
- [107] The claimant explained his admitted control of finances as an effort to prevent the respondent from purchasing alcohol or marijuana. The respondent acknowledged an alcohol use problem in 2011 and 2012, but placed the blame on the claimant's poor treatment of her.
- [108] The relationship was unusual in a number of ways from the onset. As noted by respondent's counsel, the parties did not show much, if any, public displays of affection; they had no pet names or terms of endearment for each other; they did not attend many public or family events together; they did not go on vacations together, save for one trip to Harrison Hot

Springs; they did little to no activities together after the first two-to-three years of the relationship; and they did not celebrate birthdays together after the first few years. They maintained separate finances.

- [109] Hence, the respondent argues the absence of those characteristics post-2012 should not be viewed as indicative of a separation given the parties limited level of interaction while admittedly in a marriage-like relationship.
- [110] The parties began seeing a counsellor, Dr. Don Davies, in 2012. The respondent originally characterized the counselling as intended to address the claimant's abuse of her, but acknowledged later that its purpose was to salvage the relationship. The counselling did not go well. The claimant says the counselling began in the fall and ended in December when he announced, during a session, that "it was over." He abruptly left the joint counselling never to return. He testified their "romantic" relationship, by which I assume he meant sexual relations, ended in December 2012 as well.
- [111] He referred to the return of the promise ring he had given her in 2005 or 2006 and the manner of its return. He never wore the ring she gave him and was unsure of what became of it.
- [112] He testified he also told the respondent "it was over" in November 2012, but offered no specifics other than to say they had a civil conversation and she moved from the bedroom. His announcement came around the time he withdrew from counselling.
- [113] The claimant said he told several of his old rugby friends and Dr. Brits, the doctor at the clinic where he practiced (and now his partner), of the deterioration in the relationship, and told Dr. Brits he was trying to "walk away from it".
- [114] After telling the respondent "it was over", the claimant began trying to get the respondent to engage in mediation to resolve issues arising out of the breakdown of the relationship. He provided her with a list of accredited mediators in their area and suggested a firm, Campbell and Murphy. He said she would not attend Campbell and Murphy because a lawyer at that firm did his corporate filings.
- [115] The respondent denied being told by the claimant it "was over" sometime in late 2012 or that she knew from the cessation of the counselling sessions that the relationship was over. She testified, in direct examination, that everything but for their sleeping arrangements remained the same until November 2015.
- [116] The respondent acknowledges leaving the bedroom but says she did not do so until August 2013; the date she originally maintained was the date of separation. She says the relationship, however unhappy for both, carried on.

- [117] Despite earlier agreeing, when asked in cross examination why she didn't leave following her departure from the bedroom, her reply was to the effect she didn't have the funds to leave. Similarly, when asked why mediation never took place, she again said she didn't have the funds to attend.
- [118] The respondent acknowledged the claimant "came and went as he pleased" after she removed herself from the bedroom. Such conforms with his evidence of a lack of mutual involvement once he announced "it was over".
- [119] The claimant testified what little socializing they did together prior to the end of 2012, specifically attending his family for holidays such as Christmas or Thanksgiving, came to an end in 2012. He said prior to 2012 they would celebrate birthdays and Valentine's day, but not after. He took the children to some of their activities but they did not do so together as a couple.
- [120] He said the respondent's mother invited him for Christmas in 2014, but the respondent told him not to come. The respondent disputed none of this in her evidence, noting only the wedding of a friend they attended together in August 2013.
- [121] The respondent acknowledged counselling began in the summer of 2012. She was non-specific as to when the claimant stopped attending or the circumstances under which he stopped, but did not contradict the claimant's evidence as to the manner in which he withdrew from counselling. She continued to see Dr. Davies on her own for many years after the termination of joint counselling.
- [122] She described ongoing abuse after he withdrew from counselling but, other than financial control and the alleged assault in 2015, she gave no particulars.
- [123] Given the absence of Dr. Davies' records, it is unclear whether the respondent saw Dr. Davies from the time the claimant withdrew from counselling until the alleged assault in 2015.
- [124] Previously, the parties agreed they shared cooking responsibilities and took most meals together. The claimant said that stopped after 2012. The respondent was vague as to whether the claimant continued to take meals with her and the children after she left the bedroom. In cross examination, she acknowledged that by August 2013, "he stopped cooking for me" and that she was unsure whether he ate meals that she prepared.
- [125] She did not dispute, with the exception of the 2013 wedding attendance, that they did not engage social activities together and that all intimacy was at an end. Quite apart from social activities outside the home, she was unable to identify any activities they engaged in as a couple; whether taking a meal together, taking the children on an outing or sitting to watch television as a couple or as a family.
- [126] She testified he came and went as he pleased and, when home, spent most of his time in his office.

- [127] Nonetheless, the claimant continued to describe himself as living in a common law relationship on his 2012, 2013, and 2014 income tax returns. Christmas cards were sent to "the family" by Laura Cole and other acquaintances in 2013 and 2014. The claimant, when asked how old he was when he separated from the respondent, replied "64", aligning with the 2015 date alleged by the respondent.
- [128] In her testimony, the respondent acknowledged that in 2012 or 2013, she discovered messages and pictures on the claimant's computer indicating he was receiving messages from women on dating websites. She suspected him of having an affair. The respondent says she stopped sleeping with the claimant because of his treatment of her and her belief that he was having an affair.
- [129] She acknowledged he was not involved in family life and that in 2013, relations between the parties were getting worse.
- [130] As to her steadfast position in her pleadings that the separation date was August 2013, the respondent said her then counsel told her leaving the bedroom was the date of separation and prepared the pleadings accordingly. The respondent said she did not know what constituted "legal separation". She acknowledged reading the pleadings filed on her behalf.
- [131] The respondent, quite apart from the numerous pleadings asserting August 2013 as the date of separation, amplified that assertion in affidavits filed by her prior to the 2021 Notice to Admit.
- [132] For example, in her affidavit sworn March 19, 2019, the respondent deposed at paragraph 9 that she wore her promise ring until the parties separated in 2013 when the claimant "demanded to have [her] ring back." In her testimony at trial, she agreed she gave it back but did not alter the August 2013 timeline as the date of its return.
- [133] Later, in the same affidavit, she deposed:
- The claimant and I separated in August 2013, and not on or about December of 2012, although we continued to reside under the same roof but slept in separate quarters until November 22, 2015.
- [Emphasis in original.]
- [134] The respondent once again blamed her counsel for the repeated assertion of August 2013 as the date of separation based upon her departure from the bedroom. I note her then counsel was not the same counsel who prepared the 2015 NOFC or the 2016 Response and Counterclaim.
- [135] On discovery in May 2020, the respondent was asked and answered the following questions, as reflected at pages 43-44 of the transcript:
- Q: Okay. Now, in your response to counterclaim and counterclaim you say that the date of separation is August 2013, do you still say that?

A: If that's what I said. I don't have the paper in front of me, so if that's what's written that I said, yes.

Q: Okay. And my understanding is that you and Dr. Verbonac, despite separating, continued to reside in the same home post-separation. Right?

A: Yes. I was on the couch.

Q: Whereabouts?

A: I slept on the couch in the living room.

Q: Okay. And it was November 22, 2015 - that was the police incident, and after that Dr. Verbonac left the former family home, right?

A: He was removed - arrested and removed from the home.

Q: I'm just trying to confirm the date is November 22, 2015, right?

A: that's correct.

Further at page 84:

Q: Okay. Now you say that you separated in August 2013, right?

A: I left the bedroom, yes.

Continuing at page 86-87 of the transcript:

Q: What were the living arrangements after you separated in August 2013?

A: The living arrangements?

...

Q: Okay so you would go downstairs and stay on the couch post-separation, and he would retain the bedroom upstairs, is that right?

A: Yes.

[136] In the audio recordings admitted into evidence, although she denies it was her voice, the respondent can be heard saying, in October 2015, "Why didn't you get a mediator a year and a half ago or two years ago?"

[137] Following the claimant's departure from the property, he attended on more than one occasion under supervision to retrieve personal belongings. Nonetheless, he has an extensive list of personal items, together with values he ascribes to them, he says remained at the property.

[138] The claimant, in addition to the agreed upon support, testified he has paid over \$51,000 for extracurricular activities for the children, \$94,000 in tuition fees plus, until recently, property tax and insurance on the property.

[139] The respondent, post-November 2015, received a sizeable inheritance from her mother's estate but testified it has mostly been spent on lawyers and living expenses beyond the support she receives.

Evidence of Non-Party Witnesses

[140] Various witnesses were called by each party ostensibly to support the parties' opposing contentions as to the state of the relationship from the claimant's withdrawal from counselling until November 2015.

Dr. Don Davies

[141] Dr. Davies, the counsellor, was presented as both a fact-witness and as an expert with respect to the psychological injuries suffered by the respondent from the alleged assault as well as a critique of the s. 211 report(s) prepared by Dr. Aube wherein she opined, I am told, that the respondent has alienated Brooklyn and Kyle from their father.

[142] I did not admit Dr. Davies' report into evidence as to his opinion that the respondent suffered from PTSD as a result of her injuries, based upon my conclusion that, facially, it did not conform with the requirements of a proper expert opinion. The report did not properly set out the facts upon which the opinion was based, was conclusory without providing a basis for the opinion offered, and exhibited potential for bias given the nature of the continuing relationship between the respondent and Dr. Davies after he had seen them both in his capacity as a marriage counsellor. Additionally, Dr. Davies had apparently misplaced the records upon which he formed the opinion offered in his report, making effective cross-examination a practical impossibility.

[143] I did hear his fact-based evidence.

[144] He testified that he began seeing the parties as a couple in 2012. The first meeting with them did not go well because the respondent showed up visibly intoxicated, lending credence to the claimant's stated concern over her alcohol use. Dr. Davies advised the parties he could not provide counselling services to them with her in that state. The first session ended on that note.

[145] They returned to see him two weeks or so following the first visit after the respondent had called him and said she would stop drinking. She never appeared at a session intoxicated after the initial attendance.

[146] Dr. Davies began with separate sessions with each of the parties and then began joint sessions. According to his memory, given the absence of any records, he thought the counselling began in late 2012 or early 2013. He saw them as a couple over a period of several months.

