

CANADA / JUDGMENT

Yunusova v. Naimi

2022 BCSC 848

COURT

Supreme Court of British Columbia

DECIDED

19 May 2022

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2022 BCSC 848 Yunusova v. Naimi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yunusova v. Naimi,

2022 BCSC 848

Date: 20220519

Docket: E170057

Registry: Vancouver

Between:

Zulfiya Yunusova

Claimant

And

Hamid Naimi also known as Hamid Naimi Azghadi

Respondent

Before: The Honourable Justice Skolrood

Reasons for Judgment

The Claimant appearing on her own behalf on November 29 to December 1, 2021 only and Counsel for the Claimant appearing for the remainder of the trial dates:

L. Rudovica

Z. Yunusova

The Respondent appearing

on his own behalf:

H. Naimi

Place and Date of Trial:

Vancouver, B.C.

November 29-30, 2021;

December 1-3, 6-10, 2021; and

January 27, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 19, 2022

- [1] This is a family law matter in which the principal issues in dispute are division of property and debt and child and spousal support. These latter issues turn in large part on a determination of the parties' incomes which is also contentious.
- [2] Both parties seek a divorce. I am satisfied on the evidence that the statutory criteria for granting a divorce have been established. I therefore order that the parties are divorced, with the order to take effect 31 days from the date of these reasons.

Introductory Observations

- [3] The property issues in this case present a particular challenge because many of the transactions referred to in the evidence involve money being transferred back and forth between Canada and Iran. Depending upon the transaction, the amounts in issue were described in either Iranian Rials or Canadian dollars. There was no expert evidence about the exchange rate between the two currencies, but it is apparent from the evidence that was led that the rate is variable and volatile. This makes it difficult if not impossible to assign firm values to many of the disputed assets. To the extent possible, I intend to use Canadian dollars when valuing the assets. In certain instances, that will involve providing at best an estimate based upon whatever evidence is available concerning the appropriate exchange rate. As I understood the respondent's evidence, when money was transferred between Canada and Iran, it went through an exchange company. In many instances, the exchange rate used by the respondent is the rate provided by the exchange company for the particular transaction.

- [4] The challenge is intensified by the fact that many of the transactions testified to by the respondent are not well documented, if they are documented at all. According to the respondent, money seems to have flowed regularly and freely back and forth between him and various business associates and family members.
- [5] The respondent's evidence about these transactions was often vague and inconsistent, adjectives that describe his evidence more generally. In this regard, I am mindful of the principles governing the assessment of credibility and reliability set out in cases like *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-87, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392 (S.C.C.). Applying these principles, I have approached much of the respondent's evidence with caution.

Background

- [6] I will provide an overview of the background facts and then will address the facts and evidence in greater detail as needed when dealing with the issues that arise.
- [7] Some of the facts are taken from a document titled "Admission of Facts" dated January 29, 2020 (the "AOF") that was agreed to by the parties during an arbitration in which they attempted to resolve their outstanding issues. While the respondent attempted to resile from aspects of the AOF at trial, I declined to permit him to do so and I take the facts set out in the AOF to be binding admissions by both parties.
- [8] The claimant was born in 1972 in Kazakhstan.
- [9] The respondent was born in 1953 in Iran. He came to Canada in 1990.
- [10] The parties met online in 2006. They subsequently met in person and were married in Turkey on July 21, 2008.
- [11] The respondent sponsored the claimant and her son to come to Canada and they began living together here in August 2009.
- [12] The parties have one child, "S", born in 2011.
- [13] The parties separated on September 22, 2016, although the claimant remained in the then-family home with the respondent until March 2017.
- [14] Since separation, S has lived primarily with the claimant. Pursuant to an interim order of Master Harper dated June 23, 2017, the respondent has been paying \$474 per month in child support along with \$640 per month in spousal support.
- [15] The respondent has worked for many years as an immigration consultant. He has his own consulting company, Avesta Services Inc. ("Avesta"), which was formerly known as Nanaimo Immigration Services Inc. The claimant worked for the respondent's business during the marriage.

- [16] After separation, the claimant trained to become a dental receptionist and she is now employed as such.
- [17] The parties engaged in a mediation in 2019 that resulted in an agreement about many of the parenting issues. The agreement is reflected in Minutes of Settlement that were filed with the Court on June 10, 2021. I will return to this agreement when addressing the parenting issues raised at trial.
- [18] One other introductory point to note. Throughout the case, the respondent referred to a number of business associates, many of whom still live and/or work in Iran. He asked that they not be named. While the basis for this request was a vague concern about their safety, I am prepared to accede to the respondent's request and will refer to these individuals using their initials.

Division of Property and Debt

- [19] There are a number of discrete property issues that I will address before circling back and considering the division of property as a whole.

\$325,000 Transferred by the Respondent to Iran in 2015

- [20] It is common ground that the respondent transferred the sum of \$325,000 CAD to Iran in October 2015, which was before the parties separated, and that the funds came from the proceeds of the sale of property purchased during the parties' marriage.
- [21] The respondent claims that this is excluded property. In order to address that claim, it is necessary to describe a number of property transactions that occurred before and during the marriage that ultimately resulted in the \$325,000 being generated.
- [22] There are three relevant properties. I will describe each of the properties and the related transactions in turn. I will then return to a discussion of the principles governing excluded property claims.
- [23] Property #1 is a townhouse located on West 10th Avenue in Vancouver. It was purchased by the respondent in 2001, prior to his marriage to the claimant, for \$269,900. At the time of the marriage in July 2008, the assessed value of Property #1 was \$529,000. It is somewhat unclear on the evidence how much equity the respondent had in Property #1 at the time of marriage. The respondent produced a statement for the mortgage line of credit showing a balance of approximately \$326,000 as of July 21, 2008. The respondent estimated his indebtedness to be approximately \$302,000 at the time of marriage. Using the assessed value of \$529,000, it appears that the respondent had equity in Property #1 between \$203,000 and \$227,000 at the time of marriage. In my view, given that the marriage took place on July 21, 2008, the most accurate figure reflecting the respondent's equity in Property #1 at the time of marriage is \$203,000.

