IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dignard v. Dignard,*
2024 BCSC 104

Date: 20240123
Docket: E221095
Registry: Vancouver

Between:

Wendy Jean Dignard aka Wendy Jean Ward aka Wendy Jean Baker

Claimant

And

Richard Peter Dignard

Respondent

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Claimant:	J.K. Broadhurst H.E. Johnson
The Respondent, appearing in person	R. Dignard
Place and Date of Trial:	Vancouver, B.C. September 5-8, 2023
Place and Date of Judgment:	Vancouver, B.C. January 23, 2024

Table of Contents

Introduction

[1] In their respective pleadings in this family law case, both parties sought a divorce, spousal support and unequal division of family property and debt. However, at the hearing, the parties abandoned their respective claims for spousal support. Thus, the issues are limited to the division of family property and debt. Both parties seek exclusions from family property for property owned prior to the relationship or property that was inherited. An issue is also raised concerning when and under what circumstances “banked time” is to be considered family property. Finally, both parties continue to advance claims for unequal division of family property.

Facts

[2] The parties, who were both approximately 57 years of age at the time of the trial, began living in a marriage-like relationship on July 7, 2017, were married on July 7, 2018 in Sechelt, British Columbia and separated on September 1, 2021.

[3] The marriage was a second marriage for both parties. There are no children of the marriage but the parties each have adult children from their previous relationships.

[4] Both parties owned property at the commencement of the relationship. The claimant owned a house in Langley (the “Langley home”) and the respondent owned a house at 4926 Arbutus Road, Sechelt (the “Sechelt property”). The claimant moved in to the Sechelt property at the commencement of the relationship and it became the family home.

[5] Both parties revised their wills after commencing to live together. The new wills were registered in the Wills Notice Registry on September 20, 2017. The new wills were not in evidence but the claimant testified, and I accept, that they each left everything they owned to the other. The claimant also testified that the new wills contained a clause to the effect that the survivor would somehow look after the children of the deceased. Her evidence was unclear as to exactly how this was to operate.

Employment and Banked Time

[6] The claimant operated a daycare out of her Langley home prior to the relationship. She did not work during the relationship. Since the separation she has worked as a sub-contractor for Canada Post. Her line 15000 income from her T1 General tax returns was: $3,400 in 2020; $10,700 in 2021; and $12,800 in 2022. In addition to her income reported on her tax returns, she also received rental income that was not reported.

[7] The respondent was a ship-wright with British Columbia Ferry Services Inc. (“BC Ferries”) prior to and during the first part of the relationship. According to the claimant, he retired on May 15, 2020. However, she further testified that the respondent continued to receive cheques from BC Ferries. These cheques were in respect of overtime he had worked but for which he had not been paid. The respondent did not testify as to his date of retirement but did acknowledge receiving cheques for his banked time until his banked time was exhausted.

[8] Although the claimant testified the respondent retired on May 15, 2020, there is in evidence a letter from the respondent’s pension plan dated April 14, 2023 which congratulates him on his retirement and states that he has been granted a pension effective February 1, 2023. In view of this letter, I find that, although the respondent may have stopped working on May 15, 2020, he did not formally retire until February 1, 2023.

[9] Further, I find that during the period from May 15, 2020 until the end of February 2023, he continued to receive T4 income from BC Ferries, the source of which was his banked time. The respondent’s T1 General tax returns for the years 2021 and 2022 show his income in those years was $80,105 and $79,190, respectively and comprised of T4 or employment income. Additionally, the respondent’s bank statements for the period from September 1, 2021 to February 28, 2023, show that the respondent received pay cheques twice monthly from BC Ferries. The last recorded pay cheque is February 27, 2023 in the amount of $4,184.95.

[10] Since March 1, 2023, the respondent's source of income is his pension. It is common ground that this pension has been divided as between the parties. According to the April 14, 2023 letter from the pension plan, the gross monthly pension is $6,672.58 per month of which the respondent's share is $3,381.29 per month.

The Langley Home and Condominium

[11] The Langley home owned by the claimant at the commencement of the relationship was sold on July 3, 2017 for $732,243. The proceeds of sale were used to pay off a mortgage in the amount of $72,593 and to purchase a condominium at C413-8929 202nd Street, Langley (the "Langley condominium"). The Langley condominium was purchased for $353,223.

[12] Although all of the funds for the purchase of the Langley condominium came entirely from the claimant, title was put in the names of both parties. I will address the evidence as to why this occurred later.

[13] The balance of the proceeds from the sale of the claimant's Langley home, after payment of a mortgage and sales related expenses, was $305,328. This amount was initially deposited into the claimant's Coast Capital Savings account ending 4874 on July 5, 2017. On or about July 21 and 22, 2017, she then used those proceeds as follows:

a) $20,000 was used to purchase a vehicle;

b) $35,000 was transferred into the respondent's Sunshine Coast Credit Union to pay off a line of credit owing by him that was secured against the Sechelt property; and

c) Two transfers of $70,000 and $150,000 were made into Coast Capital Savings account ending 1244, which was a joint account of the parties.

[14] The current value of the Langley condominium is the subject of a joint expert report of Brad Davis dated July 28, 2023. He values the property at $600,000, which evidence I accept.