- [147] He testified there was a lot of anger between them. The respondent was overtly angry; the claimant was more passive in his anger towards her. The exchanges in the joint sessions were negative. Each was verbally abusive to the other. Dr. Davies said "she yelled".
- [148] He didn't recall discussions about separation but acknowledged the claimant, at the last joint session, threw papers at him and left. He never returned to counselling. Thereafter, all of Dr. Davies sessions were with the respondent alone.
- [149] He testified he learned from her, sometime he thought in 2013, that the living arrangements had changed. They remained in the same house but she had moved out of the bedroom.
- [150] According to Dr. Davies, the respondent remained angry. He saw her without charge for an extended period of time (but she later volunteered a sum in payment when her mother left her an inheritance) and was still seeing her when she reported the events of November 22, 2015. He said he observed bruising on her neck "a few days after" but then she began wearing turtlenecks. He last saw the respondent in 2021.
- [151] In cross examination he acknowledged (1) without notes from sessions, he is relying on memory, and (2) his memory is "not good the last couple of years". The second self-assessment was apparent from his testimony.
- [152] With that caveat, he agreed with counsel for the claimant he likely last saw the claimant in 2012, possibly 2013.
- [153] When asked about his report of different arrangements, Dr. Davies explained they resided in separate rooms and there was lots of turmoil and friction. He admitted he had no personal knowledge of the events of November 2015 or how the conflict began. Nor did he have insight into the manner in which the parties conducted themselves in their home after the claimant left counselling.

Mark Filiatrault

- [154] The claimant called Mark Filiatrault, a friend and patient of his since 1983. Mr. Filiatrault testified that he assisted in moving furniture to the property in June 2006 from the claimant's townhouse. He testified the property was unoccupied when the move occurred and looked run down. He thought they moved in on the closing date.
- [155] He testified he did not see much of the claimant from 2006 until 2015. The claimant stopped coming out to rugby matches. Mr. Filiatrault said he attended at the property once in 2009 but offered no specifics.
- [156] He said in 2012 the claimant phoned him and told him "things were bad", referencing the relationship between the claimant and the respondent. When asked by respondent's counsel "When did you learn he separated?", he replied to the effect of, "sometime in the fall of 2012 - he phoned - he told me it was done".

[157] When asked if the claimant told him the reason they separated, he replied "they didn't get along - they had lots of arguments".

[158] In cross-examination he told counsel for the respondent he knew the date they moved in because it was "the end of school", and that shortly after the move one of his sons and a friend worked at the property cutting grass and weeds. This occurred after school was out.

Chad Jupe

[159] Another witness called, Chad Jupe, is the claimant's cousin. Mr. Jupe's parents often hosted annual Christmas dinners. Mr. Jupe testified the parties and the children came regularly from 2006 until 2011 or 2012. He said the claimant's children were five or six when he last saw them. Post 2011 or 2012, the claimant continued to attend but he was alone.

Dr. Bernice Brits

[160] Dr. Bernice Brits, the head of the clinic at which the claimant currently practices and the claimant's current partner, testified. The two now reside together in her home.

[161] According to Dr. Brits, she and the claimant began their romantic relationship in 2013. By 2017 they were living together.

[162] She has known the claimant since 2003 through their mutual work at Peninsula and Glover medical clinics.

[163] She testified when his two youngest children were born he worked less as he wanted to be active in their care.

[164] Prior to 2006, as colleagues, Dr. Brits and the claimant attended medical events together and socialized with the other doctors working in the clinic. After 2006, she testified he attended irregularly at office-related functions and then not at all from 2007 until 2012.

[165] According to Dr. Brits, the claimant told her near the end of 2012 that his relationship with respondent was very strained with lots of conflict and that he was "trying to walk away from it".

[166] In 2013, he began working an extra day per week for about a year. He then reverted to three days a week after approximately a year. When he turned 70, he reduced his office hours to two and a half days a week. By office hours, I refer to seeing patients. The claimant does other work related to his practice such as charting and patient care plans. He is now paid for that work.

[167] Dr. Brits testified she didn't see the claimant socially at any of the medical group's events until the end of 2012. Then he began attending regularly, including group dinners, barbeques, conferences etc.

- [168] After hearing of the conflict in their relationship, Dr. Brits suggested the parties attend counselling. She said by the end of December 2012, he reported "I can't do this anymore". He told Dr. Brits that the respondent had moved from the bedroom and he was trying to get the respondent to attend mediation to allow them to go their own way.
- [169] In 2013, the claimant and Dr. Brits began a relationship which became "romantic" near the end of 2013.
- [170] After his arrest and removal from the property, the claimant rented a basement suite but spent considerable and increasing time at Dr. Brits home. In 2017, he moved into her residence given he was barely staying in the basement suite. He was still seeing his children at the time, and they would visit Dr. Brits' home and swim. Her residence had a guest cottage and that's where the claimant slept with the children.
- [171] She noted, as did the claimant, that he is on a list for knee replacement therapy.

Other Witnesses

- [172] None of the other witnesses called by the claimant offered much more insight into the dates in dispute.
- [173] Ron White testified he was not in touch with the claimant until 2015 despite being old rugby friends. He knew nothing of the relationship between the parties and only regained contact with claimant when he began re-attending local rugby matches in 2015. He attended the property with the claimant once after the November 2015 incident to retrieve some of the claimant's items.
- [174] Teri Parker was a co-worker at each of the two clinics where the claimant practices. She retired in 2015.
- [175] She confirmed his long-standing work schedule of three days a week from when she began in 2001 until her retirement.
- [176] She noted the claimant was a very private person and that, as a result, she did not know when the parties actually separated. She said he did not bring the respondent or his children to annual clinic barbeques and soon after the parties got together, he stopped coming as well.
- [177] Witnesses called by the respondent offered no insight into the date of separation. The evidence, other than Dr. Davies, was directed to issues of the respondent's injuries from the alleged assault and her current employment.

Discussion

Credibility and Reliability

- [178] Credibility refers to the truthfulness of the witness; reliability relates to the accuracy of the testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104.
- [179] Credibility and reliability are significant issues in these proceedings as much of what is said to have occurred is known only to the parties.
- [180] More specifically, the parties' credibility is a central to determining: (1) the date the parties ceased to be in a marriage-like relationship (central to the respondent's FLA claims); and (2) the circumstances underpinning the respondent's claim for damages. The reliability of their testimony is central to determining the date of cohabitation, which is important as to excluded property if division of property is ordered.
- [181] Each of the parties submits the other's evidence as to key events is either untruthful (not credible) or unreliable.
- [182] In *Schuetze v. Pyper*, 2021 BCSC 2209, Madam Justice Fleming summarized the law regarding assessing a witness' credibility as follows:
- [337] The proper approach to assessing the truthfulness of the testimony given by any interested witness was articulated many years ago in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357, with these words:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [338] The factors that may be considered when assessing credibility were identified in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, which I summarize as follows:
- the capacity and opportunity of the witness to observe the events at issue;
 - the witness's ability to remember those events;
 - the ability of the witness to resist being influenced by their interest in recalling those events;
 - inconsistency in the witness's evidence, meaning did their testimony change between direct and cross-examination, or inconsistencies between prior statements, discovery evidence and their evidence at trial;
 - whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;

- whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and
- the witness's demeanour, meaning the way they presented while testifying.

[339] Regarding the last factor, Faryna and other authorities have discussed the dangers of relying too heavily on demeanour to determine credibility, recognizing there is a risk of misinterpreting the testimony of the better actor as truthful, and conversely, the poor presentation of an honest witness as deceptive (see: *R. v. Jeng*, 2004 BCCA 464 at para. 54; *R. v. Tyers*, 2015 BCCA 507 at para. 18).

[340] I also remind myself of the civil burden of proof, on a balance of probabilities, and its relationship to the assessment of credibility, as described in *F.H. v. McDougall*, 2008 SCC 53:

[49] In the result, I would reaffirm that in civil cases there is only standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event has occurred.

[86] However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case

[341] Also, credibility and reliability are related but distinct concepts. A witness may sincerely attempt to be truthful but lack the memory or observational capacity to provide reliable testimony. Both credibility and reliability are assessed in the context of the evidence as a whole.

[342] As the trier of fact I may believe some, all, or none of a witness's evidence.

[183] Those observations have application to the conflicts underlying the dispute here; primarily the date, or more accurately the time period in which the marriage-like relationship between the parties ended.

[184] Each party's evidence suffered from some lack of recall and vagueness, that is, reliability. Such is unsurprising giving the nine plus years that have passed since the events informing the outcome of the determination of the date of separation.

[185] That being said, for the reasons that follow, I largely accept the evidence of the claimant over that of the respondent when it comes to my factual findings.

- [186] Of significance on the issue of credibility, the respondent took, in my view, the incredulous position that it was not her voice on the recordings made of "discussions" between herself and the claimant in the fall of 2015.
- [187] There is no doubt the voice I heard on the tapes was that of the respondent. I conclude that both from having heard the respondent during the voir dire and the context of the conversation between the two. The respondent later admitted mediation was discussed and explained her unwillingness to attend based upon a lack of funds.
- [188] On the issue of the promise ring, the respondent originally deposed in a sworn statement that the claimant demanded its return, but later in cross-examination agreed she returned it to him. She did not deny (or adopt) the manner in which the claimant said she returned it.
- [189] When counsel suggested to the respondent in cross-examination that she knew as of August 2013 the relationship between her and the claimant was over, she avoided the question by deflecting to what her lawyer told her about separation. She never responded directly to the question posed, which did not refer to the pleadings filed but rather her knowledge as to the state of the relationship in August 2013.
- [190] Despite changing lawyers, the respondent continued, as noted above, to provide August 2013 as the separation date, both in affidavits and through her answers on discovery. Her view as to the meaning of "separation" did not change until late 2021 when she filed a Notice to Admit.
- [191] She testified that her original lawyer prepared the pleadings based on a legal error as to the effect of her withdrawal from the bedroom and cessation of sexual relations, but did not explain the change in her position leading to the preparation of the Notice to Admit. Nor did she clarify, until trial, the reason behind the significant shift in the timeline.
- [192] Another significant difficulty with the respondent's credibility is her explanation as to how she came into possession of a number of the claimant's documents that, according to the claimant's unchallenged testimony, were in a filing cabinet in his locked home office.
- [193] The respondent acknowledged breaking into the claimant's office following his departure from the property in November 2015 to "fix the modem", but denied taking the claimant's documents. She offered no plausible explanation as to how the documents that were disclosed on her first List of Documents, the vast majority of which were his, came into her possession.
- [194] When pressed in cross-examination as to where she obtained the claimant's financial documents, she "could not recall" how they came into her possession.
- [195] The conclusion I draw, despite her denial, is that she broke into the office, for whatever reason, emptied the claimant's filing cabinet, and provided the contents, or such as were relevant, to her then counsel.

