
CANADA / JUDGMENT

Y.L. v. G.L.

2020 BCSC 808

COURT

Supreme Court of British Columbia

DECIDED

29 May 2020

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2020 BCSC 808 Y.L. v. G.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Y.L. v. G.L.,

2020 BCSC 808

Date: 20200529

Docket: E152716

Registry: Vancouver

Between:

Y.L.

Claimant

And

G.L.

Respondent

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for the Claimant:

R. Tretiak, Q.C. ,C. Yoo and M.F. Heller (October 7, 8 and 9 only),

In person thereafter

Counsel for the Respondent:

F. Lamer

Place and Date of Trial:

Vancouver, B.C.

October 7-10, 15-18, 21-24 November 4-8, 12, 18-22, 25-29, December 2-6, 9-12, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 29, 2020

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Introduction

- [1] Y.L. and G.L. were married on August 28, 2003, in Beijing, China. They had one son together, B.L., born September 8, 2009. Issues pertaining to the custody, guardianship and residency of B.L. were addressed at a trial before Mr. Justice Sigurdson in 2017: Y.L. v. G.L. (13 July 2017), Vancouver E152716 (B.C.S.C.) who ordered joint custody and guardianship and that B.L. be primarily resident with Ms. L. This trial pertains to child support for B.L. and the division of family property and debt, which includes real property in British Columbia and Beijing, China, bank accounts in both countries, corporate holdings in China, and vehicles in British Columbia.
- [2] The parties negotiated and signed more than one agreement pertaining to their son, child support and division of assets. Mr. L. seeks to enforce an agreement signed on May 3, 2015 which, among other things, specified the division of real property and vehicles. The May 3, 2015 agreement does not address Mr. L.'s interests in any of the companies he founded, to which I will refer collectively as the "Mingdun companies". Through enforcement of the May 3, 2015 agreement or pursuant to s. 95 of the Family Law Act, S.B.C. 2011, c. 25, or a combination thereof, Mr. L. seeks unequal division of property. Mr. L.'s position is that no child support is payable retroactively or prospectively pursuant to the May 3, 2015 agreement.

[3] Ms. L.'s position is that none of the agreements are enforceable. She submits that the May 3, 2015 agreement should be set aside on the basis of unconscionability, because it is unfair and because it was entered into under duress. Although in her counterclaim Ms. L. seeks unequal division of family property, at trial she submitted the division of their assets and debts, which are located in China and British Columbia, should be equal. She seeks retroactive and go forward child support.

[4] The issues to be addressed are:

- a) jurisdiction and choice of law;
- b) whether the parties had a marriage-like relationship prior to marriage, and if so, when it began;
- c) date of separation;
- d) whether the May 3, 2015 agreement should be enforced or set aside;
- e) if the May 3, 2015 agreement is enforced, how should the family property not covered by it be divided;
- f) if the May 3, 2015 agreement is set aside, division of family property and family debt, which involves:
 - i. identification of family property;
 - ii. whether any property is excluded;
 - iii. whether property that is excluded can be traced into other assets;
 - iv. the date of valuation of family property;
 - v. values of family property including date of valuation;
 - vi. whether any family property should be divided unequally;
 - vii. the means to achieve the apportionment determined;
- g) child support;
- h) what steps, if any, the Court should take regarding Mr. L.'s continuation of legal proceedings in the People's Republic of China which overlap with this proceeding.

Preliminary Matters

Pleadings

- [5] Mr. L. argues that the marriage was a carefully planned trap by which Ms. L. embezzled most of the money Mr. L. made through the Mingdun companies. Ms. L. argues that the embezzlement theory is not properly raised on the pleadings and therefore is not relevant, as well as being a fabrication by Mr. L. to avoid having to divide his interests in the Mingdun companies.
- [6] On the Friday before the trial commenced, Mr. L., represented by counsel, brought an application to adjourn the trial and amend his pleadings. His application to adjourn the trial was not allowed. Chief Justice Hinkson permitted him to particularize the amendments he wanted to make. The same day, his then counsel, Mr. Tretiak, wrote to counsel for the respondent, Ms. L, stating as follows:

We write further to our mutual appearance before Chief Justice Hinkson this afternoon. Specifically, we write to further inform you of our proposed amendments to the pleadings in this matter prior to the commencement of trial on Monday, October 7, 2019. As you likely remember, Chief Justice Hinkson provided his direction that regardless of how the pleadings read, the Court will have to apply the relevant law to the same effect.

That said, the first amendment we wish to make is one that would allow us to seek a declaration of the Claimant's excluded property under section 85 of the Family Law Act. It will be our position at trial that Mr. [L.] entered the marital relationship with Ms. [L.] with assets that can be 'traced' to most, if not all, family assets.

The second amendment is one that would allow us to argue for an unequal division of family property under section 95 of the Family Law Act. It will be our position that an equal division of family property would be 'significantly unfair' based on Mr. [L.]'s greater financial contributions to the family property, to be considered with the previous agreements between the parties (and the property transfers resulting from same). Ms. [L.] retained the Anli property despite the fact that she now says the agreement is unfair.

- [7] Shortly after the trial commenced and before Mr. L.'s opening statement, Mr. L.'s counsel advised the Court that differences had arisen between counsel and client such that he must withdraw. He further advised the Court that when he advised Mr. L. of this, Mr. L. terminated him. Mr. L. confirmed to the Court that he had terminated Mr. Tretiak and wished to represent himself. With the exception of a limited retainer for a preliminary application brought by Ms. L., Mr. L. was no longer represented by counsel at trial and conducted the trial on his own behalf. The pleadings outlined in his former counsel's letter set out above were not formalized into amended pleadings. However, Ms. L., through her counsel, advised that she was prepared to proceed on the basis that the letter stands as a pleading.
- [8] Accordingly, I have approached this matter on the basis that the particulars outlined in Mr. L.'s former counsel's letter set out above are pleaded.

- [9] During the trial, Mr. L. alleged that Ms. L. embezzled money from him and from some of the Mingdun companies. He advised that he could not state the amount he alleged was embezzled because he did not yet have proper document disclosure and was still obtaining statements of various bank accounts located in China that recorded transactions he asserted were evidence of the embezzlement. He said the amount was more than ¥54,450,239.99. Mr. L. referred to these allegations throughout the trial despite that they are not raised in the pleadings, including in Mr. Tretiak's letter. Initially when he testified about facts relating to his claims of embezzlement and about financial transactions dating back many years prior to separation, the Court responded to objections or, of its own volition, directed Mr. L. to restrict his evidence to evidence that is relevant to the pleadings, including Mr. Tretiak's letter. Mr. L. did not heed these directions. In the interest of efficiency, the Court asked counsel for Ms. L. to not object further on the grounds of relevancy and advised both parties that the Court would only consider what is relevant to the pleaded issues, including the pleadings described in the letter written by Mr. L.'s former counsel.
- [10] Mr. L. brought an application for further document disclosure relating to the embezzlement allegations. I dismissed this application partly on the basis that the allegations were not pleaded, and partly because of the prejudice it would cause to Ms. L. and the delay to the trial that would ensue.
- [11] Mr. L. then sought to amend his pleadings to raise the embezzlement issues so he would be permitted to lead evidence. I did not permit the amendments because the application was brought well into the trial after Mr. L.'s testimony had been completed, the testimony of his only witness had been completed and I had continuously ruled that evidence relating solely to the embezzlement allegations was not admissible on the grounds of relevance. I noted that the embezzlement amendments were not included in the particulars that Mr. L.'s former counsel set out in his letter. Although the letter stated that a claim for unequal apportionment of assets would be made pursuant to s. 95 of the Family Law Act, the particulars it provided in support of unequal apportionment were Mr. L.'s greater financial contributions to family assets considered in the context of the agreements the parties had made. None of these particulars provide notice of a claim made under s. 95(2)(g) of the Family Law Act, that:
- (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

- [12] This is a notable omission given the letter was written by his former lawyer at a time when Mr. L. asserted he had become aware of the embezzlement. Accordingly, Ms. L. and her counsel commenced trial and conducted the trial with the particulars of the unequal apportionment claim that did not include Mr. L.'s embezzlement allegations.
- [13] Another issues regarding the bounds of relevance is one of the properties at issue in this trial, a commercial property located on Anli Road in Beijing. The Anli Road property was owned by one of the Mingdun companies, Mingdun Tong Chuang, from 2009 until 2013, when Mr. L. became the owner. The Anli Road property generated lease income. While it was owned by Mingdun Tong Chuang, the lease payments it generated were collected by Ms. L. When it was transferred into Mr. L.'s name, the lease payments were still collected by Ms. L. Subsequent to separation, Ms. L. became the owner of the Anli Road property and she continued to collect the lease payments. Mr. L. argues that Ms. L. wrongfully collected the lease payments until the property was transferred to her. Ms. L.'s receipt of the lease payments is not relevant prior to separation as their collection is not relevant to any pleading that Mr. L. has made, and the owner of the property through most of that period, Mingdun Tong Chuang, is not a party to this claim. As of the date of separation, the lease payments arguably became family property because they were generated by, or derived from, family property, and are subject to division: Family Law Act, s. 84(1)(b)(i).
- [14] In addition, Mr. L. gave evidence about real property located in Beijing. He testified that it was the property of one of the Mingdun companies (he did not specify which company) however, in order to obtain financing secured by the property, the property had to be registered in the name of an individual because in China a company cannot obtain a mortgage on a residential property. Mr. L. testified that the property was registered in the name of his daughter, X.L. Mr. L. testified that in 2001, he decided to sell the property and he had Ms. L. sell it. He testified that in 2017 or 2018 he discovered that the proceeds from the sale of this property went into Ms. L.'s bank account. Nothing about this property is raised in the pleadings pertaining to this case. The Mingdun company involved is not a party to this claim. I will not address the proceeds of the sale of this property.

Credibility of Mr. L. and Ms. L.

- [15] Both parties testified and both parties assert that the other did not tell the truth when testifying.
- [16] In addition to the parties and X.L., the following people were involved in transactions pertaining to family property and were mentioned regularly in evidence: Mr. Quanlu Yang, an investor who invested in and bought a portion of Mr. L.'s shares in one of the Mingdun companies, Mingdun Technology; Mr. Jungi Kong, another investor in Mingdun Technology; Ma Guo Bao, an employee of Mingdun Technology; Ms. L.'s parents, Ms. L.'s sister and Mr. L.'s brother, sister-in-law, nephew and niece.

- [17] Despite that issues such as whether the parties had a marriage-like relationship prior to marrying, whether Ms. L. was vulnerable in regard to the May 3, 2015 agreement and the contribution each made toward family property, especially the Mingdun companies, would be assisted by the evidence of disinterested persons with personal knowledge, the only non-party witness who testified (other than Ms. L.'s counsel's legal assistant) was X.L., Mr. L.'s adult daughter from his first marriage. There is some non-party evidence in the form of joint expert reports that were entered into evidence and there were three notices to admit with admissions that were introduced into evidence via the testimony of Ms. L.'s counsel's legal assistant.
- [18] In assessing credibility, I follow the approach described by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296. The process is to first examine a witness' evidence on a stand alone basis including the ability to and opportunity to observe events, the firmness of memory, whether the witness appears able to resist the interests at play to modify his or her recollection, a comparison of the evidence against independent evidence, whether the witness changes evidence during direct examination and cross examination, any motive to lie and demeanour. If the trier of fact accepts the witness' evidence as being generally credible, then the trier of fact should compare the evidence with the other evidence to determine whether it fits within the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
- [19] Whether the evidence fits with the preponderance of probabilities is a key consideration: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at 357 *Jin v. Cheng*, 2018 BCSC 763 at para. 19. In *Novac Estate (Re)*, 2008 NSSC 283 at para. 36, the Nova Scotia Supreme Court summarized the same factors as Dillon J. in *Bradshaw* and noted that caution should be used when relying on demeanour, and consideration should be given to the motive that parties to the proceedings who are witnesses may have to fabricate evidence. With regard to demeanour, see also: *R. v. Sue*, 2011 BCCA 91 at paras. 46-47; *R. v. S.H.P.*, 2003 NSCA 53 at paras. 28-30.
- [20] Determining what evidence is to be accepted can be difficult where the evidence of a party is clearly and obviously not credible in some respects. In *Jin* at para. 21, Madam Justice Dardi observed that when a court finds that a litigant has told a falsehood such that the court has a difficult time sorting the true evidence from the untrue evidence, and the court makes findings of fact that are contrary to the litigant's belief of what is true, the litigant has only him or her self to blame. See also *Le (Guardian ad litem of) v. Milburn*, 1987 CarswellBC 1589 at para. 2 (S.C.). It is reasonable for a trier of fact to accept parts of a witness's evidence and apply differing weight to different parts of a witness's evidence: *Novac Estate* at para. 37; *R. v. D.R.*, [1996] 2 S.C.R. 291 at para. 93; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).

- [21] The doctrine of abuse of process, including issue estoppel and res judicata, does not compel a court hearing a subsequent trial of a bifurcated proceeding to be bound by the credibility findings at the first trial: *R. v. Hunt*, 1989 Carswell NS 403 at para. 10 (NS. Co. Ct.), but if a witness was found to not be credible at the first trial, the court must consider the evidence very carefully: *Friedlander v. Claman*, 2018 BCSC 725 at para. 52.
- [22] In his reasons following the 2017 trial of issues pertaining to B.L., Sigurdson, J. found Mr. L.'s evidence to be problematic in some regards, and while he also had reservations about Ms. L.'s evidence, he generally preferred it to that of Mr. L. I have difficulties with both parties' evidence.
- [23] Mr. L. told obvious lies on the stand and at his examination for discovery. He changed his evidence or gave fantastic explanations when confronted with inconsistencies. During cross examination, there were occasions on which Mr. L. did not answer questions but responded in a way that was simply a deflection. Mr. L. was argumentative during cross examination, to the point that when counsel was simply attempting to confirm what he had already said in his evidence, he would deny what he had said. It appeared that at times he simply chose to be contradictory.
- [24] A bizarre example of Mr. L.'s contrary and internally conflicting evidence pertains to Exhibit 5. In his evidence in chief, Mr. L. presented a document and testified that it was a document that he had prepared a long time ago that showed contributions he had made to the Mingdun companies at various times. It was entered as an exhibit at his request. When counsel for Ms. L. attempted to cross examine him on it, he denied that it was a document prepared by him and he denied that he had presented the document to the Court. When confronted with the transcript of evidence on the day that he tendered Exhibit 5 into evidence, he demanded that the translation be verified.
- [25] On another occasion, he asserted that a certain bank account in the name of one of his Mingdun companies, Mingdun Technology, was a bogus account set up by Ms. L. When confronted with the fact that Mingdun Technology entered into an investment agreement executed by Mr. L. that specified that bank account as the account into which funds were to be deposited, he testified that there may be more than one bank account with that number.
- [26] Throughout the trial, Mr. L. asserted that he was telling the truth and that Ms. L. was telling lies. I do not believe his evidence except on un-contradicted matters and on matters that are supported by objective evidence.
- [27] Ms. L.'s evidence was also problematic. During her direct examination, her counsel asked her leading questions on matters that were significant, detracting from the reliability of her evidence. During cross examination, Ms. L. frequently responded that she did not know or could not remember, including on matters it is odd not to remember, such as when she was married to her first husband and when she was divorced from her first husband. Ms. L.'s answers were not responsive to some questions. Ms. L. was argumentative and combative while under cross examination, at times replying by saying that Mr. L. should know the

answer to the question he was asking her.

- [28] Ms. L.'s counsel submitted that Ms. L. had the demeanour of a spouse who has learned to defer to her husband, including not engaging with Mr. L. and speaking very quietly. He asserted that this should be taken into account when assessing her evidence about the relative power dynamics in the relationship, especially her evidence that she felt she had no choice but to sign the May 3, 2015 agreement. This submission does not resonate for several reasons. First, demeanour is not a primary tool for assessing credibility. Second, while Ms. L. did testify very quietly and did not look at the questioner during her examination in chief, during Mr. L.'s cross examination she was much more engaged, she was combative, and she was no longer speaking quietly.
- [29] In addition, Ms. L.'s evidence was internally inconsistent at times in a manner that appeared to be driven to tailor the evidence to suit her purpose or to demonstrate that Mr. L. is generally a dishonest person who had arranged his affairs to defeat the claims of his first wife. For example, she was asked about a document that showed her mother listed as the representative for Mingdun Technology in conjunction with an application to secure its corporate name. She testified that she was not aware that her mother had been designated as the representative of the company. However, she then went on to testify that at the time, Mr. L.'s first wife had learned about the incorporation of another of the Mingdun companies and tried to sue Mr. L. over corporate assets that had not been addressed in their settlement. Ms. L. testified that Mr. L. probably wanted to incorporate a new company to avoid those issues. She testified that because he was trying to incorporate a high tech company, he needed someone like her mother or father, who were both engineers, to be the representative. Ms. L. had already testified that Mingdun Technology was incorporated to take advantage of tax incentives. But Ms. L. also professed she knew very little about the Mingdun companies or the structure of the business in that timeframe because she did not work for the companies, she had her own full-time job, and Mr. L. did not involve her.
- [30] The internal inconsistencies, speculation and evasive tactics Ms. L. used from time to time convinced me that her evidence had to be approached with caution. Accordingly, I have also looked for confirmatory evidence with regard to her evidence.
- [31] Part of the difficulty with this case is that in determining the preponderance of probabilities, it is most helpful to have evidence of disinterested persons. There were none in this case as even X.L., Mr. L.'s daughter, cannot be said to be completely disinterested. For example, with regard to the transactions about which I must make findings, such as the receipt and disposition of the proceeds of Mr. L.'s sale of shares in Mingdun Technology, despite that such transactions involved the participation of other persons, none of the witnesses who could have provided objective or confirmatory evidence were called to testify.
- [32] Ms. L. sought to challenge witnesses' evidence and prove certain facts through the report of Dr. Elterman prepared pursuant to s. 211 of the Family Law Act, pertaining to parenting issues, and which was considered by Sigurdson, J. Mr. Justice Sigurdson held that the facts

set out in Dr. Elterman's report were prima facie evidence of the truth of their contents but also considered challenges to these facts. The report was not tendered into evidence as an expert report in this trial. Dr. Elterman was cross examined before Sigurdson, J. but not before me. I do not accept that facts stated by Dr. Elterman are proved in evidence.

- [33] There are some documents that provide objective evidence, there are admissions to notices to admit, and there are expert valuation reports. Given my concerns with both parties' evidence, I base my findings on the preponderance of evidence, including testing the oral evidence against any objective evidence that is available, and what makes sense.

Consideration of a reference to the Registrar

- [34] It was apparent at the conclusion of the trial that in the event I determined it necessary to divide family property and debt other than through the May 3, 2015 agreement, a number of interconnected accounting issues and calculations would result from findings as to family property, family debt, excluded property and how to address incomplete disclosure pertaining to the family property. I asked the parties to make submissions on the appropriateness of a reference to the Registrar to address the calculations and determinations to be undertaken once I had made the findings and determinations pertaining to the May 3, 2015 agreement and family property and family debt.
- [35] Mr. L. deferred to the Court on this issue. Ms. L. submitted that a reference was not appropriate because the Court would have the information to do the calculations, they were not complicated, and a reference would prolong matters and be more expensive for Ms. L., who was already financially stressed by the litigation.
- [36] I do not accept that Ms. L. has been unduly financially stressed by this litigation, given my views of her means compared to her evidence about her means. However, despite my mid-trial rulings on relevance and on Mr. L.'s application to amend his pleadings to make the embezzlement theory relevant, at the conclusion of the trial Mr. L. continued making submissions that relate to the embezzlement theory, urging the court to allow him to introduce records that would show the embezzlement and urging the Court to seek the assistance of the Chinese courts to obtain such records. I conclude that if I make a reference to the Registrar, Mr. L. will continue his attempts to advance his embezzlement theory and frustrate the resolution of the relevant issues. Accordingly, I have addressed the accounting issues.

Currency

- [37] The values of the assets and financial transactions in issue were expressed in Chinese renminbi (RMB), the name of a unit of RMB, yuan, and Canadian dollars. The parties used RMB and yuan interchangeably. For the sake of consistency, I will use the symbol for the yuan, ¥, when expressing figures in RMB or yuan. The parties agreed that the exchange rate at the time of trial between the yuan and the Canadian dollar was approximately ¥5 to the Canadian dollar.

Jurisdiction and Choice of law

- [38] The parties were married in China in August 2003 and divorced in China in May 2015. In between, they immigrated to Canada. The assets in dispute include assets in China and assets in British Columbia.
- [39] The parties both testified that they started the immigration application process in 2005-2006. They were approved for immigration in 2011. They moved to British Columbia with their young son. Mr. L. came first in late spring 2013 and purchased a condominium in Burnaby at 1903 - 5833 Wilson Avenue. Ms. L. and B.L. arrived in British Columbia in August 2013. The parties lived together in the Wilson Avenue property for a short period of time in 2013 before Mr. L. returned to China to attend to business matters. Ms. L. and B.L. remained in Burnaby from August 2013 until Mr. L. returned from China in October 2014. They all lived together in the Wilson Avenue property until early 2015 when Ms. L. and B.L. moved to a townhouse near the University of British Columbia campus in Vancouver. Ms. L. and Mr. L. returned to China in May 2015 for the purpose of seeking a divorce. Both parties returned to British Columbia and have resided in British Columbia since.
- [40] Mr. L. commenced this claim on September 28, 2015 and Ms. L. responded to it and brought a counterclaim shortly thereafter. Subsequently, Mr. L. commenced claims in the People's Republic of China, Beijing Haidian District People's Court. He commenced the first claim in that court on May 16, 2016. Ms. L. responded. On November 30, 2017, Mr. L. withdrew that proceeding. Mr. L. commenced another claim in the same court in December 2017. At the outset of this trial, Ms. L. brought an application seeking an order enjoining Mr. L. from proceeding in the People's Republic of China on the basis that it was an abuse of process to seek overlapping relief in two courts. Mr. L., who was represented by counsel at the hearing of that application, consented to an order that he abandon the second proceeding in the Beijing Haidian District People's Court.
- [41] Despite his consent to that order, Mr. L. submits that Ms. L. should return to China and deal with the investigations he instigated in China pertaining to his embezzlement and conspiracy allegations. He also urged the Court to ask the Chinese court to investigate matters for it. However, he did not make submissions on the jurisdiction of this Court, on whether this Court should decline jurisdiction in favour of a Chinese court, or lead any evidence to prove the law of China.