[15] The claimant claims an exclusion of $355,000 in respect of the Langley condominium, which I address below.

[16] It is noteworthy that the claimant's two adult children from her previous relationship reside in the Langley condominium. They pay rent of $1,400 per month to the claimant.

Sechelt Property

[17] Title to the Sechelt property was in the sole name of the respondent until March 2018 when it was transferred into the names of both parties jointly. Both parties claim exclusions in respect of this property.

[18] There were two mortgages owing on the Sechelt property in July 2017 when the claimant first moved in. One was in the name of the Sunshine Coast Credit Union. The amount owing on this mortgage in July 2017 is not known. However, on September 27, 2017, the amount owing was $71,246.52, which amount was then paid off. The source of the funds used to pay off the mortgage can be traced to the deposits made into the parties joint account in July 2017 which were part of the proceeds from the sale of the claimant's Langley home. The claimant so testified and her evidence was not challenged by the respondent. In fact, in cross-examination the respondent testified that he believed the ultimate source of the funds was the sale of the claimant's Langley home.

[19] The second mortgage on the Sechelt property was an unregistered mortgage owing to the respondent's father for which the monthly payment was $700 per month. The claimant testified that the amount owing on this mortgage when she moved in was $123,900. She testified she calculated the amount based on what the respondent had originally borrowed, which she said was $300,000, and what the respondent had paid, which she said was $1000. She additionally testified that the

father forgave $60,000 of the amount loaned and that, in connection with this, a payment of $13,000 was made to the respondent's brother in January 2019, to equalize gifts made by their father to them. The claimant's explanation of her calculation does not yield an amount owing of $123,900 in July 2017. However, the respondent does not dispute that there was a mortgage owing to his father, does not dispute the mortgage payments were $700 per month and does not dispute that the mortgage loan was forgiven on condition that a payment of $13,000 be made to his brother.

[20] During the time the parties were together, renovations were done to the Sechelt property. According to the claimant those renovations cost over $30,000 and consisted of a new kitchen, fireplaces, new upstairs flooring and painting. The claimant's evidence of the renovations and the amount spent was not challenged by the respondent and I accept it.

[21] No expert evidence was presented of the value of the Sechelt property at any time. The only evidence of the value of this property consisted of an Assessment Roll Report dated August 30, 2023 and the 2023 BC Assessment. The Assessment Roll Report indicates the assessed value of the property in 2017 was $550,000. The 2023 BC Assessment assessed the value of the property at $1,056,000 as of July 1, 2022. There being no other evidence of the value of the Sechelt property as of the date of the trial, I find as a fact that its value is $1,056,000.

Inheritance

[22] The claimant received a significant inheritance during the course of the relationship from her father. The amount of the inheritance was approximately $850,000. The evidence discloses that the bulk of this inheritance was deposited into various Vancity accounts in the name of the claimant and her sister, the sister being a mere nominee. The claimant claims the funds in these accounts are excluded property.

Post-Separation

[23] Following their separation, both parties initially continued to live at the Sechelt property and both contributed to the expenses of the property. However, the respondent began spending increasing amounts of time in the lower mainland and, in May 2022, he left the family home and began living and renting in Maple Ridge. From approximately May 2022, all of the expenses of the Sechelt property have been paid by the claimant including the 2023 property tax and water bills.

[24] There was some discussion between the parties about the possibility of the respondent returning to live at the Sechelt property, separate and apart from the claimant. The claimant was amenable to this but the respondent ultimately determined that their relationship was too toxic for him to do this.

Other Property and Settled Issues

[25] The parties are agreed that a divorce should issue. I will accordingly make an order for the divorce of the parties.

[26] The parties are further agreed that the vehicles owned by them are not to be divided and that each will retain their respective vehicles. Accordingly, the vehicles will not be considered further.

[27] The parties have also addressed and resolved issues relating to the respondent's pension and life insurance and the division of their family chattels.

Submissions

[28] The claimant submits that she is entitled to three exclusions in respect of family property, namely:

a) She is entitled to an exclusion in respect of the funds in the various Vancity accounts on the grounds that the source of those funds was her inheritance;

b) She is entitled to an exclusion of $355,000 in respect of the Langley condominium, which is valued at $600,000, on the grounds that the property was purchased using excluded funds; and

c) She is entitled to an exclusion in respect of the Sechelt property of $104,263 on the basis that she paid $71,246.52 towards the mortgage and $33,017 to retire the respondent's line of credit registered against the property.

[29] In her submissions, the claimant addressed the presumption of advancement in relation to the Langley condominium. She argues that the presumption of advancement does not apply to the Langley condominium as it applies only to transfers from a husband to a wife. She further submits that the inclusion of the respondent on the title to the Langley condominium was done for estate planning purposes and a gift was not intended.

[30] In respect of the Sechelt property, the claimant concedes that the respondent is entitled to an exclusion in the amount of $321,837.

[31] The claimant additionally submits that:

a) The Sechelt property should be sold and the proceeds, after sale expenses and payment of the respective exclusions, be divided equally; and

b) The banked time as of the date of separation is family property and she is entitled to one-half or $42,194.