- [196] Another difficulty with the respondent's credibility relates to her original testimony that the reason for attending counselling with Dr. Davies was to deal with the claimant's abuse of her. She ultimately agreed in cross-examination that the reason for their attendance was marriage counselling.
- [197] All in all, I conclude that I must approach the respondent's evidence with considerable caution. Where it differs from that of the claimant, I accept his evidence over hers.

Commencement of Cohabitation

- [198] The respondent's insistence on the commencement of cohabitation in April 2006 does not, in my view, conform to other admittedly true evidence, leading me to conclude that while the parties may have occasionally slept at the property prior to the "move-in" date of June 2006, they did not live there together until repairs, as described in the claimant's evidence, were complete and Austin had completed his school year.
- [199] The respondent conceded, based on documentary evidence, that the sale of the claimant's townhome closed in July 2006 and that he was only then required to give up possession. The White Rock home in which the respondent resided closed June 30, 2006. Until that time, she paid the mortgage on it in lieu of rent.
- [200] Austin attended school in White Rock and the respondent took him to school most days, which would have been a five-minute drive or 10-15 minute walk from White Rock, but a 20-minute drive each way from the property in Langley.
- [201] She was working full time until her maternity leave commenced. If, as the respondent states, she was living at the property by April 2006, then she would have been solely responsible for dropping Austin off at school, as her parents lived in White Rock, and she would have been solely responsible for picking him up in White Rock to take him back to the property. She would have had to do this all while working full time and continuing to pay for the mortgage payments on the White Rock property.
- [202] Although insisting the parties began living on the property in April 2006, the respondent provided no details as to arrangements for Austin, what furniture was present, and why the parties would choose to reside in, at best, a partially furnished residence undergoing renovation when each had a separate residence that was available, furnished and close to where Austin attended school and closer to the respondent's workplace.
- [203] On the other hand, I have the evidence of Mr. Filiatrault who testified he helped move the claimant into the property. He was specific as to the time period, June 2006, and why. He noted that "no one was living there" when the move began. Shortly after the move, his son and a friend, who were off from school, helped with landscaping work at the property.

[204] Based upon the totality of the evidence on the issue of when the parties moved in together, I conclude the balance of probabilities favours the move having occurred in June or July 2006, when both parties had to give up occupation of their former residences, when Austin no longer attended school in another district, and after some of the tasks such as flooring installation and painting occurred.

Date of Separation

[205] To ascertain the respondent's entitlement to statutory relief, I must, on a balance of probabilities, determine whether the parties "separated" either in December 2012 or August 2013 and then continued on separate and apart under the same roof, or remained in a marriage-like relationship, however toxic and unhappy it might have been, until November 22, 2015.

Legal Framework

[206] As above, the governing legislation is the FLA. Section 3(4) of the FLA provides

(4) For the purposes of this Act,

- (a) spouses may be separated despite continuing to live in the same residence, and
- (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

[207] In *Sachdeva v. Sachdeva*, 2013 BCSC 313, where there was a dispute about the date of separation, the Court explained that the question is whether one of the parties formed the intention to live separate and apart from the other: *Sachdeva* at para. 87. The Court in *Sachdeva* continued to explain at para. 87 that the focus of the analysis is the presence of the generally accepted characteristics of a marriage, which include:

- a) the intention to remain married;
- b) sexual relations,
- c) activities carried on in public;
- d) sharing of financial resources; and
- e) sharing significant family events.

[208] H.S.S. expanded the characteristics of a marriage-like relationship referenced *Sachdeva* as follows:

[49] Additionally, the following factors have been accepted as informing the analysis of whether the parties are living as spouses:

- Whether the parties vacationed together;
- Presence or absence of marital relations;
- How the parties conducted their financial affairs, including any financial planning they undertook as a couple and how they filed their tax returns. Notably, the authorities establish that financial dependence is no longer considered an essential element of a marital relationship;
- Estate planning;
- Making shared plans for the future;
- Participation in joint social activities and the manner in which the spouses presented themselves to others.

[209] *Nearing v. Sauer*, 2015 BCSC 58, makes clear a meeting of the minds on the intention to separate is not required. A physical separation, combined with one party's intention to live separate and apart, is sufficient: *Nearing* at para. 54.

[210] The case law also requires that the spouse who wishes to separate take action consistent with that intention: *Nearing* at para. 54; see also *McGrail v. McGrail*, 2016 BCSC 104 at para. 40.

[211] In *H.S.S. v. S.H.D.*, 2016 BCSC 1300, rev'd on other grounds, 2018 BCCA 199, leave to appeal to SCC ref'd, 38246 (7 February 2019), the court reiterated that a consensus was unnecessary to establish a separation and explained that a demonstrable intention to separate, stated or otherwise apparent through action, was sufficient to establish separation despite continued occupation of the same residence. At paras. 40-44, Justice Dardi stated the following:

[40] It is clear that the law does not require a meeting of the minds with respect to the intention to separate. A physical separation, coupled with one party's intention to live separate and apart, is sufficient: *Nearing v. Sauer*, 2015 BCSC 58 at para. 54. The legal framework for determining that spouses have lived separate and apart requires that the Court find, first, an intention of one spouse to repudiate or end the marital relationship and, second, action consistent with that intention. The parties disagree on whether that action must include an unambiguous verbal expression of his or her settled intention.

[41] Ms. D. asserts the settled intention to bring the marital relationship to an end must be unequivocally communicated by one spouse to the other spouse. Mr. S. counters with the submission that other actions, consistent with that intention, can be sufficient, regardless of whether there is an explicit verbal declaration that the marriage is over.

- [42] I have concluded, for the reasons that follow, that the weight of the jurisprudence supports Mr. S.'s articulation of the governing legal principles. The Court's task is to assess objectively, on the totality of the evidence, whether one spouse held a settled intention to separate and communicated that intention through his or her conduct to the other spouse. An express statement is only one of the factors for consideration in what is necessarily a contextual analysis.
- [43] The Ontario Court of Appeal in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429 (C.A.), held, in the context of a common law relationship, that a relationship has come to an end "when either party regards it as being at an end, and by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one": at 432. This statement was cited with approval by the Supreme Court of Canada in *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para. 42.
- [44] In *Gosbjorn v. Hadley*, 2008 BCSC 219, Madam Justice Gray adopted the analysis articulated in *Hodge*:
- [142] Using the analysis suggested in *Hodge*, parties cease to live and cohabit in a marriage-like relationship when either party regards the relationship to be at an end, and by his or her conduct, demonstrates in a convincing manner that this particular state of mind is a settled one.
- [Emphasis added.]
- [212] The question of whether parties separated is a question of mixed fact and law. In *Der Woon v. Zadorozny*, 2020 BCCA 95, the Court of Appeal adopted the chambers judge's analysis as follows:
- [5] After referring to the applicable provisions of the Act, the chambers judge succinctly analyzed the case as follows:
- [18] Although the claimant left the family home on or about September 1, 2014, I have concluded that the parties separated on June 17, 2014. (*C.P v. K.W.A.*, 2018 BCSC 332 (CanLII) and *Nearing v. Sauer*, 2015 BCSC 58).
- [19] On June 17, 2014 the respondent clearly expressed her intention to end the relationship of the parties and her actions following her expressed intention were entirely consistent with her statement that she intended to separate. Although in the same residence, they talked infrequently, they slept in separate beds and they stopped socializing as a couple with friends or family. Shortly after her declaration to the claimant, she announced their separation to her father, her ex-husband and her co-workers. She also took steps to deal with her financial circumstances as she was unemployed at the time.
- [20] In my view, it was not incumbent upon the respondent to take steps to have the claimant removed from her house. She acted fairly and reasonable in allowing him to stay until September 1, 2014 so that he could find another place to live. A meeting of the minds is not

required as to the date of separation. The claimant did not testify that the respondent did anything to lead him to believe that the relationship continued after June 17, 2014. Quite the contrary, a few days after her declaration that their relationship was over she said she had never been more resolved about a decision.

- [213] In *S.A.H. v. I.B.L.*, 2018 BCSC 544, like here, the parties differed in their view of when they started living separate and apart. One party argued separation occurred in 2004 when the intention to separate was initially formed, the other claimed the date of separation as when she moved out of the family home in 2013. In concluding the date of separation was the latter, the Court noted that while the claimant/respondent formulated and communicated the intention to separate in 2004, that intention was not acted upon: *S.A.H.* at para. 61. The Court continued:
- [62] In addition, their day-to-day life did not measurably change after the commencement of family law proceedings, either in terms of their private behaviour or how they interacted with each other in public. The evidence establishes that the parties' remained financially inter-dependent at the same level as they had always been, until October 1, 2013. They also continued to reside in the same home; share their financial resources; eat and cook their meals together; manage a joint household; parent their children together; do family activities together; and take family vacations together.
- [63] While the existence or absence of sexual intimacy is not determinative of the issue, I do not accept Mr. L.'s evidence that all sexual contact ended after the fall of 2002. There is uncontroverted evidence that Ms. H. became pregnant after this time. I accept Ms. H.'s evidence that sexual contact between the parties' continued well after 2004, albeit infrequently.
- [64] Their public life also did not change: they continued to attend social functions together and present themselves publicly as a married couple. Indeed, it appears that no-one, except the parties and the claimant's father and her lawyers, was even aware that the claimant had filed for divorce in March 2004. Their children were still giving them anniversary cards until at least 2008, and up until her political campaign of 2014, all of Ms. H.'s political campaign materials had her marriage to Mr. L. featured prominently.
- [65] These events show that the parties are making a slow, incremental move towards separation, but are not evidence of separation. The most significant of these, Mr. L. sleeping in the basement of the family home, could at best be described as a distancing, rather than a clear break, in the parties' relationship. Notably, item 5 of the Reconciliation Terms describes Mr. L.'s desire to have quality time to himself, including a "place where [I.] can relax and play recorded music at high volume without bothering anyone (basement room)". Despite sleeping in the basement, the parties continued to share the same bed during family vacations, and were intimate with each other even after Mr. L. started sleeping in the basement.