- [42] Ms. L. submits that there is no issue as to the court's jurisdiction as both parties have attorned to the court: Mr. L. by commencing this proceed and Ms. L. by not challenging the jurisdiction of the court. With regard to choice of law, Ms. L. argues that the most common habitual residence of the parties was British Columbia. Ms. L. also argues that given that neither party proved Chinese law, the Court should presume it is the same as the law of British Columbia, relying on *K.B. v. J.B.*, 2016 BCSC 1904 at para. 47.
- [43] The jurisdiction and choice of law provisions of the Family Law Act are found in Division 6 of Part 5, sections 106-108.
- [44] I conclude that the court has jurisdiction pursuant to ss. 106(2)(b) and (c) as Mr. L. commenced this proceeding and Ms. L. responded to it and because both of them were habitually resident in British Columbia at the time this proceeding was commenced.
- [45] With regard to determining the proper law of the relationship and the choice of law rules, there is some question as to whether Mr. L. and Ms. L.'s most recent common habitual residence was in British Columbia (s. 107(a)). The facts are also unclear as to whether the requirement of s. 107(c) has been met, that is that Mr. L., the spouse seeking an order, was habitually resident in British Columbia at the time of separation given that he had returned to British Columbia from a lengthy period on China in the fall of 2014, a month or two before the parties separated.
- [46] Despite these issues, neither party has pleaded that the law of China should apply. Neither party has sought to prove Chinese law. Accordingly, I conclude the applicable law is that of British Columbia.

Marriage-Like Relationship

- [47] Mr. L. claims the corporate assets were acquired by him prior to his marriage to Ms. L. and/or are derived from assets acquired by him prior to his marriage to Ms. L. and are excluded from the family property to be divided. Ms. L. argues that most of the value of the corporate assets accrued during their marriage-like relationship, which she argues commenced when they began living together in 1999 or 2000.
- [48] It is necessary to determine whether and if so, when, the parties began living together in a marriage-like relationship prior to their marriage on August 28, 2003 in order to identify and divide property and debt, including to determine what is excluded property: Family Law Act, ss. 3(3), 85(1)(a). If the evidence does not establish a marriage-like relationship prior to marriage, the start of the relationship is the date of marriage (s. 3(3)(b)).
- [49] Section 3 of the Family Law Act reads as follows:
- 3 (1) A person is a spouse for the purposes of this Act if the person
- (a) is married to another person, or

- (b) has lived with another person in a marriage-like relationship, and
- (i) has done so for a continuous period of at least 2 years, or
- (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.
- (2) A spouse includes a former spouse.
- (3) A relationship between spouses begins on the earlier of the following:
 - (a) the date on which they began to live together in a marriage-like relationship;
 - (b) the date of their marriage.
- (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.
- [50] In *Weber v. Leclerc*, 2015 BCCA 492 at paras. 7-25, the Court of Appeal explained that a holistic view of the evidence, which takes all relevant matters into account and weighs all the relevant factors, is the proper approach to determine whether a marriage-like relationship existed between the parties. In reaching this conclusion, the Court of Appeal referred to *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.); *Takacs v. Gallo* (1998), 157 D.L.R. (4th) 623 (B.C.C.A.); and *Austin v. Goerz*, 2007 BCCA 586, and held that it is critical that the parties intended to enter into a relationship similar to marriage, ie: one of indeterminate, lengthy duration. The evidence as to the parties' stated intentions should be tested against objective evidence.
- [51] While avoiding a checklist approach, the relevant factors that assist in determining whether the parties had a marriage-like relationship are:
 - a) the parties' intentions, particularly that the relationship will be of lengthy, indeterminate duration;
 - b) whether there was financial interdependence;
 - c) whether the parties resided together and if so, whether they did so in the nature of roommates or in the nature of a couple;
 - d) evidence of the parties' lifestyle and interactions; and

- e) whether the parties engaged in sexual relations and were intimate in the sense of fidelity and sharing personal information.
- [52] Ms. L. testified that at the time they commenced dating, she lived in an apartment provided by her employer, China Post Telecommunications Equipment Company Ltd. Ms. L. testified that they began living together within a year of meeting, although she could not recall precisely when.
- [53] Mr. L. testified that after they met, he rejected the idea of becoming Ms. L's boyfriend for a very long time. He testified that Ms. L. would call him and ask him where he was and then show up when he was meeting with clients or associates such that eventually, everyone believed she was his girlfriend. He testified that she would also show up at his apartment and insist on coming in. He testified that he told her that he did not want to marry again because of how he had been hurt after his first marriage. He testified that she said she was willing to just be his girlfriend even if they never got married.
- [54] Leaving aside, for the moment, that living together is not determinative of a marriage-like relationship, the evidence of when the parties began to live together is not clear.
- [55] Ms. L. testified that they purchased a condominium together in 2000 on Anli Road (a different property than the Anli Road property discussed below), which she referred to as the Anli Garden condo. She testified that she did not contribute any funds to the purchase of this property. She testified that she did not know exactly when Mr. L. bought the Anli Garden condo, but that they had been dating for over a year. She testified that after Mr. L. purchased the property, they had renovations done. She did not know how long they took and so could not say when they moved in, but she estimated that the renovations took months. Ms. L. was not able to answer questions about the renovations such as the type of hardwood flooring that was installed.
- [56] At her examination for discovery, Ms. L. was specific that they started living together in October 1999. This is obviously different from her evidence at trial where she said the Anli Garden condo was purchased in 2000 and renovated before they moved in. The difference is significant on the issue of whether a marriage-like relationship was formed and if so, when, because the second Mingdun company was established in 1999.
- [57] Ms. L. testified that after she and Mr. L. moved into the Anli Garden condo, she and Mr. L. shared the master bedroom, Mr. L.'s grandmother had a bedroom, and X.L., who was in university at this time, had a bedroom when she was not living in the dorms. Ms. L. testified that she sold the apartment that had been assigned to her by her employer and was close to where she worked. However, she was not precise as to when she sold it, just that it was after she and Mr. L. moved into the Anli Garden condo. She also testified that she kept the apartment for some time after she moved in with Mr. L. and then sold it because it was sitting empty. When she was asked if she sold the apartment after she left her employment with China Post Telecommunications Equipment Company Ltd. (in 2006) and was required to sell it to another employee, she testified that she could not recall.

- [58] Ms. L. also testified that they purchased a property, referred to as the Hemu Mountain villa, and that they lived in it before they were married and after they lived in the Anli Garden condo. However, she later testified that Mr. L. purchased it and she could not remember when Mr. L. purchased it. When asked whether it was before or after they were married, she testified that she could not recall and suggested Mr. L. look at the purchase and sale agreement. Ms. L. thought they moved into it in 2004. With that testimony, she contradicted her testimony that they lived in the Hemu Mountain villa together before they were married.
- [59] I find Ms. L.'s professed inability to remember the timing and features of major events, such as moving into a newly renovated condominium with Mr. L., moving into a villa and selling her prior apartment, to demonstrate that she was not testifying truthfully about the timing of these events.
- [60] Neither Ms. L. or Mr. L. testified about whether they combined their household furnishings in the renovated Anli Garden condo or otherwise set up a residence together. There was no evidence as to how they handled joint living expenses.
- [61] Mr. L. testified that they did not live together before they were married. He testified that at times he spent the night at Ms. L.'s apartment and at times she spent the night at his apartment, including after he moved to the Anli Garden condo. Mr. L. testified that Ms. L. did not move in with him until after his divorce from his ex-wife. Mr. L. testified he did not know when his divorce was exactly because it was many years after he and his ex-wife separated. In an affidavit sworn in this matter, he deposed the divorce was in 2001. When asked about this during cross examination, he agreed that was true. He also testified that Ms. L. moved in after they were married in 2003.
- [62] X.L. testified that she only saw Ms. L. a few times over the years between when she first met Ms. L. in 1999 and when her father and Ms. L. were married in 2003. X.L. testified that in 1999 she started attending university. During her university years, she lived at her father's residence with her father, her grandmother and her cousin's husband on weekends and during holidays. She testified that her grandmother was over 80 years old and her father took care of her. X.L.'s grandmother went to her father's factory during the day and her father cooked for her in the evening. She testified that Ms. L. did not stay at her father's residence until 2003 because the apartment had only 2 bedrooms - one occupied by her father, and one occupied by her grandmother which X.L. stayed in when she was there. X.L. testified that her cousin's husband slept on the couch. This evidence makes sense for the period before Mr. L. (if not Mr. L. and Ms. L.) moved into the Anli Garden condo which had three bedrooms. X.L.'s evidence was to the effect that Ms. L. could not have lived with Mr. L. because of the small apartment in which he lived with his mother, his daughter and his cousin. Her evidence does not address the circumstances of the larger Anli Garden condo or the Hemu Mountain villa.

- [63] X.L. also testified that Ms. L. sold her apartment after she went to work for Mingdun Technology in 2006. However, it was not clear that the apartment sale was something she had first hand knowledge of. It seemed rather that this was something Mr. L. told X.L., and so I do not accept it as first hand evidence.
- [64] Ms. L. points to the following paragraph of Sigurdson's J. decision and argues that these findings of fact are binding on me:
- [9] Ms. L. and Mr. L. met in 1999 in China through a matchmaker known to Ms. L. They began living together in about 2000.
- [65] The first finding, about the matchmaker, is contradicted by the evidence of both Ms. L. and Mr. L. at the trial before me. Ms. L. testified that they met through a friend of hers. Mr. L. testified that they were not introduced by a matchmaker and testified that Ms. L. sought him out. As I have described, whether and when they began living together before marriage is in dispute. Mr. Justice Sigurdson did not engage in any analysis of evidence when stating these facts. Rather, they appear as background facts in his judgment. Courts avoid severing matters into sequential trials because of this type of situation where a background fact stated by a judge at the first trial of bifurcated proceeding becomes a disputed issue in a subsequent trial in the same proceeding.
- [66] In any event, Sigurdson's, J. statement was that the parties began living together in about 2000. He made no findings as to when a marriage-like relationship began. Even though I accept that the evidence that they stayed at each other's apartments likely evolved into living together before they were married, I am unable to determine whether Ms. L. and Mr. L. began living together in a marriage-like relationship before they were married.
- [67] In addition to the lack of evidence about establishing a joint household in the sense of furnishings, expenses and housekeeping matters, there was very little evidence about their finances prior to marriage, except that Mr. L. paid for and purchased in his name the Anli Garden condo and the Hemu Mountain villa.
- [68] There is very little evidence about their intentions around marrying or otherwise forming a relationship of lengthy, indeterminate duration. On cross examination, when Mr. L. asked Ms. L. about her intentions during the time period she testified that they were living together, she said and that they were boyfriend and girlfriend. Ms. L. testified that she became pregnant in 2000, but terminated the pregnancy because Mr. L. was still married to his first wife and she, as an unmarried person, could not get a permit to give birth.
- [69] Mr. L. testified that he did not want to marry and that they had not agreed to be married in advance but on August 28, 2003, Ms. L. arrived at his place of work and insisted that he get in the car with her. She drove to the Marriage Registration Department of the Civil Affairs Bureau, where she announced they would be married. Mr. L. testified that he was taken aback and protested but Ms. L. insisted. He testified that he did not have the proper documentation to be married. He testified that Ms. L. managed to talk the officials into

letting them be married even though they did not have their identification and papers in order. Ms. L. did not provide any evidence about their marriage ceremony or discussions about getting married. She did not contradict Mr. L.'s evidence.

- [70] X.L. testified that she did not know about the marriage until after it occurred and there was no party or celebration with regard to the marriage.
- [71] The evidence as a whole does not support the conclusion that either party formed an intention that the relationship would be of lengthy, indeterminate duration prior to marrying. I conclude that the relevant date to assess excluded assets is the date of marriage, August 28, 2003.

Date of Separation

- [72] The parties agree that they separated in late 2014 after an argument about taxes on the Dingsi Road property and the Anli Road property. The evidence is not clear on the actual date. For the purposes of resolving the matters in this trial, I find that the parties separated on December 31, 2014.

Family Property and Family Debt

Legal Principles

Family property and family debt

- [73] Part 5 of the Family Law Act addresses family property and debt. The goal of these provisions is to simplify the division of family property and debt, to render it more certain and predictable, and to divide family property and debt on a basis that better fits expectations of fairness: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 36.
- [74] The relevant provisions are:

Equal entitlement and responsibility

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

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

Family property

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

- (a) on the date the spouses separate,

- (i) property that is owned by at least one spouse, or
- (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a)(i) or from a beneficial interest referred to in paragraph (a)(ii), or from the disposition of either, or
 - (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a)(i) or from a beneficial interest referred to in paragraph (a)(ii), or from the disposition of either.
- (2) Without limiting subsection (1), family property includes the following:
 - (c) property owing to a spouse
 - (i) as a refund, including an income tax refund, or
 - (ii) in return for the provision of a good or service;
 - (d) money of a spouse in an account with a financial institution;
 - (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;
 - (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.

Family debt

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

Valuing family property and family debt

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or

(ii) of the hearing before the court respecting the division of property and family debt.

[75] In summary, the simplified and predictable regime for dividing family property and debt is, subject to an agreement that provides otherwise, all family property and debt as of the date of separation is divided equally based on the fair market value at a presumptive valuation date. As the name suggests, excluded property is not divided. A court will only depart from this regime if dividing equally would be significantly unfair. Unequal division due to significant unfairness is addressed under s. 95, discussed below.

Excluded property

[76] Family property, as defined in s. 84(1) of the Family Law Act, is limited by s. 85 which provides for excluded property as follows:

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

- (a) property acquired by a spouse before the relationship between the spouses began;
 - (b) inheritances to a spouse;
 - (b.1) gifts to a spouse from a third party;
 - (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
 - (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
 - (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
 - (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

- [77] Section 85(1)(g) of the Family Law Act permits tracing of excluded property that has been disposed of into existing assets. Where property that is alleged to be excluded property has been dissipated, as opposed to disposed of into existing property, then no excluded property claim can be made in relation to it: *C.P. v. K.W.A.*, 2018 BCSC 332 at para. 100. If excluded property has decreased in value, the party who has (or had) an interest in that excluded property, is not entitled to seek an allocation of family property to make up the loss in value: *Remmem v. Remmem*, 2014 BCSC 1552 at para. 29. However, the increase in value during the marriage of any excluded property is family property: Family Law Act, s. 84(2)(g).
- [78] Mr. L. argues that all of his corporate interests are excluded property because he started his first Mingdun company before he met Ms. L., and all of the value in the Mingdun companies is due to his pre-relationship efforts. Ms. L. argues that their marriage-like relationship began by the time the second Mingdun company was founded and so only the interest in the first Mingdun company is excluded property. Ms. L. argues that Mr. L. has not led evidence to show that the interest in the Mingdun companies can be traced from one company to another. She argues that it is not enough to prove that the companies were involved in the same line of business. Mr. L. must prove that the excluded property in one company can be traced to the other with clear and cogent evidence and he has not done so.
- [79] Section 85(2) of the Family Law Act provides that the onus is on the spouse who claims that the property is excluded to demonstrate that: *A.A.P. v. G.T.F.*, 2015 BCSC 662 at para. 67. The burden of proof is the balance of probabilities: *Shih v. Shih*, 2017 BCCA 37 at para. 42. In *Shih*, at paras. 43-44, the Court of Appeal explained that while clear and cogent evidence is required to meet the burden of proof, the trial judge is entitled to draw reasonable inferences from the evidence that is less certain in order to do justice between the parties. If documentary evidence is not available, the testimony of a party, subject to scrutiny for credibility, can be led as to the transactions that support the argument that certain property is excluded property or derived from excluded property. The Court of Appeal has also explained that s. 85(1)(g) of the Family Law Act, by using the words "derived from", allows for a more flexible approach to identifying excluded property in the property held by the parties at the time of separation than do formal common law rules of tracing: *Jaszczewska* at para. 59. See also *C.P.* at paras. 93-99.
- [80] Applying these principles, and given that I have found that the date of marriage is when the relationship between the parties began, the proven interests that Mr. L. had in his corporate entities on August 28, 2003 are excluded property. I reject Mr. L.'s blanket position that all of his corporate interests are excluded property. The values of excluded property at the time of marriage must be compared values at the applicable valuation date for division in order to determine the amount by which the value of excluded property has increased, if any, because the increase is family property.
- [81] Ms. L. argues that Mr. L. has "clouded the history of his business in such a manner that it is difficult to tell whether the corporate assets he held at separation are truly a derivation of an asset in existence when the relationship between the parties began." Ms. L. asserts that the

Mingdun companies experienced financial difficulties. She argues that given the financial difficulties, and given Mr. L.'s efforts to shield his corporate interests from his first wife, I should not accept that there is evidence of any value in any interests that Mr. L. had in the Mingdun companies prior to the commencement of their relationship.

- [82] With regard to financial difficulties, Ms. L. testified that she was charged with raising money when finances or cash flow was tight. She testified that she arranged for loans from herself, her family members and from friends. She testified that they would transfer the funds to her personally or to Mr. L. personally and then she would transfer them to the company's account. She would then repay them out of the company's account, sometimes directly and sometimes through her own account or Mr. L.'s account, when the company could afford to do so. The evidence showed large amounts being deposited into and withdrawn from corporate bank accounts on many occasions, demonstrating large sums of money changing hands for only days or weeks at a time. Ms. L. identified these as examples of these transactions. She testified that she undertook these transactions with the knowledge and at the request of Mr. L. She also testified that she asked the company she formerly worked for, China Post Telecommunications Equipment Company Ltd., to bridge the gaps in cash flow experienced by some of the Mingdun companies by issuing letters of credit. I find this evidence, without corroboration from any of these individuals or anyone at China Post Telecommunications Equipment Company Ltd., to not make sense and I do not believe it. Her evidence as to whether there were promissory notes or other documents pertaining to these transactions was not clear. She testified that the general accounting records would contain a ledger recording loans made by family members that would show funds coming in and going out.
- [83] I do not believe this evidence because it does not make sense that such large sums would be transferred so casually by persons who had no stake in any of the Mingdun companies and no reason to do so except their relationship with Ms. L., who was not a shareholder in any Mingdun company. None of these persons testified to confirm Ms. L.'s evidence. It does not make sense, and together with other evidence, caused me to conclude that the business dealings she described, and some described by Mr. L., were not described accurately.
- [84] The evidence led by Ms. L. about Mr. L.'s attempts to shield his assets from his first wife, and the timing of that, was not reliable given that she answered many questions about other matters around that time frame by saying she did not recall. Given her willingness to speculate about things she said she had no knowledge of, her evidence did not persuade me to make a finding that Mr. L attempted to shield corporate assets from his first wife.
- [85] In addition, while Ms. L. was not explicit in what she meant by "clouding", I presume that she means that it is not possible to determine that his current assets are derived from his financial contributions to the Mingdun companies. In my view, Ms. L.'s approach is too exacting. Companies pool funds received from people who invest or contribute capital with other funds. For the purpose of determining whether family property is derived from excluded property, the investor's property is the value of his or her interest in the company,

reflected in shares or shareholders' loans, not the purposes to which the company puts the investment. While I agree that the burden is not satisfied by merely showing that the corporate entities were in the same line of business with the same or nearly the same owners, in this case there is evidence that each company was the successor of the business of the predecessor company and the successor companies acquired all of the production assets of the predecessor. In addition, for most of the companies, there is evidence of capital contributions made by Mr. L. or capital asset values at particular times.

- [86] I do not accept Mr. L.'s assertion that his excluded property had a higher value than the evidence of the capital contributions. While I accept that capital contributions may not reflect the true value of corporate holdings, there is no evidence on which to arrive at higher valuations except in a few exceptions that I will address below.
- [87] In addition, in some circumstances, the evidence does not allow me to follow the trail of all of Mr. L.'s capital contribution in one company to a successor company or to currently held property. In such circumstances, the dissipated property is not excluded property for the purposes of s. 85(1)(g).

Valuation date

- [88] Section 87 of the Family Law Act provides that the value of family property is determined as of the date of the hearing or as of the date of a separation agreement between the parties, but also provides the court discretion to depart from those dates. In *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76, the Court of Appeal explained that a departure from the presumptive date of valuation is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the Family Law Act. As a result, such a departure requires a finding that it would be significantly unfair to value the property other than on the s. 87 presumptive valuation date. Where the evidence does not demonstrate the value on the presumptive valuation date, the court should use the value that is closest in time to the presumptive valuation date: *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 69.
- [89] The parties made several agreements. Mr. L. seeks to enforce the May 3, 2015 agreement and Ms. L. seeks to set it aside and seeks equal division based on trial date values. If the agreement is set aside, Mr. L. seeks unequal apportionment in his favour essentially on the terms of the agreement. The question arises as to whether the date of that agreement is the date for valuation even if the agreement is set aside, or whether the date of trial then becomes the presumptive date of valuation. The parties commissioned valuation reports that provide values for many of the real properties as of May 2015, the month in which three of the agreements were made, as well as at the times the reports were prepared, which was about six months prior to trial.

[90] There do not appear to be any cases that have addressed this issue squarely. In *Bilawchuk v. Bilawchuk*, 2014 BCSC 2067, Madam Justice Fenlon, then a judge of this court, addressed the situation where the parties entered into two consent orders. Madam Justice Fenlon held that neither order governed the issue before her in the circumstances and that the proper date of valuation was the date of trial, subject to the discretion of the court to use a different date (at para. 23). However, Fenlon J. did not expressly consider whether the consent orders were agreements and whether the dates of either of those orders should be used to value the debts in issue even though the orders were not enforceable in the circumstances. The effect of her reasoning was to use the trial date as the valuation date, but to vary it based on the evidence, in order to achieve a fair outcome.

[91] In *S.A.H. v. I.B.L.*, 2018 BCSC 544, Madam Justice Shergill addressed a situation in which the parties had an interim separation agreement, but each party sought the court to determine value as of the date of separation, although each submitted different dates as the date of separation. Madam Justice Shergill said as follows about whether the presumptive date was the date of trial or the date of the interim separation agreement:

[77] Neither party addressed whether the Interim Separation Agreement constituted an agreement pursuant to s. 87(b)(i). Clause G of the Interim Separation Agreement stipulates that:

Neither party is prejudiced by the terms of this agreement and each party is free to seek different arrangements respecting the Family Home, the Mortgage and spousal support, in either a final separation agreement or an order of the Court.

[78] The Interim Separation Agreement divided family property and family debt such that, pursuant to the agreement:

- the claimant transferred her interest in the family home (which was previously registered solely in her name), to the respondent;
- the parties retired the joint family debt of \$71,000 (being the existing mortgage);
- the respondent refinanced the mortgage in his name alone;
- the respondent paid the claimant \$185,000 out of existing equity in the family home, to facilitate the claimant's purchase of her own home; and
- the claimant purchased a condominium unit solely in her name, moving into it on October 1, 2013.

[79] I do not view the Interim Separation Agreement as binding on the parties with respect to their positions at trial regarding the family home, mortgage and spousal support. But where, as in here, the parties positions are consistent with the Interim Separation Agreement, s. 87(b)(i) is invoked. Doing so permits this court to put into effect the wishes of the parties.