[32] The respondent, being self represented, made poorly formulated submissions. He said he should be entitled to the entirety of the Sechelt property and that the claimant should be required to pay occupation rent for her occupation of the Sechelt property for two years. He also appeared to concede that the claimant was entitled to the Langley condominium but also submitted that he should be entitled to one-half the rent paid in respect of the Langley condominium. He made no submissions on whether the funds in the Vancity accounts were the excluded property of the claimant.

[33] The respondent also made submissions that the disparity between the parties was unfair. He made vague allegations that the claimant was a spendthrift during the marriage and suggested that thousands of dollars went missing. I take his submissions as being a claim for unequal division of family property.

Issues

[34] The issues for determination are:

a) Are the various Vancity accounts the excluded property of the claimant?

b) Is the Langley condominium, in whole or in part, the excluded property of the claimant?

c) Is the Sechelt property, in whole or in part, the excluded property of the respondent?

d) Is the claimant entitled to an exclusion in respect of the Sechelt property for the monies she advanced to pay the outstanding mortgage and line of credit?

e) Was the respondent's "time bank" with BC Ferries family property and, if so, what is the amount to be divided?

f) Is the respondent entitled to occupation rent?

g) Should there be an order for unequal division of family property?

h) Should the Sechelt property be sold?

Legal Principles

[35] Part 5 of the *Family Law Act,* S.B.C. 2011, c. 25 [*FLA*] addresses "Property Division". Under s. 81 of the *FLA*, each spouse is entitled to a presumptive one-half undivided interest in each family asset as a tenant in common upon separation. However, the presumptive one-half undivided interest under s. 81(b) is "subject to an agreement or order that provides otherwise and except as set out in Part 5 [Property Division] and Part 6 [Pension Division]". Thus, the undivided one-half interest as a

tenant in common to which a spouse is presumptively entitled upon separation is subject to an order for reapportionment under s. 95.

[36] Subject to the exceptions in s. 85, “family property” is all real and personal property owned by one or both spouses at the date of separation (s. 84(1)(a)) or acquired by one or both spouses after separation if it derives from the disposition of property encompassed by s. 84(1)(a).

Valuation

[37] Under s. 87, unless otherwise ordered, all family property and family debt is to be valued according to its fair market value at the date of the hearing respecting division of family property and debt. Because family property is valued at the hearing date, the parties presumptively share in any post-separation increases in value: *Jean Louis v. Jean Louis*, 2020 BCCA 220 at paras. 33-34.

[38] The value of family property should be established by proper expert evidence, as was done here in respect of the Langley condominium. However, the court may rely on Provincial/Municipal assessments as evidence of value for property division purposes, since there is no clearly defined burden of proof in the *FLA*: *Brazinsky v Brazinsky*, 2023 BCCA 359 at paras. 80-81.

Excluded Property

[39] Section 85(1) sets out what is excluded from family property.

> **85** (1) The following is excluded from family property:
>
> (a) property acquired by a spouse before the relationship between the spouses began;
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> (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;
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> (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
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> (f) a spouse's beneficial interest in property held in a discretionary trust
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> (i) to which the spouse did not contribute, and
>
> (ii) that is settled by a person other than the spouse;
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> (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

[40] The onus and burden of proving property is excluded is on the spouse making the claim: *FLA*, s. 85(2); *Zhao v. Fang*, 2022 BCCA 227 at para. 25. The proper test for establishing such claims is proof on a balance of probabilities: *Shih v. Shih*, 2017 BCCA 37 at para. 42. Such claims can be proven by *viva voce* evidence of a spouse, provided that evidence is accepted: *Shih* at para. 43; *Brazinsky* at para. 70. However, proper expert evidence may be required to prove the value of an alleged excluded property: *Brazinsky* at paras. 80-81.

Loss of Exclusion Through Transfer

[41] Excluded property can lose its excluded status if it is subsequently transferred to the other spouse, either alone or jointly. Where such a transfer occurs, an issue arises as to whether a gift was intended. If a gift was intended, the exclusion is lost. If a gift was not intended, the exclusion remains. Determining whether a transfer was intended as a gift is a matter of evidence. However, where there is insufficient or equivocal evidence of an intention to gift property, the presumptions of resulting trust or advancement come into play.

[42] The presumption of resulting trust is a general rule of law that applies when there is a gratuitous transfer of property or a transfer of property for no consideration. In such cases, it is presumed that the transferee holds the property on a resulting trust for the transferor. The onus is on the transferee to rebut the

presumption and show that a gift was intended: *Pecore v. Pecore*, 2017 SCC 17 at paras. 24-26.

[43] The presumption of advancement, in contrast, presumes that a gift was intended where there is a gratuitous transfer of property between specific classes of persons. Traditionally, the presumption of advancement was limited to gratuitous transfers from a husband to a wife and from a father to a child. (*Pecore* at paras. 27-28)

[44] The presumption of advancement was described in *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 50 [*V.J.F.*], as follows:

> [50] When property is transferred gratuitously by one spouse to the other it may be more difficult to discern the donor's intention than where the donor was a "third party". Where the evidence is insufficient or equivocal and the transfer was made by husband to wife, the law normally provides an evidentiary presumption that a gift was intended and the burden of persuasion shifts to the opposite party to rebut on the balance of probabilities: see *Pecore v. Pecore* 2007 SCC 17 at paras. 22 and 44. This, of course, is the presumption of advancement.