- [24] Property #1 was sold on August 26, 2009 for \$580,000. Of that amount, \$422,959 was used to pay off a mortgage line of credit and another line of credit registered against the property, leaving a balance of \$157,041.
- [25] Prior to the sale of Property #1, but after the parties married in July 2008, Property #2, located on West 42nd Avenue in Vancouver, was purchased on October 27, 2008 for \$776,888. While the evidence is unclear, it seems to be common ground between the parties that the \$157,041 balance from the sale of Property #1 went towards Property #2. As I understand the respondent's evidence, approximately \$78,000 was used to pay off the second line of credit secured against Property #1, which had been obtained to assist in the purchase of Property #2. While not well explained, I am satisfied that the balance of the \$157,041 sale proceeds from Property #1 were invested in Property #2.
- [26] The existing house on Property #2 was torn down and a new house was constructed. Property #2 was then sold on December 5, 2012 for \$1,973,496.60. From that amount, a mortgage of approximately \$1.1 million was paid off. After payment of various ancillary fees, \$815,670 was paid out to the respondent.
- [27] Property #3, located on Dunbar Street in Vancouver was purchased on March 1, 2013 for \$1,189,000. That property was renovated and then sold in May 2015 for approximately \$2.5 million. From that amount, various mortgages were paid off, as were debts to certain family and friends. I note that there were no loan agreements entered into evidence to substantiate these loans, but there was evidence that a total of \$253,400 was paid towards these debts. According to the respondent, much of this money was used to invest in Dana Development Inc. ("Dana") (see below).
- [28] The respondent received net proceeds of \$615,779. He acknowledges that from this amount, \$325,000 was transferred to Iran in October 2015. The claimant suggests that the amount transferred may have been more, but the focus of the claimant's evidence and claims at trial was on the \$325,000. It is common ground that a further \$200,000 was held in a lawyer's trust account and then paid out equally to the parties as an interim distribution. Both parties acknowledge that this amount must be factored into the final division of family property.
- [29] There was considerable evidence at trial about what became of the \$325,000. According to the respondent, the bulk of it was loaned to two associates, Mr. "S" and Mr. "N". The respondent produced a spreadsheet purporting to show the payments made and then the repayments received. The respondent was vague and inconsistent in his evidence about the flow of funds, making it difficult to ascertain exactly what happened.
- [30] However, it is not necessary to develop a clear picture of what became of the funds because the evidence establishes that the respondent used the \$325,000 for his own benefit and that the claimant received none of it. Since the funds were generated from the sale of Property #3, which was purchased and sold during the marriage, the money is presumptively family property subject to the respondent's excluded property claim.

- [31] Before turning to that claim, there is also an issue about interest earned on the \$325,000. Again, the evidence does not paint a clear picture. However, the respondent testified that he earned interest of 24% on the money loaned to his associates. In response to an outstanding request at his examination for discovery, the respondent stated that by November 2017, he had earned \$5,217 in interest on the loan to Mr. S and \$17,762 on the loan to Mr. N. The November 2017 date is the date by which the respondent says he was repaid the bulk of the funds. Added to the principal amount, this totals \$347,979. The respondent also states in his discovery response that as of November 2017, Mr. S still owed him \$22,839. Presumably that amount encompasses some principal and some interest still owing.
- [32] As I indicated at the outset of this section, the respondent claims that all proceeds realized from the sale of Property #3 are excluded property because both Property #2 and #3 were purchased using proceeds from the sale of Property #1, which the respondent purchased before the marriage in part from his own savings.
- [33] "Excluded property" is defined in s. 85 (1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] to include:
- (a) property acquired by a spouse before the relationship between the spouses began;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- [34] The respondent submits that Property #2 and #3 fall within s. 85(1)(g) in that they were derived from the disposition of Property #1. However, as reflected in the above summary of the various property transactions, it is apparent that the funds ultimately realized on the sale of Property #3, which were then used for the \$325,000 transfer and to fund the investment in Dana, were generated during the marriage through the construction and sale of a new house on Property #2 and then the purchase and renovation of Property #3.
- [35] At best, the respondent can claim the \$203,000 in equity from Property #1 that subsequently went into Property #2 as excluded property. The question is whether he has established that it qualifies as such.
- [36] In *Pisarski v. Piesik*, 2019 BCCA 129, MacKenzie J.A. confirmed that the onus is on the party claiming the exclusion and she described the applicable test in these terms:
- [24] The onus rested on the appellant to prove her contribution was excluded property pursuant to s. 85. The proper test for establishing a claim to excluded property is proof on a balance of probabilities: *Shih v. Shih*, 2017 BCCA 37 at para. 42. Precision or mathematical certainty is not required, but to discharge the burden, the party seeking to prove property is excluded property must do so with clear and cogent evidence: *Shih* at paras. 40, 43. If documentary evidence is not available, the party seeking to exclude property will need to testify as to their recollection of the disputed transactions and that evidence will be scrutinized for credibility: *Shih* at para. 43. In balancing the evidence as a whole, the judge is permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do

justice between the parties: Shih at para. 44.