[92] Neither of these decisions address the interpretation of s. 87 that is raised by the facts of this case. Interpreting s. 87 in a manner that is consistent with the jurisprudence pertaining to enforcing or setting aside agreements under s. 93 of the Family Law Act, discussed below, I conclude that the values of the property and debt at separation are relevant to the exercise of determining whether to set aside the May 3, 2015 agreement pursuant to s. 93 of the Family Law Act. If the agreement is not set aside, then the valuation date is presumptively the date of the agreement. If the agreement is set aside, then the presumptive date for valuing the property and debts is the date of trial, subject to the discretion of the court to depart from that date if that would create significant unfairness.

Unequal division

[93] Section 95 of the Family Law Act addresses the unequal division of family property and debt where equal division would be significantly unfair:

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

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [94] In *Remmem* at para. 44, Mr. Justice Butler described significant unfairness as "compelling or meaningful having regard to the factors set out in s. 95(2)." In *Jaszczewska* at para. 42, the Court of Appeal said that significant unfairness "requires something objectively unjust, unreasonable or unfair in some important or substantial sense." The Court of Appeal reasoned, at paras. 43-44, that the Legislature had intended to limit the circumstances in which a departure from equal division could be justified.
- [95] In particular, s. 95 of the Family Law Act narrows the circumstances in which differing contributions to the financial circumstances of the family are considered, as the Court of Appeal recently re-emphasized in *Khan v. Gilbert*, 2019 BCCA 80 at paras. 25-36. In doing so, the Court of Appeal repeated the statement of principles in *Jaszczewska* and endorsed decisions of this court, including *Slavenova v. Rangelov*, 2015 BCSC 79 at para. 60, where Mr. Justice Savage made the observation that exactly equal contribution to the financial circumstances of a family is exceptional. It follows that if unequal contribution were to result in unequal apportionment, the presumption in the Family Law Act would become, in effect, an exception, and defeat the objectives of simplicity and certainty underlying the property division regime in the Family Law Act.
- [96] In *Khan* at para. 32, the Court of Appeal concluded that cases that had permitted unequal apportionment due to differing contributions had "involved marked, prolonged and intentional or unexplained disparities in contribution to family burdens".
- [97] In *G.P. v. M.P.*, 2015 BCSC 1757 at para. 130, this court held that the approach under s. 95(2) is not a "wide ranging examination of each spouse's contribution to the accumulation of family assets and their respective capacities", citing *Nearing v. Sauer*, 2015 BCSC 58 at para. 141.

Identification and Valuation

- [98] In the event that the May 3, 2015 agreement is not enforced, Mr. L. asserts that the family property is largely derived from excluded property and should be allocated to him and/or should be divided unequally under s. 95 because he was primarily, if not exclusively, responsible for the accumulation of the wealth in the corporate assets.

- [99] Where unequal apportionment is sought, the approach is to determine what would result from equal apportionment based on notional division, and then consider whether that results in substantial unfairness: Remmem at paras. 30, 43.
- [100] The determination of the enforceability of the May 3, 2015 agreement includes analyzing its fairness compared to the objectives of the Family Law Act. These objectives include encouraging "parties to a family law dispute to resolve the dispute through agreements" (s. 4(b)) and the certainty, predictability and clarity created by the simplified equal division regime (Jaszczewska at para. 36). Provided an agreement is entered into fairly and does not result in significant unfairness, the court should respect "the parties' autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns": De Medeiros v. Hodgson, 2018 BCSC 408 at paras. 76-77, citing Miglin v. Miglin, 2003 SCC 24 at para. 66.
- [101] Accordingly, the results of equal division may be relevant to the determination of whether or not to enforce the May 3, 2015 agreement. For these reasons, I will first address identification and valuation of family property and debt, the arguments about excluded property, the value of the family property and debt at the time of the May 3, 2015 agreement and at the time of trial, and whether there should be any divergence from either of those presumptive dates. The value of two equal shares of the family property and debt will inform the s. 95 arguments and the enforceability of the agreement.

The Mingdun companies

- [102] Mr. L. is a professional engineer. He was employed as an engineer for several years before founding the first of the Mingdun companies. The Mingdun companies manufactured products used in security systems, automobiles, railways and high speed trains, including bulletproof glass, windows and windshields. The individual companies are as follows:
- a) Beijing Mingdun New Material Technology Development Centre ("Mingdun New Material") founded in 1996;
 - b) Mingdun Tong Chuang New Technology Company Limited ("Mingdun Tong Chuang") founded in 1999;
 - c) Beijing Mingdun Technology Company Limited ("Mingdun Technology") founded in 2003; and
 - d) Mingdun He Bei Technology Co. Ltd. ("Mingdun He Bei") founded in 2013.
- [103] These companies were active at different times and there are issues pertaining to excluded property which make the particular entity and time relevant. Despite this, when testifying about one or more of these entities, both Mr. L. and Ms. L. often testified about "the company" or "Mingdun" without identifying which company they were referring to. I infer they were referring to the corporate entity that was active during the period of time regarding which they were testifying. When I refer to a specific company, it is on the basis

of testimony specific to that company or an inference I have drawn from the totality of the evidence.

- [104] The companies that were active during Mr. L. and Ms. L.'s marriage were Mingdun Tong Chuang, Mingdun Technology and Mingdun He Bei. During most of the period of time from when the various companies were founded up until the parties separated, Mr. L. was the majority shareholder. He held various positions such as chairman of the board, president and general manager. He was the chief engineer. He testified that he was the legal representative of each company in accordance with Chinese corporate rules. The positions he held changed over time. In particular, when he immigrated to Canada, new investors came on board, and he was no longer the majority shareholder in Mingdun Technology.
- [105] At the time of the trial, Mr. L. had an ongoing interest in one company, Mingdun Tong Chuang. Mr. L. asserts that all of his current property (including non-corporate property) is traceable to pre-marriage corporate interests he held, and because these corporate interests were related to each other, it is necessary to review the history of Mr. L.'s interests in each of these companies. In addition, Mr. L. asserts that Ms. L. received the entirety of the proceeds of the 2014 sale of a portion of his shares in Mingdun Technology, and has not accounted for what she did with those proceeds. Ms. L. agrees this issue is relevant to the identification of family property but asserts that she has accounted for what she did with the share sale proceeds and that she did what Mr. L. told her to do.
- [106] Mr. L. has not produced financial statements for any of the Mingdun companies in which he has been a shareholder, in particular for Mingdun Tong Chuang, Mingdun Technology or Mingdun He Bei, in which he held shares at the time of separation. Mr. L. testified that he was not able to because at the time he was requested to do so, he did not work at the companies and because he lost control of Mingdun Tong Chuang. When it was put to him that he was mixing up Mingdun Technology and Mingdun Tong Chuang in that response, he then stated that Ms. L. has the documents for Mingdun Tong Chuang. When asked if he ever asked the other shareholder in Mingdun Tong Chuang for the financial statements, he answered by describing operational and logistical difficulties the company has in establishing a manufacturing facility.
- [107] I will discuss each company in turn.

Beijing Mingdun New Material

- [108] This is the first company that Mr. L. founded. It was located in the Haidian District of Beijing. On initial registration, its capital was ¥500,000. The company was de-registered at some time after Mingdun Tong Chuang was founded in 1999.

- [109] Mr. L.'s capital investment in Mingdun New Material is excluded property as it was made prior to marriage. In the court proceedings pertaining to Mr. L.'s divorce from his first wife, his interest in this company was valued at ¥1,953,000 in 1999. I find that the value of the excluded property is ¥1,953,000. However, Mr. L. did not lead any evidence that permits a finding that his current assets were derived from the entirety of that interest.

Mingdun Tong Chuang

- [110] Mr. L. testified that there was not enough land in the Haidian District for the type of factory he needed and so he moved his production factory to the Changping District where he could lease enough land. He had to incorporate a new company because of tax rules. He founded Mingdun Tong Chuang in 1999.
- [111] Mr. L. testified that the Mingdun New Material and Mingdun Tong Chuang are essentially the same company. He testified that they shared the same trademark and the assets of Mingdun New Material were assumed by Mingdun Tong Chuang.
- [112] Mr. L. testified that private companies in China require two natural persons as shareholders. He and his brother, Y.L., were the first shareholders of Mingdun Tong Chuang. The company was established with capital of ¥1 million, allocated ¥800,000 to Mr. L. and ¥200,000 to Y.L. Their shareholdings were in the same proportion. I find that Mr. L.'s capital contribution to Mingdun Technology is derived from his capital contribution to Mingdun New Material.
- [113] Mr. L. testified that in 2000 he applied for a patent for his technology. The patent was not approved until 2004, but he testified that he used the patent as the basis for his increased capital contribution to Mingdun Tong Chuang in July 2003. He testified that at that time he had accountants prepare a valuation of it for the purpose of establishing the capital value of Mingdun Tong Chuang. The valuation report valued the pending patent at ¥9 million.
- [114] On August 6, 2003, Y.L. transferred his ¥200,000 interest in Mingdun Tong Chuang to Mr. L.'s daughter, X.L. Up until that time, Mr. L. owned 80% of the shares and his brother owned 20%. Mr. L. testified that Ms. L. was in charge of Mingdun Tong Chuang's financial affairs at that time and without Mr. L. or X.L. becoming aware, Ms. L. did something "fishy" so that Mr. L. wound up with 90% of the shares of Mingdun Tong Chuang and his daughter X.L. only acquired 10% of the shares from her uncle. Despite this allegation, Mr. L. acknowledged that around the same time, he transferred his initial ¥800,000 capital investment in Mingdun Tong Chuang to X.L. Because Mr. L. had ¥9 million invested in the company (the value of the patent), the investment ratio was 9/10 by Mr. L. and 1/10 by X.L. Mr. L. testified that using the patent to increase his capital contribution to the company was a tactic employed by Ms. L. He also testified that he knew this would be done in advance and that he just went with the flow. Ms. L. denies having anything to do with this.

- [115] The evidence on this was substantial but I do not need to recite or address the details of it because it does not change the findings I make about Mr. L.'s pre-marriage interest in Mingdun Tong Chuang, which could affect the determination of excluded property.
- [116] I find that when this restructuring took place, Mr. L. disposed of his ¥800,000 excluded property interest in Mingdun Tong Chuang by giving it to his daughter, X.L. As a result, his ¥800,000 capital no longer existed in the hands of Mr. L. at the time the relationship began.
- [117] Mr. L. also contributed his pending patent to Mingdun Tong Chuang. Ms. L. argues that a pending patent cannot be excluded property. The evidence shows that the application for the patent was made in 2000, prior to the marriage. There is no challenge to the evidence that it was based on Mr. L.'s pre-marriage endeavours. The accounting opinion that was prepared to verify the value of the increased capital in Mingdun Tong Chuang due to the pending patent was prepared in July 2003. The amendment to the articles of association of Mingdun Tong Chuang declared that Mr. L. invested ¥9 million in the form of industrial property rights. Ms. L. has not cited any authority that precludes a finding that the pending patent had value and was excluded property.
- [118] I find that in July 2003, Mr. L. invested his pending patent, then valued at ¥9 million, into Mingdun Tong Chuang. He testified he contributed another ¥1 million in cash for a total of ¥10 million, which total accords with the documents showing the capital value of Mingdun Tong Chuang at that time. However, the evidence shows that ¥1 million of that was contributed by X.L., who had been given Mr. L.'s ¥800,000 initial capital contribution and her uncle's ¥200,000 capital contribution.
- [119] I conclude Mr. L.'s initial investment in Mingdun Tong Chuang was made prior to his marriage to Ms. L. and would be excluded property except that he gifted it to his daughter. I conclude that his patent investment in Mingdun Tong Chuang was excluded property that was valued at ¥9 million when it was made prior to their marriage.
- [120] In 2004, Mingdun Technology was incorporated and took over the active business of Mingdun Tong Chuang. Mingdun Tong Chuang was not active in technology or production between 2004 and when the parties separated at the end of 2014, but did purchase the Anli Road property in 2010. Mr. L. testified, and I accept his evidence because it was not challenged by Ms. L. and it fits with the preponderance of probabilities, that all of Mingdun Tong Chuang's production assets were transferred to Mingdun Technology when it took over the active business of Mingdun Tong Chuang in 2004. As discussed below, the initial capital of Mingdun Technology was ¥1 million, ¥900,000 of which was contributed by Mr. L.
- [121] Accordingly, after 2004, there was ¥8.1 million in excluded property in Mingdun Tong Chuang that was not transferred to Mingdun Technology. There is no evidence that allows me to determine what happened to that property. In particular, no information has been disclosed about Mingdun Tong Chuang's activities prior to Mr. L.'s 2018 re-investment, with the exception of the purchase of the Anli Road property in 2010. Mr. L. did not argue that his excluded property in Mingdun Tong Chuang should be traced into the Anli Road

property.

- [122] Throughout their marriage and at the time of separation, Mr. L. held 90% of the shares in Mingdun Tong Chuang. He testified that he currently holds 20% of the shares in Mingdun Tong Chuang. That is confirmed by evidence of the shareholdings of the company shortly before trial. Mr. L. testified that the reduction in his shareholding from 90% to 20% occurred after he sold his remaining shares in Mingdun Technology in 2018, but he did not provide any information as to why that was or what value his 90% interest had at the time of separation and subsequently. He was asked about it at his examination for discovery but did not respond other than to say he was not able to obtain the information necessary to respond.
- [123] Mr. L.'s lack of disclosure in relation to his interest in Mingdun Tong Chuang, coupled with his position that the entirety of his business interests are excluded so he does not have to provide information about them, precludes a finding that any of Mr. L.'s current interest in Mingdun Tong Chuang relates to the ¥8.1 million pre-marriage interest in Mingdun Tong Chuang that did not transfer to his capital contribution in Mingdun Technology. Mr. L. did not discharge his burden to establish that portion of his interest in Mingdun Tong Chuang is part of any family property in issue in this case.
- [124] Mr. L. testified that in 2018, when he sold his remaining shares in Mingdun Technology, some of the Mingdun Technology employees and technical professionals had to return to work for Mingdun Tong Chuang. He testified that because there was no equipment or capital in that company, he had to use his own funds to help them. He testified that he used the proceeds from the sale of a property in issue in this case, the Dingsi Road property, to pay the lease on the land that Mingdun Tong Chuang rents from the government, the water and electricity bills and the employees' salaries. However, according to the document he prepared showing his financial contributions to the Mingdun companies between 2014 and 2018 (exhibit 5), the only money he sent to Mingdun Tong Chuang in this timeframe was an investment in 2018 of ¥6.5 million from the proceeds of the 2018 sale of his Mingdun Technology shares. I conclude that there is no reliable evidence to support the assertion that Mr. L. used the sale proceeds of the Dingsi Road property to pay the expenses of Mingdun Tong Chuang. Even if there was, it was an unauthorized use of such funds given a February 2016 order made at a judicial case conference prohibiting the parties from disposing of assets at issue in this proceeding, other than with consent.
- [125] Mr. L. testified that he invested ¥6.5 million in Mingdun Tong Chuang in 2018 because other suppliers to the Chinese railway system wanted to work with him to make products through Mingdun Tong Chuang. He described this investment as planting a seed to see if it will grow. He testified that he does not have any current expectations of the profitability of this investment. As of September 2, 2019, the National Enterprise Credit Information Publicity System described Mingdun Tong Chuang as having ¥23 million in registered capital.

- [126] Mr. L. made this investment without seeking the approval of Ms. L. despite the February 2016 order. Mr. L. submits that he did not need to seek Ms. L.'s approval because he had his position in Mingdun Tong Chuang before the marriage and so his shares in Mingdun Tong Chuang and Mingdun Technology are not family property and he was not prevented by the order from dealing with them.
- [127] That conclusion is incorrect. Mr. L. cannot reincarnate his previous investment in Mingdun Tong Chuang, that was excluded property, through a more recent investment made from the sale of family property. I conclude that ¥6.5 million that Mr. L. invested in Mingdun Tong Chuang in 2018 is from the proceeds of the sale of the shares of Mingdun Technology. The Canadian dollar value of this investment is \$1,300,000.

Mingdun Technology

- [128] Mingdun Technology was incorporated on December 6, 2004. Mr. L. testified that the reason for the incorporation of this company was because Mingdun Tong Chuang had exhausted the preferential tax treatment available to it and so he incorporated a new company to be able to exercise a tax exemption.
- [129] Mr. L. testified that at the time Mingdun Technology was incorporated, it took over all of the assets and business of Mingdun Tong Chuang, except the lease Mingdun Tong Chuang had with the government. The articles of incorporation show the starting capital of the company to be ¥1 million, ¥900,000 of which was contributed by Mr. L. and ¥100,000 of which was contributed by X.L. Mr. L. testified that this was a transfer of the capital from Mingdun Tong Chuang and that neither he nor X.L. had that amount of cash to invest.
- [130] I conclude that ¥900,000 of the ¥9 million excluded property that was Mr. L.'s investment in Mingdun Tong Chuang was transferred to Mingdun Technology.
- [131] Mr. L. testified that his role was research and development for the company. He testified that he was not familiar with accounting and finances and so after they were married, Ms. L. took care of the accounting and financial matters for the family and for the company.
- [132] In 2006, Mr. L.'s sister-in-law, who worked for Mingdun Technology, was sick. Ms. L. testified she left her position with China Post Telecommunications Equipment Company Ltd. and went to work for Mingdun Technology to fill the sister-in-law's position, at the request of Mr. L. She worked until 2013 when she, Mr. L. and B.L. left China for Canada. Ms. L. testified that she gave up a job that she was successful at and made much more money at to do so. She also testified that Mr. L. I accept her evidence in this regard because it was not challenged by Mr. L., and it accords with the preponderance of evidence that Mr. L. had many family members working at the Mingdun companies, including his brother, his nephew, his daughter, his son-in-law and his sister-in-law.

- [133] Ms. L. testified that she worked in an administrative role for Mingdun Technology. She testified that Mr. L. put her in charge of accounting, in possession of the means by which banking transactions were conducted, called USB keys, and in control of some of the corporate seals. She testified that she developed automated procedures for financial transactions that had been done manually. She testified that she had authority and the USB key for payments under ¥100,000 and Mr. L. had the authority and USB key for payments over ¥100,000.
- [134] Ms. L. testified that she also automated the process for use of the company seals so that when they were required, a request was made through the computer system she developed. For the seals that she controlled, when she saw the application, if she approved it, she would place the company seal as required. She testified that to be put in charge of a seal is very important within Chinese corporations.
- [135] Ms. L. also testified that she was involved in the importation of raw materials for use in Mingdun Technology's manufacturing. She testified that material importation involved posting a letter of credit for the purchase with the vendor.
- [136] As described above, Ms. L. testified that she was involved in obtaining financing for Mingdun Technology. For the reasons given already, I do not accept Ms. L.'s evidence about the nature of the transactions, but I do accept that Ms. L. was involved in these transactions and the work she did was work that Mr. L. asked her to do.
- [137] Ms. L. testified that the frequency that she worked and the hours that she worked changed when she was pregnant with B.L. and after she gave birth in 2009. She no longer physically went into the office but she was still in charge of the USB keys and the seals, the latter of which were kept at home.
- [138] X.L. was a shareholder of Mingdun Technology and was employed there commencing in December 2008, as was her husband. Her first position was secretary of the board, and then she became the deputy general manager, in which she was in charge of customer relations, purchasing and marketing. She testified that the work was hard, involving long hours. She testified that Mr. L. often worked until two or three in the morning at the factory. He focussed his efforts on research and development, technology and product development.
- [139] X.L. testified that Ms. L. started working for Mingdun Technology on an occasional basis before she started working fully with Mingdun Technology in 2006. X.L. testified that Ms. L.'s title was dean of office, which was a middle level position in the accounting department where she was in charge of money. She testified that some of Ms. L.'s duties were very important, including holding company seals.
- [140] The evidence is uniform that Mr. L. was devoted to the Mingdun companies and that he worked extremely hard on their businesses. Mr. L., through cross examination of Ms. L., through X.L.'s evidence and through his own evidence attempted to diminish the evidence about Ms. L.'s role and importance in the Mingdun companies.

- [141] The evidence pertaining to Ms. L.'s role is relevant to Mr. L.'s claim for unequal apportionment that he advances on the basis that he was solely responsible for the couple's accumulation of wealth through the Mingdun companies. I accept, as did Sigurdson, J., that the wealth was accumulated through Mr. L.'s engineering talent, entrepreneurial spirit and work ethic. I also accept that Ms. L. did what Mr. L. asked her to do and at the time he asked her to do it, he trusted her with significant responsibility and asked her to sacrifice her own successful career, which she did. I reach this conclusion notwithstanding that I do not accept all of her evidence about what she did.
- [142] In 2013, Mr. L. began to look for investors in Mingdun Technology because the lease payments for the factory tripled due to government policy to reduce pollution in Beijing. Mr. L. decided to relocate the factory to Hebei city and he needed capital investment to do so. In June 2013, Mr. Yang invested ¥20 million in Mingdun Technology and purchased 25% of Mr. L.'s shares for a further ¥20 million.
- [143] Mr. L. directed Mr. Yang to pay ¥18 million of the share purchase funds to Ms. L. The reason for this is unclear. When asked why, Ms. L. said she did not know why, but explained that Mr. L. was selling his shares and the money had to be sent somewhere.
- [144] The accounting for those funds is in issue. Despite that Mr. L.'s assertions regarding this money is an extension of his embezzlement theory, Ms. L. concedes that the ¥20 million share sale was so close to the time of separation that the funds must be accounted for as part of the exercise of identifying, valuing and dividing family property.
- [145] Mr. L. agrees that Mr. Yang paid ¥2 million of the share purchase transaction directly to Mr. L., which he transferred to Ms. L. The parties agree that Mr. Yang or his company paid the balance, ¥18 million, to Ms. L. in several installments. Mr. L. testified that Ms. L. transferred ¥6.75 million back to Mingdun Technology, but he also testified that he did not know that she did that at the time and he should have known, since he was the chairman of the board and the largest shareholder. Ms. L. testified that she transferred funds to Mingdun Technology at Mr. L.'s direction because Mingdun Technology needed cash and Mr. Yang's investment of ¥20 million, which was in addition to his purchase of Mr. L.'s shares, was delayed.
- [146] Mr. L. further testified that in 2014, Ms. L. was still in charge of accounting for Mingdun Technology, and transferred large sums from Mingdun Technology's bank account to her personal account. In asserting this, he agrees that some of these funds were transferred from Mingdun Technology into accounts in his name and some into accounts in Ms. L.'s name. He says that he had no knowledge of the accounts in his name until this litigation. He testified that Ms. L. must have opened those accounts in his name and somehow transferred the funds to herself.
- [147] Ms. L. testified about a document she prepared in late 2014 when Mr. L. asked her what happened to the ¥18 million that Mr. Yang transferred to her and she stated that it accurately sets out the disposition of those funds. That document accounts for ¥17.85

million, including ¥9 million sent to Mingdun Technology and then sent from Mingdun Technology into bank accounts in the names of Mr. L. and Ms. L. in 2014. It includes ¥9.6 million used to purchase property, which Ms. L. testified was the Wilson Avenue property in Burnaby and a property at 2126 W. 34th Avenue in Vancouver which they purchased in 2014 and intended to renovate or rebuild. The accounting states that ¥2.1 million was used for "currency exchange" without accounting for how the currency that was exchanged was used. Ms. L. testified that some of that money was sent to her account and some to Mr. L.'s account. Ms. L.'s document and explanation leaves ¥2.25 million unaccounted for - the ¥2.1 million used for currency exchange and the ¥150,000 that Ms. L. testified was remaining when she prepared the accounting. She testified that she used the unaccounted amount for "household expenses", such as new furniture, occasioned by the move to Canada.

