

CANADA / JUDGMENT

## Wang v. Yang

2024 BCSC 624

### COURT

Supreme Court of British Columbia

### DECIDED

16 April 2024

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2024 BCSC 624 Wang v. Yang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wang v. Yang,

2024 BCSC 624

Date: 20240416

Docket: E141226

Registry: Vancouver

Between:

Hai-Yeun Wang also known as Hsi-Yeun Wang

Claimant

And

Chia-Jung Yang

Respondent

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for the Claimant:

J.M.W. Cudmore

Counsel for the Respondent:

Y. Li-Reilly

Place and Dates of Hearing:

Vancouver, B.C.

February 15-16, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2024

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## I. OVERVIEW

- [1] On October 3, 2014, the claimant, Hai-Yuen Wang also known as Hsi-Yuen Wang ("Ms. Wang"), obtained a desk order divorce in this then undefended family law proceeding (the "Divorce Order"). The central issue on this application is whether or not the Divorce Order should be set aside.
- [2] The respondent, Chia-Jung Yang ("Mr. Yang"), filed no response to the notice of family claim in this action, commenced on May 5, 2014 by Ms. Wang (the "2014 Claim"). Mr. Yang denies that he was personally served with the 2014 Claim.
- [3] Ms. Wang died on October 31, 2018. About two weeks before her death, she changed her will to bequeath a property where she had been living in Vancouver, BC (the "Property") to the Gold Buddha Sagely Monastery, also known as the Dharma Realm Buddhist Association (the "Temple"). Although Mr. Yang had purchased and financed the Property, it was registered in Ms. Wang's name.
- [4] On August 20, 2019, Mr. Yang filed a notice of family claim in a separate action, claiming an interest in the Property, an unequal division of family property, and that the Divorce Order be set aside (the "2019 Claim").
- [5] Mr. Yang died on August 29, 2023. On July 28, 2023, about one month before his death, Mr. Yang affirmed his Affidavit #1, his only evidence on this application.
- [6] As both parties are now deceased, the current dispute is effectively between their one adult child, Don Han Dennis Yang ("Dennis"), and the Temple. For convenience, I refer to Dennis in these reasons by his first name only; in doing so, I intend no disrespect. The Temple is Ms. Wang's litigation representative in this action; Dennis is Mr. Yang's litigation representative.
- [7] The parties concede that the Property is the single biggest asset in Ms. Wang's estate. Dennis has commenced an action to vary Ms. Wang's last will. He and the Temple both claim an interest in the Property.
- [8] The Temple argues that Dennis asks this Court to set aside the Divorce Order between the two deceased parties for his own benefit. The Temple effectively asks this Court to do the opposite for the same reason.
- [9] For the reasons that follow, I conclude that the Divorce Order was obtained based on false information and that it must be set aside in the interests of justice.

## II. FACTUAL BACKGROUND

- [10] The parties married on February 27, 1980. Dennis, the only child of their marriage, was born in 1981. He is now a lawyer in Toronto, Ontario and the executor of his late parents' estates.

- [11] On the uncontroverted evidence of Mr. Yang and Dennis, the parties moved to Canada in or about 1988.
- [12] On Mr. Yang's unchallenged evidence, the parties purchased the Property in March 1989 for \$170,000. Mr. Yang deposes that they obtained a mortgage of \$85,000 and that he provided the remaining funds necessary to purchase the Property. The Property was registered in Ms. Wang's name only; on Mr. Yang's evidence, this was done for convenience as Ms. Wang and Dennis resided there full-time but he did so only part-time, when he visited Vancouver.
- [13] There is no dispute that, after the parties' purchase of the Property in March 1989, Mr. Yang continued to live and work in Taiwan, while Ms. Wang and Dennis resided at the Property. It is common ground that the parties spent much of their married life living "bi-coastally" in different countries.
- [14] Ms. Wang stated in Schedule 1 to the 2014 Claim (setting out the parties' personal information) that she and Mr. Yang had both been ordinarily resident in Canada since April 1, 1989.
- [15] On Mr. Yang's evidence, although the parties had minimal savings, he had a good job with China Airlines. Mr. Yang deposes that the parties' plan was for Ms. Wang and Dennis to reside full-time at the Property, for Mr. Yang to stay there when he visited Vancouver, and for the parties to reside there together after Mr. Yang retired. On Mr. Yang's uncontroverted evidence, this was not an unusual arrangement for immigrant families from Taiwan and Hong Kong at the time.
- [16] Dennis corroborates his late father's evidence on this point. He deposes that Mr. Yang kept his job in Taiwan and worked there in order to support him and Ms. Wang. On Dennis' evidence, his parents travelled to see each other and they took trips together as a family until well after 1990.
- [17] Ms. Wang's sister, Hai-Lan Wang ("Ms. H.L. Wang"), also corroborates Mr. Yang's evidence about the parties' living arrangements, after they married and immigrated to Canada. On her evidence, she and Ms. Wang maintained a close relationship and Ms. Wang visited her almost every time she travelled to Taiwan. Ms. H.L. Wang deposes that her sister did not have substantial savings before immigrating to Canada, and that Mr. Yang worked in Taiwan to support Ms. Wang and Dennis financially. On her evidence, Ms. Wang told her that this was how the parties planned to immigrate to Canada, while maintaining financial stability for their family. It was Ms. H.L.'s Wang's understanding, based on what both parties told her, that Mr. Yang sent money, including his bonuses, to Ms. Wang for the financial support of Ms. Wang and Dennis, and that he lived very frugally in Taiwan in order to do so.

- [18] On Mr. Yang's unchallenged evidence, he paid off the mortgage on the Property in or about November 1991. He deposes that he continued to send money to Ms. Wang regularly thereafter for her support, maintenance of the Property, and the parties' retirement savings. It is Mr. Yang's evidence that he sent a substantial portion of his income to Ms. Wang for the benefit of their family as a whole.
- [19] The parties bought three other properties while they were married:
- a) In 1993, a property at 390 East 16th Avenue, Vancouver (the "16th Avenue Property"), registered in Ms. Wang's name, that they sold in 1997;
  - b) In 1996, a property at 5561 Bruce Street, Vancouver (the "Bruce Street Property"), registered in both their names, that they sold in 2004; and
  - c) In 2005, an apartment in Taiwan, registered in Ms. Wang's name.
- [20] On Mr. Yang's uncontroverted evidence, he alone provided funding for the purchase, mortgage financing, improvement, and maintenance of these properties, using money he had earned from his employment with China Airlines and an inheritance and settlement he received on the death of his father in 1996.
- [21] Ms. Wang was a devout Buddhist. She attended the Temple for about ten years before her death. In or about 2012, Ms. Wang expressed an interest in becoming a Buddhist nun; doing so required her to obtain a divorce. Ms. Wang obtained the Divorce Order in 2014 but was diagnosed with cancer in or about 2015. Thereafter, she abandoned her plan to become a Buddhist nun.
- [22] On September 7, 2018, Ms. Wang changed her will, naming Dennis (instead of Mr. Yang) as both her executor and sole beneficiary.
- [23] On October 12, 2018, about two weeks before her death, Ms. Wang made another will, naming Dennis as her executor and bequeathing the Property to the Temple. Ms. Wang stated in this will that "I have discussed the donation [of the Property] to the [Temple] with my only son [Dennis] and he respects my decision and has no objection whatsoever". Dennis disputes this statement.
- [24] Mr. Yang deposes that, after Ms. Wang's death, he learned she had executed a will shortly before her death, bequeathing the Property to the Temple. He deposes that he first learned of the Divorce Order on or about March 27, 2019, after his lawyer obtained a copy of it by conducting a court search. He describes the January 1, 1990 date of separation referenced in the 2014 Claim as "patently untrue".