- [37] At para. 27, MacKenzie J.A. referred to the finding of the trial judge in that case that the wife, who claimed that her contribution towards the purchase of family property was excluded, "took no steps to keep these funds separate nor document that her contribution was to be kept or treated as separate", citing *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 78, leave to appeal ref'd [2016] S.C.C.A. No. 295 (S.C.C.).
- [38] In *V.J.F.*, referred to by MacKenzie J.A. and the trial judge, the husband had received a \$2 million gift from a third party that was subsequently used to purchase property and put in the sole name of the wife, for creditor protection reasons. Justice Newbury held that the registration of the purchased property solely in the name of the wife evidenced an intention on the husband's part to gift her the money and, as such, it was no longer excluded property (para. 74).
- [39] In the present case, each of Property #2 and #3 was registered solely in the name of the respondent, thus there is not the same evidence of intent to gift the respondent's equity from Property #1 to the claimant.
- [40] That however is not determinative of the issue. As held in *Pisarski*, the Court must consider the evidence as a whole. Here, despite the properties' being registered in the name of the respondent alone, the evidence indicates that the purchase, redevelopment and subsequent sale of Property #2 and #3 was a common or joint enterprise intended to benefit the family. While neither party gave much detail about discussions or intentions around the property transactions, the claimant did say in her evidence that they built Property #2 together. Further, the respondent took no steps to keep his funds separate or to document that the equity from Property #1 was intended to remain excluded property. I can fairly infer from the evidence that he intended to mingle the money with other family funds.
- [41] Keeping in mind that the onus is on the party seeking to claim an exclusion, I find on all of the evidence that the respondent has failed to meet that burden. The entirety of the proceeds realized on the sale of Property #3 are therefore family property.
- [42] Coming back to the \$325,000 amount, the claimant submits that on the evidence, the respondent had in his accounts the equivalent of \$287,648 from the original amount at the time the parties separated. The respondent estimates the amount at separation to be approximately \$245,000 but I accept the claimant's evidence. The claimant submits that she is also entitled to one-half of the interest earned on the \$325,000. She uses the figures of \$22,839 and \$17,762 referred to in para. 30 above. However, as set out in that paragraph, the evidence was that by November 2017, he had earned \$5,217 in interest on the loan to Mr. S and \$17,762 on the loan to Mr. N. The \$22,839 is what was still owing from Mr. S, but it is unclear how much of that is interest versus principal. In the circumstances, I find that the claimant is entitled to a share of the \$5,217 and \$17,762 interest amounts. Adding those amounts to the \$287,648 remaining in the respondent's accounts at the time of separation results in a total of \$310,627 which is the amount I find to be family property.

Shares in Dana

- [43] Dana is a BC company incorporated in October 2014. At the time of incorporation, the respondent was issued 400 shares in the company. The other shareholder was A.D. who was issued 450 shares.
- [44] According to the respondent, Dana was established to develop a property located on West 11th Avenue in Vancouver. As noted, the initial shareholders were the respondent and his friend A.D., however additional shares were subsequently issued to N.M. (50) and M.S-A. (100) on March 25, 2015. The respondent invested money in Dana which was obtained from the sale of Property #3, although the exact amount invested is in dispute.
- [45] Documents entered at trial indicate that the respondent invested approximately \$460,000 in Dana, however he says this is misleading and that he only invested approximately \$202,000. The respondent says that while he was initially issued 400 shares, or 40% of the issued shares, a portion of his investment was made on behalf of his friend Mr. N. Thus, of the 40% attributed to him, Mr. N in fact contributed 25% and he contributed 15%. This was later formalized by the transfer of 250 of the respondent's shares to Mr. N on January 21, 2016.
- [46] On or about March 5, 2017, all of the shareholders other than A.D. agreed to sell their shares to A.D. As part of this transaction, the respondent sold his shares for \$285,000.
- [47] The claimant alleges that the respondent essentially dissipated family assets in that he invested over \$460,000 but only received back \$285,000 on the sale of his shares. While I agree with the claimant that the dealings between the respondent and Mr. N are not well explained or documented, the evidence does establish the \$285,000 figure received by the respondent and there is no basis to impute a higher value to the Dana shares.
- [48] Of the \$285,000, \$270,000 was ordered frozen by Ker J. at the JCC on April 27, 2017. Prior to Ker J.'s order, the respondent had spent \$15,000 of the funds. Each of the parties subsequently received \$40,000 by consent, reducing the funds frozen to \$190,000. On June 24, 2017, the respondent withdrew a further \$15,000, contrary to a court order. While the respondent says that he did not believe the order restricted his access to the funds, he is mistaken.
- [49] I am satisfied that the frozen funds are family assets and that the claimant is entitled to one-half of the \$190,000 that should have remained in the account after the consent withdrawal by the parties. I am also satisfied that the claimant is entitled to one-half of the \$15,000 spent by the respondent from the proceeds of sale of the Dana shares prior to the freezing order. I will return to these amounts as part of the final reconciliation.

\$180,000 Deposited into TD Account "6949"