Analysis

- [214] Applying those principles to the evidence before me, and having regard to my previously stated conclusions as to the credibility and reliability of, in particular, the respondent, I find that the claimant made known his intention that the relationship was over in or about December 2012 and, in any event, no later than August of 2013.
- [215] I accept the claimant's evidence that he verbally communicated his intention to end the marriage-like relationship both at the counselling session in or about December 2012 and directly to the respondent.
- [216] The respondent either reacted to or initiated the return of the promise ring no later than August 2013. While perhaps only symbolic, I conclude the return of the ring is further evidence of both parties' acknowledgement and acceptance of the end of the marriage-like relationship.
- [217] While the parties might not have exhibited all of the criteria said to evidence a marriage-like relationship prior to 2012, any they did exhibit - e.g. sexual relations, activities together within the home - came to an end by, at the latest, August 2013.
- [218] The parties, save for the wedding in August 2013, ceased all social interaction with others. Prior to then, they attended, as a family, celebrations at Christmas at the claimant's extended family's home.
- [219] While disputed, I prefer the claimant's evidence as to the paucity of interaction within the home between himself and the respondent. He testified and I accept, given the respondent's lack of a denial, that he took the children to their activities without her and began attending social events, notably Christmas and social events through his work, alone.
- [220] Their intimate relations came to a stop no later than when the respondent removed herself from the bedroom. By the respondent's admission, the claimant came and went as he pleased and, when he was home, spent most of his time in his office.
- [221] The respondent acknowledges efforts by the claimant to enter mediation; the only purpose for which was to resolve financial and parenting issues arising from "marriage breakdown".
- [222] The respondent's explanation that their relationship was deteriorating prior to the physical separation as supportive of an ongoing marriage-like relationship fails to recognize that by any objective standard, all indicia of a marriage-like relationship ended by no later than August 2013.
- [223] Each had different motives for remaining in the home. The respondent acknowledged but for a lack of money and the fact that and she "did not want to leave the children and animals with him", she would have left the property.
- [224] The parties were, no doubt, in some form of relationship. They had two children together, lived in the same house and the claimant still provided financial support.

- [225] The respondent suggests the claimant's continued declaration on tax documents of a common law relationship is evidence of the enduring nature of their relationship. However, with respect, the claimant's lack of insight into proper declarations from a tax standpoint do not counteract the objective indicia already referred to. Further, the filing of tax returns and the status chosen by the declarant is but one factor of many that is considered in determining the existence or non-existence of a marriage-like relationship: *Hennan v. Nolan*, 2024 BCSC 1383.
- [226] Similarly, whether the parties' relationship status was known to the authors of Christmas cards sent to the parties, or the claimant's response on discovery he separated at age 64 as opposed to 62, does not change the objective assessment of their status after August 2013. None of the authors of those cards was called to testify as to their knowledge of the parties' relationship in 2013 and 2014. The claimant explained his discovery answer as, in effect, bad math not an acceptance of the respondent's suggested date of separation.
- [227] Respondent's counsel argues I cannot rely upon the date of separation raised repeatedly in her pleadings and in discovery because of the errant advice of counsel as to the effect of removing herself from the bedroom, but does not display similar forgiveness for any slips by the claimant in confounding the date of physical separation with that of the end of the marriage-like relationship.
- [228] Neither's evidence is perfect or entirely consistent save for the fact the claimant's stated date of separation has been consistent since the first pleading filed.
- [229] In submissions, the respondent suggested that if the separation date was August 2013, then the initial pleading filed on her behalf was statute-barred and, as such "improper", thus calling into question the advice the respondent received.
- [230] With respect, that is a two-edged sword. The claimant, guilelessly, filed pleadings more than two years after the date he suggests the parties separated, yet still sought property division (of which the respondent had none) along with relief related to their children. He too, it would seem, received questionable advice on the legal effect of the information provided to counsel as to the separation date.
- [231] The claimant, I find, relayed to the respondent through word and deed that the marriage-like relationship was over in late 2012 or early 2013. He, by action, and she, by removal of her person from the bedroom and voluntary return to the claimant of the promise ring, made clear their disengagement from one another as a couple living in a marriage-like relationship. Nevertheless, they continued on, each for their own reasons, living under the same roof in a dysfunctional relationship until the events of November 2015.
- [232] In the interim, the claimant was openly on dating websites. None of the witnesses who testified characterized the parties, post August 2013, as appearing in public as a couple.

- [233] In this sense, the interaction between the parties based on their mutual evidence is no different than in *Der Woon*. They stopped any meaningful interaction with the exception of one social attendance in August 2013, still more than two years before proceedings were commenced. Further, the claimant attempted to engage the respondent in steps to resolve issues (mediation), and, according to Mr. Filiatrault and Dr. Brits, whose evidence I accept, relayed to others that the relationship "was over" and he was "trying to walk away".
- [234] For largely the same reasons, I contrast the parties' actions from August 2013 forward with those of the litigants in *S.A.H.*, where the litigants, despite announcing the end of the relationship, carried on as they did before. These parties did not.
- [235] I note again that the claimant has been unwavering in his assertion that the date of separation was 2012. He stated that from the commencement of this proceeding and throughout, even before the pleading of the s.198(2) limitation. Such only came to light in 2021, when the respondent sought to change her stated separation date to 2015. Until his amendment, the claimant sought an unequal division of family property as opposed to pleading that the respondent was statute-barred from pressing her own claims under the FLA.
- [236] But for the respondent's Notice to Admit and the subsequent application resulting in the amended pleadings, the proceeding would have moved forward without the advancement of a limitation defence.
- [237] Hence my conclusion that the claimant had no clear motivation, absent the pleading of a limitation defence in his NOFC, to express a date other than that he believed was when the marriage-like relationship ended. The parties' physical separation was mere weeks before his NOFC was commenced. Had he considered that to be the end of the relationship there was no reason, other than a genuine belief in the fact the parties had lived separate and apart since 2012, to randomly assert a date other than the date he was removed from the home.
- [238] The respondent, similarly, had no reason to independently (given the actions were filed the same day and her date of separation was not in response to his) assert a date other than that which she believed was the date the parties separated.
- [239] In concluding that the date of separation was no later than August 2013, and likely earlier, I have considered the respondent's explanation that it was her lawyer who "chose" the date of separation after learning from the respondent that was the date when the respondent removed herself from the previously shared bedroom.
- [240] Even accepting the respondent received inadequate legal advice concerning the characterization of separation and its impact upon her statutory claims, there are numerous other iterations of pleadings and affidavits prepared by other counsel that assert August 2013 as the separation date.

[241] Her sworn statements and subsequent iterations of pleadings go further than merely filling in a date based upon her removal from the bedroom. They go on to explain how the children, subsequent to August 2013, have been in her care.

[242] In the originally filed counterclaim, which the respondent acknowledged reading, the bare allegation of living separate and apart was expanded to include the following:

While the Claimant and the Respondent resided together in a marriage like relationship, the Respondent assumed the primary care for the Children. The Parties separated in August 2013, although they have remained living in the Family Home, they sleep in separate quarters. Since the separation of the Parties, the Children of the relationship have also been in the Family Home but are in the actual care and control of the Respondent

[Emphasis added.]

[243] That additional assertion, in my view, suggests a change far greater than a simple change in sleeping arrangements. More importantly, it conforms with the totality of evidence I have heard.

[244] Further, in 2019, when still represented by her original lawyer, the respondent, in an affidavit sworn to be true, deposed:

The scheduled adopted under the September 2018 Consent order implemented overnight parenting time which the claimant had not had previously and since out physical separation in November 2015. (sic).

[Emphasis in original.]

[245] It was suggested to her by claimant's counsel that by distinguishing between the physical separation of the parties and separation date she maintained was August 2013, she was acutely aware of the different meanings of living separate and part in the same home as opposed to a physical separation. She replied she was unaware of the distinction until she got "new counsel". Yet, in a further affidavit sworn by the respondent in 2020, when represented by a different lawyer, the respondent again reiterated August 2013 as the date the parties separated.

[246] To be clear, the issue is not solely determined by the respondent's steadfast assertion over six years as to the separation date (although such is a factor), but on the whole of the evidence before me.

[247] I accept the evidence of the claimant that he left counselling in a dramatic fashion never to return. Thereafter, his thoughts were directed at mediated resolution of matters as between the parties, not reconciliation facilitated through counselling.

[248] From the cessation of the claimant's involvement in marriage counselling, there is a complete absence of the indicia of a marriage-like relationship referred to in H.S.S. More specifically:

- a) the parties did not sleep together or engage in sexual relations since, at the latest August 2013;
- b) they did not vacation together;
- c) while the respondent remained reliant on the claimant for financial support, there was no sharing of accounts, planning for their financial future or estate planning;
- d) admittedly, the claimant continued to file tax returns declaring himself in a common law relationship, although he explained that to my satisfaction as a result of his not understanding the legal implications of his stated intention to separate and his withdrawal from the marriage-like relationship afterwards;
- e) the parties made no plans for their future together; and
- f) with the exception of the wedding they attended together in August 2013, neither have referenced a single social event they attended as a couple - to the contrary, the evidence establishes the claimant attended family gatherings alone.

[249] There is no evidence the parties presented themselves as a couple following the termination of joint counselling.

[250] The audio tapes, if having no other import, confirmed the claimant's testimony regarding mediation. The time frame referenced by the respondent in the tapes - 18 months to 2 years - prior to the conversation, lends credence to the finality of the intention to live separate and apart well before November of 2015.

[251] Unlike in S.A.H., there is no suggestion in the evidence that the parties were, following termination of counselling with Dr. Davies, in any sort of reconciliation phase. Entry into mediation would have, according to the FLA, extended the two-year period set out in s. 198(2) but, other than an invitation to mediate, nothing further happened.

[252] From the totality of the evidence, it is clear the parties began living separate lives. It is immaterial to the outcome whether that commenced in late 2012 or by August 2013.

[253] The claimant says he took his meals separately from the respondent. He testified he did his own laundry and cooked for himself. He took the children to activities but not with the respondent.

[254] While acknowledging the parties did not conform to all of the criteria characterizing marriage-like relationships prior to 2012 (or August 2013), the relationship clearly changed following the respondent's removal from the bedroom.

[255] What few of the defining characteristic of a marriage-like relationship the parties exhibited before her departure were, objectively and subjectively, at an end.

The Limitation Defence

Legal Framework

[256] The claimant argues the respondent's claims under the FLA are statute barred. He relies on s. 198 of the FLA, which reads:

Time limits

198 (1) Subject to this Act, a proceeding under this Act may be started at any time.

- (2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,
 - (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.
- (3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.
- (4) The time limits set out in subsection (2) do not apply to a review under section 168 [review of spousal support] or 169 [review of spousal support if pension benefits].
- (5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in
 - (a) family dispute resolution with a family dispute resolution professional, or
 - (b) a prescribed process.

[257] Section 198(5) of the FLA provides that the running of time limits under section 198(2) of the FLA is suspended during any period in which persons are engaged in (a) family dispute resolution with a family dispute resolution professional, or (b) a prescribed process.