### III. PROCEDURAL HISTORY

## A. The 2014 Claim

- [25] On May 5, 2014, acting on her own behalf and without a lawyer, Ms. Wang commenced the 2014 Claim, seeking a divorce only on the grounds that the parties had lived separate and apart since January 1, 1990.
- [26] The parties disagree about whether or not Mr. Yang was personally served with the 2014 Claim. He did not file a response to the 2014 Claim.
- [27] In July 2014, Ms. Wang applied for the Divorce Order. She supported her request with her own desk order divorce affidavit made July 8, 2014, in which she deposed as follows:
- a) There was no possibility of reconciliation between the parties;
  - b) She believed that the facts set out in the 2014 Claim were true;
  - c) She was living separate and apart from Mr. Yang at the start of the 2014 Claim and she had lived separate and apart from him since January 1, 1990; and
  - d) She was neither directly nor indirectly a party to an agreement or conspiracy for the purpose of subverting the administration of justice, or to any agreement, understanding, or arrangement to fabricate or suppress evidence or to deceive the court.
- [28] Mr. Yang submits that this affidavit is factually incorrect. He denies that the parties were living separate and apart, as contemplated by the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [Divorce Act] on January 1, 1990. He urges me to find that Ms. Wang was a party to an agreement or conspiracy for the purpose of subverting the administration of justice, or to an agreement, understanding, or arrangement to fabricate or suppress evidence or to deceive the court, contrary to what she deposed in her desk order affidavit.
- [29] Ms. Wang appended to her desk order divorce affidavit an undated photograph, which she deposed was a true likeness of Mr. Yang (the "Photograph"). There is no evidence about whether or not the Photograph was current in July 2014.
- [30] Ms. Wang also filed the handwritten affidavit of personal service of Fu Nin Furness Hou, sworn June 12, 2014, in support of her request for the Divorce Order. In it, Ms. Hou deposed that she did not know Mr. Yang, and that she personally delivered the 2014 Claim to him on May 10, 2014. Ms. Hou made no reference in her affidavit of service to any form of identification that the person whom she served produced. She left blank the section of her affidavit designated for the inclusion of this information.
- [31] There is no evidence that Ms. Wang ever provided Mr. Yang with a copy of her desk order divorce affidavit or Ms. Hou's affidavit of service.

- [32] On October 3, 2014, this court issued the Divorce Order. It was granted based on Ms. Wang's desk order divorce affidavit, Ms. Hou's affidavit of personal service, and Mr. Yang's failure to file a response to the 2014 Claim. There is no evidence that Ms. Wang ever provided Mr. Yang with a copy of the Divorce Order. Mr. Yang deposes that she never did so.

## B. The 2015 Claim

- [33] On October 30, 2015, for reasons that are unclear, Ms. Wang commenced another family law proceeding in Taiwan, seeking a divorce from Mr. Yang (the "2015 Claim"). There is no evidence that the 2015 Claim was served on Mr. Yang.
- [34] On December 10, 2015, Ms. Wang withdrew the 2015 Claim. Thereafter, the Taiwan court provided Mr. Yang with notice that Ms. Wang had commenced and subsequently withdrawn the 2015 Claim.

## C. The 2019 Claim

- [35] On August 20, 2019, Mr. Yang commenced the 2019 Claim against Ms. Wang's estate, seeking orders related to the division of family property and family debt and setting aside the Divorce Order. Mr. Yang identified the parties' date of separation in the 2019 Claim as May 2014.

## D. Subsequent Events

- [36] On June 2, 2021, Dennis commenced an action to vary Ms. Wang's final will.
- [37] On January 26, 2023, Dennis, Mr. Yang, and the Temple agreed to an order that the Temple act as Ms. Wang's litigation representative in the 2014 Claim.

## IV. eVIDENTIARY RECORD

- [38] The evidentiary record on this application is imperfect.
- [39] None of the affidavit evidence has been tested on cross-examination. Apart from her desk order divorce affidavit, there is no affidavit evidence from Ms. Wang. The filed affidavits contain substantial hearsay. Much of the evidence from non-parties has limited probative value.
- [40] Neither party was examined for discovery. Counsel for the Temple referenced his July 31, 2023 letter to opposing counsel, seeking dates from Mr. Yang for an examination for discovery by September 1, 2023. No such examination occurred. Mr. Yang died on August 28, 2023.
- [41] Counsel for the Temple urges me to draw an adverse inference from the fact that Mr. Yang's counsel declined to produce in these proceedings an affidavit that Mr. Yang apparently made in the 2019 Claim. Mr. Yang's counsel advises that the Temple requested this affidavit at a judicial case conference held in the 2019 Claim, at which time the Court declined to order that it be produced. She says that the Temple subsequently failed to provide the legal basis

for its request or to apply for the production of this affidavit in these proceedings. She denies that those circumstances favour drawing an adverse inference against Mr. Yang.

[42] The Court of Appeal in *Buksh v. Miles*, 2008 BCCA 318 at para. 35 outlined relevant factors to consider before drawing an adverse inference, including whether, given the evidence before the court, the explanations proffered for not calling the witness, the nature of the evidence that the witness could provide, the extent of disclosure, and the circumstances of the trial, the trier of fact could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case.

[43] I decline to draw the requested adverse inference. For reasons that are unclear, the Temple did not pursue an application for production of this affidavit. It was open to the Temple to do so, as necessary: *Fabretti v. Gill*, 2014 BCSC 899 at para. 33, citing *Buksh* at paras. 33-35.

## V. CREDIBILITY AND RELIABILITY OF EVIDENCE

[44] Mr. Yang's counsel urged me to make adverse findings of credibility against Ms. Wang and Ms. Hou, based on their own affidavits and other evidence before the court. She submitted that this evidence, taken as a whole, suggests a willingness on their part to engage in deception that undermines their credibility. She offered the following examples:

- a) Ms. Wang asked Ms. Hou to advise Mr. Yang (falsely) that Ms. Hou did not know what was in the envelope she delivered to Mr. Yang when she served him with the 2014 Claim;
- b) Ms. Wang "hid things" from people (including her cancer diagnosis from the Temple manager, Yoke Eng Lee ("Ms. Lee"));
- c) She chose not to have Dennis, a lawyer, prepare her last will (in which she bequeathed the Property to the Temple) and (on the Temple manager's evidence) told Ms. Lee that she did not want Dennis to do so;
- d) Ms. Wang (on Mr. Yang's unchallenged evidence) requested and received from Mr. Yang \$165,000 in 2013 to help Dennis purchase a home, but she did not forward those funds to Dennis; and
- e) Ms. Wang stated in her will (in error, according to Mr. Yang) that she discussed her plan to transfer the Property to the Temple with Dennis and that he agreed with it, evidence Dennis disputes.

[45] Counsel for Mr. Yang also suggested that Ms. Wang might have lied to the Temple manager about having spoken to Mr. Yang in 2012 about getting a divorce, and that Ms. Hou might have lied about delivering the 2014 Claim to Mr. Yang. She argued that, given Ms. Hou's apparent willingness to deceive Mr. Yang (by telling him that she did not know what was in the envelope that she delivered to him when, in fact, she did), she might also have lied in her affidavit of service. I am unable to make those findings based on speculation alone.