[45] In *Venables v. Venables*, 2019 BCCA 281 at para. 95, Justice Griffin further wrote:

> [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property.

[46] In the absence of evidence that a gift was <u>not</u> intended, the presumption of advancement applies: *Brazinsky* at para. 73.

[47] The claimant has referred me to *Andersen v. Andersen*, 2021 BCSC 2598, and the cases cited therein as authority for the proposition that the presumption of advancement ought not apply to family law matters. Indeed, the presumption has now been abolished by s. 85(3) of the *FLA*, but only for cases commenced after May 11, 2023. Notwithstanding the criticisms of the presumption and its abolishment, the presumption continues to apply to cases commenced before May 11, 2023.

[48] The claimant has additionally submitted that the presumption only applies to transfers from a husband to a wife. I agree that this was a historical restriction to the application of the presumption. However, I do not agree that it continues to be so restricted. First, the Court of Appeal has repeatedly spoken of transfers between spouses when addressing the presumption of advancement. The above quotations from *V.J.F.* and *Venables* are examples of this. Secondly, such a limitation is anachronistic and has been indirectly recognized as such by the Supreme Court of Canada in *Pecore*. In *Pecore* at paras. 32-33, Justice Rothstein addressed the other limitation of the presumption of advancement, namely, that it applied only to transfers from a father to a child. He held that the presumption should equally apply to transfers from a mother to a child. He reasoned, *inter alia*, that mothers and fathers should be treated equally in Canada. The same reasoning applies to the outdated limitation restricting the presumption to transfers from a husband to a wife. Women today have their own financial resources and have the same obligations as men in respect of support and division of family property. In Canada, men and women are treated equally. This means that the presumption should apply to transfers from a wife to a husband as well as from a husband to a wife or, as put more generally in the cases, the presumption of advancement applies to transfers between spouses.

Occupation Rent

[49] As I have noted, the respondent claims occupation rent for the two years the claimant has resided alone at the Sechelt property. The law is clear, however, that occupational rent is not a “stand-alone” order but is to be addressed in the context of a reapportionment of family property under s. 95 of the *FLA*: *Shen v. Tong*, 2013 BCCA 519 at para. 94; *Holland v. Holland*, 2017 BCCA 75 at paras. 23-24. It is therefore in the context or re-apportionment or unequal division of family property that I will address occupation rent.

Unequal Division

[50] If an equal division would be "significantly unfair", in addition to varying the date for division of family property under s. 87, the court may make an order for reapportionment under s. 95(1) of the *FLA*. In either case, the threshold is "high": *Banh v. Chrysler*, 2022 BCCA 74 at para. 27 [*Banh*]; *Rana v. Ullah,* 2022 BCCA 192 at para. 43.

[51] The meaning of "significantly unfair" was addressed in *Singh v. Singh*, 2020 BCCA 21, at paras. 128-134. Justice Garson wrote that there must be persuasive reasons, i.e. something objectively unjust, unreasonable or unfair in an important or substantial sense, before property will be divided unequally.

> [128] Before turning to the manner in which the judge applied s. 95 to the facts he found, I shall review the jurisprudence on the scope of s. 95, the meaning of the language "significant unfairness," and the interpretation of ss. 95(2)(i).
>
> [129] First is the question of the meaning of the term "significant unfairness."
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> [130] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, Justice Harris, for the Court, engaged in an extensive analysis of s. 95. He first noted that the Legislature sought to increase certainty, fairness, and predictability in property division matters with the *FLA* by reducing the discretion of the courts to depart from equal division: at para. 36. The test in the previous legislation (*Family Relations Act*, R.S.B.C. 1996, c. 128) only required unfairness, whereas the *FLA* requires "significant unfairness." In addition, the legislature more precisely specified the factors to be considered in applying this threshold.
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> [131] Justice Harris agreed with the analysis in *Remmem v. Remmem*, 2014 BCSC 1552, in which Justice Butler (as he then was) defines "significant" as "extensive or important enough to merit attention" and something that is "weighty, meaningful or compelling," concluding that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": at para. 41, citing para. 44 of *Remmem*. Justice Harris then noted that it would be unwise to attempt to define the meaning of "significant unfairness" but found that reapportionment under s. 95 would require "something objectively unjust, unreasonable or unfair in some important or substantial sense": at para. 42. He said:
>
> > [44] … in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal

> division, it did not provide a closed list of factors and it did not eliminate the discretion.
>
> [132] Ultimately, Justice Harris held that unequal division was justified in the case under appeal given that the significant increase in value to one property in question was caused in part by the respondent after separation: at paras. 52–53.
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> [133] In *V.J.F. v. S.K.W.*, 2016 BCCA 186, Justice Newbury described s. 95 as requiring a high threshold of "significant unfairness" to depart from equal division: at para. 81. Other cases have reached similar conclusions about the high threshold necessary to reapportion assets under s. 95. In *Khan v. Gilbert*, 2019 BCCA 80, for example, Justice Fenlon noted that cases in which unequal contribution was found to reach the significantly unfair threshold have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: at para. 32.
>
> [134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

[52] To similar affect, in *Jean Louis* at para. 44, it was held that the objective of s. 95 is to restrain judicial discretion.