- [50] The claimant alleges that the amount of \$180,000 deposited into TD account number ending with "6949" in a number of tranches in May 2018 is family property. The TD account is registered in the name of the respondent along with his mother and two sisters. Despite the fact that it is a joint account, the claimant alleges that the money is really the respondent's and again constitutes family property.
- [51] The respondent denies that the money is his. He alleges that it came from the sale of a property owned by his mother in Iran and that the money was transferred to Canada to help her mother move.
- [52] This aspect of the claimant's claim is probably the most confusing and difficult to track in the evidence. As I alluded to at the outset, money flowed freely between the respondent and his family and business associates. Documentary evidence supporting the flow of funds is scant and the claimant submits that the respondent has not disclosed all of the relevant records.
- [53] While the claimant has cause to be skeptical about many of the transactions in issue, including this particular flow of funds, I am not satisfied that she has established that these funds are family property. I accept the respondent's evidence that the funds came from the sale of his mother's property in Iran.
- [54] While the evidence is again difficult to follow, it appears that the amounts of 9.6 billion and 3.4 billion Rials were deposited into a joint account in Iran (account number ending in "215.1") on August 19, 2015. The account was in the names of the respondent, his sister and his nephew. The respondent has produced what he says are translated copies of cheques made payable to his sister in these amounts. He has also produced what he alleges is a translated copy of the deed of sale for his mother's property.
- [55] The claimant submits that approximately 13 billion Rials translates into about \$520,000, using the respondent's own evidence of the exchange rate at that time. On the same as the deposit noted above, 10 billion Rials was transferred into a new account just opened (account number ending in "098-1"). According to the respondent, that was an investment account set up to hold the proceeds of sale from his mother's property.
- [56] Subsequently, the equivalent of approximately \$180,000 was transferred to the joint TD account in Canada (see para. 50 above).
- [57] From the TD account, a number of withdrawals and transfers were made that were not well explained in the evidence. The respondent and his sister Elahe both testified that some of the funds were used to purchase a property in Vancouver for Elahe. The respondent also acknowledged that he used some of the funds to make a loan to a friend to assist in the purchase of a property. He agreed he could access the funds, if his sister agreed.

- [58] The claimant points to numerous inconsistencies and gaps in the respondent's evidence concerning the flow of these funds, including differences in the different Iranian account numbers and the absence of any clear evidence about how the funds were disbursed and used after being transferred to Canada. She also questions whether the alleged deed of sale produced by the respondent actually relates to the sale of his mother's property.
- [59] I agree with the claimant that the respondent's explanation and evidence about the \$180,000 transferred to the TD account is wanting, however that does not mean that I can find or even infer that the funds are properly characterized as family property. Despite the flaws in the evidence, the respondent, supported by his sister Elahe, maintained that the funds were not his.
- [60] Further, apart from raising issues about the respondent's evidence and explanation, the claimant offered no evidence herself, or even any theory, about the source of the funds and how they could be considered family property. The fact that the respondent could access the funds does not necessarily lead to a finding that the funds were family property.
- [61] Looking at the evidence as a whole, including the various gaps therein, I find that on balance I accept the respondent's evidence that these funds emanated from the sale of his mother's property and that they are not family property.
- [62] This finding also takes care of another element of the claimant's claim, namely the interest on the approximately 13 billion Rials, or about \$520,000 CAD, paid into the respondent's joint account on August 19, 2015. I am unable to find that any of this money is family property.

Apartment in Tehran

- [63] According to the AOF, at the time of marriage, the respondent owned an apartment in Tehran valued at 1.95 billion Rials. Also according to the AOF, that property was valued at 2,956,800,000 Rials at the date of separation (September 22, 2016). According to the respondent's financial statement dated December 4, 2018 the respondent sold the property in June 2018 for \$42,685 CAD. In that same financial statement, the respondent used an exchange rate of 1 CAD-108,000 Rials, meaning that the apartment was sold for approximately 4.6 billion Rials, an increase in value of 2.65 billion Rials since the time of marriage.
- [64] The respondent submits that given the fluctuating exchange rate and the diminution over time of the value of Iranian Rials, an increase in the property's value using Rials does not translate into an increase in value in Canadian dollars. I also note that there is no evidence about the exchange rate at the time of marriage thus there is no means of determining the value of the property in Canadian dollars at the time of marriage. Using the 1 CAD-108,000 Rials exchange rate referred to above results in a figure of approximately \$24,000, but that is the estimated rate in 2018, some 10 years after the marriage.

- [65] There is some evidence that the respondent estimated the value of the Tehran property to be approximately \$95,000 at the time of marriage. That is the figure used in a draft marriage agreement provided to the claimant in advance of their wedding. In his final argument, he pegged the value at the time of marriage to be approximately \$90,000.
- [66] I note that the claimant relies on the fact that the draft marriage agreement lists another property in Mashad, Iran as evidence that the Mashad property belonged to the respondent (see below). In my view, given that reliance on the draft marriage for this purpose, it would be unreasonable for the claimant to then dispute the value attributed to the Tehran property in the agreement (recognizing that she did not sign the agreement).
- [67] Based on the evidence, scant as it is, this is the best estimate I can arrive at for determining the value of the Tehran property at the time of marriage. Given that it was sold in 2018 for approximately \$43,000, I am unable to find any increase in value of the property during the marriage that would constitute family property.

Property in Mashad

- [68] As noted, in the AOF, the respondent also listed a property in Mashad, Iran at the time of marriage with a value of 3.5 billion Rials. Also in the AOF, the same property was listed with a value of 11.5 billion Rials at the time of separation. The equivalent value in Canadian dollars is estimated to be \$389,170.
- [69] Despite the AOF listing the Mashad property as the respondent's, at trial the respondent testified that the property belonged to his mother and that she transferred it to him to hold in trust for his brother. Thus he claims that it is excluded property. Alternatively, the respondent submits that there has been no increase in value when measured in Canadian dollars.
- [70] With respect to the trust issue, the AOF again lists the Mashad property, both at the time of marriage and the time of separation, as the respondent's property. There is no indication the property is held in trust. It is also listed as his property in the draft marriage agreement he provided to the claimant and in his will. In the circumstances, he cannot now claim that he only held the property in trust.
- [71] I am satisfied that the Mashad property belonged to the respondent and that any increase in value since the date of marriage is family property. The challenge is determining what that value is.
- [72] Using the respondent's figures in the AOF of 3.5 billion Rials at the time of marriage and 11.5 billion at the time of separation results in an increase in value during the relationship of 8 billion Rials. However, in his documents introduced at trial, the respondent has what is purported to be an appraisal of the Mashad property showing a value of approximately 34 billion Rials as of September 23, 2021, shortly before the trial commenced. That would be an increase of 30.5 billion Rials since the time of the marriage to the date of the trial.