[46] There are many possible explanations for why Ms. Wang might have:

- 1) preferred not to have Dennis (a named beneficiary) prepare her last will; and
- 2) chosen not to provide complete information to the Temple manager about her personal health issues.

On Ms. Lee's unchallenged evidence, she and Ms. Wang did not know each other well on a personal level. While there are unresolved conflicts in the affidavit evidence, I am not persuaded that they alone permit me to make adverse findings of credibility, particularly since Ms. Wang had no opportunity to respond to Mr. Yang's affidavit evidence.

[47] Mr. Yang's counsel says it is significant that Mr. Yang admitted receiving some documents (delivered to him in Taiwan by someone whom he believed to be a friend or acquaintance of Ms. Wang) in January or February of 2014. She submits that this concession enhances his credibility. Notably, Mr. Yang does not admit receiving the 2014 Claim from Ms. Hou in May 2014.

[48] Where there is a dispute on important aspects of evidence on critical issues, this court has a limited ability to assess the parties' credibility and the reliability of their evidence on untested affidavits only: *HP and OM Enterprises Ltd. v. Badesha Enterprises Ltd.*, 2009 BCSC 1429 at para. 38. In *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.*, 2008 BCSC 918 at paras. 14-15, citing *Phillips v. Fedoration* (1987), 20 B.C.L.R. (2d) 170, 1987 CanLII 2521 (C.A.) and *Campeau v. Provident Life & Accident Insurance Co.* (1996), 63 A.C.W.S. (3d) 1040, 1996 CanLII 789 (B.C.S.C.), Justice Masuhara noted that fraud has a subjective element that is not easily determined or resolved with affidavit evidence alone. Mr. Yang alleges fraud and those comments are analogous here.

[49] Despite the imperfect evidentiary record, the parties ask me to resolve the issues that arise on this application. Accordingly, I have done my best on the available evidence. I have looked for consistencies in the evidence, independent sources of corroboration, and evidence that harmonizes with the preponderance of probabilities: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.); *Bartch v. Bartch*, 2019 BCSC 1643 at para. 87.

## VI. LAW AND ANALYSIS

A. Were the parties living separate and apart on January 1, 1990?

[50] I begin my analysis by considering whether or not the parties were living separate and apart on January 1, 1990, as Ms. Wang stated in the 2014 Claim and deposed in her desk order divorce affidavit.

[51] Counsel for Mr. Yang submits that the answer to this question is unequivocally no. She argues that the statutory requirements in s. 8 of the Divorce Act were clearly not met when Ms. Wang obtained the Divorce Order, and that this fact is determinative on this application. The Temple disagrees.

[52] Section 8 of the Divorce Act sets out the requirements for an order of divorce, based on the breakdown of a marriage and living "separate and apart" for at least one year:

## Divorce

8 (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.

### Breakdown of marriage

- (2) Breakdown of a marriage is established only if
- (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; [ ]

[...]

[53] In *S.A.H. v. I.B.L.*, 2018 BCSC 544 at para. 55, Justice Shergill distilled the law, framed in the form of a test, for determining the date of separation:

- a) Did at least one spouse have the intention to separate?
- b) Was the intention to separate communicated to the other spouse?
- c) Was the intention to separate acted upon? In other words, using generally accepted characteristics of marriage, did one or both spouses take action that is consistent with the separation, such as:
- i. changing how they behaved with each other in public; and
- ii. changing how they behaved with each other in private.

[54] It is not enough for one party to form a subjective intention to separate; there must also be objective evidence that the party wishing to separate communicated that intention to the other party and acted in a manner that was consistent with this intention: *Bartch* at para. 92, citing *Nearing v. Sauer*, 2015 BCSC 58 at paras. 54-55, and *J.L.L. v. G.A.L.*, 2010 MBQB 39 at para. 4; *Kaur v. Virk*, 2022 BCSC 173 at para. 61; *McGrail v. McGrail*, 2016 BCSC 104 at paras. 39-40. It is useful to compare the parties' behaviour before and after separation in determining whether they were living separate and apart: *Bartch* at para. 93, citing *Rose v. Guiguet*, 2008 BCSC 1225 at para. 70.

[55] In *Coupar v. Roh*, 2014 BCSC 1392, Justice Harvey considered whether the parties remained in a marriage-like relationship, despite living under different roofs for extended periods. He identified the following factors as relevant to his analysis:

- a) The lack of changes to distinguish the relationship before and after moving into separate residences (para. 73);

- b) Regular interaction between the parties, including occasional dining out or attending events together (para. 74);
  - c) Continuing to perform domestic services, cooking, cleaning, and laundry (para. 83);
  - d) Continuing to attend social functions together (para. 84);
  - e) Making gifts to one another (para. 85);
  - f) Taking vacations together (para. 86);
  - g) Neither party becoming involved in another relationship (para. 87);
  - h) Continuing to share the common use of assets (para. 88); and
  - i) Whether one party told the other party of their intention to end the relationship permanently (para. 90).
- [56] The parties' subjective intentions are relevant but not determinative; they must be communicated to the other party: Bartch at paras. 95 and 102. Objective evidence from the relevant timeframe is generally more probative of the nature of the parties' relationship than their viva voce evidence in the midst of acrimonious proceedings: Bartch at para. 95.
- [57] In *Kaur*, a decision that counsel for Mr. Yang submits is closely analogous on its facts to the one before me, Justice Tucker considered (at para. 20) indicia that the parties had lived as a married couple, including whether they had vacationed together, attended family, social, and religious functions as a couple, searched for family property to purchase together, sought joint financing, and made offers to purchase properties.
- [58] I find that the preponderance of evidence supports the conclusion that the parties were not living separate and apart, as contemplated by s. 8 of the Divorce Act, on January 1, 1990. On the uncontroverted evidence before me:
- a) Mr. Yang sent Ms. Wang personal handwritten letters and emails after 1990;
  - b) On March 2, 1993, the parties purchased the 16th Avenue Property;
  - c) On January 26, 1996, the parties purchased the Bruce Street Property as joint tenants;
  - d) On April 17, 1996, Ms. Wang made a will, naming Mr. Yang as her husband and sole executor, and Mr. Yang and Dennis as beneficiaries;
  - e) In August 1997, the parties sold the 16th Avenue Property for \$218,000. On Mr. Yang's unchallenged evidence, he received none of the sale proceeds;
  - f) In 2002, the parties vacationed together in China for approximately two weeks;
  - g) On April 29, 2003, Mr. Yang gave Ms. Wang a power of attorney as his wife for a period of three years;