[258] Section 25.1 of the Family Law Act Regulations, B.C. Reg. 347/2012, states as follows:

25.1 The early resolution requirements described in rule 10 (a), (c), (d) and (e) of the Provincial Court Family Rules are prescribed processes for the purposes of section 198 (5) (b) of the Act.

[259] Rule 10(a), (c), (d), and (e) of the Provincial Court Family Rules states as follows:

10 Before filing an application about a family law matter under Part 3 [Application About Family Law Matters], a party seeking resolution of a family law matter in an early resolution registry must, unless otherwise provided in these rules,

- (a) file a notice to resolve in Form 1 [Notice to Resolve a Family Law Matter],
- (b) provide a copy of the notice to resolve to each other party,

- (c) participate in a needs assessment under rule 16 [participating in needs assessment],
- (d) complete a parenting education program under rule 17 [completing parenting education program], and
- (e) participate in at least one consensual dispute resolution session under rule 18 [participating in consensual dispute resolution].

[260] The FLA does not specifically address time limits with respect to counterclaims brought after the expiration of the basic limitation period; however, the Limitation Act, S.B.C. 2013, c. 12 does. Section 22(1) of the Limitation Act gives the court discretion to grant amendments that raise new claims that would otherwise be time barred:

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;

[261] Relying on *Kasian Estate v. Kasian*, 2021 BCSC 538, the court in *Tilbe v. Nespiak*, 2021 BCSC 2250 considered the issue of the applicability of s. 22(1) of the Limitation Act in the context of counterclaims brought in family law proceedings. In this regard, Shergill J. commented:

[96] The FLA establishes its own limitation period, and to that extent the Limitation Act has limited application in this case. However, the two-year limitation period in the FLA is the same as the basic limitation period set out in s. 6 of the Limitation Act. As such, the general principles set out in *Olenga* are helpful. The applicability of the Limitation Act to this case becomes even more evident when considering counterclaims. The FLA is silent with respect to counterclaims. The Limitation Act is not.

[97] Section 22(1) of the Limitation Act provides that a party may bring a counterclaim whose limitation has elapsed, as long as that claim relates to or is connected with the initiating claim which has been brought within its limitation.

[98] In *Kasian Estate v. Kasian*, 2021 BCSC 538, Master Elwood considered an application to file a counterclaim after the expiry of the limitation period. He concluded that the time limits in the FLA are a limitation period within the meaning of s. 22(1) of the Limitation Act, noting that:

[29] This legislative provision provides the court with a discretion to permit "related claims," including "proceedings by counterclaim" even though "a limitation period applicable to either or both of the claims has expired"

- [99] Rule 22-4(2) of the Supreme Court Civil Rules permits the court to extend the deadline stipulated in Rule 3-4(1) for filing a counterclaim: *Kasian Estate* at para. 19.
- [100] The factors for considering the extension of time to bring a counterclaim are: the length of the delay; the reasons for the delay; whether the limitation period has expired; the degree of connection between the proposed counterclaim and the claim; and prejudice to the parties: *Syukur v. Yeh*, 2018 BCSC 1826 at paras. 32-42. These factors are similar to the factors the court considers when faced with an application to amend a pleading after the expiry of the limitation period.
- [101] In *J.D.G. v. J.J.V.*, 2016 BCSC 2389 Justice Fleming considered whether to allow an amended notice of family claim filed 16 months past the expiration of the two-year limitation period imposed by s. 198(2) of the FLA. In arriving at the decision to permit the claim to proceed despite the expiry of the limitation period, the court relied on the factors from *Chouinard v. O'Connor*, 2011 BCCA 161: J.D.G. at para. 128. The Chouinard factors relate to amendments that plead a new cause of action after the expiry of the limitation period. They include the extent of the delay, reasons for the delay, degree of prejudice caused by the delay; and extent of the connection if any between the existing claims and the proposed new cause of action.
- [262] In *Welliver v. Hees*, 2016 BCSC 1837, the court held that the respondent's claim was outside of the 2-year limitation period and as such, was statute-barred. In that case, the wife sought spousal support and the husband argued, among other things, that the wife's claim for spousal support was statute-barred based on the applicable limitation period. In arriving at its decision, the court stated:
- [45] I must find that the action was commenced more than two years after the parties separated. While this conclusion seems harsh, it must be remembered that the right for an unmarried party to seek spousal support is a statutory right limited by the provisions in the Family Law Act. Even though Mr. Hees, on the facts of this case, has a clear moral obligation to provide support after 22 years of an inter-dependent relationship, the action was not brought within the time limit in the statute.
- [263] In *Hennan v. Nolan*, 2024 BCSC 1383, the parties disagreed on the date of separation and one of the factors the court had to consider was that the parties continued living in the same house for a number of years after the date of separation. The court ultimately found that even though the parties kept living in the same house, they separated a number of years prior and the claims were time-barred under s. 198 of the FLA. Justice Bantourakis stated:

[57] Given the length of the parties' relationship, this result may seem harsh. However, the right for an unmarried party to seek division of family property pursuant to the FLA is a statutory right limited by the terms of that act: *Welliver v. Hees*, 2016 BCSC 1837, at para. 45. Further, Mr. Hennan is also statute barred from seeking any relief in that regard, notably with regard to any presumptive entitlement he may have had to a division of Ms. Nolan's teachers' pension.

Analysis

- [264] Because I have concluded that the date of separation in this case, or more precisely the termination of the parties' marriage-like relationship, was more than two years before their physical separation from one another, the effect of s. 198(2) of the FLA must be considered.
- [265] The respondent notes that in *Hennan*, while the parties remained living together until trial, the limitation issue was pleaded in the first instance in the original pleadings. Here, it was not until seven years after the commencement of the action that the issue of the significance of the separation date arose.
- [266] While undoubtedly true, the amendment was allowed after full argument and opposition by the respondent. It was never appealed despite the obvious prejudicial impact on the respondent if it was determined that the parties were in fact living separate and apart from a date no later than consistently asserted by the respondent; August 2013.
- [267] The respondent does not suggest I can ignore the pleadings. No authority was brought to my attention that allows for the circumvention of the limitation because it was raised late in the day.
- [268] A possible remedy is one sounding in costs. Another is dismissal of the claimant's claims for collateral relief, namely occupational rent, which I consider below.
- [269] In my view, the proper time to argue against the prejudicial effect of the amendment to include the limitation argument was at the time it was sought. As above, the potential prejudice to the respondent was, by that time, obvious.
- [270] Whether draconian or harsh, as acknowledged in the authorities, given my conclusion the parties' marriage-like relationship ended no later than August 2013, the originating proceedings, both filed December 8, 2015, are beyond the two-year limitation set out in s. 198(2) of the FLA. Accordingly, the respondent's Counterclaim, insofar as it relates to claims for property division or spousal support, is dismissed.

Occupational Rent

- [271] The respondent and all three children have remained on the property to date. During their occupancy, the claimant has paid property tax each year and the majority of insurance premiums.

- [272] He seeks occupational rent, suggesting a market rental value of \$2,000 monthly, for the approximate nine-year period the respondent and children have occupied the property. No opinion as to the rental value of the property was provided in any of the numerous property appraisals obtained over the course of the litigation, but the suggested figure seems modest in view of what I know of the property's size and amenities.
- [273] The claimant notes that he paid rent for a basement suite following his exit from the property in November 2015. He also currently pays rent to his partner Dr. Brits.
- [274] The proposed sum for occupational rent totals \$208,000 to the end of August 2024.
- [275] The respondent notes, and I agree, that occupational rent is a discretionary remedy used to achieve fairness and should not be addressed, in circumstances such as this family law proceeding, as a stand-alone tool.
- [276] In *Piderman v. Piderman*, 2015 BCSC 475, McEwan J. stated:
- [51] In *Ross v. Ross*, 2013 BCSC 1716, Verhoeven J. cited *Casey v. Casey*, 2013 SKCA 58, on the principles pertinent to occupations rent:
- [47] I observe that in other Canadian jurisdictions, the law does not focus upon the question of ouster, or of claims for expenses by the spouse remaining in occupation. The principles applicable in Saskatchewan were recently summarized in *Casey v. Casey*, 2013 SKCA 58, at para. 48:

From the jurisprudence the following principles may be drawn regarding the awarding of occupational rent on a matrimonial home:

1. Occupational rent is a remedy which may be utilized to obtain justice and equity in appropriate circumstances.
2. The remedy is exceptional and should be used cautiously.
3. The following factors, where relevant, are appropriately considered:
 - The conduct of both spouses, including failure to pay support, the circumstances under which the non-occupying spouse left the home, and if and when the non-occupying spouse moved for a sale of the home (Peltier at paras. 16-17; Wilgosh at paras. 99 and 109; Good at para. 90).
 - Where the children are residing and who is supporting them (Good at para. 90; Peltier at paras. 16-17; Wilgosh at para. 108).
 - If and when a demand for occupational rent was made (Wilgosh at paras. 100 and 106, Good at para. 90, and Peltier at para. 16).
 - Financial difficulty experienced by the non-occupying spouse caused by being deprived of the equity in the home (Peltier at paras. 16-17; Wilgosh at para. 106).

- Who is paying for the expenses associated with the home. This includes who is paying the mortgage and other upkeep expenses (maintenance, insurance, taxes, etc.). If there is no mortgage, occupational rent may be needed to equalize accommodation expenses (Good at para. 90; Peltier at paras. 16-17; Wilgosh at paras. 105-106 and 108).
 - Whether the occupying spouse has increased or decreased the selling value of the property (Peltier at paras. 16-17).
 - Any other competing claims in the litigation that may offset an award of occupational rent (Wilgosh at para. 108; Good at para. 92).
4. The remedy is a discretionary one requiring the balancing of the relevant factors to determine whether occupational rent is reasonable in the totality of the circumstances of the case.

[52] At para. 50 Verhoeven J. made the following observation:

[50] On the approach used by other jurisdictions, as I interpret it, the overriding question is whether occupational rent, as a discretionary remedy to be used cautiously, should be utilized in order to achieve justice and equity in all of the circumstances of the case. This approach appropriately places little if any emphasis on the question of fault or blame for the decision of one spouse or the other to leave the matrimonial residence.

[53] I think this is the proper way to approach occupation rent, that is, as a tool to achieve fairness. Were I to take a stricter approach, treating occupation rent as something akin to an entitlement, the outcome would, I think trigger other issues about fairness. I would think that, in general, claims for occupation rent ought not to be hoarded and advanced for the first time at trial. Failure to give notice of such a claim is apt to be interpreted, in the complex emotional aftermath of a marriage, as acquiescence, or a form of spousal or child support. I find that to be the case here. I dismiss the claim for occupation rent.