- [148] It is not clear whether Mr. L. is alleging that Ms. L. misappropriated all ¥18 million of these funds or all of them less the amount used to purchase their Wilson Avenue property and the W. 34th Avenue property. In any case, Mr. L. did not assert misappropriation at the time Ms. L. gave him the explanation or for many years after that, including when he and Ms. L. negotiated the May 3, 2015 agreement. He did not assert it when Ms. L. refused to comply with the May 3, 2015 agreement. He did not assert it when he commenced this action. He first asserted it in May 2016 in an action brought in the People's Republic of China. At his examination for discovery in this case, he explained that he forgot about it until May 2016.
- [149] I do not accept the evidence that Mr. L. forgot about it. He testified that Ms. L. did the at his request when he wanted to know how much cash they had to pay the taxes occasioned by the transfer of the Dingsi Road property transfer, an issue he said that caused him to decide they must end their marriage. It defies logic to say he forgot about what happened to the ¥18 million for several years while the parties negotiated the terms of their asset division and then litigated that issue. Putting aside Mr. L.'s evidence that the accounting of these these funds was key factor in his decision to end their marriage, it defies logic that Mr. L. could overlook that ¥18 million, the proceeds of the first share sale he did in the history of the companies he built from nothing, had gone missing.
- [150] I do not accept Mr. L.'s evidence and suppositions because they defy logic and because of the overall concerns I have with his credibility. As discussed above, I also have concerns with Ms. L.'s credibility. However, in this circumstance, her evidence is supported by a handwritten document that both she and Mr. L. testified she prepared relatively contemporaneously with the events it records and which she prepared at Mr. L.'s request to explain how much money they had. I find that Mr. L. directed the funds be paid back to Mingdun Technology and then to the bank accounts in his name as Ms. L. testified.
- [151] Nevertheless, ¥2.25 million of these funds are not adequately accounted for. I will address this further below in discussing cash and bank accounts.

- [152] Mr. L. testified that after Mr. Yang's investment in mid 2013, Mingdun Technology still required more investment because Mr. Yang's investment was not sufficient to complete the entire project. Mingdun Technology entered into an investment agreement with Mr. Kong dated July 16, 2014. Mr. L. signed the investment agreement as the legal representative of Mingdun Technology. A term of the investment agreement is that the company's valuation was ¥126,666,700 as of July 16, 2014. Mr. L. does not agree that this is the value of the company, but the valuation based on which he agreed to sell shares.
- [153] As a result of the financing, Mr. Kong added capital to the company and Mr. L.'s shareholding decreased to 46.51% of all issued and outstanding shares of Mingdun Technology. Mr. L. transferred 8.81% of the outstanding shares he held to employees whom he considered key employees. He explained that in China, when a controlling shareholder is reducing his investment, it is common for that shareholder to gift shares to employees who have made a contribution. This evidence was not contradicted or challenged by Ms. L. and I accept it. Mr. L.'s shareholding stood at 37.7% after these gifts.
- [154] Mr. L. testified about disputes that arose between him, Mr. Yang and Mr. Kong in 2015 pertaining to loans that Mingdun Technology took in 2014 and 2015. Mr. L. testified that as a result of misdeeds regarding these loans, he insisted on an audit of the company, to which the other shareholders agreed but subsequently thwarted by not submitting the records necessary for the audit. He testified that as a result of the misdeeds and mismanagement, the company has not been able to continue its operations and has lost many projects. Mr. L. testified that he refused, as legal representative, to approve more loans. He testified that the other shareholders reduced his salary from ¥250,000 to ¥3,500 per month. He testified that Ms. L. and the shareholders agreed that they would waive their pre-emptive rights to purchase his shares in favour of her claim for them in the litigation that Mr. L. brought in the People's Republic of China. He testified that the meeting that the other shareholders held to do this was invalid as he was not in attendance.
- [155] Ms. L. did not obtain Mr. L.'s shares in Mingdun Technology through the proceedings in the People's Republic of China. Mr. L. discontinued those proceedings on November 30, 2017. On September 18, 2018, Mr. L. sold his remaining shares in Mingdun Technology to Mr. Yang for ¥23,017,848. Mr. L. testified that he was forced to do so because of tax problems Mr. Yang created through loans for Mingdun He Bei, described below. Mr. L. testified that Ms. L. colluded with Mr. Yang and Mr. Kong in this regard.
- [156] The value of the Mingdun Technology shares at the time of the May 3, 2015 separation agreement is best determined through the 2014 investment agreement as 37.7% of ¥126,666,700 which is ¥47,753,345.90. Of that, ¥900,000 is excluded property traced from the pre-marriage investment Mr. L. made in Mingdun Tong Chuang. The Canadian dollar equivalent of the portion that is family property is \$9,370,669 as at May 3, 2015.

[157] Mr. L. sold his shares in Mingdun Technology for ¥23,017,848 in September 2018. The evidence is not clear why he sold them for so much less than the investment agreement reflected. Mr. L. provided significant evidence as to wrongdoings of Mr. Yang and Mr. Kong and asserted that he was forced to sell his shares and was not in a position to negotiate. X.L.'s evidence was that she was not receiving any information about the company and so she sold her shares at the same time. Mr. L. also alleges that Ms. L. was colluding with Mr. Yang and Mr. Kong to the detriment of Mr. L. I do not accept that evidence but I do accept that Mr. L. sold his shares for that amount and that was the "market value" in the circumstances of this serious fallout between himself and the new shareholders. The date of sale provides the closest valuation to the trial date.

[158] I find the trial date value of these shares is ¥23,017,848, of which ¥900,000 is an excluded asset traced from the pre-marriage investment Mr. L. made in Mingdun Tong Chuang. Mr. L. invested ¥6.5 million of the portion that was family property into Mingdun Tong Chuang in 2018. Accordingly, the Canadian dollar equivalent of the portion of Mr. L.'s shares that are family property is \$4,423,570, of which \$1,300,000 is invested in Mingdun Tong Chuang.

Mingdun He Bei

[159] According to Mr. L., Mingdun He Bei is a subsidiary of Mingdun Technology and does not own any assets itself. He testified that the employees and equipment of Mingdun Technology became the employees and equipment of Mingdun He Bei. At the time of the separation, Mr. L. had 37.7% of the shares in Mingdun He Bei.

[160] Mr. L. testified that in 2018, Mr. Yang created a situation, falsely, whereby Mingdun Technology had a debt that had to be repaid with its shares. A dispute arose, and the shares of Mingdun Technology were frozen. Mr. L. testified that caused Mingdun He Bei to halt production. This in turn created difficulties paying taxes. Mr. L. testified that he received a final notice from the Beijing tax authority, which was a very serious matter. He sold his shares in Mingdun Technology, and so effectively his shares in Mingdun He Bei, to Mr. Yang to avoid criminal charges, in September 2018.

[161] Although Mr. L.'s most recent financial statement shows that he has a 37.7% interest in Mingdun He Bei, Ms. L. accepts that this was in error. I conclude that as of May 2015, Mr. L. held 37.7% of the shares in Mingdun He Bei but their value is reflected in his 37.7% shareholding in Mingdun Technology. As of trial, he no longer held these shares and the proceeds of sale is reflected in the Mingdun Technology 2018 share proceeds.

Real estate

[162] This litigation also involves a number of real estate properties, some in Canada, others in China:

- a) E18 Hemushandzhaugn Dishifangyan, East Xiakou Town, Changping District, Beijing, referred to as the "Hemu Mountain villa";

- b) All the Layer - 1-2, Building 1101, Dingsi Road No. 88, Changping District, Beijing, referred to as the "Dingsi Road property";
- c) Period 1, Layer 3, Building 4, Anli Road No. 66, Chaoyang District, Beijing, referred to as the "Anli Road property";
- d) #1901-5833 Wilson Avenue, Burnaby, BC, referred to as the "Wilson Avenue property";
- e) 2126 West 34th Avenue, Vancouver, BC, referred to as the "W. 34th Avenue property";
- f) 16-3755 Clearbrook Road, Abbotsford, BC, referred to as the "Clearbrook Road property"; and
- g) 35893 Old Yale Road, Abbotsford, BC, referred to as the "Old Yale Road property".

Hemu Mountain villa

- [163] The documents show that Mr. L. purchased the Hemu Mountain villa on September 24, 2002. He purchased it for ¥1,307,825.00. I find that his purchase of the Hemu Mountain villa is excluded property.
- [164] In 2014, the parties had the Hemu Mountain villa appraised along with other properties they owned. As of February 24, 2014, the appraised value was ¥12,034,400. Mr. L. sold it in May 2015 for ¥7,500,000. He testified he sold it to pay for the taxes on the Dingsi Road property. He testified that he had to sell it quickly and that is why it sold at such a low price. He testified that he used the rest of the proceeds as a down payment for the Old Yale Road property.
- [165] The evidence shows that the 2014 appraisals are higher than the joint appraisals of the same properties the parties had done for this litigation valuing their properties as of May 2015. The 2014 appraisals were not tendered as expert reports in accordance with the rules on opinion evidence. I do not accept the evidence of the 2014 appraisal as indicative of the value of the property when it was sold in May 2015 or evidence that it was sold much lower than its market value.
- [166] I conclude that the value of this property in May 2015 when the May 3, 2015 separation agreement was made was ¥7,500,000. From this Mr. L.'s excluded property portion of ¥1,307,825 must be removed, making the family property portion ¥6,192,175, or \$1,238,435. I place the same value on it at the time of trial.

Dingsi Road property

- [167] The Dingsi Road property was purchased by Mingdun Technology in 2010 for ¥11,368,000. Both Mr. L. and Ms. L. testified that it was owned by Mingdun Technology prior to the parties' move to Canada in 2013.

- [168] Mr. L. testified that when Ms. L. moved to Canada in August 2013, she advised him that she had transferred this property from Mingdun Technology into Mr. L.'s name before she left China. Mr. L. testified that he expressed surprise and asked her how she was able to do that without a shareholders' resolution and without his signature as legal representative of the company. He testified that she said to not worry about that. He testified that he asked her whether she had paid the tax and she replied that if the legal representative of the company takes over the property, no tax needs to be paid.
- [169] In cross examination, counsel for Ms. L. suggested to Mr. L. that he directed Ms. L. to transfer the property to his name because he was in the course of finding new investors for Mingdun Technology and he did not want the property to belong to the new investors. Mr. L. disagreed, saying that it was never possible that the new investors would have an interest in the property, it would only ever have been the property of the original shareholders. Counsel for Ms. L. then asked, given Mr. L.'s assertion that the property should not have been transferred to him, why Mr. L. did not transfer the property back to Mingdun Technology when he learned that Ms. L. had transferred it from Mingdun Technology to him. Mr. L. testified that he did not have that option because if he transferred it back, he would have to pay the tax twice and because a company cannot purchase a property from an individual. He was then asked why he did not share the proceeds of the sale the property with the new shareholders. Mr. L. replied that he did not because of the other shareholders' unlawful conduct and because it was not his fault that the property was transferred to him.
- [170] Despite suggesting this reason for the transfer to Mr. L. in cross examination, Ms. L. testified to a different reason. Ms. L. testified that their accountant told them that after they became landed immigrants in Canada in 2011, they had to report their overseas assets. She testified that she understood that once they reported those assets, if they sold them, they did not have to pay tax on them. She testified that after receiving that advice, they wanted to transfer this property from Mingdun Technology to Mr. L. and the Anli Road property from Mingdun Tong Chuang to Mr. L. but they did not have the money to do the transfers because there was a transfer tax. After June 2013 when Mr. Yang invested in Mingdun Technology, they had the money to do the transfer. She testified that Mr. L. issued powers of attorney and letters of authorization to herself and an employee of Mingdun Technology, Ma Guo Bao, to transfer this property from Mingdun Technology to Mr. L. and the Anli Road property from Mingdun Tong Chuang to Mr. L.
- [171] Despite this evidence, when asked about an authorization letter which on its face appeared to be issued by Mingdun Technology authorizing Ms. L. to undertake the transfer, Ms. L. denied having signed the authorization, as the person being authorized. When asked if the handwritten identification of her as the authorizee was in her handwriting, she answered that she did not think so. When asked if the handwritten contact number for the authorizee was in her handwriting, she replied that she did not recall. During cross examination, Mr. L. showed Ms. L. another authorization stipulating her as the authorized person and again, she denied that it was her signature that appeared next to her name.

- [172] When asked about what authorization letter she was referring to for the transfer, Ms. L. replied that it was provided by Mr. L. and that she and Ma Guo Bao submitted it to the housing and administration bureau.
- [173] Mr. L. testified that in November or December of 2014, he received a phone call from "his company". He did not specify which one or who the caller was. He testified that his company was being sequestered by the Beijing tax authority because company assets were transferred to him without paying the proper tax. I infer this evidence was about the Dingsi Road property and Mingdun Technology. Mr. L. also gave evidence that the tax issues around the Anli Road property have never been raised by the Chinese authorities even though the transfer of that property, owned by Mingdun Tong Chuang, was undertaken in the same manner as the Dingsi Road property.
- [174] He testified that he asked Ms. L. why she said that there was no tax to be paid and she responded by asking him why that had anything to do with her and blamed the employees of the company for the situation. He testified that she told him to calm down and just offer to pay the tax authorities something and that it would be fine. He testified that he was very upset because it was a very serious situation and her attitude towards it was horrifying. It was this time that he requested Ms. L. to prepare the accounting of the proceeds of the sale of his Mingdun Technology shares to Mr. Yang. He testified that he told her that given her attitude and the mess she had created, they could not continue to live together and told her they should not anymore.
- [175] The evidence shows that ¥256,678 in taxes were paid pertaining to the transfer at the time of the transfer. Mr. L. testified that this was the property transfer tax, not the income tax. Ms. L. testified she paid this amount when she transferred the property out of the funds from the sale of Mr. L.'s Mindgun Technology shares to Mr. Yang. The accounting that Ms. L. prepared and that I have accepted includes an amount for property transfers. The evidence also shows that Mingdun Technology paid to the Beijing Changping District Tax Bureau personal income tax and an associated tax late penalty and fine totalling ¥4,810,464.29 (¥1,603,488.10 fine and ¥3,206,976.19 tax) on behalf of Mr. L. Mr. L. testified, and I accept, that he paid these amounts out of the sale proceeds of Hemu Mountain Villa.
- [176] In 2014, the parties had this property appraised. As of February 24, 2014, the appraised value was ¥42,550,400.
- [177] Mr. L. sold the property for ¥34,300,000. This sale was the subject of two notices to admit, one of which says the property was sold in 2016 and the other says it was sold in 2017. Both were admitted. The translation of the purchase and sale agreement contains a date of 2016 and so I conclude it was sold in 2016. It is clear it was after the February 22, 2016 judicial case conference order precluding both parties from disposing of any property in issue in the proceeding, including the net proceeds of sales of any assets or properties already disposed of. At the time of the sale, Mr. L. sought, through his counsel, and received consent from Ms. L., through her lawyer, to sell the property. Ms. L.'s agreement to the sale

had two conditions attached: that she be advised of the sale price and completion dated and that she be provided with the completed sale documents. She testified that she received the information about the sale price and completion date but she did not receive the sale documents.

- [178] The joint valuation report prepared by PricewaterhouseCoopers estimates the fair market value of this property as ¥34,000,000 to ¥42,000,000 as at May 1, 2015, with a midpoint of ¥38,000,000.
- [179] Mr. L. does not agree that the fair market value of the property at May 1, 2015, was ¥38,000,000. He replied to the third notice of admit by asserting that he sold the property at its low end value of ¥34,300,000 in 2017 because he was forced to do so because he needed funds.
- [180] I conclude that the value at the time of the May 3, 2015 agreement was ¥38,000,000. I conclude that the fair market value at the time of trial is reflected in its sale price, ¥34,300,000. Against those figures must be deducted the taxes and fines that ensued when Ms. L. transferred the property from Mingdun Technology into his name, totalling ¥4,810,464. The taxes and fine were a debt that reduced the value of the property and are appropriately taken into account in valuing this as family property. The May 3, 2015 value is ¥33,189,536 which is \$6,637,907. The trial date value of the proceeds of sale is ¥29,489,536 which is \$5,897,907.
- [181] Mr. L. testified that he used the proceeds of the sale of this property for the expenses and salaries of Mingdun Tong Chuang, to invest in its future, and to fund the audit of Mingdun Technology and the lawsuit he brought against Mr. Yang in relation to Mingdun Technology. I have set out his evidence about this in greater detail above. These were investments he chose to make but that he did not have the right to make without Ms. L.'s consent because he did so with the proceeds of sale which were family property and which were contrary to the February 22, 2016 order. I decline to take these expenses into account in determining the value of this family property.

Anli Road property

- [182] Mingdun Tong Chuang bought the Anli Road property in 2010 for ¥7,000,000. It owned this property up until the time that the parties moved to Canada. It is a commercial property. Mingdun Tong Chuang leased the property to a person who used it to run a yoga business. However, the lease payments, which went up slightly over time but which were roughly ¥1,000,000 per year, were made to Ms. L.
- [183] Ms. L. first testified that the arrangement was made because "the company", she did not say which one, needed money, and so Mr. L. directed that the lease payments be made to her. She testified that Mr. L. gave instructions as to what to do with them. Sometimes the instructions were to send the lease payments to Mingdun Technology, sometimes the instructions were to give him the lease payments, sometimes he instructed her to use the

funds for family expenses. Ms. L. also testified that the arrangement was made because Mingdun Tong Chuang's tax account had been cancelled so they arranged for the lease payments to be paid to Ms. L.'s account. Ms. L. also testified that tax was paid on the lease payments collected, and since Mingdun Tong Chuang issued the invoices for the lease payments, it paid the tax. She did not testify how it paid the tax given her evidence that its tax account had been cancelled.

[184] Mr. L.'s evidence contradicts this. He said he did not know that the lease payments were made to Ms. L. until he sued the tenant for unpaid lease payments and found out that he had paid the lease payments to Ms. L.

[185] I do not believe either Mr. L. or Ms. L. This is an example where neither of their versions fits with the preponderance of evidence or logical likelihood. If "the company" that Ms. L. was referring to as needing money was Mingdun Tong Chuang, there is no logic to the lease payments being made to Ms. L. instead of to Mingdun Tong Chuang. If "the company" was Mingdun Technology, then having lease payments made to Ms. L. also makes no sense. Nor does the alternate explanation about the lack of a tax account explain why the lease payments were paid to her given her evidence that Mingdun Tong Chuang paid the tax on the rent. I do not accept that Mr. L. was not aware that the lease payments were made to Ms. L. because it is not plausible that he forgot about lease payments of approximately ¥1 million per year from 2010 until after the parties were divorced. This is the type of evidence that convinced me that the finances of, and transactions associated with, the companies have not been the subject of complete or truthful evidence in this trial.

[186] Mr. L. testified that when Ms. L. moved to Canada in August 2013, she advised him that she had transferred this property from Mingdun Tong Chuang into Mr. L.'s name before she left China. Mr. L. testified they had the same conversation about this property as with the Dingsi Road property. Ms. L. testified that the transfer was for the reasons described above in relation to the Dingsi Road property.

[187] Ms. L. confirmed in cross examination that she continued to receive the lease payments after the property was transferred to Mr. L.'s name. Ms. L. testified that was because Mr. L. did not ask her to change the arrangement that had existed from the beginning of the lease. However, Ms. L. agreed on cross examination that she did make a change to the arrangement because she authorized her father to collect the lease payments on her behalf. When shown a document directing that the lessee make the payments to her father, with her name and a signature next to it, Ms. L. did not answer a question about whether it was her signature. Instead, she denied that she had seen the document before. When the Court asked her whether it was her signature, she said she did not recall the document. When she was asked a third time if it was her signature on the document, she said it probably was.

- [188] With regard to the lease payments between August 2013 and the date of separation, Mr. L. would be the party to properly claim them based on allegations of Ms. L.'s wrongdoing in collecting them. However, as I have explained above his pleadings do not make such a claim relevant.
- [189] On May 27, 2015, Mr. L. transferred this property to Ms. L. pursuant to the May 3, 2015 agreement. After the transfer, Ms. L. and the tenant entered into a further agreement providing that Ms. L. would honour the commitments of Mingdun Tong Chuang. Curiously, that agreement states that Mingdun Tong Chuang transferred the property to Ms. L. which is incorrect because Mingdun Tong Chuang transferred the property to Mr. L. Ms. L. did not explain this.
- [190] In 2014, the parties had this property appraised. As of February 24, 2014, the appraised value was ¥32,079,400.
- [191] The joint valuation report prepared by PricewaterhouseCoopers estimates the fair market value as ¥21,000,000 on May 1, 2015, and ¥22,500,000 on June 1, 2019. Mr. L. disagrees. In response to the third notice to admit, he asserted that the current fair market value of the property is ¥55,410,000. That is a figure he assesses based on the square footage and his views of values of commercial properties in that area of Beijing.
- [192] There is no evidence or explanation as to why the appraisal that the parties had completed with a valuation date of February 24, 2014, has a value 50% higher than the opinion of PricewaterhouseCoopers as to the value at May 1, 2015. As with the other properties, the 2014 appraisal was not entered into evidence as expert evidence in accordance with the rules on opinion evidence. There is also no evidentiary basis for Mr. L.'s assertion of its value.
- [193] The PricewaterhouseCoopers valuations do not expressly take into account the annual lease payments. I find the fair market value of the property to be as valued by PricewaterhouseCoopers, subject to the value of the lease payments.
- [194] With regard to the lease payments that Ms. L. received after they signed the May 3, 2015 agreement, Ms. L. submits that "notionally" the parties have equal rights to earn revenue from family property, but since Mr. L. has not accounted for his, Ms. L. should not be required to account for hers. The assertion that Mr. L. has not accounted for his relates to his failure to produce financial documents in relation to Mingdun Technology and Mingdun Tong Chuang and that his current financial assets do not account for the sale proceeds of family property or revenue earned on investments of the sale proceeds.
- [195] In my view, such an approach is inappropriate. It resonates of a philosophy of retaliation that is not consistent with the Family Law Act. Section 213 provides for remedies for failing to make financial disclosure as follows:

213 (1) This section applies if a person

- (a) fails to comply with
 - (i) an order for disclosure made under section 212 [orders respecting disclosure], or
 - (ii) a requirement to disclose information in accordance with the Supreme Court Family Rules or the Provincial Court (Family) Rules,within the time or in the manner required by the order or Rules, or
 - (b) provides information that is incomplete, false or misleading.
- (2) In the circumstances set out in subsection (1), the court may do one or more of the following:
- (a) make an order under section 212;
 - (b) draw an inference that is adverse to the person, including attributing income to that person in an amount that the court considers appropriate, and make an order based on the inference;
 - (c) require a party to give security in any form that the court directs;
 - (d) make an order requiring the person described in subsection (1) to pay
 - (i) a party for all or part of the expenses reasonably and necessarily incurred as a result of the non-disclosure of information or the incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5 000 to or for the benefit of a party, or a spouse or child whose interests were affected by the non-disclosure of information or the incomplete, false or misleading disclosure, or
 - (iii) a fine not exceeding \$5 000;
 - (e) make any other order the court considers appropriate.