- h) In April 2004, the parties sold the Bruce Street Property for \$418,000. On Mr. Yang's unchallenged evidence, he received none of the sale proceeds;
- i) Sometime in or after 2004, Ms. Wang filled out a Citizenship and Immigration Canada Application to Sponsor and Undertaking for her to sponsor Mr. Yang, as his "married" spouse;
- j) In 2005, the parties bought an apartment in Taiwan, registered in Ms. Wang's name. Mr. Yang deposes that they wanted to re-establish a long-term family home in Taiwan and to split their time between Vancouver and Taiwan, after Dennis left home for university. Although the apartment was registered in Ms. Wang's name, Mr. Yang paid for it with his savings and made all the mortgage payments;
- k) Mr. Yang retired in 2006. Thereafter, on his evidence, he did not move to Vancouver full-time (because Ms. Wang wanted him to remain in Taiwan) but he continued to visit once or twice a year. He denies that Ms. Wang communicated to him an intention to end their marriage;
- l) In 2008, the parties attended interviews to do volunteer work together for a philanthropic organization in China;
- m) In December 2008, Ms. Wang emailed Mr. Yang, referencing the parties' apartment in Taiwan as "our" house;
- n) The parties periodically visited and resided with each other in Vancouver and Taiwan and took trips together as a family;
- o) On Mr. Yang's evidence, as corroborated by Taiwan border entry and exit records (from 1983-2019), he departed Taiwan for Vancouver, BC on the following dates before Ms. Wang's death:
  - i. December 22, 2000;
  - ii. June 8, 2004;
  - iii. December 10, 2004;
  - iv. December 16, 2005;
  - v. August 24, 2006;
  - vi. June 6, 2007;
  - vii. January 25, 2008;
  - viii. July 24, 2008;
  - ix. April 10, 2011;
  - x. February 14, 2012;
  - xi. May 7, 2013;

xii. August 27, 2013; and

xiii. May 15, 2014.

- p) On Ms. H.L. Wang's uncontroverted evidence, Ms. Wang made at least five trips to Taiwan in the 1990s, and eight to ten trips to Taiwan between 2000 and 2008, at which times she stayed with Mr. Yang;
  - q) In July 2009, Mr. Yang emailed Ms. Wang, in part, to ask if she was "coming back" to see him so that he did not have to "miss [her]";
  - r) On February 8, 2012, Ms. Wang made a new will, naming Mr. Yang as her husband, executor, and trustee and Mr. Yang and Dennis as beneficiaries. This revised will provided that, if Mr. Yang and Dennis predeceased Ms. Wang, the residue of her estate would go to the Temple;
  - s) Mr. Yang deposes that, in May 2013, August 2013, and May 2014, he travelled to Vancouver to visit Ms. Wang and stayed with her and Dennis. Mr. Yang deposes that, based on his May 15-31, 2014 visit to Vancouver, he did not understand that the parties were separated. He denies that they discussed divorce or divorce proceedings during this visit. Mr. Yang deposes that he accompanied Ms. Wang to an event at the Temple during his May 2014 visit and that she introduced him to others as her husband;
  - t) Mr. Yang deposes that he continued to send money to Ms. Wang until late August 2014, by which time he had substantially exhausted his savings. On his uncontroverted evidence, as corroborated by bank transfer records in evidence, he sent Ms. Wang a total of approximately \$1,000,000 over about 26 years (between 1988 and 2014), funds he says were intended for the purchase and maintenance of the parties' properties in Canada and their retirement savings; and
  - u) On October 20, 2015, in response to her application, the Taiwan government issued Ms. Wang a Republic of China ID Card, naming Mr. Yang as her spouse.
- [59] On the evidence before me, the parties periodically made donations to the Temple between 2011 and 2014. These donations were variously made (individually and/or collectively) in the names of the parties, Dennis, or the Yang family.
- [60] Translated extracts of the Temple's records in evidence indicate that Mr. Yang donated to the Temple in February 2014 when he was not in Vancouver (based on his passport records). The Temple records in evidence (appended to Dennis' Affidavit #1) indicate that Mr. Yang donated to the Temple again in his own name on July 31, 2014; there is no evidence that he was then in Vancouver. Based on Mr. Yang's statement in the 2019 Claim, the parties separated in May 2014. I accept that the parties periodically made donations to the Temple. In my view, this evidence is of limited assistance in determining whether or not they were then living separate and apart.

- [61] Dennis and Ms. H.L. Wang both depose that they were unaware of any indication that the parties were living separate and apart as of January 1, 1990. Dennis denies that Ms. Wang ever told him she had commenced any legal proceedings against Mr. Yang, or that she had sought an order for divorce. Ms. H.L. Wang deposes that, to her knowledge, the parties had a strong and positive relationship until at least 2015. On her evidence, Ms. Wang mentioned during a 2015 visit to Taiwan that she had commenced divorce proceedings against Mr. Yang in Taiwan but later withdrawn them, without seeking Mr. Yang's consent, before returning to Canada in December 2015.
- [62] While this evidence is unchallenged, I conclude that it too has limited probative value. In my view, there are many reasons why Ms. Wang might not have told her sister, or her son, that she had separated from Mr. Yang. While Dennis' evidence on this point comprises hearsay and is somewhat self-serving, I accept that it is consistent with the parties conducting themselves in the same manner to the outside world, both before and after January 1, 1990.
- [63] Ms. H.L. Wang deposes that she had a conversation with Mr. Yang after Ms. Wang's death, at which time he said that he had learned about the Divorce Order. According to Ms. H.L. Wang, it would have been out of character for Mr. Yang not to have mentioned the Divorce Order to her earlier, if he had known about it. This evidence is consistent with Mr. Yang's own evidence that he was unaware of the Divorce Order until his lawyer obtained a copy of it by conducting a court search. It is also consistent with Ms. Wang's statement to Ms. Lee, the Temple manager, in or about 2012 that "she would obtain a divorce from Mr. Yang" but that "Mr. Yang might want money from her". In my view, this statement could reasonably be construed to mean that Ms. Wang thought Mr. Yang might want money from her (by way of a division of family property) if he knew that she intended to seek a divorce.
- [64] Numerous photographs of the parties are in evidence; the Temple admits they were all taken after 1990. They depict the parties together at various locations, including on a boat, at different landmark venues, at a vineyard, and in restaurants, often with Mr. Yang's arm around Ms. Wang's shoulders and with them occasionally holding hands. I conclude that these photographs comprise some evidence that the parties continued to engage in activities characteristic of marriage-like relationships after 1990: Coupar at paras. 73-74 and 83-90; Kaur at para. 20.
- [65] The Temple submits in its application response that the parties moved to Canada in or about February 1990, a date that roughly corresponds with the date of separation referenced in the 2014 Claim. There is no evidence to support the conclusion that the parties moved to Canada then; the evidence of Mr. Yang and Dennis directly contradicts this date. Even Ms. Wang stated in the 2014 Claim that she and Mr. Yang were both ordinarily resident in BC by April 1, 1989.
- [66] Ms. Wang stated in a sponsorship application (which she never submitted and that Dennis found after her death) that she became a permanent resident in Canada on February 6, 1989. Counsel for Mr. Yang conceded that these two dates are not exactly the same and suggested

that Ms. Wang might have "played fast and loose" with some facts. I accept this as some evidence that Ms. Wang became a permanent resident of Canada in 1989 but conclude that its probative value is undermined by the fact it was never submitted. However, it is undisputed that the parties bought the Property in March 1989.