- [73] While the Mashad property appears to have increased in value when measured in Iranian Rials, that does not necessarily translate into an increase in Canadian dollars. In his October 21, 2021 financial statement, the respondent used an exchange rate of 1 CAD - 225,000 Rials. Applying that exchange rate to the 34 billion Rials results in a value of about \$150,000, well less than the estimated value of the property at the time of separation.
- [74] Given this figure and the lack of evidence generally about the value of the property and the proper exchange rate(s), I am unable to find that the Mashad property increased in value in any meaningful way over the course of the parties' marriage.

Avesta

- [75] Avesta is the respondent's company through which he operates his immigration consulting business. There is no expert evidence as to the value of the company. The respondent had the company prior to the marriage and there are financial statements in the evidence, albeit incomplete, for the predecessor company Nanaimo Immigration Services Inc., for the fiscal year ending October 31, 2008, the year of the marriage.
- [76] The respondent submits that the amount set out in the statements as being due to shareholders, reflects the value of his interest in Avesta at the time of marriage. That amount is \$47,089.
- [77] There is no evidence about the current value of Avesta. The most recent information comes from the financial statements for the year ending October 31, 2016, which show \$48,539 due to a shareholder (the respondent) plus retained earnings of \$43,535.
- [78] The claimant notes that in September 2016, shortly after the parties separated, the respondent paid his sister \$66,000 out of Avesta which she alleges was an attempt to strip money out of the company. The respondent testified that this payment was for services provided by his sister.
- [79] The claimant submits that although there has only been a small increase in the amount owing to the shareholder, the 2016 financial statements show retained earnings of \$43,535. She submits that her share of the company should comprise half of the retained earnings and half of the amount paid out to the respondent's sister.
- [80] The respondent submits that the value of the company is reflected in the amount due to the shareholder, which only increased by \$1,446 from 2008 to 2016.
- [81] I am not satisfied that the payments made to the respondent's sister can be included when assessing the value of the respondent's interest in Avesta, or the family property portion thereof. While I agree with the claimant that the respondent's evidence about the payments was vague, she has not established that the money was paid out of Avesta to thwart her claim or should otherwise be factored back into the valuation of the company.

[82] Rather, the increase in the respondent's interest in Avesta is, in my view, best assessed by comparing the total shareholder equity in the 2008 financial statements to the 2016 statements. Shareholder equity is determined by adding the amount due to the shareholder, the amount of the share capital (given that there is a single shareholder) and the retained earnings. Total shareholder equity in 2008 was \$66,063 and in 2016 it was \$102,098, a difference of approximately \$36,000. I find that amount to be family property.

Family Debts

- [83] The claimant did not identify any family debts in her evidence but the respondent claims there are a number of debts that must be factored in. A large portion of what the respondent claims as "debts" result from his alleged overpayment of child and spousal support. These are not debts but are more properly addressed when considering the support issues. Similarly, the respondent asserts that the claimant owes him \$2,000 in costs ordered by Master Dick in her May 8, 2019 order. In fact, what Master Dick ordered was costs to the respondent of the application before her in any event of the cause. Those costs will therefore be factored in at the end of the case when costs of the proceeding are dealt with.
- [84] The respondent further submits that the claimant owes \$7,300 for purchases made on his credit card after separation. However, I accept the claimant's evidence that these were family expenses that she incurred during a period in which the respondent was not paying any support. I do not accept that they are debts owing to the respondent.
- [85] Having reviewed the respondent's list of alleged expenses in light of the evidence, I am satisfied that two of the items claimed are valid: the claimant's share of the rent for the former family home for the balance of the lease and the claimant's share of invoices from a counsellor, Alyson Jones. These two amounts total \$11,827, which reflects the claimant's share which is owing to the respondent.

Summary of Family Property and Debts

- [86] Based on the above, I have found the following to constitute family property:
- a) \$310,627, representing the remainder of the \$325,000 transferred to Iran, plus interest earned;
 - b) \$200,000 paid into trust from the sale of Property #3 and then disbursed;
 - c) \$190,000 from the sale of the respondent's shares in Dana including the \$15,000 withdrawn by the respondent in breach of the court order (\$175,000 currently held in trust);
 - d) \$15,000 withdrawn from the Dana funds before the freezing order; and
 - e) \$36,000 the increased value in Avesta during the marriage.
- [87] These amounts total \$751,627. While the parties have disagreed on what constitutes family property, both agree to an equal division.

[88] Before turning to division, it is necessary to say a word about valuation date.

[89] Pursuant to s. 84(1), family property is determined as at the date of separation. However, separation is not necessarily the date used to value family property (or debt). Section 87 of the FLA deals with valuation:

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.

[90] As can be seen, leaving aside the situation where there is an agreement in place, the presumptive date of valuation of family debt and property is the date of trial. Section 87 must be read in conjunction with s. 81 which provides for an equal division of family property and family debt. Section 87 is subject to s. 95 which permits an unequal division if it would be significantly unfair to divide family property and/or debt equally. Section 95(2) out a number of factors that will inform the "significant unfairness" analysis. The court of appeal has recently confirmed that another way of addressing significant unfairness resulting from an equal division is to vary the date of division: *Banh v. Chrysler*, 2022 BCCA 74 at para. 26.

[91] The cases also direct that the court should first value the family property at the time of trial and then consider how to address any significant unfairness either by way of an unequal division or by varying the valuation date.