[277] Here, the equities favour denial of the claim for occupational rent given the late amendment to the claimant's pleadings which, as can be seen, severely prejudiced the respondent.

[278] That being said, as will be seen, the provision of what was essentially free accommodation to the respondent and three children is a factor in determining the appropriate level of child support for those same years the respondent and children were in occupation of the claimant's, and only the claimant's, property.

Child Support

[279] Regardless of the outcome of the respondent's claims for property division or spousal support, each of the parties acknowledges that by virtue of events following the pronouncement of the consent order in 2016 matters have changed, specifically the income of the claimant, warranting a revisiting of the issue of child support retrospectively.

- [280] I note the original child support consent order was without prejudice based upon the claimant's 2014 Line 150 income of approximately \$70,000.
- [281] No application to vary the interim order was ever brought forward despite the passage of approximately eight years from the date of the order to the commencement of the trial, as well as ongoing fulsome disclosure by the claimant of his rising income through document exchange and exchange of numerous Form 8 financial statements.

Legal Framework

- [282] The claimant argues the respondent is not seeking a retroactive variation of the January 2016 order when, in dealing with the claim for spousal support, she submitted:
- Finally, Ms. Thompson submits that what she is seeking is not truly retroactive support and therefore the usual factors in deciding whether to make a retroactive award do not apply. Ms. Thompson first filed her claim in December 2015 and an interim consent order was made in January 2016. The JCC order was "rough justice" and explicitly made without prejudice.
- [283] I agree. This trial is the first instance in which the issue of child support is being addressed on its merits. As the court explained in *M.J.H.I.G. v. F.M.E.G.*, 2024 BCSC 2372:
- [75] All support orders between the parties are interim, without prejudice orders, made by consent and without hearings. This summary trial represents the first point at which the issues of child and spousal support have been before the Court for determination based on evidence. Accordingly, the legal principles that apply are those for determining support at first instance, rather than those that apply where a party seeks a variation.
- [284] Similarly, in *K.W. v N.Q.*, 2021 BCSC 2495, albeit in the context of an interim relocation order as opposed to a child support order, the trial judge noted:
- [31] In my view, K.W.'s argument fails for three reasons. First, the fact that an interim relocation order is a serious decision and may be tantamount to a final order does not on its own legally transform it into a final order. Second, it is clear from a review of the record that, under all the circumstances, the Motion Judge Order was properly characterized by both the Motion Judge and the Trial Judge as an interim order and not a final order. Third, a trial judge has no obligation under the FLA, in issuing a final order, to first find a material change of circumstances with respect to prior interim orders.
- [52] Under these circumstances, imposing a material change of circumstances standard on the trial judge would be the procedural equivalent of the tail wagging the dog, by prioritizing the interim hearing over the trial. This runs contrary to the well-established concept that the primary purpose of an interim order is merely to maintain the status quo and provide short-term solutions pending trial, and not to tie the hands of the trial judge

[Emphasis added.]

[285] The principles applicable in the instant case are therefore those for determining support at first instance.

[286] The starting point for determining child support is the parties' incomes: see e.g. M.J.H.I.G. at para. 79.

Parties' Positions

[287] The claimant suggests the simplest way to address the child support payable for previous years is to take his actual income on his T1 General in each year, but then impute an income to the respondent so as to calculate her share of the s. 7 expenses paid for by the claimant over the years since separation, and deduct her proportionate share from what is owing.

[288] The respondent submits I should impute an income to the claimant of \$233,500 for each year since the January 2016 order based on his most recent tax filing, noting:

While Ms. Thompson argues it is inappropriate to use Dr. Verbonac's Line 150 income in any year she submits that Dr. Verbonac's stated position as to his current income represents the minimum amount of income that should be imputed to him since it reflects what he himself says he can earn.

[289] In support of that submission, the respondent suggests that, by working less than full time hours, the claimant is intentionally underemployed and his income should be imputed to reflect five days of office visits weekly.

[290] Further, the respondent suggests that income should also be imputed to the claimant on the basis of section 19(c) and (h) of the Federal Child Support Guidelines, which provide as follows:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (e) the spouse's property is not reasonably utilized to generate income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax;

[291] With respect to s. 19(e), the respondent argues that the North Vancouver condominium is 100% beneficially owned by the claimant and should be rented at market rates. As for s. 19(h), the respondent suggests that a substantial part of the claimant's income is received as dividend income and thus attracts more favourable tax treatment than if paid as salary.

[292] The claimant opposes the imputation of income to himself as suggested. With respect to his alleged underemployment, he notes his age, his employment history of working in the office two-and-a-half to three days per week, and his general health. He argues there is no

under-utilization of the North Vancouver condominium as he and his mother purchased it as a gift for his daughter, Laura Cole, and he is therefore not entitled to any rent from it. Finally, he submits that no income should be imputed on the basis that his income is received as dividend income and thus attracts more favourable tax treatment.

Analysis

- [293] The proposed calculation by both counsel overstates either the claimant's actual income (claimant) or the amount I could reasonably impute to him (respondent).
- [294] Dealing first with the respondent's proposal, while \$233,500 is the highest income declared by the claimant, with respect, the claimant has never "earned" \$233,500 in any year since separation, let alone every year. Nor could he, even if he worked in the clinic five days a week seeing patients throughout.
- [295] The claimant's income, disclosed in his most recent 2022 T1 General, is comprised largely of a dividend declared from the personal corporation in the sum of \$195,000. Such far exceeded the amount paid to his corporation by the clinic for which he provides services.
- [296] The respondent acknowledged, and it is settled law, that encroachment on retained earnings is not included in income for the purpose of determining income for child support purposes: *Grossi v. Grossi*, 2005 BCCA 47.
- [297] The claimant has regularly, since 2016, encroached on savings/retained earnings from a personal services corporation. In total, term deposits held within the company have been diminished by approximately \$300,000 since 2016. All of those retained earnings were held in the corporation prior to the parties' physical separation in 2015.
- [298] The claimant has also encroached on his RRSPs on two separate occasions to augment his line 150 income. The total withdrawn is \$45,000.
- [299] Neither the withdrawal of "savings" from his company, nor the periodic withdrawal of RRSPs (necessitated, I infer, from the costs of litigation and establishing his own residence post-separation), would normally form part of the calculation of the claimant's income for child support purposes.
- [300] With the minor exception of pension income the claimant began receiving at or around age 65, the bulk of his income comes from the practice of medicine.
- [301] Given the claimant's sole source of income, other than CPP, is derived from payments received via his solely owned corporation, s.18 of the Guidelines is engaged. The result is that, unless the claimant demonstrates that retention of pre-tax profit is necessary for the ongoing needs of the corporation, the whole of the corporation's pre-tax profits are available to him as income and should be considered as such for determining income for child support: *Hausmann v. Klukas*, 2009 BCCA 32 at para. 51, leave to appeal to SCC ref'd, 33101 (11 June 2009).

- [302] The claimant provided no evidence supporting the contention that retention of earnings was necessary for the sustainability of the corporation (despite the clear plan prior to cohabitation to shield tax paid earnings within the corporation). Thus, his income should be established, in any given year, as the combination of money paid to him by way of salary or dividend from the corporation plus any pre-tax profit retained by the corporation, as well as any pension income received by the claimant since turning 65.
- [303] No analysis of the claimed expenses within the corporation was provided such that I could allocate any of those expenses back to the claimant, although I note modest deductions for car expense, entertainment and telephone. The majority of the expenses within the corporation are for insurance and professional fees/meetings. They are significant. It is unclear what, if any relationship, expenses bear to gross corporate income. Does higher income result in increased expenses to the company? I don't know.
- [304] No evidence was provided as to the average earnings for a family doctor in B.C. with a like practice to that of the claimant or for doctors still practicing over the age of 65 or 70.
- [305] I have not performed a year-by-year analysis of the pre-tax profits of the corporation or individually analysed the expenses charged against income in any of those years. Most recently, for the year ended 2022, the gross corporate income before expenses was \$134,000. Expenses substantially reduced the pre-tax profit to approximately \$65,000.
- [306] With respect to the three bases on which the respondent suggests income should be imputed to the claimant, I begin by noting the imputation of income is discretionary, not mandatory. The party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36.
- [307] Dealing firstly with the submission the claimant is entitled to rent from his daughter for her occupation of the North Vancouver condominium, the legal title is registered 99% in the name of Laura Cole and 1% in the name of the claimant.
- [308] The claimant explained his intention in setting up the title in the fashion he did. He was clear the payment from him and his mother was a gift, thus rebutting the presumption of resulting trust. He has not acted in a manner consistent with any true ownership interest in the condominium since its acquisition.
- [309] While not particularly sound at law, the claimant's stated intention of protecting his daughter from claims by others (presumably spouse-like partners) by having 1% of legal title hardly sustains a conclusion he is the beneficial owner of the whole of the property.
- [310] Laura Cole is not a party to the proceeding. Absent a finding of resulting trust, the suggested conclusion here, the registered title is evidence of ownership. Therefore, if the claimant has an interest in the property it is limited to the 1% registered on title and is, in such circumstances, incapable of generating income.

- [311] There was no evidence led by the respondent to suggest anything other than the condominium being beneficially owned by Laura Cole.
- [312] As to the receipt of dividend income, grossing same up for the preferential tax treatment in the hands of the taxpayer would only be appropriate if one were to ignore s. 18 treatment of the corporations' pre-tax income. Dividends are paid from the post tax earnings of the company making the gross up for payment via dividends double counting.
- [313] The submission that the claimant is intentionally under-employed carries more weight although, for the reasons which follow, I consider it the least practical way to address the issue of child support from December 2015 to date.
- [314] The test for imputing income for intentional under-employment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability: *Marquez* at para. 37.
- [315] The claimant was 64 when the consent order was agreed to. Now, at 73, he has reason to reduce his time spent doing office visits and to work less than full time. He is on a wait list for knee replacement. His current knee problems impair his ability to stand for long periods.
- [316] At age 70, he reduced his office hours from three to two-and-a-half days per week. In one year post-separation he worked more than three days in the office seeing patients. In addition to office work with patients, he testified, and I accept, he does remunerative office work. I agree with the respondent that the time consumed by the out of office work is likely less than claimed by the claimant.
- [317] No evidence was provided by which I could establish the average earnings net of expenses for a family medicine practitioner let alone a family practitioner of the age the claimant.
- [318] I agree, in principle, that the claimant has, throughout the entirety of his relationship with the respondent and following their separation, worked less than full time at the practice of medicine.
- [319] A review of a spreadsheet showing the revenue the claimant's personal corporation receives from the medical clinic where he practices (75% of his billing according to the evidence) demonstrates the highest year of revenue from 2013 to date was \$134,677.33 in 2022. In other years, his corporation's share of revenue from the clinic has been as low as \$84,000 (rounded) for 2014. From either amount he has expenses for insurance and professional development.
- [320] His 2022 Line 150 income, from which the respondent suggests I establish his historical income earning capacity, was approximately \$233,500. As I have stated above, the reason for the claimant's healthy income in 2022, a significant increase over previous years, was the declaration of a dividend of \$195,500.