- [67] I acknowledge that, as a self-represented claimant seeking a divorce on her own behalf, Ms. Wang might not have appreciated the meaning of living "separate and apart", as contemplated by s. 8 of the Divorce Act. Parties need not reside under the same roof to remain spouses: *Hu v. Lee*, 2022 BCSC 56 at para. 42, citing *Thompson v. Floyd*, 2001 BCCA 78 at paras. 22-36 and *Coupar* at paras. 67-68. It was open to Ms. Wang to consult a lawyer about the legal meaning of this phrase. As counsel for the Temple notes, ignorance of the law is not an excuse.
- [68] There is no evidence that Ms. Wang ever clearly communicated, or acted on, any stated intention to separate from Mr. Yang by January 1, 1990. The parties' bi-coastal living arrangements remained materially unchanged before and after that date. Mr. Yang continued to make significant financial contributions to the support of Ms. Wang and Dennis, maintenance of the Property, and the parties' savings for several years thereafter. He continued to visit Ms. Wang and resided with her at the Property when he did.
- [69] Having regard to the evidence, taken as a whole, I find that the parties were not living separate and apart, within the meaning of s. 8 of the Divorce Act, on January 1, 1990.

B. Were the parties living separate and apart in May 2014?

- [70] I next consider whether the parties were living separate and apart, within the meaning of s. 8 of the Divorce Act, on May 5, 2014, when Ms. Wang commenced the 2014 Claim. Mr. Yang denies that the parties had been living separate and apart for one year by then, or by July 2014 (when Ms. Wang applied for the Divorce Order).
- [71] The Temple submits that there is limited evidence of an ongoing relationship between the parties by 2008. However, there is also limited evidence that the parties' relationship changed materially thereafter. Ms. H.L. Wang deposes that her sister made only two visits to Taiwan after 2008, at which time Ms. Wang stayed with her, rather than with Mr. Yang. While it is possible that this evidence signals a change, the significance of it, if any, is unclear on the evidence.
- [72] Dennis deposes that his parents held themselves out to be a married couple until at least May 2014. He denies that Ms. Wang ever told him she had commenced divorce proceedings against Mr. Yang, or that she intended to separate from him. Dennis deposes that he first learned that his mother had commenced legal proceedings after her death.

- [73] Mr. Yang deposes that, after his last visit to Vancouver (between May 15 to 31, 2014), Ms. Wang telephoned him and told him not to return. Mr. Yang denies that Ms. Wang mentioned anything about a divorce but he admits the parties never saw each other in person again. In my view, this is the earliest possible date that could reasonably be construed on the evidence as a communication by Ms. Wang to Mr. Yang of her intention to end the parties' marriage.
- [74] In December 2015, Mr. Yang received notice from the Taiwan court that Ms. Wang had commenced and subsequently withdrawn divorce proceedings against him. In my view, Mr. Yang's receipt of this document might reasonably have reinforced his stated (but erroneous) view that Ms. Wang required his consent in order to obtain a divorce order in Canada.
- [75] I find that the parties were not living separate and apart, within the meaning of s. 8 of the Divorce Act, in May 2014 (when Ms. Wang commenced the 2014 Claim) and had not been living separate and apart for one year by July 2014 (when Ms. Wang applied for the Divorce Order).

C. Was the 2014 Claim personally served?

- [76] I next consider whether the Divorce Order is a nullity on the basis that the 2014 Claim was not personally served. Rule 6-3 of the Supreme Court Family Rules [SCFR] provides that a notice of family claim must be served personally, unless otherwise ordered.
- [77] The parties disagree about whether or not it is necessary for me to make a finding that Mr. Yang was (or was not) personally served with the 2014 Claim. Mr. Yang denies such a finding is necessary; his lawyer argues that the fact the Divorce Order was obtained on false evidence is sufficient to set it aside. The Temple disagrees.
- [78] A default order taken in the absence of service of a claim is a nullity: Kaur at para. 48, citing Wright v. Czinege, 2008 BCSC 1292 at paras. 42-45 and Kerpan v. Vovers, 2012 BCSC 154 at paras. 32-35. Failure to serve a claim is a flaw of jurisdictional consequence: Kaur at para. 49, citing William v. Lake Babine Indian Band, [2000] 1 C.N.L.R. 233, 1999 CanLII 6121 (B.C.S.C.). In Kaur, the husband conceded that the wife had never been served with the notice of family claim: Kaur at para. 42. Justice Tucker found that the husband was aware the affidavit of personal service was false when he filed it in support of his desk order divorce: Kaur at para. 44. Those facts are not analogous here.
- [79] The Temple relies on Bojarski v. Bojarski, 2000 SKQB 216. In that case, the Saskatchewan Court of Queen's Bench declined to set aside a divorce order, finding that the husband had been given notice of the proceedings, took no action in response to them, and could have, but chose not to, consult a lawyer about the matter: Bojarski at para. 13. The court held that the husband's ignorance of the law was no basis for setting aside the divorce order: Bojarski at para. 14. Notably, there was no suggestion in Bojarski that the divorce order might not have been personally served or that it was obtained on false evidence. In my view, Bojarski is distinguishable on that basis.

- [80] *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58, [1979] B.C.J. No. 1965 (Co. Ct.), a decision that has been repeatedly affirmed (see e.g., *Dosanjh v. Singh*, 2011 BCCA 179; *Deline v. White*, 2002 BCCA 662), outlines the factors to consider before setting aside a default judgment, where notice has been properly given. In *Nichol v. Nichol*, 2015 BCCA 278 at para. 35, our Court of Appeal confirmed that the Miracle Feeds framework applies generally to an application to set aside uncontested divorce orders obtained pursuant to the SCFR, R. 10-10. The three-part inquiry (modified for the family context) provides as follows:
- a) The applicant must establish that he did not willfully and deliberately fail to file a response to the notice of family claim. This inquiry is meant to focus on the personal and actual intent of the applicant and not their counsel.
  - b) The applicant must establish that he applied to set aside the final order as soon as reasonably possible after having obtained knowledge of it or, alternatively, must offer a reasonable explanation for any delay in doing so.
  - c) The applicant must establish that they have a meritorious defence or at least one that is worthy of investigation.
- [81] These factors are neither immutable nor applied inflexibly; failure to address a particular factor is not fatal and additional factors may be relevant: *Nichol* at para. 37. The court may review affidavit material and draw inferences that are supportable by the totality of circumstances: *Nichol* at para. 36.
- [82] Justice Tucker did not engage in the Miracle Feeds analysis in *Kaur* because the notice of family claim had not been personally served: *Kaur* at para. 50. She noted that, if she had done so, the overarching need to avoid a miscarriage of justice would have been dispositive, and that maintaining the court's integrity did not permit her to countenance the divorce order: *Kaur* at paras. 51-52, citing *Bassi v. Bassi*, 2013 BCCA 422 at paras. 25 and 27 and *Lin v. Tang* (1997), 147 D.L.R. (4th) 577 at para. 59, 1997 CanLII 2675 (B.C.C.A.).
- [83] Similarly, Mr. Yang submits that, even if the 2014 Claim was properly served, the Divorce Order must be set aside so as to prevent a miscarriage of justice, including one based on fraud, perjured evidence, and/or deliberate misleading of the Court, citing *Kaur* at paras. 31-35 and 51 (and the decisions cited therein).
- [84] The Temple submits that the 2014 Claim was personally served on Mr. Yang, as set out in the affidavit of personal service of Ms. Hou. The Temple describes personal service of the 2014 Claim as a central issue on this application and argues that Mr. Yang must establish he was deprived of an opportunity to make the case that he now wishes to advance, citing *Luo v. Yi*, 2012 BCSC 1201 at para. 42:

I think the trend toward flexibility noted in *Rivas* (see paras. 34-38 herein) is the proper way to approach questions of this kind. There may be cases of absolute want of jurisdiction, or a failure to fulfil a condition precedent, where the court would be obliged to declare a divorce void in order to preserve the integrity of the legal system. No such considerations arise here. The

respondent had an opportunity to make the case he now wishes to make before the divorce was entered, and he did not do so. There is no irregularity in the proceeding: his inaction simply amounts to deemed acceptance of the facts put to the court by the claimant. He affirmed the irreconcilability of his marriage and acted on the consequence of those facts in remarrying. As in the Bojarski case, ignorance of a legal position, in this case a position he has taken a very long time to assert, cannot be an excuse.