[196] While this provision provides wide discretion in the final clause, it is not, in my view, appropriate to ignore family property in the hands of one party because of allegations that family property disposed of by another party should have generated income that would become family property. Elsewhere in these reasons I have addressed and applied consequences to Mr. L.'s failure to disclose, his breaches of the February 22, 2016 order prohibiting the disposal of property in dispute without consent or the disposal of the proceeds of sale of property in dispute without consent, and his failure to account for proceeds of the sale of family property or revenue from the investment of such proceeds.

[197] I do not accept Mr. L.'s failures and breaches as providing a reason to fail to address the Anli Road property revenue.

- [198] The lease was entered on August 17, 2010 and runs 120 months from December 1, 2010 to November 30, 2020. The lease payment was ¥79,167 per month, or ¥950,004 per year for the first five years and ¥1,026,004 per year, which equates to ¥85,500 per month, for the second five years of the agreement (December 2015 - November 2020). Ms. L. has continued to collect the rent. She testified that after taxes, she currently collects a little over ¥800,000 per year. Ms. L. submitted that the amounts she actually receives are lower due to "taxes and other expenses necessary to repatriate that revenue into Canada". There is no evidence as to what the taxes are for, how they related to the fact that Ms. L.'s father receives the lease payments or what the other expenses are. I cannot make a finding in the absence of evidence. The best evidence is the lease agreement as to the amount of lease payments.
- [199] Section 84(1)(b)(i) provides that property derived from family property after separation is also family property. I find that all of the lease payments are family property and should be included in the values at the time the May 3, 2015 agreement was entered into and at the time of trial. From separation (December 31, 2014) through April 2015, the lease payments total ¥316,668. From December 31, 2014 to the commencement of trial the payments total ¥4,803,849. I value the Anli Road property at ¥21,316,668 at the time of the May 3, 2015 agreement (\$4,263,334) and ¥27,303,849 at the date of trial (\$5,460,770).
- [200] Both parties agreed that unlike the Dingsi Road property, which was the subject of a notice of unpaid taxes and subjected Mingdun Technology to an investigation, the Chinese tax authorities have never made inquiries about the unpaid taxes on the Anli Road property. Neither party has taken any steps to address it. In the circumstances, there is no evidence of a tax debt associated with this property which should be applied against its value.

Wilson Avenue property

- [201] The Wilson Avenue property was the first property bought when the parties moved to Canada from Beijing. Mr. L. purchased the Wilson Avenue property and registered it in Ms. L.'s name with the land title office. The purchase price was \$566,000. The mortgage was \$367,899.
- [202] Ms. L. moved out of the Wilson Avenue property after they separated. Mr. L. stayed in the Wilson Avenue property so that B.L. could continue lessons with a teacher who was nearby. Mr. L. testified that one day he returned to the Wilson Avenue property with his son and found that Ms. L. had changed the locks. He moved to Abbotsford, where his daughter lived. He purchased the Clearbrook Road property and then moved to the Old Yale Road property.
- [203] The joint appraisal report prepared for this litigation estimated the fair market value of the Wilson Avenue property as \$590,000 on May 1, 2015, which I accept as the value at the time of the May 3, 2015 agreement. The outstanding mortgage does not appear to have changed between purchase and the sale in 2019, so I infer it was still about \$367,000 in May 2015, and the net value of the property was \$233,000. This property was sold on January 26, 2019,

pursuant to court order for \$841,175.87. The proceeds of sale were \$472,230 after the mortgage and fees were paid. That is the value I place on it as the trial date value.

- [204] The proceeds of sale were paid into trust. By court order, Ms. L. received \$249,000 as an advance on her interest. In addition, approximately \$38,000 has been paid, by court order and/or agreement, in trust administration fees and for the joint expert reports. At the conclusion of trial, I ordered that the interpreter's account in the amount of \$4,194.75 be paid out of the funds held in trust.
- [205] Accordingly, the trial date value of the Wilson Avenue property is \$472,230, of which \$42,474.75 has been paid for the litigation expenses of experts, the trial translator, and trust fees, leaving \$429,755 that is family property. Because Ms. L. received \$249,000 of that amount, an adjustment of \$35,000 in Mr. L's favour is required.

W. 34th Avenue property

- [206] It is not disputed that Mr. L. and Ms. L. bought the W. 34th Avenue property in 2014 and registered it in both their names. The purchase price was \$2,800,000. It was purchased with \$1,500,000 cash and \$1,300,000 from a secured line of credit. They intended to renovate the home or build a new home on the lot.
- [207] Mr. L. testified that he has been paying the taxes on this property since it was purchased and since their separation and divorce.
- [208] The parties agree that its fair market value on May 1, 2015 was \$2,850,000 and I accept this was the value as of the time of the May 3, 2015 agreement. The parties agree that the fair market value at May 1, 2019 was \$2,975,000 and I accept this is the value as at the time of the trial.
- [209] As discussed above, the parties had a line of credit secured against the W. 34th Avenue property. Its opening balance was \$1.3 million which were funds used to purchase the W. 34th Avenue property. At the time of separation, the balance was \$1.3 million, but they made payments out of family property shortly after separation that reduced the balance to \$460,000.
- [210] It is not disputed that in April 2015, when Mr. L. was insisting on divorce, Ms. L. withdrew \$840,000 from the line of credit, bringing it back to \$1.3 million, and deposited the money into her own account.
- [211] In the May 3, 2015 agreement, she agreed to pay back \$700,000 of this amount. She testified that her sister needed money and in April 2015 she loaned \$200,000 to her sister on the promise that her sister would repay her shortly. However, her sister did not repay her so while she repaid \$500,000 to the line of credit, she did not repay the rest the following month. She did not repay it any time after that. She has not address the difference of \$140,000 between what she took and what she agreed to pay back even though she seeks to set aside the May 3, 2015 agreement. Mr. L. immediately withdrew the \$500,000 she repaid,

putting the line of credit back to \$1.3 million. It is currently at \$1,294,000.

- [212] In *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895, Mr. Justice Betton addressed the issue of how to address family debt (such as a line of credit) that has been increased or decreased post separation. Family debt is determined either by when it was incurred, if that was during the relationship, or the purpose for which it was incurred, if that was to maintain family property: Family Law Act, s. 86; *K.M.J.* at para. 142. The debt is the totality of the account or financial obligation, not any one particular charge within that account (at paras. 144-145). Since the presumptive date of valuation is the date of the hearing (absent an agreement), the value of the debt at that time is divided equally. When one of the spouses either increases or decreases the value of the debt before the trial date, the court should consider whether it is necessary to apportion the debt unequally pursuant to s. 95 to avoid significantly unfairness. Subsequent to *Jaszczewska*, the law seems clear that using any valuation date other than the presumptive valuation dates in s. 87 must be limited to circumstances where it is necessary to avoid significant unfairness.
- [213] Based on this caselaw, I conclude that Ms. L.'s withdrawal from the line of credit after separation and Mr. L.'s withdrawal from the line of credit after separation should be considered under s. 95.
- [214] Mr. L. testified that he has been solely responsible for the mortgage, property taxes and vacancy tax since they have separated. Ms. L. has not led any evidence to refute that. These are obligations Mr. L. undertook to maintain the family property. The evidence does not relate them to the assumption of debt or the increase or decrease in existing debt, except for the mortgage payments which have reduced the line of credit by about \$5,000. I conclude the rest of the mortgage payments went to paying the interest on the line of credit.
- [215] The question arises as to whether these expenses should be considered a family debt and divided equally or are a reason to depart from equal division of the underlying asset, pursuant to s. 95(2).
- [216] Mr. L.'s pleadings address them as a reason to depart from equal apportionment pursuant to s. 95(2). I agree. Although some of the payments could be characterized as new obligations that Mr. L. assumed in order to maintain this family property, they should be addressed under s. 95(2).

Clearbrook Road property

- [217] Mr. L. purchased the Clearbrook Road property in 2015 and moved there with B.L. The purchase price was \$717,900. Mr. L. put \$450,000 down and financed the balance. In April 2019, the outstanding mortgage was \$403,800. Mr. L. has been the only person on title since he purchased the property. Mr. L. testified that the property was not suitable for his son so he moved to the Old Yale Road property described below. After he moved, he could not sell the property because Ms. L. had a certificate of pending litigation registered against it. So

his daughter, X.L., moved in, renovated it and took over the mortgage payments. He asserts that she is the beneficial owner of the property. X.L. testified since late 2015, she has reimbursed Mr. L. for the strata fees, property tax and the mortgage. Mr. L. asserts that his daughter has made all the mortgage payments since "in or about 2016".

[218] Mr. L.'s position is that because the Clearbrook Road property was purchased after the divorce, it has nothing to do with Ms. L. or their marriage. Ms. L. argues that because family property can be traced into it, the court can order it be sold to satisfy a judgment in Ms. L.'s favour.

[219] I conclude that the down payment on this property is derived from family property because other than a relatively modest income from Mingdun Technology, Mr. L.'s only source of funds was family property and he has not fully accounted for the difference between the value of the family property he controlled at the time of separation and what he claims to have now. I find that the \$450,000 down payment used for this property is family property.

Old Yale Road property

[220] Mr. L. testified he purchased the Old Yale Road property because the Clearbrook Road property was not a suitable home for B.L. He purchased it for \$1,180,000 on October 15, 2015. Mr. L. testified that the down payment on the property came from the sale of the Hemu Mountain villa. The down payment was \$480,000.

[221] Mr. L.'s position is that because it was purchased after the divorce, it has nothing to do with Ms. L. or their marriage. Ms. L. argues that because the down payment was made with family property, the court can order it be sold to satisfy a judgment in Ms. L.'s favour.

[222] I find that the down payment on this property, \$480,000, was made with family property.

Vehicles

[223] At the time of separation, the parties had two vehicles, a Lexus and a Mercedes. In the May 3, 2015 agreement, they agreed that Mr. L. would take the Lexus and Ms. L. would take the Mercedes. They do not seek anything different at this juncture or argue for a set off for any difference in the values of the vehicles.

[224] I find that the vehicles were split equally and do not affect the apportionment of the remaining assets or the fairness of the May 3, 2015 agreement.

Bank accounts and investments

Mr. L.'s bank accounts

- [225] Part of Mr. L.'s embezzlement theory of the case is that Ms. L. opened bank accounts in his name and transferred sums of money from the Mingdun companies or from her accounts into accounts in his name. Presumably he asserts that she also transferred the money from the accounts in his name to herself. He did not adduce evidence of this, but rather said that if he was given more time, he would be able to prove who actually opened the accounts and where the money went.
- [226] I have rejected the embezzlement theory as irrelevant. The primary issues with regard to the bank accounts is to identify those in existence at the time of separation and their balances at the time of the May 3, 2015 agreement and at the time of trial.
- [227] Mr. L. also argues that the evidence in relation to these bank accounts do not identify assets in his possession because he did not control his own bank accounts, Ms. L. did. Ms. L. agreed that she managed the family finances. However, she testified that she did not have control over Mr. L.'s bank accounts to his exclusion.
- [228] An example of Mr. L.'s evidence as to his control, or lack thereof, of his bank accounts relates to the accounts he had at China around the time the parties moved to Canada. Ms. L. testified that when she left Beijing for Canada in August 2013, she left a note for Mr. L. advising him of the location of his bank cards and personal banking USB keys in their Beijing residence, the Hemu Mountain villa. Mr. L. testified that he found the note when he arrived in Beijing in the fall of 2013, but the personal banking cards and USB keys were not in the residence and he did not get them from Ms. L. until May of 2015 when they returned to Beijing to obtain a divorce.
- [229] It is not plausible that Mr. L. did not seek control over his own bank accounts prior to May 2015. He testified that the reason he insisted on a divorce was that when he learned about the tax issue on the Dingsi Road property and he asked Ms. L. for an accounting of the funds they had in China to address it, her accounting was that they only had ¥150,000 (she disputes this is the upshot of her accounting). He testified that based on what she told him about their financial situation, he concluded their marriage could not go on and insisted on a divorce. If he felt that Ms. L. had mismanaged their money to the extent that it caused him to end the marriage, he would have insisted on having access to his bank accounts. By that time, he had retrieved Ms. L.'s note left in the Hemu Mountain villa as to the whereabouts of his USB keys and bank cards in the villa. By his account, he did not find them where the note said they were. If that was the case, he would have insisted on them at the time he said the marriage was over due to what he saw as her mismanagement of the family finances. I do not believe he did not have access to his bank accounts, bank cards and USB keys until May 2015.
- [230] Another example relates to bank accounts in Mr. L.'s names ending in 0259 and 8898. Mr. L. denies that he opened the 0259 account or undertook transactions in this account. On January 8, 2014, the balance in the account was ¥4,790,442. The same amount was

transferred out the same day, leaving the balance at zero. Mr. L. agreed that on January 8, 2014, he opened a bank account at China Citic Bank with a number ending in 8898. He testified that he did so at Ms. L's request and that he gave her the bank card for the account when he returned to Vancouver. The account documents show ¥4,791,496.57 deposited into the account on the same day. Mr. L. denied that he deposited this amount into the account on the day he opened the account. He testified that he did not know how to transfer money into the account and such transactions were in Ms. L.'s control.

- [231] Mr. L. testified that there is only one transaction in the 8898 account that he was aware of between the time the account was opened and May 2015 when the parties were divorced. He testified that he had a very clear recollection of this transaction. On February 25, 2014, ¥20 million was deposited into Mr. L.'s accounting ending in 8898 account by Mr. Yang's company. On February 26, 2014, the same amount was withdrawn out of Mr. L.'s account and transferred to Mr. Yang's company. Mr. L. testified that this transaction was a loan from Mr. Yang that Mr. L. asked for because Ms. L. had advised Mr. L. that they needed proof that they had ¥20 million in the bank for a reason associated with enrolling B.L. in school in Vancouver. Mr. L. testified that he asked Mr. Yang to do him a favour by lending him ¥20 million and transferring it into the account so they could provide a certificate of funds on deposit. Mr. L. testified that Mr. Yang agreed to do so and transferred the funds from his company. Mr. L. testified that the following day, he went to the bank and transferred the funds back to Mr. Yang's company.
- [232] However, at his examination for discovery, he testified that Mr. Yang asked to borrow the money from him and that he loaned it to Mr. Yang as well as testifying that he did not undertake those transactions. When confronted with this, Mr. L. first explained that he had a different recollection at the discovery and then said that maybe he misspoke or maybe the court reporter or translator at the discovery made a mistake. He then testified that he had made a mistake at his discovery because in September 2014, Mr. Yang had asked to borrow money and that is what he was testifying about in error.
- [233] I do not believe Mr. L's testimony that he was not aware of money going into or out of this bank account or his evidence about the ¥20 million transaction involving Mr. Yang's company. Given the obviously false evidence he gave under oath about this bank account, I also do not believe him that he had no knowledge about the bank accounts he claims Ms. L. opened in his name without his knowledge.
- [234] I find that at the time of separation, he had funds on deposit in bank accounts in China and in Canada about which he was aware and over which he had control. In May 2015, those totalled ¥3,616,605 and \$510,018 (inclusive of the \$500,000 which Ms. L. repaid to the line of credit and Mr. L. subsequently withdrew), for a Canadian total of \$1,233,339.
- [235] Between May 2015 and trial, Mr. L. has disposed of his remaining shares in Mingdun Technology and two real estate properties in China. He has testified about using the proceeds of the sales of the real estate to pay the Dingsi Road tax debt and to pay the down

payment on his Old Yale Road Property. He also purchased the Clearbrook Road Property in which his daughter now lives out of family property. He testified that he paid for salaries of some Mingdun Tong Chuang employees and funded an audit of Mingdun Technology due to his dispute with Mr. Kong and Mr. Yang.

- [236] Mr. L. has not provided detailed information about his bank accounts at the time of trial. The financial statement he filed immediately before trial mostly refers to the bank account balances in April 2019, approximately 6 months before trial. Those amounts total \$1,774,116.83 and ¥2,088,339.07. The total in Canadian dollars is \$2,191,784.65.
- [237] At trial, Mr. L. brought bank automated teller statements showing much lower balances in his Canadian bank accounts including one account which showed a decreased balance of almost \$870,000 between April 2019 and October 2019. When asked about the dissipation, he testified that he took vacations with his son, his girlfriend and her son, he bought an expensive watch for his girlfriend and paid legal fees.
- [238] Mr. L. agreed that on May 25, 2017, he transferred ¥1 million from the proceeds of the sale of the Dingsi Road property to his niece so that she could buy a house. Counsel for Ms. L. suggested to him that the house is his own purchase, but done in his niece's name as his nominee. He denied this suggestion. I do not believe Mr. L., but even if I did I would require him to account for this amount given it is a dissipation of a family asset and is in breach of the February 22, 2016 court order.
- [239] Mr. L. should have in the neighbourhood of \$8 million given the sale of his Mingdun Technology shares, the Dingsi Road property and the Hemu Mountain villa, less payment of the Dingsi Road taxes, the down payments for the Clearbrook Road and Old Yale Road properties, and his investment in Mingdun Tong Chuang.
- [240] It is apparent that Mr. L.'s failure to abide by the February 2016 order of the court to not dispose of assets without consent, his failure to comply with the terms of the consent he received to sell the Dingsi Road property, and his failure to provide complete financial disclosure have hampered Ms. L. and the Court in assessing the evidence and determining a fair apportionment of the family assets.
- [241] Accordingly, the criteria set out in s. 213(1) of the Family Law Act are satisfied and pursuant to s. 213(2)(b), I consider it appropriate to draw an inference that is adverse to Mr. L. Specifically, I impute the proceeds of the sale Mr. L.'s 37.7% shareholding in Mingdun Technology, the sale proceeds from the Dingsi Road property and the sale proceeds from the sale of the Hemu Mountain villa, less the taxes paid with regard to the Dingsi Road property, to him as financial assets he holds as at the date of trial. I am not taking into account his annual living expenses as deductions from these amounts because his breaches of the court order and failing to account, including failing to account for any income he has earned on the investment he made with the funds invested in Mingdun Tong Chuang, have hampered the fair apportionment of assets. To consider the evidence he has led pertaining to annual living expenses without having all of the evidence because he has not met his

disclosure obligations, would allow Mr. L. to benefit from his failure to disclose.

Ms. L.'s bank accounts

- [242] Ms. L. has disclosed bank account balances totalling the Canadian equivalent of \$107,946.19 in Canadian and Chinese bank accounts around the time of the May 3, 2015 separation agreement, the vast majority of which was in Canadian bank accounts.
- [243] In addition, there is the matter of the unaccounted for ¥2.25 million from the 2013 sale of Mingdun Technology. I find that Ms. L. received that money. Ms. L. has not produced all of her banking statements from Chinese bank accounts and short term investments. She testified she is not able to get all of them because to retrieve them she must return to China, and she cannot do that because Mr. L. falsely reported that she stole money to the public security bureau. She was not specific about why that means she cannot go back to China and she did not lead any evidence of what would happen if she did. I infer from a question Mr. L. asked her as to whether she had been told that she would be arrested, that she fears that if she returns to China with the investigation or inquiries from the public security bureau outstanding, her liberty may be negatively impacted.
- [244] The evidence I have accepted is that Ms. L. converted most of these funds, ¥2.1 million, into Canadian dollars through multiple individuals and had it sent to Canada. Ms. L. asserts that she used these funds to pay for expenses associated with setting up a new household in British Columbia. In my view, that is too large a sum to be explained in that manner, especially without receipts or any objective evidence as to what it was spent on. Her evidence and the other accounting provided show that she tracked the receipt and payment out of funds carefully. I find she retained those funds for herself. The valuation date for the purpose of the analysis of the May 3, 2015 agreement is ¥2.25 million. The value as at the date of trial is ¥2.25 million. The Canadian dollar equivalent is \$450,000. I am imputing that amount to her as of May 3, 2015 and as at the date of trial.
- [245] As of trial, Ms. L. disclosed additional bank accounts totalling \$59,993.10.

The Agreements

- [246] The parties entered into four agreements between the time at which they decided to separate in late 2014 and when they were divorced on May 28, 2015.
- [247] In his pleadings, in particular the letter discussed at the outset, Mr. L. seeks to enforce the May 3, 2015 agreement, which he submits is also a reason for unequal apportionment pursuant to s. 95. Ms. L. argues that agreement is not enforceable.

Legal Principles

[248] Section 81 of the Family Law Act, set out above, provides that each spouse has the right to an undivided half interest in all family property "[s]ubject to an agreement or order that provides otherwise and except as provided in this Part and Part 6". Section 81 is contained within Part 5 of the Family Law Act, which addresses property division. Sections 92-94 are also germane:

Agreements respecting property division

92 Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:

- (a) divide family property or family debt, or both, and do so equally or unequally;
- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;
- (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt].

Setting aside agreements respecting property division

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.
- (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

Orders respecting property division

94 (1) The Supreme Court may make an order under this Division on application by a spouse.

- (2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in section 93 (1) [setting aside agreements respecting property division], unless all or part of the agreement is set aside under that section.

[249] Sections 81 and 92-94 of the Family Law Act provide that the parties can make agreements that displace equal division. In particular, s. 94(2) provides that the court may not divide property that is the subject of a written, signed and witnessed agreement unless it is first set aside under s. 93. If an agreement is set aside under s. 93, then the presumption of equal division governs. Subsections 93(3)-(5) provide for the circumstances under which a signed and witnessed agreement may be set aside. Subsection 93(6) provides that the court may apply the provisions pertaining to setting aside a signed and witnessed agreement to a written but unsigned and/or unwitnessed agreement if the court is satisfied it would be just to do so. In addition, s. 95(2)(b) permits the court to consider "the terms of any agreement between the spouses, other than an agreement described in section 93 (1)" in making an order for unequal division based on significant unfairness.

[250] This case engages the issue of whether an agreement that is written and signed but not witnessed displaces the presumption of equal division. It is not a "section 93(1)" agreement.

[251] Ms. L. argued that the court should not follow a line of authorities, starting with Thomson v. Young, 2014 BCSC 799 in which oral agreements are held to be an exception to the s.81 presumption of equal division so long as they are not set aside under common law rules of enforceability. She argues that I should follow a line of authorities, including P.N.K. v. C.L.,

2013 BCSC 1856 at paras. 86-88; Doell v. Prentice, 2018 BCSC 1115; and J.C. v. W.A., 2016 BCSC 1012 at paras. 106-109, in which the applicability of oral agreements is limited to consideration under s.95 as to whether equal division should not occur based on significant unfairness, but the agreement does not displace the s.81 presumption of equal division.