- [321] Absent reserves in the form of term deposits held by the corporation, assuming all pre-tax profit (after eliminating amortization, vehicle, entertainment etc.) would provide for pre-tax profit in the corporation of approximately \$114,000. To that must be added his 'other income' notably CPP benefits.
- [322] Although his 2023 tax information was not before the court, I suspect, given his age and ownership of an RRSP as disclosed in the parties' respective Scott Schedules, he will from 2023 forward be in receipt of additional income from his RRIF.
- [323] The claimant has, in differing amounts over the years since separation reduced the retained earnings of his personal services company from a high of \$488,000 in 2011 to the last available figure on the 2023 financial statements of \$194,000, a reduction of almost \$300,000
- [324] The level of the claimant's income has therefore been sustained not from the corporate pre-tax earnings alone but from the encroachment on retained earnings (almost \$300,000 in 12 years) and, as acknowledged by the respondent, on two occasions augmented by withdrawals from his RRSP.
- [325] Nonetheless, knowing all of that, the claimant, through his counsel, suggests I calculate the average declared income from 2016-2020 and then use his actual income declared for the years 2020, 2021 and 2022 to arrive at the appropriate figure for a retroactive adjustment to child support for each of the years since the consent order (provided I impute an income to the respondent back to 2016 and deduct from the shortfall in child support her proportionate share of the s. 7 expenses he claims to have paid since 2016).
- [326] The claimant submits, despite the order by consent, that child support should never have been paid for Austin and, if paid, Austin's support should be calculated with reference to s. 147(5) of the FLA. It reads:
- 147(5) If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty
- (a) is secondary to that of the child's parents and guardians, and
 - (b) extends only as appropriate on consideration of
 - (i) the standard of living experienced by the child during the relationship between the stepparent and the stepparent's spouse, and
 - (ii) the length of time during which the child lived with the stepparent.
- [327] As to that issue, I note the order was made by consent. The claimant explained that she was not in receipt of child support for Austin and that she had no knowledge of where Austin's biological father was or his means.

- [328] In my view, the claimant cannot be heard to say, nine years later and six plus years since the last payment made on account of Austin, that he should be entitled to claw those funds back from arrears he acknowledges are owing in respect of his two biological children. Where a biological parent is unable to pay a support order or it cannot be enforced against the parent, the step-parent bears the primary support obligation: *Shen v. Tong*, 2013 BCCA 519.
- [329] Section 147(5), however, allows me to view the question of retroactivity differently than from the claimant's two biological children given my conclusion the family of five - the claimant, respondent, and three children - enjoyed a modest lifestyle given the claimant's reasonably modest income throughout the whole of the nine years the five of them lived at the property.
- [330] As to the claimant's suggested imputation of income to the respondent, he notes she was doing volunteer work as at the date of physical separation and investigating options for employment. He suggests the respondent must properly contribute to the approximate \$175,000 said to have been paid for school fees, activity fees and dental and medical fees.
- [331] The claimant suggests an income of \$30,000 be imputed to the respondent for all of the years since the claimant vacated the property, and that her proportionate share of the claimed extraordinary expense be deducted from that which is owed in respect of Brooklyn and Kyle.
- [332] With respect, when parties wait nine years to litigate matters and expect reconstruction of the parties' financial affairs, they should provide proper analysis of the issues of the parties' respective incomes, the breakdown of the \$175,000 in expenses as to the years in which they were incurred, and the propriety of the expense if contribution is expected from the other party.
- [333] Accepting, as I do, the claimant has been underemployed, to some extent, both prior and after physical separation, I have insufficient information as to what adjustment, if any, ought to be made to the pre-tax income of the corporation year by year given the changing methodologies of payment. Nor do I have proper information before me to perform an analysis, year by year, of the propriety of the expenses claimed within the corporation.
- [334] Using the respondent's proposed method of calculating, retrospectively, the claimant's income, overstates his receipt of revenue from the clinic where he works. Given I accept the claimant works outside the office (seeing patients) doing remunerative work and given his age and health, I would be speculating were I to conclude how many more hours he could spend working with patients and the impact that would have on the corporation's pre-tax income.
- [335] Nor can I, on the information available to me, do as suggested by the claimant; impute an income to the respondent and then charge back her proportionate share of the s. 7 expenses said to have been paid by the claimant. The claimed s. 7 expenses were never

allocated on a year-by-year basis or detailed in such a fashion as to allow for sharing as the claimant suggests. Further, the \$30,000 suggested figure, while not unreasonable now, suggests there was no impact of the separation on the respondent, physically or mentally, and that she would immediately find a job paying approximately \$15 per hour, forty hours per week.

- [336] With some trepidation, given the inclusion of retained earnings and RRSP withdrawals, I adopt, at least in part, claimant's counsel suggestion that I average the Line 150 incomes available to reach an average claimed income over the years since physical separation. While admittedly unscientific, it is no less precise than what the respondent seeks; an imputation across the board of an income well beyond that ever achieved by the claimant through the practice of family medicine.
- [337] In short, as I have said, the proposed calculation by both counsel overstates either the claimant's actual income or the amount I could reasonably impute to him.
- [338] In the circumstances, doing the best I can on the information available to me, I conclude the following.
- [339] Firstly, the claimant is not guilty of any blameworthy behaviour. He has not hidden his income nor provided misleading information concerning his income, either corporate or personal. Full disclosure has been made.
- [340] Secondly, the equities involved in assessing retroactive payments need to be considered. While I have not allowed a sum for occupational rent, the advantage to the respondent and the three (then two) children is undeniable. They have enjoyed, to the prejudice of the claimant, nine years of rent-free accommodation. The proposed amount of occupational rent (based on a not unreasonable monthly rental) approximates the respondent's best-case scenario for retroactive support based on her suggested income of \$233,500 annually for each year since 2015.
- [341] Such, in my view, is a factor militating in favour of a holistic approach to the retroactive assessment of child support. Were it otherwise, I would have been more favourably inclined to allow, at least to some degree, the claim for occupational rent to reflect both the benefit received by the respondent and the children, and the cost incurred by the claimant of maintaining a residence for them. Here, I am referring to the remarks in *Piderman* at paras 52-53.
- [342] I conclude a tempered approach to the calculation of the claimant's post-separation income is required given the free accommodation enjoyed by the respondent and the children for whom support was being paid during the last nine years, the payment of all s. 7 expenses by the claimant despite the respondent's ability to obtain remunerative employment and make a proportionate contribution to those expenses, and the delay in moving the application forward. A variation of the original without prejudice order could have and should have been brought in a timely fashion so as to inform the claimant of the

consequence of his alleged intentional underemployment.

- [343] For want of better information, I am unable to review each year of separation to determine the claimant's income and make individual adjustments year-by-year for underemployment.
- [344] A cursory review of the financial statements for the claimant's personal corporation show wide fluctuations in both revenue and expenses that are unexplained in the evidence.
- [345] For example, in 2022 the revenue was \$137,046 with professional fees and insurance totalling almost \$46,000. In 2021, the revenue was just under \$87,000, with similar expenses for professional fees and insurance of approximately \$47,000.
- [346] No explanation was provided in the evidence as to what those expenses represent or why, given the timing of the adjustments to the manner of payment for previously unpaid services or better sharing arrangements for billings explains the \$50,000 uptick in revenue between 2021 and 2022.
- [347] In each year, 2021 and 2022, the claimant's income as stated on his tax return was considerably higher than the gross revenue (let alone the pre-tax income) received by his corporation. In each year, retained earnings within the corporation were reduced.
- [348] Section 17 of the Federal Child Support Guidelines provides for averaging income where income patterns fluctuate, as is the case here, but only over the last three years.
- [349] Averaging the claimant's Line 150 income over the years where his reported income is available, 2015 to 2022 inclusive, results in an average income of \$121,000 (rounded). In addition, for the years in which the claimant has been receiving CPP, the actual sum received should be added to calculate the claimant's income for each year since 2015.
- [350] I choose this method as the manner in which to, in effect, impute income to the claimant for those years 2016 to 2022. For the taxation year 2023, any income from the claimant's RRIF should be added, and, from January 1 onward, support should be calculated upon the further adjusted income.
- [351] Admittedly this approach does not impute greater income to the claimant based on more hours worked but, rather, conforms in some measure with the submissions of both counsel to include in the claimant's income amounts generally not regarded as income for child support purposes; retained earnings and irregular withdrawals from his RRSP.
- [352] Based upon the income as determined by counsel after receipt of these reasons, the support payable should be adjusted to what ought to have been payable for the parties' two biological children for the period the claimant ought to have paid support; December 1, 2015 until present.
- [353] I make no retroactive adjustment to the support payable to Austin based upon a consideration of s. 147(5) of the FLA.

- [354] From whatever amount ought to have been paid for the parties' two biological children, the support that was paid for those two children should be deducted. That is, based on my conclusion above that the claimant is not entitled to recover whatever support was payable on account of Austin, the amount deemed paid by the claimant for the period Austin was receiving support should be adjusted to include only the credit received by the claimant for the amount paid for Brooklyn and Kyle.
- [355] The parties are at liberty to apply if they are unable to agree on the amount owing to the respondent based upon the calculations I have tasked them to perform.
- [356] Dealing briefly with the claimant's contention that, from the amount I find payable in respect of the children, deductions should be made for spousal support paid to the respondent and the advance ordered by Justice Majawa given my dismissal of her claims, I note my earlier comments about the effect of the last moment amendment to the claimant's pleadings.
- [357] Those amendments significantly altered the landscape of the litigation to the detriment of the respondent. By the date the amendments were granted, the respondent was all-in on the litigation.
- [358] I accept she spent a significant portion of her inheritance funding this litigation. On the state of the pleadings until the amendment was granted, the case was about quantum, not entitlement.
- [359] Noting, primarily, the late amendment to the claimant's pleadings, I decline to exercise my discretion to offset any underpayment of child support as against the sums suggested by the claimant to payable to him by the respondent in respect of s. 7 expenses he claims to have exclusively paid.
- [360] The repayment of support and/or litigation advances will be the subject of submissions at the conclusion of the trial.
- [361] The claimant shall not discontinue child support without the consent of the respondent or further court order.