[Emphasis added.]

[85] Mr. Yang denies there is any basis for concluding that he bears the onus of proof on this issue. His lawyer submits that, whether or not Mr. Yang was served personally with the 2014 Claim, this has no bearing on whether the parties were living separate and apart on January 1, 1990 (as Ms. Wang asserted in the 2014 Claim). The Temple concedes that, if I find Mr. Yang was not personally served with the 2014 Claim, it would be difficult to uphold the Divorce Order.

[86] The SCFR, R. 4-3 provides as follows:

#### Filing a response to family claim

- (1) To respond to a notice of family claim, a person must, within 30 days after being served,
  - (a) file a response to family claim in Form F4, and
  - (b) serve a copy of the filed response to family claim on the claimant and on the other persons named in the notice of family claim as respondents.

#### No notice of hearing if no response to family claim

- (2) A person served with a notice of family claim under Rule 4-1 (2) who does not file a response to family claim in accordance with subrule (1) of this rule is not entitled to receive notice of any part of the family law case including, without limitation, any court appearance, hearing, conference or trial.

[87] If Mr. Yang was personally served with the 2014 Claim and filed no response to it within 30 days, he was entitled to no further notice of any part of the family law proceedings: Nichol at para. 26.

[88] Ms. Hou, homemaker, swore an affidavit of personal service in Taipei, Taiwan on June 12, 2014. She deposed as follows:

- a) On May 10, 2014, at 10:20 am, she served Mr. Yang at the address she specified in Tao City, Taiwan, with the 2014 Claim, a copy of which she said was appended to her affidavit as Exhibit "A"; and
- b) She did not know Mr. Yang but attached to her affidavit as Exhibit "B" was the Photograph, which Ms. Hou deposed was a true likeness of the person she served.

[89] The Photograph appears to be the same one that is appended as an exhibit to Ms. Wang's desk order divorce affidavit made July 8, 2014. Ms. Hou's affidavit of service is silent about whether or not she obtained any formal identification from Mr. Yang when she met him in May 2014. It is unclear when the Photograph was taken or whether it was current in 2014.

[90] Ms. Hou subsequently provided an additional affidavit, affirmed in these proceedings on February 2, 2024, deposing as follows:

- a) She and Ms. Wang were acquaintances who met at the Temple;
- b) Ms. Wang spoke to Ms. Hou in or about the spring of 2014, before Ms. Hou's planned trip to Taiwan to visit family;
- c) During this conversation:
  - i. Ms. Wang asked Ms. Hou if she would deliver some documents to Mr. Yang in Taiwan and Ms. Hou agreed to do so;
  - ii. Ms. Wang provided Ms. Hou with an envelope containing some documents and asked her to give it to Mr. Yang;
  - iii. Ms. Wang asked Ms. Hou to tell Mr. Yang (if he asked) that she did not know what was in the envelope;
  - iv. When Ms. Hou questioned Ms. Wang about this, Ms. Wang replied that she was worried Mr. Yang would refuse to accept the envelope;
  - v. Ms. Wang told Ms. Hou that she was preparing herself to leave home in order to become a nun and, accordingly, she was seeking a divorce;
  - vi. Ms. Wang gave Ms. Hou Mr. Yang's address in Taiwan, his telephone number, and the Photograph;
  - vii. Ms. Hou told Ms. Wang that she was not comfortable taking anything into another country without knowing what it was;
  - viii. Thereafter, Ms. Wang told Ms. Hou what was inside the envelope and Ms. Hou opened the envelope to confirm its contents before she left Canada for Taiwan;
- d) The envelope contained the 2014 Claim (i.e., the document appended as Exhibit "A" to her affidavit of personal service);
- e) Ms. Hou left Vancouver for Taiwan in May 2014, called Mr. Yang on her arrival, and, after he had identified himself, told him that she had some papers for him from Ms. Wang;
- f) Mr. Yang asked Ms. Hou what the papers were and (as directed by Ms. Wang) Ms. Hou replied that she did not know;

- g) Mr. Yang and Ms. Hou met briefly on May 10, 2014, at which time they spoke in Mandarin and Ms. Hou gave him the envelope;
  - h) Mr. Yang took the envelope, asked Ms. Hou what was inside and, in response, she told him to open it and then he would know;
  - i) Mr. Yang did not open the envelope in front of Ms. Hou;
  - j) This is the only time Ms. Hou ever met Mr. Yang;
  - k) Ms. Hou recalls Mr. Yang saying that he thought Ms. Wang was getting too involved with Buddhism; and
  - l) Ms. Hou subsequently swore an affidavit of personal service and mailed it to Ms. Wang in Vancouver.
- [91] Mr. Yang admits he had an encounter in January or February 2014 with an unnamed person (whom he understood was a friend or acquaintance of Ms. Wang's) in Taiwan. On his evidence, this person gave him some documents that appeared to be incomplete blank forms, written entirely in English; he recalls that there was no stamp, handwriting, or signature on any of them. The 2014 Claim is date-stamped by the Vancouver Court Registry and signed by Ms. Wang. The evidence is silent regarding Mr. Yang's ability to read and/or understand English in 2014.
- [92] Mr. Yang denies that he understood the nature of the documents he received (indirectly from Ms. Wang) in early 2014, or that they had anything to do with his rights to the Property. He deposes that, to the best of his recollection, they did not look like the 2014 Claim his lawyer later obtained as a result of a court search.
- [93] Mr. Yang's evidence on this point conflicts with that of Ms. Hou. It is unclear whether either of them accurately recalled a meeting between them in 2014; on Ms. Hou's evidence, it occurred about a decade before they provided their affidavits in this matter (in 2023 and 2024, respectively). The Temple submits that Mr. Yang might have been describing a different event entirely.
- [94] The evidence regarding service of the 2014 Claim is suboptimal. Ms. Hou was a homemaker and not a professional process server. She did not know Mr. Yang and had never met him before May 2014. There is no evidence that she obtained any form of identification from him when she says they met, or that she carefully reviewed the documents appended to her affidavit to ensure they were the same as those she delivered to Mr. Yang.
- [95] Mr. Yang sets out his best recollection of the papers he admits receiving in his Affidavit #1, affirmed July 28, 2023, when he was in poor health, about one month before he died, and almost ten years after Ms. Hou deposes she delivered the 2014 Claim to him. Those circumstances give rise to concerns about the reliability of this evidence. Mr. Yang makes no reference to the Photograph in his affidavit. Notably, he does not deny that it is a photograph of him or that it was a true likeness of him in May 2014. There is no evidence from Mr. Yang

that he received documents in Taiwan from a friend or acquaintance of Ms. Wang's on any other occasion.

[96] I find that:

- a) Ms. Hou and Mr. Yang met in Taiwan in May 2014;
- b) Ms. Hou delivered some documents to Mr. Yang at that time;
- c) Mr. Yang knew that these documents were from Ms. Wang; and
- d) These documents probably comprised the 2014 Claim.