[92] One of the challenges in this case is that the parties focussed on the value of the different assets at the time of separation and not trial. That is not an issue for the \$200,000 previously disbursed or the funds currently held in trust. The only real question surrounds the approximately \$310,000 balance of the \$325,000 sent to Iran. Absent any evidence of current value, I think it reasonable to use the \$310,000 figure.

[93] Returning to the property division, the \$751,627 must be reduced by the \$200,000 already disbursed, leaving a balance of \$551,627. An equal division of this amount results in \$275,813.50 owing to each party.

[94] To date, the respondent has had, or has had the benefit of, all of the family property, apart from the \$200,000. Thus, to effect an equal division of family property, the claimant is entitled to the entire \$175,000 currently held in trust.

[95] That leaves a balance of \$100,813.50 owing from the respondent to the claimant. From this amount must be subtracted the \$11,827 representing the claimant's share of the debts owing to the respondent, resulting in an outstanding balance of \$88,986.50.

Parenting

[96] The parties are not far apart in their views of the appropriate parenting arrangements for S moving forward.

[97] As set out above at para. 16, the parties reached a mediated agreement about parenting in 2019. The claimant wants to maintain the parenting arrangements set out in that agreement. The respondent largely agrees, with some small tweaks. Based on the evidence and the parties' positions, I order that the child S will reside primarily with the claimant and that the respondent will have the following parenting time:

Regular Parenting Schedule

- a) Tuesday, Wednesday and Thursday from 3:00 p.m.-6:00 p.m.;
- b) The 1st and 3rd weekends of every month from 10:00 a.m. Saturday to 12:00 p.m. on Sunday; and
- c) The 4th weekend of the month, Friday 3:00 p.m. to Saturday 6:00 p.m. (as one additional overnight per month).

School Holidays

Spring Break

- a) The 1st week of Spring Break: Monday-Friday from 8:00 a.m.-6:00 p.m.; weekend as per Regular Parenting Schedule.

Summer Break

- a) The second and fourth full weeks of August: Monday-Friday from 8:00 a.m.-6:00 p.m.; weekends as per Regular Parenting Schedule; and
- b) The other weeks of the summer break will be subject to the Regular Parenting Schedule.

Winter Break

- a) The 1st week of Winter Break; Monday-Friday from 8:00 a.m.-6:00 p.m.; weekend as per Regular Parenting Schedule.

[98] The parties will have reasonable telephone and/or electronic communication with S during the other party's parenting time.

[99] If either parent needs to change the scheduled parenting time, they will give three days' notice to the other parent, except in cases of emergency. Any additional parenting time for the respondent, including any additional overnight parenting time, will be by agreement of the parties in consultation with the psychologist Dr. Kot, or another psychologist as agreed to by the parties.

[100] I also make the following ancillary orders regarding parenting:

- a) The parties are both guardians of S pursuant to s. 39 of the FLA;
- b) Neither party may travel internationally, including to Iran, with S without the written consent of the other party;
- c) The claimant will hold S's passport and will provide it to the respondent if necessary for travel as agreed to under (b) above. The respondent will be provided a copy of S's passport;
- d) The parties will share equally all of the parental responsibilities under s. 41 of the FLA. The parties will advise one another and will consult about important decisions affecting S and will attempt to reach agreement. If they are unable to agree, the claimant will have final decision-making authority and the respondent may seek directions from the Court if he disagrees;
- e) The party exercising parenting time may make emergency health decisions for S and, if such a decision is made, must inform the other party immediately;
- f) The parties will:
 - i. Put the best interests of the child before their own interests;
 - ii. Encourage the child to have a good relationship with the other parent and speak to the child about the other parent in a positive and respectful manner; and
 - iii. Make an effort to maintain polite, respectful communications with each other, refraining from negative or hostile criticism, communication or argument in front of the child.
- g) The parties will not:
 - i. Question the child about the other parent or time spent with the other parent beyond simple conversational questions;
 - ii. Discuss with the child any inappropriate adult, court or legal matters; and
 - iii. Blame, criticize or disparage the other parent to the child.

Child and Spousal Support and s. 7 Expenses

[101] As noted at the outset, a central issue in dispute in assessing child and spousal support is determining the parties' incomes.

- [102] Pursuant to the consent order of Master Harper dated June 23, 2017, the respondent has been obligated to pay \$474 per month in child support and \$640 per month in spousal support. Master Harper's order does not set out the parties' respective incomes used to set the support amounts, likely because the order went by consent. I do note that in the parties' respective financial statements sworn shortly before the date of Master Harper's order (the claimant April 20, 2017 and the respondent April 23, 2017) the parties claimed income of \$13,000 (claimant) and \$51,000 (respondent).
- [103] While the numbers do not align perfectly, using those income figures results in child and spousal support amounts not far off the figures set out in Master Harper's order.
- [104] I will deal first with the claimant's income as it is relatively straightforward. She testified that following the breakdown of the marriage, she returned to school and was trained as a dental receptionist. She says she currently earns approximately \$35,000 per year. That is the figure she uses as her employment income in her most recent financial statement filed October 12, 2021. In that statement, she also claims approximately a further \$7,600 in spousal support. The claimant included in her financial statement her notices of assessment for the years 2020, 2019 and 2018 and her Line 150 income for those years was (in round numbers) \$42,000, \$49,000 and \$40,000 respectively. In addition, she provided pay statements for the months of August and September 2021 which averaged approximately \$1,750 every two weeks. This equates to approximately \$45,000 per year.
- [105] The respondent seeks to impute income to the claimant of \$60,000. He submits that she only works four days per week and is therefore purposely underemployed.
- [106] I do not agree. The evidence was that the claimant works the hours that are available to her at the dental clinic where she is employed, which currently only operates four days per week. Given her ongoing child care obligations and the fact that she went to some length to retrain in order to earn an income, there is no basis to impute additional income to her.
- [107] I find that the claimant's current income for child and spousal support purposes is \$45,000.
- [108] In terms of the respondent's income, some helpful evidence can again be found in the AOF where the following facts are agreed to:
16. [The respondent's] immigration consulting business earned the following gross revenues from 2015-2017:
 - a. \$214,815 for the 2015 tax year,
 - b. \$344,545 for the 2016 tax year,
 - c. \$104,000 for the 2017 tax year.
 17. [The respondent] declared the following as his line 150 personal income for his personal income tax returns:

- a. \$43,815 for the 2015 tax year,
- b. \$51,064.81 for the 2016 tax year,
- c. \$61,499 for the 2017 tax year,
- d. \$44,691.12 for the 2018 tax year.

[109] In addition, in his financial statement filed February 18, 2021, the respondent included his 2019 notice of assessment listing his line 150 income as \$29,777.

[110] The respondent submits that his income should be set at \$35,000. He notes that his immigration consulting business has been reduced dramatically as immigration from Iran to Canada has slowed. He also used to serve immigrants from Iran to the United States but that has almost completely stopped. The respondent points out that he is currently 69 years old with minimal ability to earn income. According to the respondent, the \$35,000 figure reflects about \$12,000 in old age security and then \$20,000-\$25,000 in other income, although he did not explain the source of such income.

[111] The claimant seeks to impute income to the respondent of \$100,000. The principal basis for imputing this amount is the numerous unexplained deposits into his various bank accounts. The claimant notes that the respondent had deposits of over \$180,000 into his personal chequing account in 2019 alone and \$40,000 into another.

[112] The claimant submits that these funds could not have all come from the respondent's immigration consulting business given the downturn in that business. She submits that he must have another business or a source of funds in Iran. The claimant also points out that in his various financial statements, the respondent claims annual expenses in the range of \$45,000-\$69,000 and submits that he must have income to cover those expenses. The claimant also relies on evidence adduced at trial, in the form of recorded conversations as well as emails between the respondent and a supposed girlfriend in Iran, about quantities of money he has provided her. For example, in an email sent by the respondent to the woman dated March 27, 2021, he asserts that she has received from him about 886 million Tomans, which is the equivalent of about 8 billion Rials.

[113] For his part, the respondent says that he is largely living off of loans from family and friends. However, as with many of the financial transactions at issue in this proceeding, there is no supporting documentary evidence.

[114] In *D.L. v. J.L.*, 2017 BCSC 801, Murray J. addressed the test for imputing income. While Murray J. was dealing with a case of alleged underemployment by one spouse, her review of the general principles is helpful (at paras. 16-19):

[16] Section 26.1(2) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) requires that parents have a joint financial obligation to maintain the children in accordance with their relative abilities to contribute.

- [17] Imputing income under s. 19 of the Federal Child Support Guidelines, SOR/97-175 is how courts give effect to this requirement. In s. 19(1)(a), where income may be imputed for intentional unemployment or underemployment. There is no requirement for bad faith, that is specific intent to evade child support obligations.
- [18] To determine if a parent is earning to capacity, the court will apply the following general principles:
1. parents who are healthy and can work have a duty to seek employment;
 2. reasonable income earning capacity will be based on consideration of a parent's age, education, experience, skills, health, and on-the-job opportunities that are reasonably available;
 3. limited experience and skills do not justify a failure to pursue employment that does not require significant skill or requires skills to be learned;
 4. persistence in unremunerative employment or unrealistic or unproductive career aspirations will not be an excuse; and
 5. self-induced reduction in income will not justify the avoidance of child support: *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (QL) (S.C.).
- [19] The test for imputing income is set out by our Court of Appeal in *Marquez v. Zapiola*, 2013 BCCA 433:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.
- [115] As noted by Murray J., s. 19 of the Federal Child Support Guidelines deals with the imputation of income. The relevant provisions of s. 19, based upon the claimant's allegations, are:
- 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;
- (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 reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;

[116] The claimant also cites *Shih v. Shih*, 2015 BCSC 2108, rev'd on another point 2017 BCCA 37, where the Court accounted for cash gifts from a family member when imputing income and *Van Deventer v. Van Deventer*, 2000 BCCA 9, where the Court relied on unexplained deposits to a bank account to impute income.

[117] Given the unexplained deposits in the respondent's accounts and the numerous gaps in his disclosure and his evidence generally, the claimant is, quite fairly, skeptical about the respondent's claimed income. However, the \$100,000 figure she seeks to impute to the respondent is highly speculative and, in my view, not born out by the evidence.

[118] Further, while many of the unexplained deposits into the respondent's accounts likely indicate that he has access to more funds than he is prepared to admit, I am not satisfied that those funds can be characterized as income.

[119] Recognizing that any attempt to determine the respondent's income is largely guesswork, but taking account of what evidence there is, including the respondent's age and what I accept to be the slowdown in his immigration business, I impute income to the respondent of \$70,000 per year.

[120] Using income figures of \$70,000 for the respondent and \$45,000 for the claimant results in child support of \$666 per month and zero spousal support. I therefore order that effective May 1, 2022, the respondent will pay child support in that amount. This amount may be reviewed in June 2023 based upon the parties' incomes at that time.

[121] While I tend to agree with the claimant that the proper duration of spousal support given the length of the parties' marriage is about eight years, I also acknowledge that the impact of my findings on the parties' incomes and resulting support amounts leads to the effective termination of spousal support.

[122] The claimant also seeks an award of retroactive child and spousal support back to 2017. She provides calculations based on her own declared income for each year and her proposed imputed income to the respondent of \$100,000.