[53] The factors to consider in determining whether family property should be divided unequally are set out in s. 95(2) and (3).

> (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
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> > (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;
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> (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;
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> (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.
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> (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.

[54] In *Banh* at para. 59, Justice Marchand accepted that a single factor from s. 95(2) could support an unequal division of property.

[55] In *Cook v. Cook,* 2021 BCCA 19, Justice Wilcock held that a financial disparity because of an inheritance, or other excluded property, does not give rise to unfairness justifying an unequal division of family property. He also confirmed that a financial advantage unrelated to the economic characteristics of a spousal relationship is not a relevant consideration.

> [48] The principle that animated the judgment of this Court in *Pasch* is still valid. We ought not to find unfairness in the outcome contemplated by the legislation and that is, therefore, presumptively fair. Under the current *Family Law Act* regime, "[t]he starting point in the division of property analysis already applies significant exclusions": *V.J.F.* at para. 10, citing *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 60. An unequal starting point suggests that an unequal end point is similarly contemplated by the statutory regime.
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> …
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> [50] In my opinion, the trial judge erred in law in finding that it would be significantly unfair to equally divide family property because of a disparity arising from events unrelated to the parties' marriage. Financial advantage alone, unrelated to the *economic characteristics of a spousal relationship*, does not justify a departure from the usual rule. Unless

> necessary to give effect to an order for compensatory support, neither the unequal division of family property, nor the division of excluded assets, was called for by the *Act*.

Analysis

[56] With these legal principles in mind, I now turn to the analysis.

[57] The properties in issue and their respective values are:

a) The Vancity accounts in the name of the claimant or which she holds together with her sister and which collectively had approximately $650,000 on deposit at the time of trial;

b) The Langley condominium which has always been in the joint names of the parties and has a value of $600,000;

c) The Sechelt property which was originally owned solely by the respondent but which has been in the joint names of the parties since March 2018. The value of this property is $1,056,000; and

d) The “banked time” of the respondent which had been depleted by the time of trial.

The Vancity Accounts

[58] The claimant gave detailed evidence that the source of the funds in the various Vancity accounts was the inheritance she received from her father. The respondent has not refuted this evidence and made no submissions to the effect that the funds in these accounts were family property.

[59] I am satisfied that the claimant has proven the source of the funds in the Vancity accounts was her inheritance. Pursuant to s. 85(1)(b) of the *FLA*, these funds are the excluded property of the claimant and not family property to be divided.

The Langley Condominium

[60] The claimant claims an exclusion of $355,000 in respect of the Langley condominium being the purchase price of the condominium which was funded from the sale proceeds of her Langley home.

[61] I do not agree that the claimant is entitled to an exclusion in the amount of $355,000.

[62] The Langley condominium was registered in the names of both parties. This gives rise to an issue of whether the claimant intended to gift an interest in the condominium to the respondent.

[63] The claimant was directly asked during her examination in chief why she included the respondent as a joint owner of the condominium. She testified that this was done because the respondent told her that if she did not add him to the title then he would not add her as a beneficiary of his work pension and life insurance. She said he pushed her to be put on title and she felt trapped. The claimant further testified that by putting the respondent on title she never intended to give up her claim to excluded property. She said her intent was always that her children would get the Langley condominium.

[64] In cross-examination, the claimant was again asked why she added the respondent to title. She again said she did so because the respondent told if she did not, he would not add her to his pension and life insurance. She further in cross-examination acknowledged that the rent for the Langley condominium was deposited into the parties' joint account and that expenses related to the condominium were paid from the joint account. She also confirmed in cross-examination that she left all her property to the respondent in her will, including the Langley condominium. She testified that if she died she was confident he would give her children the condominium in his will.

[65] In my view, the evidence of the claimant supports that a gift was intended. First, the very fact she registered the respondent on title is consistent with a gift.

Second, her evidence that she bought the condominium for her children is inconsistent with her registering title in the joint names of her and the respondent. If she bought the condominium for her children, she would have included them on title rather than the respondent. Third, the fact the parties revised their wills leaving everything they owned to each other is consistent with an intent to share all property and inconsistent with an intent that the condominium was to go to her children. Fourth, other than the claimant's bald statement that she felt pushed or trapped by the respondent, there is no evidence of the respondent exercising any coercion or undue influence. Finally, the respondent's agreement to add her as a beneficiary to his work pension and life insurance is consistent with her reciprocating by way of a gift to him of a joint interest in the condominium.

[66] I note that it has not been necessary for me to resort to and rely upon the presumption of advancement to find that a gift of an interest in the condominium was intended by the claimant. Obviously, had it been necessary to resort to the presumption, I would have found the claimant had not rebutted the presumption.

[67] I therefore find that the claimant has failed to discharge the onus on her of proving an exclusion in respect of the Langley condominium. Accordingly, the Langley condominium is family property in its entirety and is to be shared equally between the parties. The value of the condominium, which constitutes family property, is $600,000, as per the expert report of Mr. Davis.