[252] The May 3, 2015 is not witnessed, but it is written and signed, and so the court can exercise the s.93(6) discretion to apply s. 93, including setting the agreement aside, even though it is not a s. 93(1) agreement: Family Law Act, s. 93(6). It is not in dispute that if an agreement is set aside under s.93, it is not an agreement that displaces the s.81 presumption of equal division.

[253] If it is not set aside the question becomes whether it displaces the presumption of equal distribution, or instead the presumption remains in place but the agreement is a factor to be considered under s. 95 when deciding whether to apportion unequally.

[254] It is my view that the following questions must be answered with regard to the May 3, 2015 agreement because it is written and signed but not witnessed before addressing its role if its enforceability is not addressed pursuant to s.93:

- a) should the Court exercise its discretion to apply s. 93 to this agreement pursuant to s. 93(6);
- b) if so, should the agreement be set aside; and
- c) if the agreement is not set aside under s. 93, is it enforceable at common law?

[255] Before addressing these questions, I will discuss the facts around the making of all of the agreements as the facts about the other agreements are relevant to some of the arguments pertaining to the May 3, 2015 agreement.

[256] The parties testified about four agreements signed by them dealing with their assets.

[257] Mr. Justice Sigurdson addressed the agreements, other than the first agreement, because they contained provisions pertaining to B.L. Mr. Justice Sigurdson did not determine the enforceability of these agreements because he did not need to given the overriding factor of the best interests of the child, but he did make some factual findings relating to the agreements. In the interests of judicial comity and the benefits of consistent fact finding, I will consider these findings.

The first agreement

[258] The first agreement was not in evidence. Mr. L. testified that right after the argument about the taxes owing on the Dingsi Road property, on January 27, 2015, he handwrote a divorce agreement that Ms. L. dictated. Mr. L. testified that it was almost consistent with the May 3, 2015 agreement.

- [259] Ms. L. testified that they made this first agreement in November 2014. She testified that Mr. L. insisted she sign an agreement one morning and would not allow her to leave the house until she did sign. She said their son was upset by their argument over it and so she had to sign it. Her evidence was inconsistent with Mr. L.'s assertion that she dictated the terms.
- [260] Both parties testified that the agreement was destroyed during a subsequent altercation between them, but they differ on how that came about. Neither party seeks to enforce the first agreement. Its existence is relevant in that it establishes that they were addressing asset division several months prior to the May 2015 agreement.

May 3, 2015 agreement

- [261] The May 3, 2015 agreement is a typewritten agreement in Chinese that both parties acknowledge signing. As already noted, it is not witnessed.
- [262] There is more than one translation of it. The translations are not identical. All translations contain a term or terms that reference or require a lawyer's involvement in the agreement. One translation describes that involvement as "the lawyer's acceptance", another translation describes the involvement as the lawyer signing the agreement and another refer to a lawyer acknowledging the agreement. No lawyer ever signed the agreement, nor notarized the parties' signatures. There is no evidence of a lawyer acknowledging or accepting the agreement.
- [263] Mr. L. testified that Ms. L. was responsible for the content of the agreement. He asserted that she dictated what she wanted and he agreed to what she wanted and changed the agreement in response to her requests for changes because she is a lady, and he is a man, and according to the culture in which he had lived most of his life, it is his duty as a man to try to cooperate.
- [264] Ms. L. testified that from the time they separated in October 2014 or near the end of 2014, she was not sure whether Mr. L. really wanted a divorce. She testified that she did not want a divorce. By April 2015, she realized he really wanted a divorce. She testified that Mr. L. sent her drafts of the agreement by email. She testified that he threatened her that because their son, B.L., was conceived with his sperm and a donor egg, she had no rights as a mother and if they went to court, she would not have any rights with regard to B.L. She testified that X.L. took Mr. L.'s side on this and argued that B.L. should be with Mr. L. Ms. L. testified that she had to beg Mr. L. to let her see B.L. and she signed what he demanded because it also provided for joint custody of B.L.
- [265] X.L. testified that Ms. L. asked her to come to the Wilson Avenue property in the spring of 2015. At that time, Mr. L. was living there, but Ms. L. and B.L. were living near UBC. When X.L. arrived, Mr. L. and Ms. L. had the terms of the agreement on paper. X.L. was asked to format it on the computer and to add passport numbers and ID numbers. She testified that she did not insert any terms or her own opinion into the agreement. She sent it to Mr. L. and Ms. L. by email. She testified that she had this kind of role on three occasions, twice at

the Wilson Avenue property when they were both there and once when they were both speaking to her over the phone. Ms. L.'s counsel did not challenge X.L.'s evidence in this regard except to put to her that she only sent the agreement by email to Mr. L., to which X.L. replied by pointing out that the same document showed her sending the agreement to Ms. L.'s email address. Ms. L.'s counsel did not put to X.L. that she had insisted that Mr. L. have sole custody of B.L. during this time, as Ms. L. testified.

- [266] Ms. L. argues that I should not believe X.L. because she is clearly aligned with Mr. L. I accept that X.L. is aligned with her father in the sense that he is her father, she is close to him, she sees him and B.L. often, and she has received financial assistance from him including the home in which she resides. But X.L.'s evidence did not have the hallmarks of someone who would say whatever her father wanted her to say. Among other things she did not testify completely consistently with his evidence including on the point of who drafted the agreement. Had she been willing to lie for her father, presumably she would have said that Ms. L. dictated the terms she was asked to put in digital form. When Mr. L. asked her questions about his contribution to the company and how hard he worked, she responded that he worked very hard and long hours on product development in the factory but did not spend enough time with customers. She testified that the customers complained about that and one of her roles was to pay attention to them and address their concerns. In addition, she acknowledged that she and her father had fallen out on at least one occasion.
- [267] I accept X.L.'s evidence of her involvement in drafting the agreement, specifically that she assisted at the request of both parties. Her assistance was limited to putting the agreement in digital form and inserting information that they asked her to. She emailed the drafts she was involved with to both parties. I find she was not involved in drafting the substantive terms.
- [268] The May 3, 2015 agreement is not completely one-sided. For example, they had one piece of real estate that generated income. Ms. L. received the Anli Road property. If Mr. L. was dictating the terms and she would say yes to anything so long as she had at least joint custody of B.L., there would be no reason for Mr. L. to dictate that she received such a valuable piece of property. On the other hand, the agreement provided for her to use the revenue from this property for purposes which benefit Mr. L. for a period of time. If Mr. L. was simply accepting whatever Ms. L. dictated, there would be no reason for her to dictate such a term.
- [269] So far as asset division is concerned, the translated versions of this agreement provide as follows:
- a) Mr. L. is to become the sole owner of the W. 34th Avenue property. Ms. L. will use the lease payments earned by the Anli Road property to repay the loan and the fee for the change of property ownership for a period of 12 months subsequent to the participation of a lawyer. The differences among the translations pertaining to this provision are:

- i. the description of the lawyer's participation as described above;
- ii. one translated version calls for the borrower on the property to be changed to Mr. L.; another calls for the lender to be changed to Mr. L.;
- iii. one translated version says the rental income from Anli Road property shall be used to "repay the loan and pay the fee for change property ownership of this house", another says the Anli Road property rental income shall be used to "continue to assume loan repayment and property right change expenses";
- iv. one of the translated versions contains the language "Party B [Ms. L.] hasn't cooperated with the formalities of transfer of property ownership". This is apparently a reference to the fact that Ms. L. refused to transfer the W. 34th Avenue property to Mr. L. in June 2015, a month after the agreement was signed;
- b) the Lexus is to belong to Mr. L. and Ms. L. is to use the rental income from the Anli Road property to the pay the loan on the vehicle for a period of 12 months subsequent to the participation of a lawyer. The translations pertaining to the lawyer's participation differ as described above.
- c) the Wilson Avenue property shall be owned by Ms. L.;
- d) the Mercedes Benz shall be owned by Ms. L.;
- e) cash in the amount of \$840,000 located in Canada shall be allocated \$700,000 to Mr. L. and \$140,000 to Ms. L. One of the translated versions contains the words "Party B shall deposit \$500,000 CAD as repayment into Party A's account on May 5th and deposit the remaining \$200,000 CAD as repayment into Party A's account before June 5th". Mr. L. testified that these words were handwritten by Ms. L. on the Chinese version that the parties signed. One of the translations does not contain these words.
- f) Ms. L. is to become the owner of the Anli Property and one of the translations says that the rental income of this property be used for "repaying the loan of house properties, taxes, the construction payment for the house in 2126 W34th, Vancouver, and the loan of cars and other related living expenses within the territory of Canada in priority"; another says the rental amounts currently generated from this property "must be preferentially used to pay for the loan repayment, taxes, and construction of the real-estate in Canada at 2126 W34th Vancouver, repayment of vehicles assets, and for other related living expenses."

May 15, 2015 agreement

- [270] Mr. L. testified that Ms. L. had a lawyer named Mr. Wang translate the May 3, 2015 agreement and then they signed it in front of him and he witnessed their signatures. However, Mr. L. testified that Mr. Wang made some changes to the agreement. He testified he did not object to those changes and he signed the May 15, 2015 agreement as did Ms. L. He testified that at the time he signed, Mr. Wang read the agreement to him because he was

not able to read it. He also testified that he insisted that the term that Ms. L. repay him \$200,000 be included in the agreement and it was not, so right there "on the scene" Ms. L. made a promissory note.

- [271] Ms. L. testified that Mr. L. discovered that the May 3, 2015 agreement needed to be translated so that it could be provided to the bank to discharge the mortgage on the W. 34th Avenue property for the purpose of transferring it into Mr. L.'s name alone. Ms. L. testified that Mr. L. hired Mr. Wang to do so and told her to come to his office to do so. Ms. L. testified that Mr. Wang did not say much to her but provided her with what she referred to as the English translation and she signed it. She testified that she did not read it and she did not receive any legal advice on it.
- [272] Once again the parties' evidence cannot be reconciled as to why this agreement was prepared and who instigated it. I do not have to make findings on it because neither party seeks to enforce it, it is simply part of the narrative.
- [273] The May 15, 2015 agreement is different from the May 3, 2015 agreement in several respects, including:
- a) it provides for Mr. L. to have sole custody and guardianship of B.L. compared to the May 3, 2015 agreement which provides for Mr. L. to have sole guardianship and both parties to share custody of B.L.;
 - b) the May 3, 2015 agreement contained terms regarding support for B.L. and sharing of B.L.'s expenses. The May 15, 2015 agreement does not;
 - c) the May 15, 2015 agreement describes the incomes of the parties, whereas the May 3, 2015 agreement does not;
 - d) the May 3, 2015 agreement does not list a date of separation. The May 15, 2015 agreement says the date of separation was October 1, 2013, a date which is not consistent with either party's evidence of when the relationship broke down and discussions of separation and divorce began;
 - e) the May 15, 2015 agreement describes the W. 34th Avenue property as the family residence, despite that neither party was living in it and the time and they had never lived in it;
 - f) the May 15, 2015 agreement does not provide for Ms. L. to use the proceeds of the Anli Road property to pay for the taxes, mortgage on the W. 34th Avenue property unlike the May 3, 2015 agreement;
 - g) the May 15, 2015 agreement provides for Mr. L. to pay the mortgage, strata fee and property taxes on the Wilson Avenue property until Ms. L. is financially independent or sells the Wilson Avenue property, a term that is contrary to the May 3, 2015 agreement which provides that Ms. L. shall be responsible for the loan and all other expenses and fees relating to the Wilson Avenue property;

- h) the May 15, 2015 agreement does not expressly reference the Anli Road property, but rather provides that Ms. L. waives any and all claims against Mr. L's "all other assets, present and future owned assets in Canada". If "all other assets" includes assets in China, the May 15, 2015 agreement is contrary to the May 3, 2015 agreement with regard to the Anli Road property;
- i) it contains terms regarding resolving disputes and a process to agree on proposed amendments to the agreement; and
- j) it contains terms that the parties both acknowledge that the agreement is fair and reasonable, that they are not under undue influence or duress, that they acknowledge that both are signing the agreement voluntarily, that they have been advised that it is in their best interests to obtain independent legal advice and that they confirm they have received it or waived their rights to obtain it.

May 28, 2015 agreement

- [274] Mr. L. testified that after they signed the May 15, 2015 agreement, Ms. L. told him that she did not want to be divorced in Canada anymore, because it takes a year to be divorced. She told him she wanted to be divorced in China because it can be done more quickly there. She asked him to go to China with her to get a divorce there and he agreed. Ms. L. testified that it was at the request of Mr. L. that she agreed to go to China to obtain a divorce.
- [275] Mr. L. testified, and Ms. L. did not dispute, that on May 27, 2015, they attended at the appropriate office in Beijing to transfer the Anli Road property from him to her as agreed to in the May 3, 2015 agreement. The next day, May 28, 2015, they went to the Beijing Municipality Haidian Department of Civil Affairs where they were divorced. They disagree as to what transpired there.
- [276] Mr. L. testified that when they arrived at the Department of Civil Affairs, Ms. L. told him to put away the May 3, 2015 agreement because if they relied on it to show they agreed to a divorce, they would be required to pay taxes and it would take time and cost money. Mr. L. testified that Ms. L. said that all they needed to do was tell the personnel that they had reached an agreement and did not have a dispute regarding asset division. Mr. L. testified that when Ms. L. did that, the administrative person provided her with a piece of paper and told her to write it down, which Ms. L. did, and they both signed it. Mr. L. testified that he did not question this because he was under pressure to complete the divorce quickly as their son, B.L., was being cared for by his daughter, X.L., in Vancouver and he felt like he needed to get back to Vancouver to take care of B.L.
- [277] Ms. L. testified that the administrative person at the Department of Civil Affairs told them that the May 3, 2015 agreement would not "work" because there is no such thing as joint custody so they had to name one person to have custody of their son. She testified that the administrative person provided them with the template of an agreement and she wrote whatever Mr. L. told her to write. She testified that she and Mr. L. signed the agreement that

Mr. L. dictated to her. Ms. L. testified that she was forced to sign this agreement also because it was based on the May 3, 2015 agreement.

- [278] There is more than one translated version of the agreement in evidence. The translations are not identical. Since neither party seeks to enforce this agreement, neither made any submissions on the significance of the differences. However, Mr. L. testified that this agreement provides for the parties to keep the assets under their names. When the agreement was translated during trial, the interpreter used the word "assets". The translated version provides that real estate obtained during the period of the marriage shall belong to the respective owners but does not provide for division of other assets. Mr. L. testified that Chinese people use the words assets and real estate interchangeably. He testified that they were "not that serious" or cautious when they wrote the May 28, 2015 agreement.
- [279] However, Mr. L. subsequently testified that the May 3, 2015 and May 28, 2015 agreements specifically referred to real estate and not assets generally and specifically did not deal with division of cash or money. I pause to note that he was not correct in this regard as the May 3, 2015 agreement does address the division of \$840,000 CDN in cash and the vehicles the parties had in Canada. In any event, Mr. L. testified that these two agreements deal with real estate and not assets generally because he did not think they had any cash because they had to pay taxes arising out of the transfer of the Dingsi Road property from Mingdun Technology to Mr. L., but they had no money except for ¥150,000.

Whether the Court should apply s. 93 to the May 3, 2015 agreement

- [280] In *Delege v. Delege*, 2016 BCSC 630, the parties negotiated an agreement through lawyers. The terms were reduced to writing, but the agreement was neither signed nor witnessed prior to one party resiling from it. Mr. Justice Kelleher considered whether to apply the provisions of s. 93 to set aside the agreement pursuant to s. 93(6). The factors that Mr. Justice Kelleher discussed in coming to his decision to apply s. 93(6) were that he had found that the agreement has not been reduced to a formal document but was otherwise enforceable and the circumstances supported the use of s. 93 in keeping with its legislative objective, which was to encourage settlements by allowing the parties to have the court set them aside where the circumstances in s. 93 apply (at paras. 13-17).
- [281] In this case, the evidence supports that the parties intended to be bound by what they signed. However, there is also evidence that the s. 93(3) considerations may apply, including evidence from Ms. L. that she was vulnerable and that Mr. L. did not disclose all of his property. In addition, there is evidence that calls into question whether they understood the agreements, such as the fact that the parties signed three different agreements within one month under two different legal regimes and in two different languages that are substantively different from one another. Both parties testified that at the time they signed the May 15, 2015 agreement they each understood it to be a translation of the May 3, 2015 but it is substantively different in many respects.

[282] In my view, the circumstances of this case are such that the parties should have access to the provisions of s. 93 to determine whether that agreement should be set aside because, like in *Delege*, there is both evidence that the parties sought to be bound by the agreement but also evidence that some of s.93 factors that are considered to determine whether agreements should be set aside are present. The legislative objectives to encourage settlements are met if parties know that the discretion to review settlements in such circumstances will be robustly applied.

Whether the May 3, 2015 agreement should be set aside pursuant to s. 93

[283] In *Asselin v. Roy*, 2013 BCSC 1681 at paras. 125-127, Mr. Justice Harvey held that s. 93 compels a two-pronged approach to determining whether to set aside the agreement. The first considerations are those set out in s. 93(3) which relate to fairness in the formation of the agreement. If the agreement was fairly reached, the court must then consider the factors in s. 93(5) which relate to the substantive fairness of the effect of the agreement. If the agreement was not fairly reached, the court may decline to set it aside if the terms that the court would substitute are not substantially different than those contained in the agreement. See also *Bartch v. Bartch*, 2019 BCSC 1643 at para. 146. This two pronged approach is a codification of the approach described by the Supreme Court of Canada in *Miglin*, a decision that pre-dates the Family Law Act: *De Medeiros* at para. 85.

[284] A touchstone in the analysis is whether the legislative objectives of the Family Law Act, namely, to encourage resolution of family law disputes through agreements (s. 4(b)) and the certainty, predictability and clarity created by the simplified equal division regime (*Jaszczewska* at para. 36), are met. The analysis must also respect contractual autonomy while recognizing the unique nature of negotiating agreements for the dissolution of spousal relationship and the inherent vulnerabilities in play as they relate the concept of unconscionability: *Miglin* at paras. 66, 82.

[285] With regard to the s. 93(3) considerations, on review of *Miglin*; *Rick v. Brandsema*, 2009 SCC 10; *Asselin*; *Bartch*; *De Medeiros*; *B.L.S. v. D.J.S.*, 2019 BCSC 846; and *Bradshaw v. Bradshaw*, 2011 BCSC 1103, the following principles emerge:

- a) the court should consider the s. 93(3) considerations holistically, and not in isolation to each other as the combination of certain factors may lead to setting aside the agreement where each of the factors alone would not, or where the presence of a factor in favour of setting aside the agreement may be ameliorated by the absence of another factor;
- b) the fact-specific nature of the inquiry, particularly the relative vulnerabilities of the parties and/or the relative amount of information they have about each other's financial affairs is such that the cases are not necessarily readily comparable;
- c) with regard to failing to disclose significant property, debts or other relevant information:

- i. failure to disclose financial information or incomplete disclosure impacts the integrity of the bargain made. The extent and nature of the failure determines whether the court will intervene;
 - ii. a party's assertion that he or she did not believe the other party had a claim to the assets and so did not disclose is not an answer if the party has a claim or an arguable claim. Disclosure is mandatory separate from any argument or negotiation around whether there is a legal interest in the property;
 - iii. failing to disclose any value for property cannot be defended on the basis that there is no misrepresentation because no value is given;
 - iv. where an asset's value is uncertain, the party with the duty to make disclosure should disclose the facts that will allow the other party to make a decision as to the value or as to whether further investigation is required;
 - v. if a party waives the right to financial disclosure in making a separation agreement but does so in the context of having been misled about the existence of assets and/or their value, the waiver may not be informed and therefore not determinative, especially if it is paired with a representation that the facts disclosed are true, accurate and complete;
 - vi. failure of a party to act in good faith and to act in accordance with an agreement made is not an answer to the other party's failure to disclose financial information;
 - vii. failing to disclose includes incomplete financial disclosure such as not providing the values of assets that both parties know to be in existence, not advising of the true income stream of a business, and providing estimates of the values of an RRSP;
 - viii. failing to ask for greater financial disclosure does not prevent the party who did not receive it from relying on s. 93(3)(a);
 - ix. where the party complaining of non-disclosure has general knowledge of the other party's assets and their value, non-disclosure of the exact value may not result in an agreement being set aside where the non-disclosure is not a deliberate attempt to avoid addressing the division of those assets or to deprive the other party of information he or she should have in making the agreement;
 - x. the non-disclosure must be significant and material;
- d) with regard to one spouse taking advantage of the other's vulnerability, including the other's ignorance, need or distress:
 - i. the parties' relative abilities to understand financial matters is relevant to the assessment of whether one party took advantage of the other's vulnerabilities;
 - ii. vulnerability of a less powerful party should not be presumed, there must be evidence to support a finding of vulnerability;

- iii. whether the party who asserts vulnerability had input into the content of the agreement is relevant to assessing this factor;
- iv. legal advice may negate vulnerability but does not necessarily do so and the absence of legal advice does not lead to a presumption that a vulnerability has not been exploited;
- v. the parties' respective bargaining power is relevant to vulnerability and includes whether one of the parties was at an immediate economic disadvantage because the other party controlled the cash or had better access to cash;
- vi. physical and/or emotional abuse is relevant;
- vii. the timing of emotional or physical abuse in relation to the time at which the agreement was made is relevant in the sense that if a party is living in active fear and makes the agreement to get away from an abuser, that is different than a situation where there was an incident of abuse a significant length of time prior to when the agreement was made, especially if the parties were living in different locations when the agreement was made;
- e) with regard to whether one of the spouses did not understand the nature or consequences of the agreement:
 - i. whether the party received independent legal advice is relevant, but not determinative;
 - ii. persons who do not take advantage of the ability to receive legal advice may not be held to unfair agreements despite their own failures especially where the party seeking to enforce it withheld information or the person is vulnerable;
 - iii. if a party received legal advice but it was affected by incomplete financial disclosure, it may be not fair to hold the party to the agreement;
 - iv. similarly, failure to read an agreement when there was an opportunity to do so will be taken into account in assessing whether failure to understand the agreement is a basis on which to set it aside;
- f) with regard to other circumstances that would, under the common law, cause all or part of a contract to be voidable:
 - i. unconscionability can be based on information asymmetry; and
 - ii. unconscionability does not have to result in the same type of power imbalance that would void a commercial contract but can arise out of any circumstances of oppression, pressure or other vulnerabilities.

Financial disclosure (s. 93(3)(a))

- [286] The major concern with the agreement in terms of disclosure is that none of the corporate assets are identified or divided, yet Mr. L. asserts they are covered by the agreement because it is an agreement to resolve all property division issues.