[97] If Mr. Yang did not understand the nature, content, or significance of these documents, it was open to him to seek legal advice; there is no evidence that he did so. It was also open to Mr. Yang to contact Ms. Wang to ask her about them; there is no evidence that he did that either.

[98] Mr. Yang's own evidence suggests that he had some understanding of the papers he admits receiving in early 2014. He deposes in his Affidavit #1 that, when he received them, he understood that he should neither return nor respond to them if he did not consent to a divorce. On his evidence, he understood in 2015 that Ms. Wang had not obtained a divorce in BC because he had not signed the documents that had been delivered to him.

[99] I find that Mr. Yang probably received the 2014 Claim in May 2014. However, for the reasons that follow, I conclude that this finding is not determinative of the matters in issue on this application.

D. Does this Court have jurisdiction to set aside the Divorce Order?

[100] The parties agree, as confirmed by the Court of Appeal in Nichol at para. 27, that this court has jurisdiction to set aside the Divorce Order pursuant to s. 200 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]:

### **Applications may be heard in party's absence**

200 (1) If permitted under this Act, the Supreme Court Family Rules or the Provincial Court Family Rules, a court, in the absence of a party, may hear an application and make any order the court has authority to make under this Act.

(2) If an order was made in the absence of a party, the court, in accordance with the Supreme Court Family Rules or the Provincial Court Family Rules, as applicable, may change, suspend or set aside the order.

[101] The parties also agree that this court has inherent jurisdiction to set aside an order obtained by fraud, collusion, or perjury: *Esteghamat-Ardakani v. Taherkhani*, 2023 BCCA 290 at para. 87, leave to appeal to SCC ref'd, 40928 (21 March 2024). There is no dispute that this court has inherent jurisdiction to prevent miscarriages of justice: *Nichol* at para. 28; *Zant v. Zant*, 2022 BCSC 2023 at para. 91.

E. Is the Divorce Order void or voidable?

[102] Counsel for Mr. Yang submits that the Divorce Order is void and therefore cannot stand. She argues that relevant questions on this application include:

- 1) whether the Divorce Order should be set aside in order to prevent a miscarriage of justice; and
- 2) whether condoning the Divorce Order (obtained based on false or wrong evidence) risks bringing the administration of justice into disrepute.

She submits that the answer to both questions is yes.

[103] The Temple submits that there was evidence to support the Divorce Order and that there are consequences to parties who fail to respond to originating proceedings. The Temple also emphasizes the finality of divorce orders, their in rem quality, and the many significant ways they can affect a person's status, citing *Dhaliwal v. Dhaliwal*, 2013 BCSC 1376 at para. 12. The Temple submits that this Court must strive to uphold non-appealable decrees of divorce and to find them voidable rather than void in order to ensure that justice is done to all parties, citing *Dhaliwal* at paras. 14 and 25; *Dryden v. Dryden*, [1973] 3 All E.R. 526 at 540 (Fam. D. U.K.).

[104] The genesis of Ms. Dhaliwal's application to set aside a divorce order was rooted in proceedings taken against her by immigration authorities: *Dhaliwal* at paras. 4 and 26. Ms. Dhaliwal had remarried and sponsored her present husband's emigration from India to Canada; in the course of doing so, she provided particulars of her divorce to the immigration authorities. Those particulars were used by the authorities in their pursuit of her removal. The outcome of Ms. Dhaliwal's attempt to set aside the divorce order therefore indirectly affected the immigration proceedings and whether she and her husband would be required to leave Canada, together with their dependent children.

[105] Unlike Mr. Yang, Ms. Dhaliwal did not seek to have the divorce order set aside because she was deprived of the ability to advance a claim for corollary relief arising from the marriage: *Dhaliwal* at para. 24. Ms. Dhaliwal took no steps to rectify the situation after she discovered that the divorce order was obtained without notice to her; thereafter, both parties remarried: *Dhaliwal* at para. 24. In that context, Justice Barrow declined to set aside the divorce order. In my view, *Dhaliwal* is distinguishable on its facts.

- [106] I accept that changes in a person's status (such as remarriage or having children with new partners), predicated on the finality of a divorce order, are important factors to consider when deciding whether or not to set aside this kind of order, or to find it voidable rather than void: Dhaliwal at para. 13; Luo at para. 41.
- [107] However, there is no evidence that Ms. Wang relied on the Divorce Order to make any comparable life decisions after 2014. She did not remarry, start a new relationship, or have more children with a new partner. Due to her health issues, she never became a Buddhist nun, the catalyst for the 2014 Claim seeking a divorce. She continued her religious practices unimpeded. In my view, the evidence does not support the conclusion that Ms. Wang lived her life any differently (as a result of having obtained the Divorce Order) than she would have otherwise.
- [108] I acknowledge that Ms. Wang changed her will two weeks before she died to bequeath the Property to the Temple. I do not agree that this reflects different estate planning during her lifetime after October 2014 (when she obtained the Divorce Order), on the basis that she was then unmarried.
- [109] Mr. Yang alleges that the Divorce Order was obtained fraudulently. Our Court of Appeal defined fraud in *Cabaniss v. Cabaniss*, 2010 BCCA 348 at paras. 51-52 as follows:
- [51] The classic definition of fraud may be found in the oft-cited passage from *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.) at 374:
- [F]raud is proved when it is shewn that a false representation has been made (i) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false ... To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial.
- [52] Thus, the objective element of fraud is the making of a false representation; the subjective elements of fraud are dishonesty and deceit in making the false representation. Issues of whether a representation is false and/or whether the party making the false representation did so dishonestly or deceitfully are questions of fact that are reviewable on the deferential standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.
- [110] The fact that parties may disagree on a fact in issue does not elevate such difference of opinion to the status of a fraudulent act: *Cabaniss* at para. 65. An inaccuracy in the evidence does not necessarily establish, even on a prima facie basis, a case of fraud: *Cabaniss* at para. 67. In *Cabaniss*, the Court of Appeal found at para. 70 that, at its highest, the inaccuracy in the evidence simply demonstrated a difference of opinion between the parties as to the date of separation.

[111] Justice Tucker found in *Kaur* at para. 40 that the husband knowingly swore and put before the court false evidence, misrepresenting the state of his marriage, in order to obtain a divorce. She concluded that the requirements of s. 8 of the Divorce Act (regarding separation as a basis for divorce) were not met at the time the divorce order was made: *Kaur* at para. 41.

[112] The Temple submits that, in order to reach the same result as in *Kaur*, I would need to make the same findings, namely:

- 1) a want of jurisdiction on the basis that the 2014 Claim was not served;
- 2) that the statutory requirements in s. 8 of the Divorce Act were not met; and
- 3) that Ms. Wang knowingly sought and obtained the Divorce Order on perjured evidence: *Kaur* at para. 54.

I disagree.

[113] Whether or not Ms. Wang intended to defraud the court, I conclude that she provided false information in the 2014 Claim (regarding the parties' date of separation, as defined in the Divorce Act) and in her desk order divorce affidavit.

[114] The Temple relies on *Hinds v. Peart*, 2016 ONSC 4891. In that case, the court declined to set aside a divorce order, finding that, while the affidavit of service was false, there was no evidence that the applicant knew it was false or that she played any role in the fraud perpetrated on the court: *Hinds* at para. 3. The court found (unlike here) that the respondent was aware of the divorce order no later than a few weeks after it was granted, did nothing about it for a minimum of more than one year thereafter, and provided no adequate explanation for his delay: *Hinds* at para. 6. Those facts are not analogous to the case before me.