[68] Before leaving the Langley condominium, I note that the claimant says that a potential $29,000 tax liability should be taken into account in the valuation of the Langley condominium. This arises from the expert report of Lucas Terpkosh, a Chartered Professional Accountant, who was retained to provide an opinion on the tax consequences to the claimant in the event that the Langley condominium was sold. He opined that in the event of a sale, the claimant would incur an income tax liability of $29,000. In reaching this opinion, he assumed that the property would first be transferred into the sole name of the claimant at its adjusted cost base and she

would sell it for $600,000. In other words, he assumed the tax consequences would be borne by the claimant alone.

[69] The claimant refers me to *Hopson v. Hannon*, 2021 BCSC 99 at paras. 65-66, as supporting a reduction in the value of the property. In that case Justice Warren stated a tax liability should be taken into account where it is inherent or inevitable but not where it is speculative. Justice Warren was, however, talking about an adjustment to a compensation payment and not a reduction in the value of a specific property. In any event, given my finding that the parties have an equal interest in the entirety of the Langley condominium, the tax liability is not unique to the claimant and is speculative. Both parties will incur a tax liability if the Langley condominium is sold. Further, neither party is requesting a sale of the Langley condominium and it is not likely that it will be sold as it is the home of the claimant's children.

The Sechelt Property

[70] Both parties have potential exclusions in respect of the Sechelt property, which I accept has a value of $1,056,000.

Respondent's Exclusion

[71] Although the respondent did not initially clearly articulate a claim to an exclusion in respect of the Sechelt property, he did submit that he should be awarded the entirety of the property and during his cross-examination he stated that he was claiming an exclusion in the Sechelt property.

[72] Importantly, the claimant admits that the respondent is entitled to an exclusion of $321,837 in respect of the Sechelt property. In her written submissions she wrote that the Sechelt property should be sold and the proceeds divided with "$321,837 to Mr. Dignard on account of his exclusion". In oral submissions before me, claimant's counsel similarly accepted that the respondent had an exclusion of $321,387 in respect of the Sechelt property.

[73] Given the admission by the claimant, I will address only whether the respondent is entitled to a greater exclusion than has been conceded.

[74] There are two difficulties with any claim by the respondent to an exclusion in respect of the Sechelt property of more than $321,387. The first difficulty is that the respondent transferred the property into the joint names of the parties in March 2018. In my view, this transfer was a clear gift to claimant and defeated any exclusion the respondent had of more than $321,387. The respondent did not testify in-chief as to the reasons why he transferred the property into the joint names of the parties nor did he testify that he never intended a gift in doing so. However, in cross-examination he was asked what he intended when transferring the property. He replied that he intended to give the claimant ownership. His answer is entirely consistent with an intention to gift an interest in the Sechelt property to the claimant.

[75] The second difficulty the respondent has concerns the proof of the value of the exclusion. The onus is on the respondent to prove both that the property comes within s. 85(1) of the *FLA* and the amount or value of the exclusion. The respondent has not proven the value of the exclusion is more than the $321,387 amount that is conceded. The only evidence of the value of the Sechelt property in March 2018 is the Assessment Roll Report which indicates the assessed value of the property in 2017 was $550,000. This report is, however, not expert evidence and there is no other expert evidence establishing the value as of March 2018. As in *Brazinski*, the respondent had the onus of proving the value through properly admissible evidence and he failed to do so.

[76] Accordingly, the value of the respondent's exclusion in respect of the Sechelt property is $321,387, as conceded by the claimant.

Claimant's Exclusion

[77] The claimant also claims an exclusion with respect to the Sechelt property. More particularly, she submits that she is entitled to an exclusion in the amount of $104,263. The basis for this exclusion is that she used part of the proceeds from the sale of her Langley home to pay off the line of credit registered against title to the property ($33,017) and the mortgage on the property ($771,246). The line of credit was paid off in July 2017 and the mortgage in September 2017.

[78] The respondent made no submissions on the exclusion claimed by the claimant except to submit that he should be awarded the entirety of the Sechelt property.

[79] It is undisputed that the proceeds from the sale of the claimant's Langley home are excluded property. It is further undisputed, and indeed the evidence supports, that the mortgage and line of credit were paid off using part of those proceeds. However, it does not follow that the claimant is entitled to an exclusion in the amount of $104,263 pursuant to s. 85(1)(g) of the *FLA*.

[80] This is not a case where the presumption of resulting trust has an application as the transfer of these funds was not gratuitous. When giving her evidence in-chief, the claimant was asked why she was added to the title of the Sechelt property. She replied that her paying off the mortgage and line of credit was to "buy-in" to the property. She testified that this was something she and the respondent had discussed but she did not particularize those discussions. In my view, this is evidence the parties agreed that in exchange for her paying off the line of credit and mortgage, she would be added to the title. It follows that the transfer of the funds to pay off the mortgage and line of credit was not a gratuitous transfer. To the contrary, the consideration for the transfer was the claimant being added to title which did, in fact, occur.

[81] Accordingly, the claimant is not entitled to an exclusion for the funds advanced to pay off the line of credit and mortgage.

[82] The result is that the value of the Sechelt property that constitutes family property is $734,613 ($1,056,000 - $321,387).