- [287] Mr. L. testified that his corporate shareholdings were not included because Ms. L. did not raise it. He was also cross examined about the evidence he gave at his examination for discovery when he said he would never have agreed to discuss dividing his corporate interests because of his view that they belong to him alone and if Ms. L. had raised it, they would not have reached an agreement but rather they would have had to litigate. I accept that what he said at his discovery about his rationale was true and remains the case as it is consistent with his assertions at this trial.
- [288] Mr. L. testified that he had received a salary while leading the Mingdun companies but had never received dividends. He testified that his salary was about ¥250,000 per year at the time he left China. In 2014, 10 months before the May 3, 2015 agreement was signed, the capital value of Mingdun Technology was stated in the investment agreement between Mingdun Technology and the investors to be ¥126,666,700. Mr. L.'s 37.7% share of that capital was ¥47,753,346. Obviously, the capitalization of the company had been increasing over the years since it was founded with a capital value of ¥1 million.
- [289] As stated above, Mr. L. had 90% of the shares of Mingdun Tong Chuang for a significant period of time. He currently has 20% of the shares of Mingdun Tong Chuang. He has not explained what happened to his shareholding including what it was at the time the May 3, 2015 separation agreement.
- [290] Ms. L. was aware that he held an interest in those companies. The evidence does not indicate whether she was aware of the profitability of the company or the value of the shares. She left China in August 2013 and while there is a dispute about whether she continued to hold USB keys and/or corporate seals for a period of time, there is no doubt she was no longer active in the day to day operations of the business. She testified that she was not aware of the valuation placed on the shares in the 2014 investment agreement. Since by that time, she had left China and was no longer active in the operations of the companies, I accept her evidence in this regard.
- [291] In Canadian dollars, I estimate the value of Mr. L.'s shares in Mingdun Technology at the time of the May 3, 2015 agreement to be \$9,370,669.00 based on the values agreed to in the 2014 investment agreement, less his excluded portion. I value the total family assets at \$25,074,630 based on the values I have set out above, of which Mr. L. would receive \$20,030,350 based on the May 3, 2015 agreement. The failure to address his interest in Mingdun Technology is a significant gap that results in the agreement falling far short of equal division of family property. The failure to disclose the value of these interest is such that Ms. L.'s agreement was made without the information necessary to make an informed decision.

- [292] This case is similar to B.L.S. because the party entitled to receive full disclosure knew of the existence of the corporate asset, but did not have the information to know its true value. There are significant differences because in B.L.S., the party with the duty to disclose also made representations about the status of the corporation intended to persuade the other party that it had no value and defended the non-disclosure on the basis that the party had no interest in the asset.
- [293] I do not find, as did Madam Justice Norell in B.L.S., that the failure to disclose was intentional and involved positive misrepresentations. I conclude that Mr. L. did not address his interest in either company at the time of making the May 3, 2015 agreement because of his wrongly held view that Ms. L. was not entitled to any interest in those companies. This was also a rationale proffered in B.L.S. but it was tainted by the finding that the non-disclosure was intended to hide the true value of a known asset. Nevertheless, the rationale does not restore the integrity of the agreement that full disclosure is intended to provide because, regardless of the rationale, the other party does not have the information to make an informed decision: B.L.S. at para. 233.

Vulnerability, ignorance, need or distress (s. 93(3)(b))

- [294] Ms. L. testified that Mr. L threatened that if they had to go to court to resolve matters, she would have no rights and no entitlement to custody of their son because of the manner in which he was conceived. She testified that he used these threats to compel her to sign the May 3, 2015 agreement. She testified that all she wanted was joint custody, and that she was prepared to give Mr. L. anything he wanted. She testified that they did not discuss the monetary terms of the agreement. She testified that the monetary terms were what Mr. L. would give her and if she did not agree to it, he would take her to court. Ms. L. testified that she believed what Mr. L. told her about her rights pertaining to their child.
- [295] Mr. L. points to a WeChat message that Ms. L. sent to him on April 14, 2015, in which Ms. L. said that she had given the matter a lot of thought and felt that it would be in their son's best interests if Mr. L. had guardianship. She said that she hoped Mr. L. would allow her to see their son often. Ms. L. testified that she felt that if Mr. L. had guardianship but allowed her to see the child every day, the arrangement would be the same as joint custody which is what she agreed to. Ms. L. argues that the WeChat message corroborates that she believed what Mr. L. told her about her lack of rights.
- [296] The WeChat message does not advance matters. First of all, it is clearly part of back and forth in negotiating an agreement and does not necessarily reflect what was agreed to. It does not take Mr. L. any further than the May 3, 2015 agreement in which Ms. L. agreed to him having sole guardianship and the parties having joint custody. It does not corroborate Ms. L.'s assertion that she felt compelled by Mr. L.'s threats to agree to matters in order to retain joint custody because it does not say that and it cannot be naturally read as consistent with such an assertion.

- [297] Ms. L. argues that the following comment made by Mr. Justice Sigurdson at para. 193 of his reasons on parenting in relation to B.L. is a finding that is consistent with Ms. L.'s evidence that she felt that she had no choice but to enter into the agreement because of Mr. L.'s threats regarding her lack of legal rights pertaining to B.L.:
- [193] Although Mr. Pederson suggested that I should give substantial weight to the agreements in determining custody and parenting orders, I have concluded that the agreements are entitled to only modest weight. Furthermore, I give modest weight to the May 3 agreement because if any of the agreements were considered by the parties to be binding and applicable, that was the one. While I am not satisfied that it was entered into under duress or that non est factum applies, the May 3 agreement was made without legal advice. The evidence also suggested that the factual matrix under which it was made was in the context of Mr. L. suggesting that Ms. L. had few if any legal rights given the circumstances of the child's birth.
- [298] Mr. Justice Sigurdson's finding was that the evidence suggested that Mr. L. asserted to Ms. L. that she had "few if any legal rights given the circumstances of the child's birth." It is not a finding that the assertion operated to force Ms. L. to agree to something she would not have agreed to had she not been vulnerable, ignorant in need or under distress (the s. 93(3) (b) descriptors).
- [299] In May 2015, Ms. L. and Mr. L. also travelled to China where they obtained a divorce. During that trip, Mr. L. transferred the Anli Road property to Ms. L. It is not in dispute that the transfer was made pursuant to the May 3, 2015 agreement. Ms. L., when asked in cross examination about that, testified that Mr. L. had not coerced her or forced her to signing that agreement. However later in her cross examination she clarified that she meant that she had not been coerced into signing the property transfer for the Anli Property, but that Mr. L. forced all of the terms of the May 3, 2015 divorce agreement on her.
- [300] Ms. L. argues that her evidence that she was presented with versions of the agreement in late March and early April when Mr. L. was making these threats, that she begged him to allow her to see her child after which he prepared a version providing for joint custody, together with the comment of Sigurdson J., should result in a finding that she entered into the agreement because of the threat that if she went to court, she would have no rights in regards to B.L.
- [301] I do not accept the picture she presents. There is no evidence that the earlier drafts of the agreements provided for Mr. L. to have sole guardianship and custody in accordance with the demands of Mr. L and X.L. Ms. L. did not challenge X.L.'s evidence that she did not provide input on the terms of the agreement. Nor did she testify about the content of the drafts she saw. She was not asked about that in cross examination despite Ms. L.'s argument that X.L. was insisting that Mr. L. have sole custody of B.L. while drafts of the agreement were exchanged.

- [302] Ms. L.'s evidence that the controlling issue for her was to achieve joint custody of B.L. does not make sense when considered with the rest of her evidence of what went on in the same timeframe. She testified that after obtaining the divorce in China on May 28, 2015, she returned to Canada on June 4. Around that time, she talked to a friend who told her that the agreement she made with Mr. L. was not fair. Mr. Justice Sigurdson commented that the evidence before him was that the friend's view on unfairness was about the division of assets. Ms. L. testified that after hearing her friend's views, she did not transfer the W. 34th Avenue property to Mr. L. Clearly, a month after signing the May 3, 2015 agreement, Ms. L. was not so afraid of what Mr. L. might do in regards to custody of their son that she felt compelled to adhere to the May 3, 2015 agreement even though Ms. L. testified that it was not until September 2015 that she received legal advice that what Mr. L. told her about her rights in regard to guardianship and custody of their son was not true.
- [303] In June 2015, when Ms. L. refused to transfer the W. 34th Avenue property to Mr. L., Mr. L. had already transferred the Anli Road property to her. The Anli Road property generates just under \$200,000 per year in lease revenue, so her income stream was secure. If, at that time, she was under the impression that she was vulnerable to losing custody of their son if she did not accede to Mr. L.'s demands, she was not motivated by that fear. If it was solely that fear that led her to sign the agreement, the advice that the agreement was not fair in regards to property would not, one month later, cause her to resile from the agreement by which she achieved joint custody.
- [304] Ms. L. argues that the allocation of this asset to her was not beneficial, but rather a "hot potato", a term used by Mr. L. in his evidence regarding the Anli Road property in relation to the fact that like the Dingsi Road property, it was transferred from a corporation into Mr. L.'s name without the proper income tax being paid. I do not accept that she see it that way. Ms. L. did not testify that she objected to the transfer of this property because of its potential tax liability nor did she offer to transfer it back when she resiled from the May 3, 2015 agreement. She did not pay for any expenses that the May 3, 2015 agreement required her to pay out of the lease income. Essentially, she took the benefit of what the agreement gave her in terms of property division and ignored the obligations she assumed in terms of property division.
- [305] I find that Ms. L. was motivated to achieve ownership of the Anli Road property and its lease income stream. That is why she signed the May 3, 2015 agreement. Once the property was transferred to her and she secured the income stream, she resiled from the agreement but kept the Anli Road property.
- [306] Accordingly, I do not accept that Mr. L. took advantage of Ms. L.'s vulnerability, including ignorance, her needs or her distress, regarding her rights around B.L., even if he threatened her that she had no rights pertaining to B.L. The evidence of what happened during the negotiations, particularly X.L.'s evidence, and Ms. L.'s evidence of why she resiled from the agreement in June 2015, is most consistent with the May 3, 2015 agreement being the subject of negotiations back and forth and each party evaluating for

themselves what was in their best interest. The evidence is not consistent with Ms. L.'s assertion that she agreed to everything Mr. L. demanded because of his threats about B.L. Nor is the evidence consistent with Mr. L.'s assertion that he agreed to everything that Ms. L. demanded because she is a lady.

- [307] Ms. L. also argues that she was in financial distress because the only asset she had was the \$840,000 withdrawn from the parties' line of credit and compared to Mr. L.'s corporate assets, this made her vulnerable. Leaving aside that \$840,000 does not logically lead to a conclusion of financial distress (especially given that she almost immediately loaned \$200,000 of it to her sister), the assertion of financial distress ignores the fact that Ms. L. was still the payee of the lease payments on the Anli Road property, totalling almost \$200,000 per annum. I conclude that Ms. L. was focussed on achieving a desirable financial outcome from the negotiations and she was motivated to retain the income stream from the Anli Road property. That is different from financial distress. I do not accept the assertion of financial distress or that Ms. L. was vulnerable due to lack of funds.
- [308] However, for the same reasons discussed above around disclosure, I find that Ms. L. did not have current information to value of Mr. L.'s corporate assets. In conjunction with my conclusion, explained below about the parties' understanding about what they were signing, I find that Ms. L. has established on a balance of probabilities that she did not understand her rights because of the non-disclosure, and she did not understand what she was signing.

The parties' understanding of what they were signing (s. 93(3)(d))

- [309] Both parties had been previously divorced in China and so had some experience with the process in that country. At the time of the May 3, 2015 agreement, they were both newly living in Canada. Neither spoke English. Neither testified as to what the source of their understanding was to sign the May 3, 2015 agreement in terms of Chinese law or Canadian law.
- [310] The parties do not agree which of them drafted the agreement. Each argued the other drafted the agreement and they signed whatever the other wanted. The emails attaching drafts do not contain any substantive comments on the drafts that would assist in determining whether either party is correct that the other dictated the terms. X.L.'s evidence did not point to either of them being the sole or primary drafter. Her evidence was neutral on this issue in the sense that she did not endorse Mr. L.'s evidence that Ms. L. dictated the terms of the agreement and so cannot be said to be concocted to simply line up with the evidence of Mr. L. The evidence does not support that either party acquired an understanding or even made any inquiry into what they agreed to compared to what their respective legal rights were.
- [311] I find that the agreement was the product of negotiation, albeit without the benefit of legal advice on either side.

- [312] There are different translations of the agreement. The differences do not provide any insight into what the parties understood when they signed it, since they signed an agreement written in Chinese and they both read Chinese and speak Mandarin. However, the differing translations do pose problems in interpreting the agreement and whether the language in the agreement as written is capable of more than one understanding.
- [313] The fact that the parties signed three agreements in the month of May 2015, all saying different things, raises the issue of whether they understood what they signed on May 3, 2015, especially since they both testified that they understood the May 15, 2015 agreement to be a translation of the May 3, 2015 agreement.
- [314] Neither party had the benefit of legal advice at the time of signing the May 3, 2015 agreement. There is no evidence that the parties agreed to or deliberately avoided involving lawyers to minimize expenses or deal with matters in a simpler manner. Indeed, given the provisions of the agreement calling for it not to be effective until signed by a lawyer and calling for certain timelines to start once a lawyer signed it, there is an indication that the parties intended to have a lawyer or lawyers participate in some way. However, for reasons not explained, they did not do so.
- [315] Considered together with the failure to address the corporate assets and the lack of information about the value of those assets, the failure to seek legal advice becomes significant and played on a vulnerability that was more pronounced for Ms. L. than for Mr. L. since legal advice may have prompted her to seek the information that he had and that would have helped to restore the integrity to the agreement making process: Rick at paras. 46-48, 60-61.
- [316] I conclude that Ms. L. did not understand the May 3, 2015 agreement in its entirety when she signed it.

Common law enforceability considerations (s. 93(3)(d))

- [317] The various translations of the agreement provides that it "becomes valid after it is signed by both parties and signed in writing by a lawyer" and "will take effect upon the two parties' signing of signatures on it and dealing with and signing signature by the lawyer". As stated previously, some time frames in the agreement are related to the time at which it is signed by a lawyer. Neither party testified as to what the lawyer's signature was to be in aid of, but it was never signed by a lawyer. This raises an issue as to whether the agreement ever became effective or binding on the parties. However, neither party addressed this aspect of that provision and so I will not address it further.
- [318] Mr. L. did not address s. 93(3)(d) specifically. Ms. L. addressed it at length and emphasized that unconscionability is not only a factor to be considered under s. 93(3)(d), but also the lens through which the whole of s. 93 should be viewed as well as a stand alone reason to set aside an agreement. Ms. L. relied on Miglin and Rick for the proposition that where there is any circumstances of oppression, pressure or other vulnerabilities that resulted in

an agreement that deviated substantially from the objectives of the legislation, the agreement may not be enforced.

[319] Ms. L. argues that the May 3, 2015 agreement is unconscionable because:

- (a) Ms. L. entered into it based on misinformation relating to her rights as a mother;
- (b) Mr. L. exploited her vulnerability regarding her ignorance of her true rights; and,
- (c) the separation departed substantially from the principle of equal division of family property, the legislative intention of the Family Law Act.

[320] For the same reasons I declined to find that Ms. L. entered into the agreement because Mr. L. exploited her vulnerability around her rights pertaining to B.L., I do not find that the basis on which she argues these facts lead to a conclusion that the agreement is unconscionable would result in the agreement being set aside or being void or voidable at common law.

[321] However, when compared to the objectives of the legislation - that family property and debt be divided equally unless the parties have negotiated differently in a manner that is fair and after full disclosure - this agreement falls far short. In addition to the failure to address the corporate assets, real property in China, with values at May 3, 2015 of over \$7 million, is not addressed. My assessment of the division of the family property and debt is that the agreement provides for Mr. L. to receive \$20,030,350 and Ms. L. to receive \$5,044,280, leaving aside the vehicles. Out of her share, which includes the lease payments on the Anli Road property, Ms. L. is to fund the expenses and renovations on the W. 34th Avenue property, vehicle payments and Mr. L.'s living expenses for a period of one year.

Conclusion on the enforceability of the May 3, 2015 agreement

[322] Due to the failure to disclose significant and material assets, the evidence as to the uncertainty of the terms of the agreement including the differing translations and the references to involvement of a lawyer or lawyers which never happened, I conclude that the agreement was concluded in circumstances where Ms. L. did not have all the information she should have had when signing and did not have the ability to understand what she was signing, if it was capable of being understood at all. I find her ignorance, both of the value of the corporate assets Mr. L. had, and of her legal position vis-à-vis her rights to the assets, which is highlighted by a lack of legal advice despite that being contemplated in the agreement, is such that her vulnerability was exploited. I conclude that the May 3, 2015 agreement was reached in circumstances that were not fair to Ms. L. I would not replace it with an order that is substantially similar, therefore s.93(4) is not applicable.

[323] Having reached this conclusion, I do not need to consider whether to set the agreement aside under s. 93(5). Nor do I need to determine whether it can be set aside under common law principles alone. Finally, I do not need to determine whether, if not set aside, the agreement remains capable of displacing the s. 81 presumption (Thompson line of authorities) or is only relevant under s.95(2) (P.N.K.and Doell line of authorities).

Division of Family Property and Debt pursuant to the Family Law Act

Equal Apportionment

[324] Based on the values I have placed on the family assets and debts, the total family assets at trial, reduced for the \$1,294,000 line of credit on the W. 34th Avenue property, is \$21,833,215. Excluding the W. 34th Avenue property and its line of credit, and the \$185,000 from the proceeds of the Wilson Avenue property held in trust, Mr. L. currently holds \$13,751,697 and Ms. L. holds \$6,219,770.

[325] Accordingly, as matters stand equal apportionment has not been achieved. Before addressing the means by which to accomplish that, I turn to Mr. L.'s arguments for unequal apportionment.

Unequal Apportionment

[326] As discussed above, in order to depart from equal division of family property and debts, a party must establish that equal division would result in significant unfairness, considering the factors contained in s. 95(2). The s. 95(2) factors that Mr. L. pleaded are Mr. L.'s greater financial contributions to the family property, the agreements made by the parties and the transfers of property which took place pursuant to the May 3, 2015 agreement.

Mr. L.'s greater financial contributions

[327] As discussed above, unequal contribution plays a role where there has been "marked, prolonged and intentional or unexplained disparities in contributions to family burdens": Khan at para. 32.

[328] While there is no doubt that Mr. L.'s engineering skill, entrepreneurial determination and work ethic led to the success of the Mingdun companies, Mr. L. asked Ms. L. to make sacrifices which she did. She had a position in a state owned company that she held for many years which earned her progressively more income each year. Both parties and X.L. testified that such a position is highly regarded and sought after in China. Ms. L. gave up that position at Mr. L.'s request to work for Mingdun Technology. She earned far less at Mingdun Technology than she did at her previous position.

[329] Although I do not accept Ms. L.'s evidence about the financial transactions that she was involved in for Mingdun Technology and Mingdun Tong Chuang or that she played a key role in obtaining financing and addressing cash flow problems, there was no evidence contradicting her evidence that she applied her skills and worked hard in the best interests

of the company. By Mr. L.'s own evidence, supported by the evidence of X.L., he devoted almost all of his time to research and development and little time to the operations of the company, both in terms of financial process and customer relations. Ms. L. played roles in that regard. Mr. L. did not contradict or challenge her evidence about the processes and protocols she established for Mingdun Technology.

- [330] It is apparent that this couple came together on differing career trajectories and with different earning abilities and skill sets. They organized their work lives to prioritize the Mingdun companies and Ms. L. left her position do that in support of Mr. L. They had a child and, like many families, they organized themselves so that Ms. L. had more responsibility for caring for their son. Their relative contributions to the financial aspects, and other aspects, of the family are both explained and intended. Ms. L.'s contribution to the financial success is not markedly low.

The May 3, 2015 Agreement

- [331] I have set aside the May 3, 2015 agreement under s. 93. However, I accept it remains relevant under s. 95(2)(b) and that the circumstances surrounding it are a relevant factor under s. 95(2)(i).
- [332] As I have discussed above, the May 3, 2015 agreement significantly departs from equal apportionment in part because the corporate assets and some real property are not addressed in it. I do not accept that Ms. L. had the information to form the intention that apportionment should be in the ratios that the May 3, 2015 agreement produces when all assets are considered.
- [333] Mr. L. argues that I should consider that, despite signing the May 3, 2015 agreement and after acquiring sole title to the Anli Road property and its lease income stream pursuant to the agreement, Ms. L. refused to do her part under the agreement and transfer the W. 34th Avenue property to him and repay the entire amount she advanced to herself from the line of credit.
- [334] I have found that Ms. L. was motivated to acquire the Anli Road property and its income stream. She did acquire it, after which Mr. L. was precluded from benefiting from that source of income. He was also precluded from moving forward with his plans to renovate, rebuild or sell the W. 34th Avenue property because Ms. L. refused to transfer it to him and filed a certificate of pending litigation against it. The question is whether her actions in this regard are significantly unfair.
- [335] There is no doubt that a party who asserts that an agreement should not be enforced has the right to take that position. However, Ms. L. did not bring an action to set aside the agreement. Mr. L. brought this action to enforce it, and she responded to it by seeking to set aside the agreement. She took the asset she was motivated to acquire, and then refused to comply with the rest of the agreement. Not only did she not transfer the W. 34th Avenue property to Mr. L., she did not contribute to the expenses that were inevitable given that

the residence was uninhabited, uninhabitable and could not be sold. Those included the payment on the line of credit, the property tax and the vacancy tax.

- [336] It took four years to get to this trial on the property division issues because the court ordered that the issues pertaining to B.L. be tried first. The burden of delay has manifested itself in concrete ways in relation to both the Anli Road property and the W. 34th Avenue property.
- [337] I have taken the lease payments into account in valuing the Anli Road property pursuant to s. 84(1)(b)(i) of the Family Law Act. Alternatively, it could be appropriate to consider the financial consequences of the delay under s. 95 apportionment, instead of in valuing the asset. In *Jaszczewska*, the Court of Appeal cautioned that valuing property at a date other than the s. 87 presumptive date was a form of reapportionment and should only be done if to do otherwise would be significantly unfair. In my view, that concern does not apply to the lease payments because the valuations are being undertaken at the presumptive valuation date and because s. 84(1)(b)(i) provides that property derived from property is also family property.
- [338] With regard to the expenses on the W. 34th Avenue property, I conclude it appropriate to consider those expenses, which Mr. L. has solely born in relation to this property, under s. 95 as they relate to post-separation maintenance of family property (s. 86(b)).
- [339] This court has found that reduction of the mortgage by one party after separation is a ground on which to base a decision to use the date of separation to value the debt or the asset or to apportion unequally: *K.M.J.* at paras. 155-156; and *Piderman v. Piderman*, 2015 BCSC 475 at paras. 46-48.
- [340] In *Bilawchuk* at paras. 35-38, Madam Justice Fenlon refused to reapportion based on the argument that the claimant did not share equally in the maintenance of the family home in circumstances where she had moved out and the occupational lease payments payable by the respondent would more than offset the costs of maintaining the home.
- [341] In *Ellis v. Ellis*, 2018 BCSC 510 I held that the payment of the mortgage and property taxes did not amount to significant unfairness in the circumstances. In that case, the party who made the payments continued to reside in the family home and the party who moved out rented much less grand premises and paid rent. Given the parties' pre-separation arrangements, their means, the practical realities of the situation and the fact that no adjustment for occupational lease payments was made, I declined to apportion unequally.
- [342] In my view, this case is factually distinct from all of those cases. Neither party has been living in the house. It is not fit to be lived in and apparently has been occupied by squatters as it is sitting empty. Ms. L. did not transfer her interest in it to Mr. L. as provided for in the May 3, 2015 agreement and has a certificate of pending litigation filed against it. During the time between May 2015 and now it has become subject to a vacancy tax that has added to the tax burden by over \$40,000 per year. Both parties have had costs of shelter and in

addition Mr. L. has paid the expenses on this house which is frozen by the litigation. I conclude that the reduction in the line of credit and the taxes (there was no evidence about the interest payments on the line of credit), totalling \$156,000, should be shared equally by the parties, resulting in a credit of \$78,000 in Mr. L.'s favour.