[123] I decline to make a retroactive award. Neither party addressed the factors governing retroactive awards as set out in *D.B.S. v. S.R.G.*, 2006 SCC 37. Further, based upon my findings, I am not satisfied that the respondent has in fact underpaid support over the past few years. Nor do I accept the respondent's argument that he has overpaid. Accordingly, I order that the respondent is required to pay the child and spousal support amounts set by Master Harper's order (\$474 and \$640) up until April 30, 2022. At that time, the new child support amount will commence, as set out in para. 119 above.

[124] Little was said at trial about s. 7 expenses, apart from the primary expense of childcare expenses incurred through the YMCA for after school care. The respondent has in the past objected to these expenses on the ground that he was available to care for S. However, I accept the claimant's evidence that the respondent in fact was often unavailable and that these are necessary expenses. I also accept the claimant's evidence that she has incurred expenses totalling \$3,525, of which the respondent's share is \$1,762.50. Going forward, the parties will share s. 7 expenses on a pro rata basis using the incomes set out in these reasons (\$70,000 and \$45,000).

Contempt Application

[125] The claimant seeks an order finding the respondent in contempt for taking money out of the frozen funds in breach of Ker J.'s order (see para. 47 above). The respondent submits that he did not understand the order to restrict his access to the funds. As I noted in para. 47, he was mistaken in that belief.

[126] While there is no doubt that the respondent was in breach of the order, I have factored the \$15,000 into the division of family property and the claimant will be compensated appropriately for her share of that amount. In the circumstances, an order of contempt is both unnecessary and excessive and I decline the order sought.

Summary and Conclusion

[127] In summary, I make the following orders:

- a) The parties are divorced with the order to take effect 31 days from the date of these reasons;
- b) The total family property as set out in para. 86 is divided equally between the parties;
- c) The claimant is entitled to receive the \$175,000 currently held in trust credited towards her share of the family property;
- d) The respondent owes the claimant an additional \$88,986.50 to equalize the division of family property. This includes the claimant's share of family debt owing to the respondent in the amount of \$11,827;
- e) Parenting time for the child S will be as follows:

Regular Parenting Schedule

- i. Tuesday, Wednesday and Thursday from 3:00 p.m.-6:00 p.m.;
- ii. The 1st and 3rd weekends of every month from 10:00 a.m. Saturday to 12:00 p.m. on Sunday; and
- iii. The 4th weekend of the month, Friday 3:00 p.m. to Saturday 6:00 p.m. (as one additional overnight per month).

School Holidays

Spring Break

- i. The 1st week of Spring Break: Monday-Friday from 8:00 a.m.-6:00 p.m.; weekend as per Regular Parenting Schedule.

Summer Break

- i. The second and fourth full weeks of August: Monday-Friday from 8:00 a.m.-6:00 p.m.; weekends as per Regular Parenting Schedule; and
- ii. The other weeks of the summer break will be subject to the Regular Parenting Schedule.

Winter Break

- i. The 1st week of Winter Break; Monday-Friday from 8:00 a.m.-6:00 p.m.; weekend as per Regular Parenting Schedule.
- f) The parties will have reasonable telephone and/or electronic communication with S during the other party's parenting time;
- g) If either parent needs to change the scheduled parenting time, they will give three days notice to the other parent, except in cases of emergency. Any additional parenting time for the respondent, including any additional overnight parenting time, will be by agreement of the parties in consultation with the psychologist Dr. Kot, or another psychologist as agreed to by the parties;
- h) The parties are both guardians of S pursuant to s. 39 of the FLA;
- i) Neither party may travel internationally, including to Iran, with S without the written consent of the other party;
- j) The claimant will hold S's passport and will provide it to the respondent if necessary for travel as agreed to under (i) above. The respondent will be provided a copy of S's passport;
- k) The parties will share equally all of the parental responsibilities under s. 41 of the FLA. The parties will advise one another and will consult about important decisions affecting S and will attempt to reach agreement. If they are unable to agree, the claimant will have final decision-making authority and the respondent may seek directions from the Court if he disagrees;

- l) The party exercising parenting time may make emergency health decisions for S and, if such a decision is made, must inform the other party immediately;
 - m) The parties will:
 - i. Put the best interests of the child before their own interests;
 - ii. Encourage the child to have a good relationship with the other parent and speak to the child about the other parent in a positive and respectful manner; and
 - iii. Make an effort to maintain polite, respectful communications with each other, refraining from negative or hostile criticism, communication or argument in front of the child.
 - n) The parties will not:
 - i. Question the child about the other parent or time spent with the other parent beyond simple conversational questions;
 - ii. Discuss with the child any inappropriate adult, court or legal matters; and
 - iii. Blame, criticize or disparage the other parent to the child.
 - o) Effective May 1, 2022, income of \$70,000 will be imputed to the respondent and \$45,000 to the claimant;
 - p) Effective May 1, 2022, the respondent will pay the sum of \$666 per month in child support and zero in spousal support. These amounts may be reviewed in June 2023 based upon the parties' incomes at that time;
 - q) Beginning in June 2023, and every year thereafter, the parties will exchange annual income tax information, including tax returns and notices of assessment;
 - r) The parties' respective applications for a retroactive variation of child and spousal support are dismissed;
 - s) The respondent will pay the claimant \$1,762.50 for his share of retroactive s. 7 expenses. Effective May 1, 2022, the parties will share s. 7 expenses on a pro rata basis according to the incomes determined herein; and
 - t) The claimant's application for a contempt order is dismissed.
- [128] The parties requested that they be permitted to address costs following release of my reasons. They may make arrangements through Supreme Court Scheduling to do so.

"Skolrood J."

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