Banked Time

[83] As I have indicated, on May 15, 2020, the respondent stopped working but continued to collect regular employment income from BC Ferries until his banked time with BC Ferries was exhausted at the end of February 2023 when the respondent formally retired and commenced receiving his pension.

[84] The evidence includes a “Time Detail Statement” from BC Ferries for the period from September 1 to 15, 2021. This statement indicates that as of September 1, 2021, the date of separation, the respondent’s time bank with BC Ferries consisted of 1646.66 “Timebank” hours and 723.186 “Retirement Bonus” hours, for a total of 2,369.652 hours.

[85] The claimant has calculated that the respondent received a total of $84,389.19 in after-tax payments from BC Ferries during the period from September 1, 2021 to the end of February 2023 when the time bank was exhausted. She submits that is the value of the time bank as of the date of separation and that it was family property subject to division between the parties.

[86] The claimant refers me to *Dignard v. Dignard*, 2014 BCSC 1902, as supporting a division of the banked time. It is noteworthy that this case concerned the respondent’s first divorce. An issue in the case involved 422.82 hours of accrued leave that had been accumulated as of the date of separation. At para. 85, Justice Bernard wrote:

> [85] Holiday pay earned during the marriage is considered to be a family asset. In *King v. King*, 2004 BCSC 871, Allan J. helpfully summarized the law as follows:
>
> > 42. Holiday pay earned before separation is normally a family asset: *Cameron v. Cameron* (1994), 1994 CanLII 1861 (BC SC), 100 B.C.L.R. (2d) 104, 9 R.F.L. (4th) 358 (S.C.). There, at ¶17, the Court described holiday pay as:
> >
> > > …an outgrowth of the efforts of both the husband and wife during the course of the marriage and are created as a result of the husband making certain choices during the marriage, which would have impacted to a varying degree on the family unit.
> >
> > The Court concluded that severance pay and holiday pay in that case fell within the definition of family assets under the *FRA*. In *Stewart*, supra, the Court held that holiday pay earned after separation is not a family asset.
> >
> > While *King* dealt with a situation where holiday pay was paid out to the employee, there is no legal distinction between paid-out vacation pay and banked vacation time. Indeed, in *Grainger v. Bush*, 82 A.C.W.S. (3d) 947 at para. 10 (B.C.S.C.) Clancy J. held that “where a present value is established for… accumulated leave benefits they are to be considered family assets subject to division.”

> [86] I conclude that Mr. Dignard's accrued leave at the date of separation is a family asset subject to division. In *Derksen v. Derksen*, 2007 BCSC 542 at paras. 44-45, Holmes J. held that banked time is to be valued on an after-tax basis; accordingly, Ms. Dignard is entitled to a half-interest in the after-tax value of Mr. Dignard's 422.82 hours of accrued leave that was outstanding at the date of separation, as valued at the first day of trial.

[87] A distinction between the facts in *Dignard* and those before me is that in *Dignard* the accrued leave had not been paid out at the time of trial whereas here the banked time was being drawn down at the time of separation and had been paid out completely by the time of the trial. Another distinction is that *Dignard* concerned the *Family Relations Act*, not the *FLA*.

[88] I have been provided with no other authorities on this issue by the parties. I note, however, that Justice Voith, as he then was, disagreed with aspects of *Dignard* in *Cole v. Cole*, 2016 BCSC 716, which was an *FLA* case. More specifically, after reviewing the various authorities that had addressed banked or accrued holiday time, Voith J. concluded that banked time which had been paid out was a family asset subject to division but, if it had not been paid, it was not a family asset subject to division. In other words, he disagreed with the conclusion of Bernard J. in *Dignard* that banked time that had not been paid out was a family asset.

> [93] *Dignard* has not yet been cited by any other court. Respectfully, I do not agree with the conclusions expressed in that decision. Rather, I consider that the approach in *Christensen* should be followed, for similar reasons to those that I outlined with respect to banked sick time.
>
> [94] Banked or accrued holiday time, like sick time, is a form of potential future replacement income. It is generally intended to be used during the term of employment and it is expected to function as replacement income when a former spouse cannot work or chooses to take vacation. It is unlike the investment vehicles outlined in s. 84(2)(e) because it is not designed to be accumulated for the purpose of retirement, even if it is sometimes paid out upon retirement.
>
> [95] I do, however, accept the proposition established in *Cameron* that banked holiday pay, which is paid out prior to the date of separation, should be regarded as family property. Once paid out, these funds no longer need function as potential replacement income since the party is free to obtain other employment or retire. Banked holiday pay then becomes more akin to a severance payment, which is family property; see *Nitnawre v. Jagtap*, 2015 BCSC 1562 at para. 146; *Madruga v. Madruga*, 2015 BCSC 1605 at para. 19.

> [96] The *Dignard* approach also potentially allows a party receiving spousal support to "double dip". A payee spouse would receive half of the payor spouse's accumulated holiday time at the time of trial, and would receive spousal support payments from those same funds when the banked time was used.
>
> [Emphasis Added.]

[89] The concerns expressed by Voith J. about double dipping apply here. During the period from September 2021 to May 2022, the respondent lived at the Sechelt property and contributed to expenses. The claimant benefited from these contributions which came from the respondent's banked time payments. It would be "double dipping" if the claimant was to now receive one-half of the value after tax payments during the period from September 2021 to May 2022.