[115] The Temple also relies on *Luo*. That case focused on an application to withdraw an admission that the parties had been living separate and apart since a particular date. Those facts are similarly inapplicable here. Notably, *Luo* is now more than ten years old and was decided under predecessor legislation, before many other more recent authorities cited on this application.

[116] As in *Rong v. Tan*, 2023 BCSC 1664 at para. 32, I conclude that the Divorce Order was not, in law, available to the parties when Ms. Wang applied for it. I have found that the parties were not then living separate and apart, and that they had not been living separate and apart for at least one year by July 2014, when Ms. Wang obtained the Divorce Order, as required by the Divorce Act. Failure to comply with statutory requirements which are conditions precedent to obtaining a divorce order can form the basis for finding that a decree of divorce is void: *Luo* at para. 37; *Dhaliwal* at para. 14.

[117] I also note that, while the parties might have been eligible for a divorce based on a separation of one year by 2015, the parties agree it is not open to me to grant the now deceased parties another divorce, effective as of a different date.

[118] In my view, the Divorce Order is likely void. The statutory pre-requisites set out in s. 8 of the Divorce Act were not met when Ms. Wang applied for, or obtained, the Divorce Order. I have, nonetheless, also considered whether the Divorce Order should be set aside based on the analytical framework in *Miracle Feeds*.

F. Should the Divorce Order be set aside based on *Miracle Feeds*?

1. Did Mr. Yang willfully fail to file a response?

[119] I conclude that Mr. Yang likely did not appreciate the implications of ignoring the 2014 Claim. This conclusion is supported by Ms. Wang's own evidence that she told Ms. Hou she was concerned that, if Mr. Yang knew what was in the envelope she asked Ms. Hou to give him, he would not accept delivery of it. Based on the Temple Manager's affidavit, affirmed February 2, 2024, Ms. Wang told Ms. Lee in or about 2012 that she "would obtain a divorce from Mr. Yang" but thought he "might want money from her" in response.

[120] Mr. Yang deposes that he had no understanding of the Canadian legal system in 2014. He understood that Ms. Wang required his signature and consent in order to obtain a divorce. Having regard to the evidence as a whole, I conclude that Mr. Yang did not willfully fail to file a response to the 2014 Claim.

2. Did Mr. Yang apply promptly to set aside the Divorce Order?

[121] The Temple takes the position that the 2019 Claim (seeking a division of family property and family debt and to set aside the Divorce Order) is barred by the Divorce Order; Dennis disagrees.

[122] Section 198 of the FLA provides as follows:

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,

(a) in the case of spouses who were married, the date

(i) a judgment granting a divorce of the spouses is made, or

(ii) an order is made declaring the marriage of the spouses to be a nullity, or

(b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

[123] I accept that Mr. Yang did not receive the Divorce Order before his Vancouver lawyer discovered it by conducting a court search on or about March 27, 2019, after Ms. Wang's death. There is no evidence to the contrary.

[124] The Temple denies there is any obligation to serve a party who has failed to file a response to family claim within the time prescribed by the SCFR with any documents, including a desk order divorce.

[125] Mr. Yang commenced the 2019 Claim against Ms. Wang's estate on August 20, 2019. He was diagnosed with throat cancer in September 2019. Shortly thereafter, he underwent surgery, chemotherapy, and radiation therapy. He later developed leukopenia, anemia, and thrombocytopenia. I accept that those complications rendered Mr. Yang incapable of managing his affairs in the ordinary course or proceeding with an earlier application to set aside the Divorce Order.

[126] On Mr. Yang's uncontroverted evidence, as corroborated by medical records in evidence, his mobility was significantly limited in March 2020, and thereafter as a result of his medical condition and stringent COVID-19 lockdown measures in Taiwan. He subsequently developed myelodysplastic syndrome (a form of leukemia resulting from bone marrow damage), had reduced function, a severely compromised immune system, low energy, and difficulty hearing. Mr. Yang was quarantined in hospital before he received a bone marrow transplant in February 2023. He remained in hospital thereafter and died on August 28, 2023.

[127] I find that that Mr. Yang took steps promptly to set aside the Divorce Order once he became aware of it.

3. Does Mr. Yang have a meritorious defence?

[128] I have found that the parties were not living separate and apart, as contemplated by s. 8 of the Divorce Act, on January 1, 1990, contrary to what Ms. Wang stated in the 2014 Claim. It follows that the Divorce Order was obtained on false information. I have also found that the parties were not living separate and apart when Ms. Wang commenced the 2014 Claim, and had not been living separate and apart for at least one year when Ms. Wang obtained the Divorce Order. Accordingly, the statutory prerequisites for obtaining a divorce, as set out in s. 8 of the Divorce Act, were not met.

[129] I accept that Mr. Yang has a meritorious defence to the 2014 Claim or one that is at least worthy of investigation.

G. Do the circumstances warrant setting aside the Divorce Order?

[130] Based on the Miracle Feeds framework, the overarching question is whether it is in the interests of justice to set aside the default judgment: *Albo v. Haines*, 2021 BCSC 2200 at para. 15. As noted by Justice Rogers in *McEvoy v. McEachnie*, 2008 BCSC 1273 at para.13:

[ ] Whether to set a default judgment aside is an exercise of discretion, and the Miracle Feeds criteria are nothing more than a non-exhaustive set of factors to be taken into account when considering whether to exercise that discretion. [ ]

[131] Having regard to the evidence, taken as a whole, I conclude that it would be contrary to the interests of justice to permit the Temple to rely on the Divorce Order to bar the 2019 Claim. On Mr. Yang's uncontroverted evidence:

- a) He alone contributed to the purchase, financing, and maintenance costs associated with the Property and the other properties the parties bought and sold in Canada during their marriage;
- b) He did not share in the proceeds of sale for either the 16th Avenue Property or the Bruce Street Property;
- c) Mr. Yang sent Ms. Wang approximately \$1,000,000 over roughly 26 years during their marriage for her support, maintenance of the Property, and their retirement savings; and
- d) He gave Ms. Wang \$165,000 in 2013, representing the bulk of his remaining savings, to assist Dennis with the purchase of a home but she retained those funds.

[132] I conclude that the Miracle Feeds framework favours setting aside the Divorce Order. Notably, I have also found that the statutory prerequisites to obtaining a divorce, as set out in s. 8 of the Divorce Act, were not met, either when Ms. Wang commenced the 2014 Claim, or when she applied for and obtained the Divorce Order.

[133] Ultimately, I conclude that the question I must ask is whether this court can countenance the Divorce Order, given my finding that it was obtained based on false evidence. In my view, the answer to this question is no. I conclude that the interests of justice require me to set it aside. In my view, allowing the Divorce Order to stand risks rewarding one party for filing false evidence to the other party's detriment, thereby, undermining the integrity of the justice system.

## VII. DISPOSITION

[134] I make the following orders:

- 1) BY CONSENT, Dennis, executor of the will of Chia Jung Yang, deceased, is substituted as the respondent in this action; and
- 2) The Divorce Order is set aside.

## VIII. costs

[135] If the parties are unable to agree on costs, they may apply to address this matter by contacting Supreme Court Scheduling within 30 days after the release of these reasons.

"Douglas J."

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