- [343] The next issue relating to the May 3, 2015 agreement is the monies that Ms. L. withdrew from the line of credit after separation. As already described, in the May 3, 2015 agreement, and on other occasions afterward, she promised to repay \$700,000 of the \$840,000 she withdrew in April 2015. She repaid \$500,000 and promised to repay a further \$200,000 but never did. When she repaid the \$500,000, Mr. L. withdrew the same amount from the line of credit for his own uses.
- [344] Ms. L.'s behaviour was unreasonable and unfair in a substantial sense because she did not need the money but rather took it to increase her cash reserves and then loaned \$200,000 to her sister and refused to pay it back despite her promise in the agreement to do so. However, Mr. L.'s reaction to scoop the repayment for himself also calls out to be addressed.
- [345] It is my view that this conduct, on both parties' part, must be addressed or significant unfairness will rise. It is simply not acceptable, and therefore compelling and objectively unjust, that parties can increase family debt post-separation in this manner and in these amounts (which are large even if not that large compared to the total value of the family property in this case) without any reasonable excuse for doing so to the detriment of their former spouse.
- [346] Accordingly, I conclude that \$340,000 of the line of credit debt should be solely attribute to Ms. L., and \$500,000 of it should be solely attributed to Mr. L., resulting in a \$160,000 adjustment in Ms. L's favour. In addition, one half the expenses related to the W. 34th Avenue property shall be credited to Mr. L. The net adjustment is \$82,000 in Ms. L.'s favour.

Achieving the apportionment

- [347] I have determined that property and debt should be divided equally, with the exception of an adjustment of \$82,000 in Ms. L's favour.
- [348] In order to achieve this, assets must be transferred from Mr. L. to Ms. L. The assets available are Mr. L.'s investment in Mingdun Tong Chuang, cash including bank deposits and investments that he has not disclosed, if any, the W. 34th Avenue property, the Clearbrook Road property and the Old Yale Road property. As discussed above, Mr. L. purchased the latter two properties after separation with family property and so pursuant to s. 97(2)(d) of the Family Law Act, the court can order them to be sold and payment to be made out of the proceeds of sale to one spouse or both in specified proportions or amounts.

[349] I have found that Mr. L.'s remaining excluded property in Mingdun Tong Chuang cannot be traced after 2004 when Mingdun Technology was established and I found that Mr. L. invested \$1.3 million of family property Mingdun Tong Chuang in 2018, after the parties separated. Mr. L. produced very little information with respect to Mingdun Tong Chuang. I do not have information as to the value of the 2018 investment at the time of trial. I do not have evidence that any order that I would make with regard to it would be enforceable: Family Law Act, ss. 109(2)(b)-(c); Slavenova paras. 77-79. Accordingly, I do not consider it a viable asset to use to achieve apportionment. However, under s. 109(2)(a) of the Family Law Act, the court has discretion to substitute property in B.C. or make a compensation order "instead of dividing the extraprovincial property".

[350] Mr. L. gave evidence that his cash is depleted and the only asset he has to finance his retirement is the W. 34th Avenue property. Although he gave this to persuade the Court to allocate this asset to him, it raises a concern about how he will satisfy a judgment other than through the W. 34th Avenue property. Despite that I do not believe that he has fully disclosed all of his assets and I anticipate that he will use any non-disclosed assets to fulfill the judgment, it is appropriate to allocate assets known to exist. The rest will have to be achieved through a compensation judgment. I consider it appropriate to give Mr. L. time to fulfill such a judgment before requiring the sale of the Clearbrook Road property or the Old Yale Road since those properties are the residences of his daughter and himself. However, if he does not fulfill the compensation judgment, since family property has been traced into those properties, they will have to be sold to satisfy the judgment.

[351] I order as follows:

- a) the funds from the proceeds of sale of the Wilson Avenue property remaining in the trust account of Ms. L.'s counsel be paid to Ms. L. (approximately \$185,000);
- b) the W. 34th Avenue property and its line of credit be transferred to Ms. L. alone (if there needs to be an order discharging the certificate pending litigation to accomplish this then I make such an order);
- c) Mr. L. pay Ms. L. \$2,912,837 (the "compensation judgment");
- d) if, within 90 days of this order, Mr. L. has not paid Ms. L. the entirety of the compensation judgment, then the Clearbrook Road property and the Old Yale Road property and/or the Clearbrook Road property be sold and the proceeds of sale applied to satisfy the portion of the compensation judgment not yet paid;
- e) pursuant to s. 284 of the Land Title Act, R.S.B.C. 1996, c. 250, Mr. L. is prohibited from selling, or otherwise transferring, charging or dealing with the Old Yale Road property or the Clearbrook Road property until the s. 284 order is registered against title or the compensation judgment is paid in full, whichever occurs first.

Child Support

- [352] Ms. L. seeks retroactive child support for B.L. from July 2017, when Mr. Justice Sigurdson ordered that B.L. be primarily resident with Ms. L., to the date of trial and on a go forward basis.
- [353] Mr. L. explained that he has not paid child support because when B.L. was living with him, between the summer of 2015 and Mr. Justice Sigurdson's order, Ms. L. did not pay any child support because the May 3, 2015 agreement provides that they will each pay the child expenses when the child is in their respective care. Ms. L.'s counsel submitted that it would be appropriate to offset child support that Ms. L. should have paid from July 2015 to June 2017 from the award of child support she seeks from July 2017 to the present.

Applicable Legislation

- [354] Child support is governed by the Family Law Act and the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.). It is important to specify under which Act orders are made: *Yu v. Jordan*, 2012 BCCA 367 at paras. 1, 48; *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 at para. 15. Where the parties are married or were formerly married, orders for child support and spousal support are corollary orders under the Divorce Act. However, the doctrine of paramountcy does not preclude consideration of and making orders under the Family Law Act if there are no "operational inconsistencies" between the acts: *B.D.M. v. A.E.M.*, 2014 BCSC 453 at paras. 110, 113-115. Where there is conflict, the Divorce Act governs.
- [355] As discussed, the parties were divorced in China in May 2015. At the trial pertaining to B.L., Mr. Justice Sigurdson considered both legislative regimes and decided custody under the Divorce Act, supplemented with orders under the Family Law Act (see paras. 65-75 of Mr. Justice Sigurdson's reasons for judgment).
- [356] Both legislative regimes provide that child support shall be decided in accordance with the Federal Child Support Guidelines, SOR/97-175: Divorce Act, s. 15.1(3); Family Law Act, s. 150(1); Family Law Act Regulation, B.C. Reg. 347/2012, s. 8. They utilize different language pertaining to the discretion of the court to make an order in an amount different than that which would be made in accordance with the Federal Child Support Guidelines but neither party has sought such an order in this case so those differences do not require me to consider whether there is an operational inconsistency or conflict between the two acts. Since Mr. Justice Sigurdson decided the child custody issues pursuant to the Divorce Act, I will determine child support under the Divorce Act.

Legal Principles

- [357] In *M.A.G. v. P.L.M.*, 2014 BCSC 126 at para. 52, this court described three fundamental principles that apply to all child support applications:
- a) parents have a joint and ongoing legal obligation to support their children;

- b) the children, not the custodial parent, have the right to support; and
- c) support payments are based on earning capacity and not only on what a parent actually earns; as a result, a parent has a legal obligation to earn as much as he or she is reasonably capable of earning.

[358] Section 15.1 of the Divorce Act provides that an order for child support is to be in accordance with the Federal Child Support Guidelines. Section 16 of the Guidelines provides that child support shall be calculated in accordance with a party's total income as stated on their T1 General form, often referred to as line 150 income.

Imputing Income

[359] Section 19(1) of the Guidelines permits the court to impute income to a spouse in certain circumstances, including that the spouse's property is not reasonably utilized to generate income and where the spouse has failed to provide income information. Section 19 read 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:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from 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; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

- [360] Mr. L. testified that he earned about ¥250,000 per year from Mingdun Technology in the second half of 2014 and 2015. Although he was not precise about the timing, he testified that his falling out with Mr. Yang and Mr. Kong occurred over two years commencing in around 2016. Mr. L. testified that there was a shareholders meeting in September 2017 at which the other shareholders waived their right to redeem his shares and instead agreed that a portion of Mr. L.'s shares could be transferred to Ms. L. as part of the Haidian District People's Court proceedings. I infer that to be the time at which they reduced his salary to ¥3,500 per month. He further testified that by September 2018, he had no choice but to sell his shares and his income ended. I conclude his income was ¥250,000 in 2015, 2016 and in 2017 until September, reduced to ¥3,500 per month in October 2017 and ended in September 2018.
- [361] Mr. L.'s most recent financial statement reports that his annual income for child support purposes is \$8,000 per year and his annual living expenses are \$203,000 per year. His 2018 income tax return reported income of \$22,320, \$20,000 of which was reported as business income. His 2017 income tax return reported total income of \$8,861 and his 2016 income tax return reported total income of approximately \$12,000. Obviously, his income declared on his financial statement is inconsistent with his income tax return and neither is sufficient to support his declared annual expenses.
- [362] Ms. L.'s counsel urges me to impute income to Mr. L. on the basis of his significant assets. Ms. L. urges an imputation of income equalling 4% per year on the asset base he should have had each year given his sale of Hemu Mountain villa, the Dingsi Road property and the 2018 sale of the remainder of his Mingdun Technology shares.
- [363] As described above, Mr. L. testified that despite the sale of his significant assets, he has nothing left except the W. 34th Avenue property he owns with Ms. L., the Old Yale Road property which he asserts is beneficially owned by his daughter, the Clearbrook Road property in which he lives and less than \$1 million in the bank. I do not believe his evidence about this and I find that he has significant undisclosed assets.
- [364] I accept that I should impute income to Mr. L. based on his ability to earn income on the proceeds of sale his assets. However, Ms. L. did not cite any authority for the proposition that 4% is an appropriate rate or how to determine it.
- [365] This court has used an annual rate of return of 3% when imputing income pursuant to s.19(1)(e) of the Guidelines in the absence evidence that establishes a higher rate: *Kim v. Hong*, 2013 BCSC 587 at para. 353. Three percent, at the time of *Kim*, was the "Bank of Canada Prime Business Rate" and the court was "unwilling to assume or take judicial notice" of a higher rate. In subsequent decisions, the same rate has been used where there is evidence of the Bank of Canada Prime Business Rate or no evidence of the Bank of Canada Prime Business Rate: *Ferguson v. Ferguson*, 2019 BCSC 1946 at para. 23; and *J.R. v. N.R.*, 2017 BCSC 455 at para. 98. In *Devathasan v. Devathasan*, 2019 BCSC 661 at paras. 291-294, the court made no reference to *Kim* or any other case when concluding that a 3%

rate of return was appropriate. Although in that case the real rate of return on the investment portfolio in question had been 4.78%, the court concluded that was too aggressive and that it was "most reasonable to assume a relatively conservative approach." In reaching this conclusion, the court relied in part on the prescribed 2% discount rate under s. 56(2) of the Law and Equity Act, R.S.B.C. 1996, c. 253.

- [366] In the absence of evidence as to the appropriate rate, I conclude the appropriate annual rate to impute income pursuant to s. 19(1)(e) of the Guidelines is 3%.
- [367] I conclude that I should not impute income on the sale proceeds of all of the assets because, for example, the Clearbrook Road property and the Old Yale Road property are not income earning assets. However, I include his investment in Mingdun Tong Chuang in the asset base for the purposes of imputing his investment return income. He has not produced information about whether that investment produces a return and even assuming that investment is not currently providing a return, there is no evidence that he could not have invested in something that did produce a return.
- [368] I have used the figures already determined in this judgment to calculate Mr. L.'s asset base at the relevant times (which includes time periods prior to 2017 because of s. 7 expenses), except that I have not excluded the excluded property portion as that is not relevant to child support. I have also excluded the proceeds of the sale of the Hemu Mountain villa as the evidence shows he used those funds to pay for the taxes and penalty on the Dingsi Road property and for the down payment on the Clearbrook Road property. I have reduced his asset basis on a go forward basis by the compensation judgment I have ordered.
- [369] I find there are three sources of income that existed at different times: (a) Mr. L. salary from Mingdun Technology, which was either \$50,000 per year or \$700 per month depending on the applicable timeframe; (b) imputed income based a 3% rate of return on June 2016 sale proceeds from the Dingsi Road property in the amount of \$5,897,907; and, (c) imputed income based a 3% annual rate of return on September 2018 sale proceeds from the Mingdun Technology shares in the amount of \$4,432,570. I calculate his notional annual income for child support purposes as follows:
- a) 2015 - \$50,000 (Mingdun Technology annual salary);
 - b) 2016 - \$138,468 (Mingdun Technology annual salary and imputed Dingsi Road property sale proceeds income for six months);
 - c) 2017 - \$216,537 (Mingdun Technology salary and imputed Dingsi Road property sale proceeds income);
 - d) 2018 - \$218,581 (Mingdun Technology monthly salary, imputed Dingsi Road property sale proceeds income and imputed Mingdun Technology shares sale proceeds income for three months);

- e) 2019 - \$309,914 (imputed income from Dingsi Road property sale proceeds income and Mingdun Technology shares sale proceeds income); and
- f) 2020 - \$309,914.31 (imputed income from Dingsi Road property sale proceeds income and Mingdun Technology shares sale proceeds income; reduced to \$222,529.20 on a prospective basis to account for lower annual income assuming that his asset base has been reduced by the compensation judgment of \$2,912,837).

[370] I consider it appropriate to impute income to Ms. L. on the same basis in addition to the income she realizes from the lease of the Anli Road property. Specifically, the \$450,000 unaccounted for from the 2014 sale of Mingdun Technology shares, on which I impute income based on a 3% annual rate of return. For the purpose of child support, I include the lease income she was receiving from the date of separation, end of December 2014, at the Canadian dollar equivalent of \$190,000 per year until August 2015 when it increased to \$205,200 per year until the end of 2019. As a result, Ms. L.'s notional annual income for child support purposes is as follows up the date of trial:

- a) 2015 - \$204,767;
- b) 2016 - \$218,700;
- c) 2017 - \$218,700;
- d) 2018 - \$218,700;
- e) 2019 - \$218,700; and
- f) 2020 - \$201,600.

[371] Subsequent to trial, the parties have relatively equal asset bases and should be able to generate similar incomes.

Calculation of Child Support

[372] Based on the imputation of income to Ms. L., child support during the period that Mr. L. had custody, July 2015 through June 2017, should have totalled \$43,326, payable by Ms. L. to Mr. L., based on the following:

- a) July to December 2015 - \$1,728 per month (\$10,368 for six months);
- b) 2016 - \$1,831 per month (\$21,972 for the year); and
- c) January to June 2017 - \$1,831 per month (\$10,986 for six months).

[373] Based on the imputation of income to Mr. L., child support during the pre-trial period that Ms. L. had primary custody, July 2017 through September 2019, should have totalled \$57,069, payable by Mr. L. to Ms. L., based on the following (note the table amounts changed in November 2017):

- a) July to November 2017 - \$1,815 per month (\$9,075 for five months);
- b) December 2017 - \$1,875 per month;
- c) 2018 - \$1,891 per month (\$22,692 for the year); and
- d) January to September 2019 - \$2,603 per month (\$23,427 for nine months).

[374] Child support from the commencement of trial in October 2019 to May 2020 totals \$20,824 (\$2,603 per month for eight months), payable by Mr. L. to Ms. L. Child support on a go forward basis is \$1,922 per month payable by Mr. L. to Ms. L.

[375] From 2015 until the date of these reasons, the s. 7 expense ratios are:

- a) 2015 - 63.5% to Ms. L. and 36.5% to Mr. L.;
- b) 2016 - 61.2% to Ms. L. and 38.8% to Mr. L.;
- c) 2017 split 50.2% to Ms. L. and 49.8% to Mr. L.;
- d) 2018 - 50% to each;
- e) 2019 - 41.4% to Ms. L. and 58.6% to Mr. L.;
- f) 2020, until the date of these reasons - 39.4% to Ms. L. and 60.6% to Mr. L.;
- g) date of these reasons onward - 50% to Ms. L. and 50% to Mr. L.

Retroactive Child Support

[376] The leading case on retroactive child support is D.B.S. v. S.R.G., 2006 SCC 37. The court set out the following factors to be considered in determining whether to make such an award at paras. 100-116:

- a) whether the recipient parent has a reasonable excuse for not seeking child support earlier;
- b) the conduct of the payor parent;
- c) the circumstances of the child; and
- d) whether a retroactive award will occasion hardship on the payor.

[377] The court must consider these factors together, taking a holistic view of the case: D.B.S. at para. 99. The principles that apply to the consideration of these factors include:

- a) both the recipient parent and the payor parent have obligations to ensure that the proper amount of child support is paid;
- b) proper child support is the right of the child; and
- c) the court must balance certainty, predictability and flexibility.

- [378] In D.B.S. at paras. 61-84, the court considered three situations that could give rise to an application for a retroactive award. The first is where the payor parent is making child support payments pursuant to a court order but there is a change in circumstances that prompts an application to retroactively revise child support. The second is where there is an agreement between the parties as to child support and the recipient parent applies to the court to revise it. The third is where there has been no order for child support.
- [379] The payor parent's interest in certainty, which militates against a retroactive award, is highest in the first circumstance, lower in the second circumstance, and lowest in the third circumstance. This case has elements of the second and third because there was an agreement, which I have set aside, leaving no enforceable agreement on child support.
- [380] With regard to a reasonable excuse as to whether support is payable, Ms. L.'s conduct in seemingly complying with the May 3, 2015 agreement for some purposes but not for others clouded the situation around child support. However, by the time Mr. Justice Sigurdson ordered that B.L. be primarily resident with Ms. L., Mr. L. had notice that Ms. L. sought to avoid the application of the May 3, 2015 agreement and sought child support.
- [381] Mr. L.'s conduct was not blameworthy because it is consistent with his position that the agreement ought to be enforced. However, his incomplete disclosure of his financial picture is also unacceptable when it comes to child support. Regardless of his views on the enforceability of the May 3, 2015 agreement, his responsibility as a father and a family litigant is to fully disclose his assets and his income so child support can be properly calculated.
- [382] With regard to B.L.'s circumstances, he is a high needs child and one of the ongoing disputes between his parents is the provision and costs of his special care needs.
- [383] With regard to hardship, Ms. L. is prepared to offset the amount she claims with what she should have paid during the period that B.L. was primarily resident with Mr. L. Mr. L.'s burden will be reduced by that amount. In addition, consistent with my findings that Mr. L. has retained his assets that he has not accounted for, I find there will be no hardship.
- [384] Considering these factors, it is my view that an award of retroactive child support is appropriate. Ms. L. seeks retroactive support commencing July 2017, which is when Mr. Justice Sigurdson ordered that B.L. be primarily resident with her. I find this is an appropriate date to start the retroactive child support, subject the deduction noted above to address child support that Ms. L. should have paid to Mr. L. while B.L. was primarily resident with him.
- [385] I award retroactive child support in the amount of \$34,567 after setting off the amount Ms. L. should have paid to Mr. L. during the time B.L. was primarily resident with him. For simplicity, I have considered all child support up to the date of these reasons together as retroactive child support and order that this be paid as a lump sum.

[386] Neither party has made a specific claim for past s. 7 expenses.

Go Forward Child Support

[387] I award go forward child support in the amount of \$1,922 per month commencing in June 2020.

[388] Because the parties will have equal asset bases subsequent to trial, I order that on a go forward basis, s. 7 expenses shall be shared equally.

Mr. L.'s proceedings in the Peoples' Republic of China

[389] As discussed, Mr. L. brought two proceedings against Ms. L. in China. He discontinued the first. Ms. L. discovered the second shortly before this trial. At the outset of the trial, Mr. L. consented to an order that he abandon that proceeding.

[390] Ms. L. asserts that nothing has been done to abandon the proceeding. Mr. L. and his daughter testified that they had made efforts.

[391] Ms. L. is also concerned that X.L. may commence litigation against her in relation to the interest that X.L. had in the Dingsi Road property and the Anli Road property by virtue of being a shareholder in the companies that held those properties before Ms. L. transferred them into Mr. L.'s name.

[392] Ms. L. seeks orders requiring Mr. L. to indemnify her against any proceedings that Mr. L., X.L. or Mingdun Tong Chuang may bring against her.

[393] I made an order at the outset of trial relating to proceedings that were duplicative of the trial on which I was about to embark. It was a consent order. If it is not complied with, Ms. L. should follow the avenues available to her.

[394] I consider it inappropriate to make broadly cast orders pertaining to hypothetical actions that may or may not involve some of the assets that I addressed but do not duplicate the claims made in this proceeding and involve the rights of persons who are not parties to this action.

Costs

[395] Ms. L. asked for leave to speak to costs after this judgment is rendered. Since the parties did not address costs at the conclusion of the trial, I grant leave to address costs.

[396] For the guidance of the parties, I advise that my present inclination is to order that the parties bear their own costs primarily because both parties engaged in conduct that distracted from the issues to be dealt with and because persons who supported both parties (Ms. L.'s boyfriend or former boyfriend and Mr. L.'s girlfriend) were significantly disruptive to the trial proceedings. My present inclination could change based on submissions if they are made. If the parties make submissions, each party must fully address their behaviour and the behaviour of those supporting them during the trial.

[397] If either party wishes to address costs they may do so by delivering written submissions to me electronically through the registry within 30 days of these reasons and deliver any reply submissions within 45 days of these reasons by the same method. If, after reviewing the written submissions, I require oral submissions, I will arrange for a hearing. If either party wishes an opportunity to address the Court through a telephone hearing, they may make that known in their written submissions and I will consider the request and advise the parties if I grant it.

"Matthews J."

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