[90] There is, however, no concern about double dipping with respect to the period from June 2022 to February 2023. During this period the respondent was not contributing anything towards the expenses of the Sechelt property and the claimant received no benefit from the banked time payments made to the respondent. The value of the after tax payments made during this period were family property subject to equal division.

[91] The period from September 2021 to February 2023 comprised 18 months. The period from June 2022 to February 2023 comprised 9 months or 50%. Accordingly, the amount of banked time that was family property is $42,194 (50% of $84,389.19). One half of this amount, or $21,097, comprised the claimant's share of that family property and must be accounted for.

Equal Division

[92] The below table summarizes the family property subject to division and calculates the compensation payment that is to be paid by the respondent to the claimant to equalize the family property.

Property	Value to be Divided	Claimant's Share	Respondent's Share

Langley Condo	$600,000	$300,000	$300,000
Sechelt Property	$734,163	$367,081	$367,081
Banked Time	$42,194		$42,194
Total	$1,376,357	$667,081.00	$709,275
Equalization Payment		$21,097	($21,097)
Value after Compensation Payment		$688,178	$688,178

[93] The claimant has indicated a desire to retain ownership of the Langley condominium and the respondent has indicated a similar desire with respect to the Sechelt property. I calculate that if title to the Langley condominium is given solely to the claimant and title to the Sechelt property is given solely to the respondent, the respondent would owe the claimant a total compensation/equalization payment of $88,178. This is reflected in the following table:

Property	**Value to be Divided**	**Claimant's Share**	**Respondent's Share**
Langley Condo	$600,000	$600,000	
Sechelt Property	$734,163		$734,163
Banked Time	$42,194		$42,194
Total	$1,376,357	$600,000	$776,357
Equalization Payment		$88,178	($88,178)
Value after Compensation Payment		$688,178	$688,179

Unequal Division

[94] Both parties claim unequal division of family property.

[95] The claimant submits that, if it is found she has lost her exclusion to the Langley condominium, then the property should, in any event be re-apportioned to her. She submits that there is significant unfairness to her if it is not re-apportioned. I do not agree.

[96] The claimant went into the relationship with net assets of approximately $640,000 and leaves the relationship with a share of family assets of $710,000. In other words, her net wealth has increased during the relationship, which is not indicative of significant unfairness. Moreover, she retains the bulk of her excluded inheritance from her father.

[97] I appreciate that the claimant contributed approximately $255,000 of the proceeds from her Langley home to the relationship and that a portion of these funds (approximately $110,000) were used to pay off the respondent's line of credit and the registered mortgage on Sechelt property. This contribution does not give rise to unfairness, however, because the respondent also contributed funds to the relationship, namely his earnings from BC Ferries in the amount of approximately $80,000 per year. The relationship was slightly over four years in duration, meaning the respondent contributed approximately $320,000 to the relationship. Thus, during the course of the relationship, the respondent actually contributed more than the claimant.

[98] The respondent submits that he should be entitled to an unequal division of family property because the claimant was "spendthrift" during the relationship. The claimant concedes that the parties lived above their means but denies being spendthrift.

[99] Other than the bald assertions by the respondent of the claimant's careless spending, there is no evidence that the claimant was spendthrift or careless in the spending of money. The evidence does establish that the parties lived beyond their means but I am unable to conclude that either party was careless or spendthrift to the degree that would constitute a substantial unfairness.

[100] The respondent also submits that he should be entitled to occupation rent for the two years the claimant has resided alone at the Sechelt property. As I have indicated, the authorities direct that this is to be considered in relation to unequal division of property. I find, however, that there is no significant unfairness resulting from the claimant's sole occupation of the family home for two years. First, it was the respondent that decided to move out of the family home in May 2022. He was not asked to do so by the claimant and was not obliged to leave. Second, the claimant looked after the property and paid all of the expenses after he moved out. Finally, there is no evidence whatsoever of what the occupation rent should be.

[101] Considering the factors in s. 95(2) of the *FLA*, there is no significant unfairness if the family property is divided equally. The parties were in a relatively short relationship. Neither party contributed to the career of the other. There was no accrual of family debt during the relationship. Neither party caused a significant decrease in the value of family property beyond market trends. Neither spouse acted in bad faith.

Orders

[102] In view of my determinations, I request that the parties appear before me to address whether there continues to be a need to sell the Sechelt property. As I have indicated, if the respondent has sole title to the Sechelt property and the claimant has sole title to the Langley condominium, the compensation payment required to be made by the respondent to the clamant is only $88,178. Given the Sechelt property is not mortgaged, the respondent ought to be able to finance the needed compensation payment and there will be no need to sell the Sechelt property.

[103] Pending the further appearance of the parties, I make the following orders:

a) Subject to s. 12 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), the claimant, Wendy Jean Dignard, and the respondent, Richard Peter Dignard, who were married at Sechelt, British Columbia on July 7, 2018, are divorced from each other. The divorce to take effect on the 31st day after the date of this order;

b) The parties shall retain their respective vehicles as their sole and exclusive property; and

c) The family property as set out herein is to be divided equally between the parties.

"Giaschi J."