The Alleged Assault

- [362] As part of this proceeding the respondent seeks damages arising from an alleged assault said to have occurred on November 22, 2015; the date the claimant was removed from the home.
- [363] His removal was initiated by police attendance and the respondent's report of an assault. It was the claimant, not the respondent, who called police to attend.
- [364] Each, unsurprisingly, has a different view as to what happened.

The Respondents' Evidence

- [365] The respondent testified she was having a delayed birthday party for Brooklyn. She wanted money for the party but the claimant refused her, so she borrowed some from her mother.
- [366] When asked why the claimant was not attending, the respondent replied: "he chose not to be involved in their lives he came and went as he pleased since 2013 . he was in the office or gone".
- [367] She testified Austin, who by then was 16, was at home. Younger children were coming to the party. She says she entered the claimant's office and was told by him to "Fuck off".
- [368] She testified she remained in the doorway but when she started to leave he rose, came towards her and slammed the door catching her arm. Austin came down from upstairs, the other children were in the living room.
- [369] According to the respondent, the claimant "snapped" and ran towards her, kicked her ankle out, grabbed her neck and took her to the floor. She says he hit her with a bottle on the head. She said she couldn't breathe but she managed to bite his arm causing him to release her.
- [370] During the struggle, she said the claimant put her in a headlock. She acknowledges kicking him as well biting his arm "because I was being strangled".
- [371] She ran to get her phone to call the police. She tried to call out to Austin to call police but doesn't believe he heard her. She says she never inquired of the children as to whether they saw anything.
- [372] I pause to note that Austin, now 25, was listed as a witness for the respondent but did not testify.
- [373] By the time she located her phone, she heard the claimant on the phone speaking to police. She said she was upstairs at the time, in the bathroom examining the marks on her neck.
- [374] Photographs of each of the parties were exhibited at trial depicting abrasions and or marks on the arms of each of them, but no photographs of the respondent's neck were produced. The photographs of the injuries to the respondent's arm(s) were "selfies" taken by her in the bathroom.
- [375] The respondent's next recall is returning to the living room where three or four police officers were in attendance. One of them, Constable Brianna Campos, was known to the respondent through the respondent's volunteer work. She says the officers saw the marks on her and that she and the claimant were spoken to individually.
- [376] She accompanied an officer to the station where she said further photographs of her injuries were taken. Police suggested she go to hospital but she declined.

- [377] The respondent reported the events of the evening to her friend Elizabeth Adikirchner, telling her she had been strangled. She saw Elizabeth "in the next few weeks."
- [378] The respondent reported having difficulty swallowing after the altercation. She attended Dr. Niemand on December 1, 2015, to whom she reported dysphagia (difficulty swallowing) and throat discomfort. She apparently told Dr. Niemand she had been strangled. There are no observations in Dr. Niemand's notes of the respondent's throat area, and the only entries under the medical summary report are "recent back injury and depressive disorder not elsewhere classified".
- [379] According to both Dr. Davies and Ms. Adikirchner, they observed bruising of her neck. Neither were precise as to when they saw her following the incident.
- [380] The respondent reported the bruising on her neck was present for at least a month and she had difficulty swallowing for three to four months. She had no other medical interventions apart from the attendance on Dr. Niemand. She complained of nightmares following the incident but was unable to describe them.
- [381] No photos of her injuries were presented at trial. The respondent blamed her former counsel for failing to "get them". Later, when she sought to retrieve the photos she says depicted her injuries, the RCMP advised they didn't have photos.
- [382] The respondent spoke to Brianna Campos, one of the attending constables, but nothing came of that. Constable Campos was not called to give evidence as to the events of November 22, 2015, or her observations of the respondent on the day of the reported incident.
- [383] The respondent was "treated" by Dr. Davies, although it is not entirely clear what that treatment consisted of. As best one can glean from the evidence, she had continued seeing Dr. Davies after the claimant ceased attending for marriage counselling. Neither the respondent nor Dr. Davies suggested there had been any interruption to her periodic attendances from the cessation of marriage counselling until November 22, 2015.
- [384] Eventually, following receipt by the respondent of her inheritance, she paid Dr. Davies \$16,500 for services rendered. No invoice was presented indicating the time period covered or the nature of the treatment. She seeks special damages in respect of the assault despite the numerous attendances by her with Dr. Davies from early 2013 until November 2015.
- [385] No invoice was produced indicating the dates on which she received the services for which she was billed.
- [386] In cross-examination, the respondent acknowledged the claimant might have attempted to leave the office to disengage, and that she might have "kicked him in the rear end."
- [387] She acknowledged scratching the claimant, but only as he was strangling her. She denied that he was restraining her with a bear hug and that they fell to the ground.

[388] When it was put the respondent that she left the office after the incident to go to the barn, not upstairs, she replied "it's a real blur for me-I may have fed them dinner".

[389] She said she believed she took photographs of her neck but "was not sure where they are".

The Claimants' Evidence

[390] The claimant has quite a different recall of the events leading to his removal from the property.

[391] He complained of two previous occasions where the respondent assaulted and/or threatened him. He said he reported two such incidents to police but was told, in effect, to "suck it up". He says on one occasion the respondent slapped his face. The respondent could not recall the incident but did not deny it.

[392] On another, he testified she made threats against a sales representative for medical products believing, apparently, the claimant was having an affair with the person. The respondent denied such threats.

[393] The claimant testified that on November 22, 2015, the respondent entered his office uninvited and he asked her to leave. She demanded gift cards from him which he refused. He acknowledges telling her to "fuck off" but says when he approached to leave the office and disengage from her, she blocked his way and began kicking and punching him.

[394] In response, he testified he grabbed her by putting both arms around her but fell over on top of her. He acknowledged the matter had "gone too far" and called police. He said the respondent went to the barn, not upstairs.

[395] Photographs of his injuries were exhibited showing bruising of his forearm and thighs as well as scratch marks on his arms.

[396] Although arrested and charged, the charges were stayed and no criminal proceedings followed.

[397] He denied strangling the respondent.

Findings and Conclusion on the Alleged Assault

[398] The onus is on the respondent to establish she was assaulted and, as a result, suffered damage.

[399] I conclude she has failed to discharge her onus. As earlier referenced in these reasons, I have little confidence in the objectivity of the respondent's evidence as to how the altercation began and what happened during it.

[400] The respondent made no acknowledgment in her direct testimony of the claimant attempting to diffuse the situation by leaving the office or that she blocked his way.

- [401] She originally claimed he "snapped" and came at her as she was leaving and slammed the door on her arm. In cross-examination she acknowledged kicking him as he was leaving.
- [402] The mechanics the respondent suggest as to her arm injury defy common sense. If she was leaving, it's hard to conceive how her arm could remain in the room to have a door slammed on it.
- [403] Further it's hard to reconcile her concession that she kicked him in the rear-end with her version of events in direct testimony. Such could only have occurred as he was attempting to leave; not as he "snapped" and ran towards her.
- [404] She clearly took photographs of her arms, depicting injuries to them, but her major concern she says was her neck. No photographs, whether those she says were taken by her or police, were in evidence. There is no notation in the consult report from Dr. Niemand of any visual damage.
- [405] The respondent conceded to claimant's counsel that the event was a "real blur" and that she might well have gone to the barn to feed the animals as the claimant testified.
- [406] Such hardly accords with the severity of the events as she originally described them or with her stated intention to phone police to report an assault.
- [407] Instead, she recalls being upstairs "looking for her phone" and hearing him call police and then, without describing any time lapse, returning to the living room to find police in attendance.
- [408] As before, I generally prefer the evidence of the claimant as to the manner in which the altercation began and the events that followed. There was no doubt a scrum where both were on the ground. The more likely scenario was that the claimant was attempting to leave the office to disengage and the respondent initiated the physical contact.
- [409] Whatever happened after is best described as a brief, consensual "fight". The injuries to each were minor as depicted in the photographs of each of them. Other than continuing attendance on Dr. Davies, the respondent sought no medical treatment.
- [410] I am unable to conclude the claimant assaulted the respondent in the manner she described and find it more likely that he defended himself from her assault of him in the first instance.
- [411] Her claim for damages is accordingly dismissed.

Trust Claims

- [412] The respondent, throughout the various iterations of her counterclaim, pleads, in the alternative, an interest in the claimant's property under the doctrine of either express, resulting or constructive trust.

- [413] In submissions, both at the trial's conclusion and in written supplemental submissions, the respondent's counsel did not address the claim. Nor did he formally abandon it.
- [414] There is no evidence to sustain a claim for a declaration of an express or resulting trust.
- [415] There is evidence of the respondent providing labour and homemaking services over the course of the marriage-like relationship which endured from June 2006 until no later than August 2013.
- [416] The claimant addressed the pleading and suggested the trust claim be dismissed, arguing the evidence did not support a finding that the respondent established a "substantial and direct link, causal connection or nexus between the claim and the property upon which the remedial constructive trust is to be impressed and that a monetary award is inadequate, insufficient or inappropriate in the circumstances": 0928772 B.C. Ltd v. Ross, 2024 BCSC 1436 at para. 466.
- [417] The respondent made no reply to this submission in their original submission at the conclusion of the evidence, nor in the supplemental submission received some days later.
- [418] I simply cannot deal with the claim under the doctrine of constructive trust on the submissions presently before me.

Other Matters

- [419] The claimant testified a significant number of his items remained at the property despite his various attendances post November 2015.
- [420] He listed a variety of items and assigned values to them.
- [421] Other than ordering that the respondent leave all personal property belonging to the claimant on the property when she vacates, I have no intention of making any further order or specifying what items are to be left.
- [422] The matter of chattels was never addressed by the respondent in her evidence, and I would need further submissions as to what relief is available in the event the claimant, after re-taking possession of the property, asserts, and can prove, items are missing.

Vacant Possession of the Property

- [423] The respondent shall give up vacant possession of the property within sixty days from the date of these Reasons provided he shall, 30 days in advance of the respondent vacating, pay her the sum awarded for child support up to and including the date of these reasons and thereafter for so long as the children, or one of them, remains a child of the relationship entitled to receive support.

Costs

[424] In my view the matter of costs ought to be reserved until the conclusion of the trial. The continuation scheduled for April 2025 forms part of this proceeding and, unless otherwise advised the continuation is not going forward, costs are subject to the outcome of the as-yet unresolved issues.

"Harvey J."

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